

# The EU as state builder in the process of European integration - the case of Bosnia and Herzegovina

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## **Abbreviations and Acronyms**

**BiH** – Bosnia and Herzegovina, Bosnian and Herzegovinian

**CEC** – Central Election Commission

**CEE** – Central and East European countries

**CFSP** - Common Foreign and Security Policy

**CoE** – Council of Europe

**CoM** – Council of Ministers

**CRA** – Communications Regulatory Agency

**CRPC** - Commission for Real Property Claims of Displaced Persons and Refugees

**DPA** – Dayton Peace Accords

**EC** – European Commission

**ECHR** – European Court of Human Rights

**ESDP** - European Security and Defense Policy

**EU** – European Union

**EUI** – European University Institute

**EUPM** – European Union Police Mission

**EUSR** – European Union Special Representative

**FBiH** – Federation of Bosnia and Herzegovina

**FRIDE** - Foundation for International Relations and Foreign Dialogue

**GDP** – Gross Domestic Product

**HoD** – Head of Delegation

**HDZ** – Croatian Democratic Union

**HJPC** – High Judicial and Prosecutorial Council

**ICISS** - International Commission on Intervention and State Sovereignty report

**IMC** - International Media Commission

**IMF** – International Monetary Fund

**IPA** – Instrument for Pre-accession Assistance

**IPTF** – International Police Task Force

**ITA** – Indirect Taxation Authority of BiH

**JHA** - The Justice and Home Affairs (**JHA**) acquis (from the framework for cooperation set out in Title VI (Article K) of the Treaty on European Union)

**NATO** – Northern Atlantic Treaty Organisation

**NGO** – Non-governmental organisation

**OECD** – Organisation for Economic Co-operation and Development

**OHR** – Office of the High Representative

**OSA/OBA** – Intelligence-Security Agency

**OSCE** – Organisation for Security and Co-operation in Europe

**PA BiH** – Parliamentary Assembly of Bosnia and Herzegovina

**PARCO** - Public Administration Reform Co-ordinator's Office

**PIC** – Peace Implementation Council

**PIC SB** – Peace Implementation Council Steering Board

**RS** – Republika Srpska

**SAA** – Stability and Association Agreement

**SAP** – Stability and Association Process

**SBiH** – Haris Silajdžić's "Party for BiH"

**SDA** – Party of Democratic Action

**SDP BiH** – Social Democratic Party of BiH

**SIPA** – State Investigation and Protection Agency

**SNSD** – Alliance of Independent Social Democrats (RS)

**UN** – United Nations

**WB** – Western Balkans

***“When dealing with the Balkans, the devil is usually not in the details but in the failure to confront the obvious”***

Edward P. Joseph

Key words: Bosnia and Herzegovina, European Integration; State building, institutional building, Europeanization, EU conditionality.





## **1. Introduction**

After the European Union (EU) failed to prevent the disaster in the Balkans in the 1990s, the year 2000 heralded a new beginning in the EU's relations with the Western Balkans (WB). At the turn of the century, the EU entered a new phase in its relations with the WB by taking a leading role in the stabilisation of the situation in the region. A turning point occurred when the EU offered the Balkan countries the prospect of becoming full members of the EU provided that they meet certain conditions. After the Central and East European (CEE) countries' successful "return to Europe", integration has become the "only game in town" for the countries of the WB.

The situation in Bosnia and Herzegovina (BiH), however, remains a particular challenge for the EU. Following the war and the signing of the Dayton Peace Agreement (DPA), the country was placed under international civil and military administration. For the first time in its history the EU was involved, together with the wider international community, in a state-building process using authoritarian means. The authoritarian state-building process was closely linked with the Stabilisation and Association Process (SAP). While the use of authoritarian state-building instruments helped establish key institutions needed for elementary functioning of the state, after the abandonment of such a model, reforms came to a halt, jeopardising everything that had been achieved in the state-building process. Within the SAP, conditionality remains the EU's key approach used in the accession process. While other countries in the region have made substantial progress in the accession process, BiH remains increasingly isolated, having failed to fulfil the requirements for submitting their application.

## 2. Methodological considerations

Since the year 2000, the EU has increasingly gained influence over the reform process in BiH. The EU policy toward BiH is framed within the SAP. This was designed to prepare the countries of the WB for membership in the EU. However, unlike other enlargement rounds before, what can be observed in BiH is a more intrusive involvement of the EU in state-building exercises. The EU also has been present in BiH within the framework of the Common Foreign and Security Policy (CFSP) and European Security and Defense Policy (ESDP).

The central research question of the study is how effective the EU has been with regard to state-building in post-conflict BiH in the process of integration into the EU. Essentially, this question entails investigating both theories concerned with European integration as well as the growing literature devoted to state building.

The study examines the policies and tools deployed by the EU in the process of state-building in Bosnia and Herzegovina in order to understand the transformative power of the EU. As Rupnik describes it – “Until now the EU’s transformative power has proved effective in integrating established states; now it is confronted with the challenge of integrating contested states.”<sup>1</sup>

In order to address that challenge the study considers the specificities of BiH in terms of the creation of the state, foreign presence and contested sovereignty. The study particularly devotes attention to the process of institution building as pivotal in the process of state-building and seeks to examine how local actors respond to the EU incentives policies.

The basic hypothesis of the study is that the EU approach has been ineffective due to different external and internal factors that affect the process of state building and integration into the EU and that the EU

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<sup>1</sup> James Rupnik, ‘The Balkans as European Question’, in the ‘The Western Balkans and The EU: “The Hour of Europe”’, James Rupnik (ed), (Chaillot Papers, June 2011), p.24

cannot simply replicate policies successfully applied in CEE countries. Differences in relation to the accession of CEE countries are multiple. The primary difference lies in the initial assumptions of the accession process. Although the CEE countries too were undergoing a comprehensive social and economic transformation, they still had a stable and well-established institutional framework. That framework was subsequently only upgraded to respond to the changing social and economic relations, whereas in BiH the national and institutional structures had to be built from the ground up. Also, the CEE countries embarked on the accession process as a result of a broad social consensus, whereas consensus in BiH could not be reached on such elementary matters as the very existence of the state.

As the study has the aim to find out the level of effectiveness of the EU with regard to state-building in post-conflict BiH in the process of integration into the EU, a mix of sources has been used, including law texts and official documents (International agreements, EU law and BiH law). Various think-tank, international organizations and non-governmental organizations reports and assessments have also been used, as well as domestic and international media sources. The documentation considered for this study relies predominantly on records from 2000 to the present. The paper is designed in the frame of a single-case model.

This study will look at the establishment of the basic functions of the state and institution building. In this regard, it will specifically discuss the requirements and obligations placed before BiH by the EU, as well as the role of the EU in this process. Also analysed will be the role of political elites in BiH in the state-building process and response to the requirements and incentives coming from the EU. To obtain a complete picture of the interaction between BiH and the EU, this study will also examine the positions of key EU stakeholders in the process.

Finally, the study will explore the outcomes of reform actions implemented as part of the state-building process. The criteria used for performance assessment includes functionality, capacity, independence and sustainability of the institutions established as a result of the requirements laid down by the EU. Also discussed will be the overall ability of

institutions to create laws and policies, as well as their capacity to put these into practice. This analysis will answer the questions of how successful the state building efforts have been and how effective the EU has been with regard to state-building in post-conflict BiH in the process of the integration into the EU.

### **3. Theoretical consideration**

A considerable amount of literature has been published on European integration in recent decades, reflecting its importance. As Schimmelfenning & Sedemeier argue, “EU enlargement is a key political process both for the organization itself and the international relations of Europe in general”.<sup>2</sup> Nevertheless, Schimmelfenning & Sedemeier found that the bulk of EU integration literature is rather descriptive – typically analyzing single-member integration or a single round of EU enlargement. They point out that these shortcomings in theory-oriented work do not contribute much to our cumulative understanding of enlargement. Therefore they proposed “to embed theoretical analysis of enlargement in the current international relations debate between rationalist and sociological institutionalism.”<sup>3</sup>

Rationalism has to some extent different meanings in different fields, but “at its core, rationalism is based on a methodological-individualist concept of rationality, according to which the actor exists prior to and can be studied independent of social structures.”<sup>4</sup> According to rationalism, actors have exogenously given preferences and they act based on their understanding of rationality.

In his well-known book “Social Theory of International Politics” Wendt gives two tenets of constructivism: “(1) that the structures of human association are determined primarily by shared ideas rather than material forces, and (2) that identities and interests of purposive actors are constructed by these shared ideas rather than given by nature.”<sup>5</sup>

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<sup>2</sup> Frank Schimmelfennig and Ulrich Sedelmeier, ‘Theorizing enlargement: Research focus, hypotheses and the state of research’ *Journal of European Public Policy* 9 (4), 500-528

<sup>3</sup> *ibid*

<sup>4</sup> Diana Panke, ‘How To Combine Rationalist and Constructivist Accounts of International Politics. Building Bridges on Terra Firma’ Center for European Studies (2005)

<sup>5</sup> Alexander Wendt, ‘Social Theory of International Politics’ (Cambridge: Cambridge University Press, 1999)

Some authors have suggested that the rationalist-constructivist debate has become the most significant in the discipline of international relations theory.<sup>6</sup>

Even though “constructivism and rationalism do not provide consistent competing hypotheses on enlargement that we can test against each other”, it is possible to construct two ideal types in order to portray the theoretical alternatives as clearly as possible.<sup>7</sup>

A basic rationalist hypothesis on the relationship between an applicant country and the EU is based on the logic of consequences. According to the logic of consequences, expected costs/benefits determine applicant preferences.

In contrast to the rationalist hypothesis, which emphasized that state behavior depends on their potential gain, the constructivist hypothesis accentuates that preferences of state are not necessarily exogenously given. Common identity and shared values of an applicant country and the EU play a significant role, while the adoption of and compliance with the EU rules is based on the logic of appropriateness and legitimacy of such rules.<sup>8</sup>

Schimmelfennig & Sedelmeier also propose a definition of the enlargement of an organization “as a process of gradual and formal horizontal institutionalization of organizational rules and norms”, whereas institutionalization means the process by which the actions and interactions of social actors come to be normatively patterned.<sup>9</sup>

The concept of “Europeanization” has become widely used in order to describe the process of “(a) construction, (b) diffusion and (c)

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<sup>6</sup> Schimmelfennig and Sedelmeier (n2)

<sup>7</sup> Schimmelfennig and Sedelmeier (n2)

<sup>8</sup> Pål Røren, ‘When Membership Becomes Insufficient - Norm Diffusion, the European Union, and Bosnia and Herzegovina’, 2013  
[http://www.academia.edu/3354061/When\\_Membership\\_Becomes\\_Insufficient\\_Norm\\_Diffusion\\_the\\_European\\_Union\\_and\\_Bosnia-Herzegovina](http://www.academia.edu/3354061/When_Membership_Becomes_Insufficient_Norm_Diffusion_the_European_Union_and_Bosnia-Herzegovina)

<sup>9</sup> Frank Schimmelfennig and Ulrich Sedelmeier, ‘Governance by Conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe’, *Journal of European Public Policy* 11:4 August 2004: 669–687

implementation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms, which are first defined and consolidated in the making of EU public policy and politics."<sup>10</sup>

There is almost a general consensus that the two key mechanisms available to the EU in the process of Europeanization are: conditionality and socialisation.

The key mechanism of Europeanization based on rationalistic logic of consequences is conditionality. Europeanization, as systemic political and economic transformation, occurs when the EU provides incentives for adoption and compliance with its rules. Membership is the most important reward that the EU can offer to these countries, but another important reward is access to EU funds as well as technical assistance."<sup>11</sup>

By contrast, the socialisation mechanism is based on a constructivist model of internalising norms through a process of learning and understanding the established norms as legitimate and acceptable behaviour. According to the logic of appropriateness, "Europeanization is an effect of the perceived authority and legitimacy of the EU, its model of governance, or its norms and rules."<sup>12</sup>

While in practice it is difficult to distinguish which of the two mechanisms is dominant in each individual case, but also, more generally, in the process of effecting the EU's influence in potential member states, most authors agree that the conditionality mechanism plays a dominant role.<sup>13</sup>

As to how the conditionality mechanism operates, it is simple and based on granting rewards for the fulfilment of given conditions and, conversely, withholding rewards for failure to meet the conditions. Very rarely has the

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<sup>10</sup> Claudio Radaelli, 'Europeanisation: Solution or problem?', *European Integration online Papers (EIoP)* Vol. 8 (2004) N° 16; <http://eiop.or.at/eiop/texte/2004-016a.htm>

<sup>11</sup> Frank Schimmelfennig, 'Europeanization beyond the member states', (ETH Zurich 2010)

<sup>12</sup> *ibid*

<sup>13</sup> Frank Schimmelfennig, Stefan Engert, Heiko Knobel, 'Costs, Commitment and Compliance. The Impact of EU Democratic Conditionality on European Non-member States' *EUI RSC*; 2002/29



EU opted for direct negative sanctions in cases when the EU's conditions were not met. In most cases, failure to comply with the conditions resulted in ineligibility to transition to the next phase of integration or withholding of EU funds earmarked for the potential candidate state in question. However, the possible election defeat of a government that does not meet the EU requirements might be seen as an indirect sanction, in situations where the EU integration process has a stronger impact on society and citizens tend to attach more weight to this topic when deciding who to give their vote to in elections.<sup>14</sup>

The basic requirements for any country that aspires to join the EU are the Copenhagen criteria.<sup>15</sup> However, these are directly applicable only when the country becomes a candidate for membership. Compared with the previous enlargement rounds, candidate status now requires compliance with specific requirements as part of the SAP. While the CEE countries were granted candidate status and signed the respective "European Agreements" with the EU without any special conditions attached, the process has been much more elaborate for the countries of the WB.<sup>16</sup>

Noutcheva proposes a typology that distinguishes between three groups of requirements imposed by the EU on potential member states:

1. **Overarching conditionality** (EU sovereignty conditionality, democracy conditionality, market economy conditionality, ICTY cooperation conditionality and regional cooperation conditionality);

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<sup>14</sup> *ibid*

<sup>15</sup> The Copenhagen Criteria represent the following:

- Political–stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- Economic–existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;
- Acceptance of the Community *acquis* – ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

The Official Website of the EU - [http://europa.eu/scadplus/glossary/accession\\_criteria\\_copenhagen\\_en.htm](http://europa.eu/scadplus/glossary/accession_criteria_copenhagen_en.htm)

<sup>16</sup> Gergana Noutcheva, 'EU conditionality and Balkan compliance: Does sovereignty matter?', University of Pittsburgh 2006

2. **Sector-specific conditionality** related to the third Copenhagen criterion (single market *acquis*, JHA *acquis*, sectoral policy *acquis*);
3. **Assistance conditionality** linked to the implementation of specific projects;<sup>17</sup>

To understand the EU's approach to the WB countries on their path towards EU membership, many authors emphasise sovereignty as an important variable to keep in mind.<sup>18</sup> Sovereignty as one of the fundamental concepts of political science and international relations is a subject of intense debate in academic circles, which significantly departs from and goes beyond the traditional concept of sovereignty which resulted from the Treaty of Westphalia in 1648.<sup>19</sup> The influential International Commission on Intervention and State Sovereignty report (ICISS), "The Responsibility to Protect", spells out that, in its view, "sovereignty then means accountability to two separate constituencies: internally, to one's own population; and internationally, to the community of responsible states".<sup>20</sup> This definition reveals a general trend highlighted by many authors referring to a clear distinction between two types of sovereignty: internal and external (or international). While internal sovereignty is understood as the capacity of the state to carry out its basic functions, external or international sovereignty, on the other hand, is defined as equality and acceptance of the state by other actors in international relations.<sup>21</sup> Chandler points out that if sovereignty is understood as "good governance", therefrom stems the right of external

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<sup>17</sup> *ibid*

<sup>18</sup> Gulio Veneri, 'From international to EU driven state building: the re-organization of sovereignty in post- Dayton Bosnia and Herzegovina', PhD Dissertation, University of Trento

<sup>19</sup> See Robert Jackson, *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990) and Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999)

<sup>20</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Research, Bibliography, Background* (Ottawa: International Development Research Centre, 2001), p.11

<sup>21</sup> Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999) and G Noutcheva, 'EU conditionality and Balkan compliance: Does sovereignty matter?', University of Pittsburgh 2006

actors to get engaged in strengthening exactly that kind of sovereignty through the processes of state- and institution-building.<sup>22</sup>

In countries with limited sovereignty, conditionality is usually much more robust and can be more focused on changes to the state structure. Noutcheva therefore stresses that the requirements set by the EU to potential member states which impinge on their sovereignty do not have the same level of legitimacy as the generally accepted requirements stemming from the Copenhagen criteria.<sup>23</sup>

The response of potential member states to the conditionality mechanism applied by the EU also depends on the degree of their sovereignty. In countries with limited sovereignty, the presence of external actors changes the internal dynamics in the decision-making process regarding the acceptance of the requirements defined by the EU. On the other hand, in a situation where a country's sovereignty is limited and the conditions set by the EU impinge on the matters of sovereignty, these conditions can meet with considerable resistance and opposition from political elites.<sup>24</sup>

Compliance with the EU demands may happen through imposition or be based on voluntary consent. While in sovereign states compliance is largely based on voluntary compliance, in those with limited sovereignty both modes are in play in the meeting of EU conditions.

The next division relates to whether compliance is interest-based or norm-based. In her analysis of compliance, Noutcheva identifies four possible situations that may arise in the realisation of the EU's impact on potential member states. The first case corresponds to the situation where a rational cost-benefit analysis shows that the fulfilment of the EU requirements is against the interests of the political elite, but the level of legitimacy of these requirements is sufficient for the fulfilment of the requirements. In this case, socialisation is the dominant mode of meeting the EU

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<sup>22</sup> David Chandler, 'International state-building - Beyond conditionality beyond sovereignty', Institute for International Relations, Brussels 2005

<sup>23</sup> Noutcheva (n15)

<sup>24</sup> Noutcheva (n15)

requirements, and reforms that have occurred as a result of *socialisation-driven compliance* usually remain sustainable in the long term.

The second case occurs in a situation where local political actors recognise their interest in fulfilling the EU requirements, but the legitimacy of these demands is low. This is *conditionality-driven compliance*. With this type of compliance, implemented reforms are not sustainable in the long term and there may even be a return to the status quo ante.

The ideal case exists when conditionality and socialisation operate in synergy, and then it is actually possible to speak of *genuine compliance*. In this case reforms are fully sustainable, and the transformation of the state and society is irreversible.

Finally, the last situation arising in connection with the response of potential member countries to EU requirements exists when the cost of meeting the EU conditions for the local political elites is very high and thereby the legitimacy of the EU requirements is quite low. In such cases, local political actors usually simulate compliance so as to avoid further damage that might occur to them if they directly reject the EU requirements. The best indicator for the distinction between real and simulated compliance is implementation. Very often local political actors adopt legislation that is in line with the EU requirements, but its subsequent implementation indicates that there was no real willingness to implement it. Also, very often political actors establish institutions in accordance with the EU requirements, but after adopting the legislation establishing these institutions, they either fail to provide sufficient financial resources for their operation or seek to ensure through partisan appointments that such institutions primarily work in the interests of the political elites rather than apply the law consistently.<sup>25</sup>

The key variables determining the outcome of EU conditionality are:

- determinacy of conditions: the more clearly defined the requirements are, the more likely they are to be implemented;

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<sup>25</sup> Noutcheva (n15)

- the type and dynamic of reinforcement: the higher the reward and the closer in time to its implementation, the greater the likelihood of the conditions being met;
- credibility of conditions: the probability of meeting the EU conditions depends on the credibility of the EU in terms of consistency of the conditions it imposes, and of the conditions themselves.<sup>26</sup>

In the last two decades the process of state-building has been widely discussed among scholars and practitioners. The literature on state-building has been largely driven by the fields of international relations and political science. Studying the process of state-building and the process of European integration and enlargement of the EU is just beginning to strongly permeate in the process of accession countries from Eastern and Central Europe, whereas in the case of the Western Balkans it seems to have experienced its peak. In this sense Noutcheva points out that the involvement of the EU in the process of the Western Balkans accession cannot be clearly categorized as a foreign or enlargement policy.<sup>27</sup>

The transition from communism has meant not only building a market economy from the ground up but also creating a modern regulatory state capable of implementing the EU's *acquis*, now a far more substantial job than during any previous wave of enlargement.<sup>28</sup>

Precisely therein lies the crucial difference between all previous rounds of EU enlargement and the integration of the WB, especially countries that are under a partial protectorate such as BiH and Kosovo. In the case of these two countries, the task is even more complex, given that they have not yet completed the process of state-building and building of the institutions that are supposed to assume the rights and obligations as a future member of the EU.

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<sup>26</sup> Schimelefenig, Engert, Knobel (n12)

<sup>27</sup> Gergana Noutcheva, 'Fake, Partial and Imposed Compliance - The Limits of the EU's Normative Power in the Western Balkans', CEPS Working Document (2007) No. 274

<sup>28</sup> Andrew Moravcsik and Milada Anna Vachudova, 'National Interests, State Power, and EU Enlargement', *East European Politics and Societies*, Vol. 17, 2003 No. 1, 42-57

Compliance with the EU's conditions has required strong and capable state institutions, able to transpose and implement the *acquis communautaire*. While the EU conditions for accession are rather detailed, articulated and well-known, the transfer or replication of well functioning public institutions remains a more complex question.<sup>29</sup>

Fukuyama particularly emphasized the importance of institutions for transformation of the society and that: "institutions must be in place before a society can move from amorphous longing for freedom to a well-functioning, consolidated democratic political system with a modern economy. And if there is one thing that the study of democratic transitions and political development teaches, it is that institutions are very difficult to establish."<sup>30</sup>

Francis Fukuyama also offers a broad definition of state-building as "the creation of new institutions and the strengthening of existing ones."<sup>31</sup> And he makes distinction among three various stages in the process of state building:

- post-conflict reconstruction;
- creation of self-sustaining institutions;
- strengthening of the state and institutions capacity.

Knaus and Cox discern three models of state-building. The first is authoritarian state-building, the second is the traditional capacity building model, and the third is the member-state building model.<sup>32</sup>

Acemoglu and Robinson emphasized existence of inclusive institutions<sup>33</sup> as what matters the most in why some nations fail and others succeed.<sup>34</sup>

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<sup>29</sup> Francis Fukuyama, 'State building: governance and world order in the 21<sup>st</sup> century, Cornell University Press Ithaca, New York 2004

<sup>30</sup> Francis Fukuyama, 'After the Neocons, America at the Crossroads', London Profile Books 2006, 146

<sup>31</sup> Fukuyama (n28)

<sup>32</sup> Gerald Knaus and Marcus Cox, 'The "Helsinki Moment" in Southeastern Europe', Journal of Democracy, Volume 16, (2005) Number 1

<sup>33</sup> Daron Acemoglu and James Robinson, 'Why Nations Fail : the origins of power, prosperity and poverty' (Crown Business Retrieved 2012)

The state-building process gives rise to a number of dilemmas. The first important dilemma relates to the question of whether it is right to insist on reconstructing multi-ethnic states that remain deeply divided along ethnic lines after a civil war.<sup>35</sup> The EU's approach, however, is based on the assumption that integration into the EU as a wider community through stabilisation within the accession process will lead to a reduction in inter-ethnic tensions.<sup>36</sup>

The second dilemma concerns the choice of approach in the state-building process. In this regard, two possible approaches are identified: top-down (which focuses on institution building and is of a technical nature) and bottom-up (which is focused on the construction of participatory democratic culture, a civil society and reconciliation).<sup>37</sup> Very often state-building missions ignore the broader context and societal factors and are oriented mainly to the technical process of institution building.<sup>38</sup>

It is the wider context and understanding of state-building that is very important for the final outcome of the process. Fukuyama therefore warns: "In the cases where there is no complementary domestic demand, conditionality is a failure." Even in those situations where the demand for state- and institution-building is imposed from the outside, this practice has very limited effects. When he speaks of the four aspects of stateness (organisational design and management, institutional design, basis of legitimisation and social and cultural factors), Fukuyama points out that the smallest amount of transferable knowledge lies exactly in the social and cultural factors.<sup>39</sup>

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<sup>34</sup> *ibid* - They divided institutions into two types – extractive and inclusive institutions. Extractive institutions are those in which a small group of individuals exploit the state and rest of the population, and inclusive institutions are those in which the majority of the population is included in the process of governing and the process of exploitation is completely absent or very limited.

<sup>35</sup> Veneri (n17)

<sup>36</sup> Veneri (n17)

<sup>37</sup> Veneri (n17)

<sup>38</sup> Fukuyama (n28)

<sup>39</sup> Fukuyama (n28)

When it comes to broader social mobilisation to create demand for institutions and reforms, it is important to bear in mind the relationship between society and the state. The absolute domination of the state over society and the lack of appropriate channels of communication between the society and the state prevents active public participation in decision-making processes. Political parties with no internal democracy and weak civil society fail to articulate the appropriate demand for reforms.<sup>40</sup>

Chandler and Zelonka are probably the best known critics of the role and policies of the EU in the modern world.<sup>41</sup> Zelonka argues that the EU acts as an imperial power, but “the EU’s ‘imperial’ instruments are chiefly economic and bureaucratic rather than military and political.” Chandler criticizes the generally accepted premise that conditionality projects EU norms and values “in a way which promotes democracy and strengthens state institutions. In fact, the reality is very different. The EU promotes its right to assert conditions for EU membership as a democratic one.”<sup>42</sup>

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<sup>40</sup> Scimmelfennig, Engert, Knobel (n12)

[http://www.eup.ethz.ch/people/schimmelfennig/publications/o3\\_JCMS\\_CostsCommitment.pdf](http://www.eup.ethz.ch/people/schimmelfennig/publications/o3_JCMS_CostsCommitment.pdf)

<sup>41</sup> Jan Zelonka “Europe as empire – the nature of the enlarged European union”, (Oxford University Press, Oxford 2007)

<sup>42</sup> David Chandler, *The EU and Bosnia: Normative Power and Liberal Peace*, Sarajevo EUPF7 Conference “Delivering Just and Durable Peace? Evaluating EU Peacebuilding strategies in the Western Balkan”  
[http://www4.lu.se/upload/LUPDF/Samhallsvetenskap/Just\\_and\\_Durable\\_Peace/DavidChandlerEUandBosnia.pdf](http://www4.lu.se/upload/LUPDF/Samhallsvetenskap/Just_and_Durable_Peace/DavidChandlerEUandBosnia.pdf)



## **4. EU enlargement in the Balkans – context, tools and policies**

After the failure of EU policies towards the WB during the 1990s, the EU reached consensus that the WB needed a new comprehensive policy approach. The generally stated goal of the EU policy towards the WB, including BiH, is stabilisation of the entire region as well as of all its individual states and, ultimately, their accession to the EU as full members.<sup>43</sup> The first time the EU proclaimed its commitment to the integration of the WB countries was at the Council of Feira in Portugal in June 2000.<sup>44</sup> After the CEE countries' successful "return to Europe", integration became the "only game in town" for the countries of the WB.

Conditionality has become the dominant model of relations between the EU and the countries that have aspirations to EU membership, the countries covered by the neighbourhood policy and other countries that aspire to be the beneficiaries of the EU's development aid.

The Stability and Association Process (SAP) was introduced as the overall policy framework established by the EU in 1999/2000 to cooperate with the WB on the road to EU membership. The SAP aims to create the necessary conditions for the political and economic transition of the Western Balkans. The key feature of the new EU approach was the offer of the prospect of full membership.<sup>45</sup> The Stabilisation and Association Agreement (SAA) represents the framework of overall relations between the European Union and the WB countries for implementation of the SAP. The conclusion of the SAA represents the signatories' commitment to complete, over a transition period, a formal association with the EU. Such

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<sup>43</sup> Karen E. Smith, 'Enlargement and European Order' in Christopher Hill and Michael Smith, *International Relations and the European Union*, OUP 2005

<sup>44</sup> SANTA MARIA DA FEIRA EUROPEAN COUNCIL, 19 AND 20 JUNE 2000, CONCLUSIONS OF THE PRESIDENCY, [http://www.europarl.europa.eu/summits/feii\\_en.htm](http://www.europarl.europa.eu/summits/feii_en.htm)

<sup>45</sup> Fraser Cameron, 'The EU and Balkans: Looking back, looking forward' in Johanna Deimmel and Wim van Meurs (eds.), *The Balkan Prism: A retrospective by policy-makers and analysts*, Munich 2007

an association has a high political importance. It is based on the gradual implementation of a free trade area and reforms designed to achieve the adoption and implementation of EU standards with the aim of moving closer to the EU. Careful preparation with each country before the EU offers such a contract has been and remains a vital component of the SAP. The SAA creates tools which provide, much as the Europe Agreements did for the candidate countries in Central Europe, the formal mechanisms and agreed benchmarks which allow the EU to work with each country to bring them closer to the standards which apply in the EU.

The Thessaloniki Summit (2003) marked “a pivotal moment in the EU’s approach towards the region, which shifted from post-conflict stabilization (security) to European integration (enlargement).”<sup>46</sup> The progress of each country would depend on the fulfilment of conditions formulated by the EU. The relatively successful application of Conditionality in the case of accession of the Eastern European countries led the decision-makers in Brussels to a logical conclusion – that, with some adjustment, the Conditionality approach can have similar results in the unstable and never predictable region of the WB as well.

In the framework of the SAP, in 2004 the EU Council established the European partnership as “a framework covering the priorities resulting from analysis of Partners’ different situations, on which preparations for further integration into the European Union must concentrate in the light of the criteria defined by the European Council and the progress made in implementing the stabilisation and association process including stabilisation and association agreements, where appropriate, and in particular regional cooperation.”<sup>47</sup>

The key EU financial instrument for support of the SAP is the Instrument for Pre-Accession Support (IPA), established in 2006 for the period 2007 –

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<sup>46</sup> Evioala Pifti (ed), ‘The European future of the Western Balkans: Thessaloniki@10 (2003-2013)’

<sup>47</sup> Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the Stabilisation and Association Process, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0533:EN:NOT>

2013. The beneficiary countries are divided into two groups: candidate countries and potential candidate countries. Council Regulation (EC) No.1085/2006 stipulates that the overall objective of the IPA is to assist candidate and potential candidate countries “in their progressive alignment with the standards and policies of the European Union, including where appropriate the *acquis communautaire*, with a view to membership.”<sup>48</sup> The scope of assistance includes: (a) strengthening of democratic institutions, as well as the rule of law, including its enforcement; (b) the promotion and the protection of human rights and fundamental freedoms and enhanced respect for minority rights, the promotion of gender equality and non-discrimination; (c) public administration reform, including the establishment of a system enabling decentralisation of assistance management to the beneficiary country in accordance with the rules laid down in Regulation (EC, Euratom) No.1605/2002; (d) economic reform; (e) the development of civil society; (f) social inclusion; (g) reconciliation, confidence-building measures and reconstruction; (h) regional and cross-border cooperation.

The IPA is made up of five components: Transition Assistance and Institution Building, Cross-Border Cooperation, Regional Development, Human Resources Development, and Rural Development. Potential candidate countries are eligible for support for Transition Assistance and Institution Building and Cross-Border Cooperation, and the other three components are aimed at candidate countries only.

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<sup>48</sup> Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA)  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1085:EN:NOT>

## **5. From international to EU-driven state building**

The initiative for organising a peace conference was the result of efforts of the US administration to end the war in BiH, which was entering its fourth year. After several failed peace processes taking place under the auspices of the United Nations, the European Union and the Contact Group, and following a limited NATO intervention against Serb forces, the top US administration officials spearheaded the initiative to end the war.

The peace conference in Dayton (Ohio) began on 1 November 1995, and the final peace agreement – General Framework Agreement for Peace in Bosnia and Herzegovina – was reached on 21 November between the presidents of BiH, Croatia and Serbia. The process was led by Richard Holbrooke, who was the chief US peace negotiator, and Secretary of State Warren Christopher.

The Dayton Peace Accords (DPA) were formally signed on 14 December 1995 in Paris. International leaders attending the signing ceremony included US President Clinton, French President Jacques Chirac, British Prime Minister John Major, German Chancellor Helmut Kohl, and Russian Prime Minister Viktor Chernomyrdin.

The state-building process was essential for BiH in the post-war period. Given the complete institutional discontinuity with the pre-war situation, the absence of rule of law and gross and systematic violations of human rights, the establishment and building of institutions was fraught with great challenges. As was pointed out earlier, there are different approaches to the building of the state and institutions employed by external actors (authoritarian, member-state building and traditional capacity building model). But what remains a common assumption for all the above approaches is the lack of demand for institutions within the state in which the state-building process is implemented.

It is very difficult to draw a clear line between the authoritarian phase and the member-state building phase as these have been closely intertwined

ever since the first EU conditions were set out for BiH in 2000. The most precise division, in fact, would be:

- **the authoritarian state building phase until 2000** (the International community personified in the OHR directly ran the country with the help of other international or *ad hoc* institutions) - arguably this phase only began in 1997, as in the first year after the war there were no Bonn powers.
- **a mixed phase or the interim phase** of both authoritarian and membership state building between 2000 and 2005 (the EU introduced the first set of conditions, and the EUSR was the same as the HR from 2002).
- **member-state building phase** after 2005.

In order to gain a clearer insight into the results of each state building phase, it would be convenient to use the year 2005 as the demarcation line between the authoritarian and member state phases, for several reasons, although the Bonn powers still formally remained in effect and continued to be used after 2005. It was in 2005 that the Peace Implementation Council (PIC) first expressed its commitment to replace the Office of the High Representative (OHR), together with its broad Bonn powers, with the European Union Special Representative (EUSR), which would have a solely European agenda based on voluntary acceptance of conditions. Negotiations on SAA were officially opened in November 2005. Also, Paddy Ashdown's mandate, which was marked by widespread use of authoritarian powers, ended in 2005.

## **5. 1 International authoritarian state building**

The constitutional setup of BiH was established by the DPA concluded in November 1995 at the Wright Patterson military base, in Dayton, Ohio, USA, and signed in December 1995 in Paris, France. Annex 4 of this Agreement, which constitutes the Constitution of BiH, created an extremely complex and decentralized structure composed of: two entities – FBiH (the Federation of BiH, consisting of 10 cantons) and Republika

Srpska (RS), plus the Brčko District (a condominium shared by both entities), and the joint state-level government with very limited powers.

The total institutional discontinuity in relation to the period before the signing of the DPA effectively meant that only the municipal level of government existed prior to the conflict. As a result of the unprecedented involvement of the international community, the key institutions necessary for the functioning of the state were established during the authoritarian state-building phase.<sup>49</sup>

According to Article 3, Paragraph 1 of Annex 4 to the DPA, which constitutes the Constitution of BiH, the following matters are the responsibility of the state-level institutions:

- a) Foreign policy
- b) Foreign trade policy
- c) Customs policy
- d) Monetary policy
- e) Finances of the institutions and the international obligations of BiH
- f) Immigration, refugee, and asylum policy and regulation
- g) International and inter-Entity criminal law enforcement, including relations with Interpol
- h) Establishment and operation of common and international communications facilities
- i) Regulation of inter-Entity transportation
- j) Air traffic control

All other matters not explicitly listed therein are the responsibility of the Entities.

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<sup>49</sup> Gerald Knaus and Marcus Cox, 'Bosnia and Herzegovina: Europeanisation by Decree?' in *Western Balkans: Moving on 2004*, edited by Judy Batt, Chaillot Paper <http://www.iss.europa.eu/uploads/media/cp070.pdf>

The format of the international presence in BiH after the war was determined by the DPA, through establishment of the OHR as the “final authority in theatre to interpret the agreement”. The Security Council Resolution 1031 of 15 December 1995 confirmed the position and authority of the OHR provided for in the DPA.<sup>50</sup> The PIC, a group of 55 countries and international organisations that sponsor and lead the peace implementation process, later on elaborated this mandate further and in more detail.

In subsequent years various international conferences were held, resulting in considerable expansion of the High Representative’s mandate. The aim of the London Peace Implementation Conference, held on 8 and 9 December 1995, was to mobilise international support for the implementation of the Agreement. The conference established the Steering Board of the PIC to work as the executive arm of the PIC.<sup>51</sup> The Steering Board of the PIC provides the HR with political guidance. In Sarajevo, the High Representative chairs weekly meetings of the Ambassadors who are Steering Board members. In addition, the Steering Board meets at the level of political directors every three months.

Since the London conference, the PIC came together at the ministerial level another five times to review progress and define the goals of peace implementation for the coming period: in June 1996 in Florence; in December 1996 for a second time in London; in December 1997 in Bonn; in December 1998 in Madrid; and in May 2000 in Brussels.<sup>52</sup>

The HR’s mandate evolved significantly during the implementation period. Among the most important milestones in the peace implementation process was the PIC Conference in Bonn in December 1997. Elaborating on Annex 10 of the DPA, the PIC requested and authorised the HR to remove

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<sup>50</sup> RESOLUTION 1031 (1995), *Adopted by the Security Council at its 3607th meeting, on 15 December 1995*

<sup>51</sup> Conclusions Of The Peace Implementation Conference Held At Lancaster House London, London, 8 December 1995

<sup>52</sup> OHR: Key events since Dayton [http://www.ohr.int/ohr-info/key-events/default.asp?content\\_id=35971](http://www.ohr.int/ohr-info/key-events/default.asp?content_id=35971)

from office public officials who violate legal commitments and the Dayton Peace Agreement, and to impose laws as he sees fit if Bosnia and Herzegovina's legislative bodies fail to do so.<sup>53</sup>

The first phase of the state-building process lasted from 1997 until 2000. In the authoritarian state building phase the OHR was mainly oriented towards stabilising the country through eliminating obstruction to the implementation of the DPA and the establishment of basic government functions. During that period the Bonn powers were used widely to dismiss elected and appointed officials who obstructed the implementation of the DPA. Imposition of legislation in that period helped establish basic prerogatives of the state, such as the state symbols and a single currency, and secured the freedom of movement throughout the country. Characteristic of that period was the fact that the OHR directly ran the country with the help of other international or *ad hoc* institutions. The Organisation for Security and Cooperation (OSCE) Mission was responsible for establishing electoral rules and conducting elections. The OHR established the International Media Commission (IMC), which was tasked with establishing and implementing regulations related to electronic broadcasting. The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), in accordance with the DPA and established by the OHR, was charged with ensuring the return of property to displaced persons and refugees in places where they had lived before the war as their property was occupied. The robust United Nations International Police Task Force mission (IPTF) was charged in that period with the direct supervision of the police forces and licensing of police officers. The EU's specific role in that period was limited to the participation of the Commission and individual member states in policy making through the PIC and PIC Steering board.

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<sup>53</sup> Conclusions of the Peace Implementation Council met in Bonn on 9 and 10 December 1997.



## ***Conclusions***

In the initial phase of the authoritarian state building, attention was focused on the country's post-conflict reconstruction and stabilisation of peace. In that phase the EU's role was part of a broader involvement of the international community, through participation of the European Commission in the PIC and the PIC Steering Board. In that phase one could not speak of conditionality being used as a mechanism to influence local actors simply because the EU conditions as such did not exist. The country was directly run by the international community led by the OHR, with the help of a wide range of international organisations and institutions.

## **5. 2 Mixed phase or Interim phase of both authoritarian and membership state building**

After the initial phase of the state-building run by the international community led by the OHR, with the help of a wide range of international organisations and institutions, the most significant change identified is in the character of the international presence in BiH, as reflected in the increasing involvement of the EU. EU conditionality for BiH was introduced for the first time in 2000. An EU "Road Map" identified eighteen initial "Steps to be taken by BiH to prepare for a Feasibility Study on opening Negotiations on a SAA".<sup>54</sup>

Priorities identified in the 2000 Road Map were aimed at ensuring basic conditions for the functioning of the state, so that the country would be eligible for the SAA in the first place. Given that, according to Annex 4 of the DPA, which is the Constitution of BiH, responsibilities entrusted to the state level are very limited, by means of the Road Map the EU tried to

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<sup>54</sup> Road map 2000 <http://www.esiweb.org/pdf/bridges/bosnia/EURoadMap.pdf>

ensure the provision of minimum functions of the state in order for BiH to even be able to begin the process of joining the EU.

The 2000 Road Map conditions can be classified into three groups:

- **Political conditions** (adopt an election law, adopt a civil service law, establish permanent secretariat in the Presidency; agree on chairmanship of the Council of Ministers (CoM) and adopt legal amendments; single passport; implement the law on state border service;)

The adoption of the election law was without a doubt one of the most important requirements of the 2000 Road Map and also one of the conditions for BiH becoming a member state of the Council of Europe (CoE). The adoption of the election law in August 2001 meant that the responsibility for conducting elections was finally handed over from the OSCE and the Provisional Election Commission, which operated under the auspices of the OSCE, to the Central Election Commission of BiH (CEC BiH). The Commission's first make-up was appointed by the HR and included both national and international members. The first elections fully organised and funded by the CEC BiH were held in 2004. An important condition concerned the strengthening and expansion of the Council of Ministers, which was a major step towards strengthening the central-level executive.

- **Economic conditions** (abolish payment bureaus; establish state treasury; remove all trade barriers between entities; implement FDI legislation and adopt restitution legislation)

Economic conditions were primarily concerned with enabling market-based operation of the payment system via commercial banks in lieu of the former system of payment bureaus, and eliminating trade barriers between entities. An important requirement was related to the establishment of a treasury mode of

operation of government institutions, providing greater transparency and accountability in the spending of budget funds.

- **Conditions in the area of Human Rights and Rule of Law;** constitutional court funding; conditions for sustainable return and property legislation, law on judicial and prosecutorial service at the entities' level

Although at the time when these conditions were defined the working assumption of the EU was that it would take between eight and nine months to meet them, it turned out that the fulfilment of these conditions took more than two and a half years.<sup>55</sup> The fact is that these conditions did not originate exclusively as an initiative of the EU, but were also set by the PIC and OHR. Reforms of the justice system and establishment of state-level judicial institutions had been part of the OHR agenda even before the Road Map. Reforms in this area were implemented solely as a result of imposition by the OHR (Law on the State Court, Law on the State Prosecutor's Office, Criminal Code, Criminal Procedure Code, Law on High Judicial and Prosecutorial Council). The primary aim was to establish and ensure the functioning of state-level judicial institutions, while ensuring appropriate independent appointment of judges and prosecutors. As resistance to the implementation of these reforms was quite strong, particularly in RS due to the strengthening of judicial functions at the state level as well as due to the unwillingness of the political elite to have themselves excluded from the appointment process, the OHR resorted to imposing the law.<sup>56</sup> An important segment of this set of conditions concerned the creation of conditions for return of displaced persons. The CRPC, established under the DPA and comprising both national and international members, played a key role in returning property to displaced persons. Thus, this condition was aimed at creating conditions for continued return after the end of the Commission's mandate.

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<sup>55</sup> Gergana Noutcheva, 'European Foreign Policy and Challenges of Balkan Accession, Conditionality, Legitimacy and Compliance', Rutledge 2012

<sup>56</sup> Noutcheva, (n54)

In general, key reforms required by the Commission within the Road Map such as the Law on the Council of Ministers (CoM), the Law on the Civil Service in the Institutions of BiH, the Law on the High Judicial and Prosecutorial Council, the Law on the State Court, and the Decision on Restructuring the Public Broadcasting System have been enforced by OHR through imposition.

In 2002 the European Union Special Representative (EUSR) was introduced as the instrument of CFSP. The idea behind the establishing of the EUSR presence was “complementing the role of the HR with the tasks of the EUSR, thereby maximizing synergies. In other words, the ‘hard power’ of the Bonn powers was complemented by the ‘soft power’ of the EUSR, charged with bringing the country towards the negotiations of the SAA and to pursue the European destination of BiH [...], proclaimed by the European Council of Thessalonica in June 2003.”<sup>57</sup> The EUSR and the HR were one and the same for more than nine years.

In 2003 the European Commission officially stated that the Road Map was “substantially completed”.<sup>58</sup> However, in their off-the-record remarks Brussels officials acknowledged that not much more could be attained from the Road Map, and that it was necessary to preserve the momentum for further reforms.<sup>59</sup> As a result, sixteen priorities were subsequently identified that were to be implemented before the Commission gave a recommendation to the Council to open negotiations, which was an indirect acknowledgment that the Road Map had not been fully completed after all.<sup>60</sup>

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<sup>57</sup> Giovanni Grevi, ‘Pioneering Foreign Policy: The EU Special Representatives’, European Institute for Security Studies (eds.), Chaillot Paper No.106, Paris 2007. p.83. See also European Security Strategy – Bosnia and Herzegovina – Comprehensive Policy, adopted by the European Council, 17/18 June 2004

<sup>58</sup> Bosnia and Herzegovina: Commission approves Feasibility Study, European Commission - IP/03/1563 18/11/2003 [http://europa.eu/rapid/press-release\\_IP-03-1563\\_en.html](http://europa.eu/rapid/press-release_IP-03-1563_en.html)

<sup>59</sup> Noutcheva, (n54)

<sup>60</sup> Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union/\* COM/2003/0692 final \*/

Although at that stage the EU did not mention constitutional amendments as an explicit requirement, this still followed from the way it laid down its requirements and finally from the views expressed in official EU documents, which pointed out that “from a perspective of European integration it is difficult to argue that the current constitutional order is optimal.”<sup>61</sup>

The additional conditions set by the Commission to be met before recommendation was given for the opening of SAA negotiations had the same purpose as those set out in the Road Map, namely the establishment and strengthening of institutions at the state level. This is evident from the fact that virtually no condition was related to the strengthening of institutions at the entity level.<sup>62</sup> An additional 16 requirements from the Feasibility Study concerned largely the implementation of the laws that were part of the 2000 Road Map. Most of the Road Map requirements, as already discussed, were adopted through imposition by the OHR. Implementation of the Law on the CoM, which Council was extended as a result of imposition by OHR from the original format consisting of three ministries plus a chairman to one consisting of nine ministries plus a chairman, was also among the conditions of the Feasibility Study. Originally, the CoM was composed of only three ministries (Foreign Affairs, Foreign Trade and Economic Relations, and Civil Affairs and Communications), two co-chairs and one vice-chair who rotated as chairperson. Following the decision of the Constitutional Court, the rotating chairmanship of the CoM was abolished. The 2003 Law greatly expanded the composition of the CoM with the departments important for the overall functioning of the central-level executive (six additional ministries were formed: defence, security, finance and treasury, justice, human rights and refugees, and communication).

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[http://eurlex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=503DCo692](http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=503DCo692)

<sup>61</sup> European Commission, Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union (Feasibility Study) COM (2003) 692 final, 18 November 2003

<sup>62</sup> Noutcheva, (n54)

Also, the implementation of the Law on Civil Service, which had been a requirement in the 2000 Road Map, was reaffirmed as a requirement through a demand for the development of an action plan for a countrywide public administration reform.

Conditions related to the rule of law were aimed at creating a single High Judicial and Prosecutorial Council (HJPC) at the central level and strengthening state-level judicial and law enforcement institutions. Conditions related to human rights, in particular further creation of conditions for sustainable return, also remained in the Feasibility Study. A completely new requirement, compared to the 2000 Road Map, was the establishment of the Directorate for European Integration with functional capacity for aid and project coordination. The country's full cooperation with the ICTY was also restated as one of the conditions.

A significant difference in relation to the 2000 Road Map requirements was that the Feasibility Study contained important requirements concerning the adoption of legislation related to the budget and tax collection at the central government level. Conditions included the establishment of a single state-level indirect taxation institution and adoption of relevant legislation, as well as adoption of appropriate legislation governing the budget and budgetary procedures at the state level.

In October 2005 the Commission recommended to the Council the opening of SAA negotiations with BiH, highlighting the progress made in meeting the 16 requirements, but also stressing that further efforts were needed to improve cooperation with ICTY, ensure the implementation of the police reform, and adopt the Law on Public Broadcasting System.<sup>63</sup> Negotiations were then officially opened on 25 November 2005.

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<sup>63</sup> EU Commission recommends opening Stabilisation and Association Agreement negotiations with Bosnia and Herzegovina (21 October 2005: Brussels) [http://www.eu-un.europa.eu/articles/en/article\\_5169\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_5169_en.htm)

The European partnership as an instrument of the SAP set up a framework of priority action and a financial structure was adopted in 2004 and updated in 2006 and 2008.<sup>64</sup>

Definition of priorities within the European Partnership marked the expansion of conditions to all those areas that were covered in the Copenhagen criteria.

The priorities outlined in the European Partnership were oriented towards further consistent implementation of the reforms that had been implemented as part of the first two sets of conditions in 2000 and 2003. In particular, emphasis was on institutional building, i.e. full functionality of the newly established executive institutions, judicial institutions, and law enforcement agencies. One of the most important objectives was to make the institutions and reforms imposed by the OHR self-sustaining via a complete takeover by the national authorities of all aspects of their operation, from the appointment of management to budget sustainability and consistent application of the relevant laws.

### ***Conclusions***

Conditions that the EU set out for BiH in 2000 and 2003 were largely focused on strengthening the central government and, as such, interfered with the constitutional distribution of responsibilities between the State and the Entities. An important feature of this phase was the introduction of the EUSR as an instrument of CFSP. By their structure, these conditions were based mainly on the OHR agenda and were primarily aimed at strengthening the state-level government and expanding its functions. As such, the EU conditions did not have sufficient legitimacy, especially for the RS authorities, although the representatives of FBiH quite often hid behind the rejection of the transfer of responsibilities that came from RS. It

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<sup>64</sup> Council Decision [2008/211/EC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008/211/EC) of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC  
[http://europa.eu/legislation\\_summaries/enlargement/western\\_balkans/r18012\\_en.htm](http://europa.eu/legislation_summaries/enlargement/western_balkans/r18012_en.htm)

can therefore be argued that during this phase there was not even fake compliance but rather imposed compliance, given that the cost of accepting the conditions was perceived by the government as too high, with only a long-term reward for their acceptance.

The original 2000 Road Map conditions were to a large extent also part of the 2003 Feasibility Study, with the 2003 conditions placing greater emphasis on the implementation of what had been adopted as part of the 2000 Road Map conditions through imposition by the OHR. Fulfilment of these conditions occurred mainly through imposition of laws by the OHR, due to the refusal of local actors to accept them. Local actors' role was subsequently limited to implementation, although the OHR played an instrumental role in this area too, in terms of appointing the management of newly established agencies. It is important to note that this phase was the most intense one in terms of building and expanding the functions of the central government. During this phase state-level judiciary and law enforcement agencies were established, the responsibilities and composition of the CoM as a key power holder at the state level were expanded, and independent agencies responsible for the conduct of elections, supervision and regulation of electronic broadcasting, etc. were established. European Partnership priorities further elaborated and expanded the priorities from the first two sets of conditions, primarily with the aim of making the reforms and newly established institutions self-sustaining, with national authorities taking over full responsibility for their operation.

In the previous round of enlargement the EU very rarely opted for direct sanctions in cases when the EU's conditions were not met. In most cases, failure to comply with the conditions resulted in the ineligibility to transition to the next phase of integration or the withholding of EU funds earmarked for the potential candidate state in question. However, in this respect, too, BiH is an exception, given that the OHR was "in personal union" with the EUSR (they were the same person) for nearly a decade (2002–2011), which corresponded with the period when the Bonn powers were extensively used by the OHR to dismiss elected and appointed



officials and impose legislation. It should also be borne in mind that the European Commission and four EU member states are members of the PIC Steering Board.

Some commentators criticise the SAP for setting a very broad agenda often with contradictory objectives. In the case of BiH, this was certainly even more so since other international community actors (OHR and PIC) were also involved in the process of setting out accession conditions. On the other hand, the incentives to fulfil the conditions were not strong enough to motivate the governing structure to take on bolder reforms.<sup>65</sup>

Bieber warns of the lack of clarity in the defined conditions, and discrepancies between broad declarative conditions and specific requirements which, to a significant extent, undermine the effectiveness of state-building.<sup>66</sup> What also follows from the aforementioned is that the performance indicators have never been clearly established. While partial fulfilment of the conditions was tolerated in certain phases of the process, at other times, the EU insisted on rigid solutions, which had no basis in policies and did not contribute to the stated goals.

### **5.3 EU-driven membership state building**

The role of the OHR gradually weakened, in parallel with the emergence of increasingly dissenting views among the key PIC member states regarding its purpose, in spite of the fact that the formal powers (called the Bonn Powers) remained unchanged. It was in 2005 that the PIC first expressed its commitment to replace the OHR, with its wide Bonn powers, with the EUSR, which would have a solely European agenda based on voluntary acceptance of conditions. Negotiations on the SAA were officially opened

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<sup>65</sup> Arolda Elbasani, "The Stabilisation and Association Process in the Balkans: Overload Agenda and Weak Incentives?", 3 EUI Working Papers SPS, 2008, 15

<sup>66</sup> Florian Bieber, 'Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans', Special Issue: Unconditional Conditionality? The Impact of EU Conditionality in the Western Balkan, European Asia studies 2011

in November 2005. Also, Paddy Ashdown's mandate, which was marked by widespread use of authoritarian powers, ended in 2005.<sup>67</sup> Following the appointment of Christian Schwarz-Schilling as HR/EUSR, it became clear that he did not intend to use the Bonn powers in a manner and to the extent that his predecessors had. Instead, his focus was on the transformation of the OHR into the EUSR and transfer of responsibilities to the BiH authorities. The focus remained on meeting the commitments that are required for the conclusion of SAA negotiations.

During that period, police reform was a key priority before a positive opinion could be given for the start of SAA negotiations.<sup>68</sup> Police reform negotiations began in 2004 within the Police Restructuring Commission, established by the OHR, which was composed of international members designated by the OHR and representatives of BiH institutions (state, entity and cantonal ministries).<sup>69</sup> In 2004, the Commission supported the preparation of a functional review of the police agencies in BiH, with a view to defining the direction the reform should take. The review found that the 15 different police agencies did not represent a weakness *per se*, noting that a significant number of EU countries have similar models of organisation. Therefore, three possible options for the organisation of the police structures were offered: centralised, entity organised, or regionally organised.

The principles proclaimed by EU officials in cooperation with the OHR on which the reform was to be based were:

- 1) Police forces will be coordinated and managed at the state level.

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<sup>67</sup> Communiqué by the PIC Steering Board Sarajevo PIC SB Political Directors | 24/6/2005  
[http://www.ohr.int/pic/default.asp?content\\_id=34918](http://www.ohr.int/pic/default.asp?content_id=34918)

<sup>68</sup> Statement by EC Commissioner Rehn on the police reform negotiations in Bosnia and Herzegovina, following his meeting with the European Union Special Representative Paddy Ashdown  
[http://www.ohr.int/ohr-dept/rule-of-law-pillar/prc/prc-pr/default.asp?content\\_id=35383](http://www.ohr.int/ohr-dept/rule-of-law-pillar/prc/prc-pr/default.asp?content_id=35383)

<sup>69</sup> Decision Establishing the Police Restructuring Commission, OHR, 5/7/2004  
[http://www.ohr.int/ohr-dept/rule-of-law-pillar/prc/prc-key-doc/default.asp?content\\_id=34149](http://www.ohr.int/ohr-dept/rule-of-law-pillar/prc/prc-key-doc/default.asp?content_id=34149)

- 2) There will be no political involvement in police operations and work.
- 3) Local police units will be established based on the principle of functionality.<sup>70</sup>

The decision defined the aim of establishing a single structure of policing under the supervision of the Council of Ministers. From the start, the RS government opposed the transfer of responsibility from the entity-level ministries to the state-level Council of Ministers and rejected the proposed model of organisation in which police regions would cross the inter-entity boundary line.<sup>71</sup> The Commission ended its work with no results and without an agreed joint proposal.

The Commission's failure to come up with a reform proposal led to the transfer of negotiations to the level of political leaders. Again under the auspices of the OHR, new negotiations started in 2005. The first round of negotiations yielded no concrete results. After 16 months of negotiations and the initial rejection of the agreement by the RS National Assembly, in October 2005 the RS National Assembly accepted the agreement that the RS president had worked out with the High Representative, which the European Commission judged acceptable. While the agreement did not provide any concrete solutions, it nevertheless offered a way out of an impasse. The agreement was interpreted as a success by the international community, while at the same time Serb politicians presented it to their electorate as their own success. Shortly thereafter, negotiations on the SAA formally started in November 2005.<sup>72</sup>

The first comprehensive initiative to amend the Constitution of BiH came in 2005. The initiative was launched by the former Deputy High Representative Donald Hays. The initiative soon got the support of the U.S. State Department and was conducted under the operational management

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<sup>70</sup> BOSNIA'S STALLED POLICE REFORM: NO PROGRESS, NO EU – Crisis group Europe Report N°164 – 6 September 2005

<sup>71</sup> Daniel Lindvall, 'The Limits of the European Vision in Bosnia and Herzegovina' An Analysis of the Police Reform Negotiations; University of Stockholm 2009

<sup>72</sup> Ibid.

of the U.S. Embassy by direct negotiations between political leaders. The initiative was based on the opinion of the Venice Commission.<sup>73</sup> After negotiations behind closed doors, the political leaders came up with an agreed proposal for constitutional changes in March 2006. The proposals envisaged the strengthening of the state-level government, with the formation of two new ministries (Agriculture and Technology), as well as strengthening the state-level parliament along with increasing the number of MPs. Following fine-tuning and approval by political leaders, the initiative was submitted to the parliament in April 2006, whereupon it came to be referred to as the April Package of Constitutional Reforms. The strongest opponent of the initiative was Haris Silajdžić's "Party for BiH" (SBiH), which considered the envisaged reform insufficient and merely cosmetic, and leading to a definitive division of the country. The constitutional amendments failed to receive the necessary parliamentary majority because of the opposition coming from SBiH<sup>74</sup> and parts of HDZ. Cables released by WikiLeaks later revealed that SBiH allegedly resorted to bribery and subterfuge to get the MPs to vote against the amendments.<sup>75</sup>

In 2006, before the upcoming election, the HR launched an initiative calling for speedy enactment of a number of important laws in the 100 days before the election (the Law on Obligations, the Salary Law, the Law on National Fiscal Council and the Pharmaceuticals Law, and facilitating the creation of a Central Banking Supervision System)<sup>76</sup> in order to stabilise the situation in the country and demonstrate the willingness of BiH politicians to take the lead in implementing reforms. The initiative failed to produce

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<sup>73</sup> European Commission for Democracy Through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, March 11–12, 2005, [www.venice.coe.int/docs/2005/CDL-AD\(2005\)004-e.asp](http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp)

<sup>74</sup> Sofia Sebastian, 'Leaving Dayton Behind: Constitutional Reform in BiH', FRIDE November 2007

<sup>75</sup> WikiLeaks o padu aprilskog paketa ustavnih promjena (WikiLeaks on the failure of the April Package of Constitutional changes), DW 04.09.2011.

<http://www.dw.de/wikileaks-o-padu-aprilskog-paketa-ustavnih-promjena/a-15363510>

<sup>76</sup> 100 Days to Make History - OHR Sarajevo | 24/5/2006

[http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content\\_id=37226](http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=37226)

any results,<sup>77</sup> and the 2006 election ultimately led to a change of government. The majority of votes in RS were won by SNSD and in FBiH by SDA.

Continuation of the police reform process came in 2006, when the Police Reform Directorate was formed by the Council of Ministers, which aroused the opposition of the RS Government.<sup>78</sup> The first conclusions adopted by the Directorate in 2006 did not get the support of the RS delegates. In late 2006 the Directorate came up with a final report which was not much different from the previous proposal by the Police Reform Commission. The RS representatives called the Directorate's report unacceptable and unlawful.<sup>79</sup> Following the failure to achieve progress in police reform, the PIC decided to extend the mandate of the OHR and postpone full transition to EUSR.<sup>80</sup>

However, negotiations continued in early 2007, when the RS president unexpectedly accepted the police reform proposal, just before the expiration of the ultimatum issued by the EU; the proposal envisaged transfer of responsibilities to the state level providing that the RS police remain part of the state-level police force. This time the proposal was rejected by the Bosniak Member of the BiH Presidency, Haris Silajdžić, who found it problematic that the RS police should preserve its name, which he considered a violation of the European principles.<sup>81</sup>

Negotiations were resumed under the leadership of the newly appointed HR Miroslav Lajčák during the second half of 2007, when the OHR offered political leaders a protocol based on the provisions contained in the Police

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<sup>77</sup> Maja Peter, *Shifting Contours of International State Building Practices in Bosnia and Herzegovina in State or Nation? The Challenges of Political Transition in Bosnia and Herzegovina* (eds. E Sarajlic and D. Marko) Sarajevo 2011, Center for Interdisciplinary Postgraduate Study, University of Sarajevo

<sup>78</sup> Denis Hadžović, Armin Kržalić and Alma Kovačević, *PREGLED STANJA U OBLASTI POLICIJE U BOSNI I HERCEGOVINI*, Centar za sigurnosne studije, Sarajevo 2013

<sup>79</sup> Lindvall, (n70)

<sup>80</sup> Communiqué by the PIC Steering Board PIC SB | 27/2/2007  
[http://www.ohr.int/pic/default.asp?content\\_id=39236](http://www.ohr.int/pic/default.asp?content_id=39236)

<sup>81</sup> Lindvall, (n70)

Reform Directorate's proposal. The protocol was an attempt at reaching a consensus based on the results of previous negotiations. It envisaged the integration of policing structures at the state level under the Ministry of Security, but police regions would not cross the inter-entity line. Although the document was initially rejected by both the party of the presidency member Haris Silajdžić and RS President Milorad Dodik's SNSD, the two parties reached an agreement on accepting the Protocol in September. However, the Croat parties and SDA accused SNSD and SBiH of backing an agreement which was not in line with the European principles, which ultimately led to the failure of that round of negotiations in October 2007.<sup>82</sup>

After the collapse of the police reform negotiations, the HR decided to re-activate the Bonn powers imposing a decision enacting the amendments to the Law on the Council of Ministers, with the intention of improving the decision-making process within the Council of Ministers. At the same time, the HR instructed the Parliamentary Assembly of BiH to amend the provisions of the Rules of Procedure governing the manner of voting.<sup>83</sup> The amendments were an attempt to unblock the decision-making process in these institutions, such as to prevent blockage and manipulation by representatives of ethnic groups.

The decision of the High Representative opened up a new crisis as the RS representatives threatened to withdraw from state institutions, and the Chairman of the Council of Ministers resigned. The HR tried to resolve the newly emerging crisis by bringing the political leaders together in Mostar, re-opening the issue of police reform. The meeting resulted in the acceptance of the "Mostar Declaration", which did not outline any details, but yet again emphasised that the implementation of the reform would be based on the three European principles and the Constitution of BiH. Shortly thereafter, the political leaders adopted an action plan for

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<sup>82</sup> Denis Hadžović, Armin Kržalić and Alma Kovačević, PREGLED STANJA U OBLASTI POLICIJE U BOSNI I HERCEGOVINI, Centar za sigurnosne studije, Sarajevo 2013

<sup>83</sup> OHR, Decision Enacting the Law on Changes and Amendments to the Law on the Council of Ministers of Bosnia and Herzegovina, October 19 2007

implementation of the “Mostar Declaration” in order to meet the conditions for signing the SAA. The Action Plan called for the adoption of two laws to regulate the establishment of the new state-level police institutions (Institute for Forensics, Institute for Education and Professional Upgrading, Police Support Agency, Independent Board, Citizens’ Complaints Board and Police Officials’ Complaints Board), with entity- and canton-level police structures staying in place. Although the document was not based on previous proposals or any of the EU principles, the international community supported it, believing that it would help overcome the crisis and unblock police reform.<sup>84</sup>

As part of negotiations over the Action Plan, it was also agreed that the OHR should amend the Decision Enacting the Law on Changes and Amendments to the Law on the Council of Ministers of Bosnia and Herzegovina by adopting a so-called “authentic interpretation” of said decision, which would in effect revise the decision.

After three years of negotiations, an agreement was reached which significantly deviated from the envisaged principles and which failed to bring about any substantial change to the organisation of policing structures in BiH. In April 2008 the agreed laws were finally adopted and BiH, formally at least, met the conditions for signing the SAA.<sup>85</sup> After that the SAA was signed in June, and the Interim Agreement entered into force on 1 July 2008.

Meanwhile, the extensive powers of the OHR led to ever greater criticism, particularly in view of its non-democratic nature. The OHR has used the so-called Bonn powers on more than 800 occasions to dismiss elected officials or to cancel and/or impose laws.

Even though the OHR’s engagement in imposing laws and dismissing elected officials resulted in the resolution of important issues and

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<sup>84</sup> Lindvall, (n70)

<sup>85</sup> European Commission, Ambassador Korkoulas welcomes the signature of the Stabilisation and Association Agreement with Bosnia and Herzegovina. Press Release, 16.06.2008

establishment of institutions important for the functioning of the state, even if it entailed interventions in the domain of constitutional matters, the sustainability of such institutions remains an open question. The inability of these institutions to function without external stimuli and their being devoid of actual power has invited much criticism. Therefore, precisely for the reasons mentioned above, Chandler characterises such institutions as “virtual institutions”.<sup>86</sup>

Increasingly extensive criticism of the OHR started also to come from international organisations. Thus, the Parliamentary Assembly of the Council of Europe expressed the following view: “... the Assembly considers it irreconcilable with democratic principles that the High Representative should be able to take enforceable decisions without being accountable for them or obliged to justify their validity and without there being legal recourse”.<sup>87</sup>

The Venice Commission also very clearly concluded in an opinion from 2005:

“... it is however certainly not a normal situation that an unelected foreigner exercises such powers in a Council of Europe member state and the justification for these powers for the future merits not only political but also legal consideration ... such an arrangement is fundamentally incompatible with the democratic character of the state and sovereignty of BiH.”<sup>88</sup>

A no less important consequence of this kind of international management of the state-building process was the creation of dependence of domestic actors on the international community and their avoidance of painful

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<sup>86</sup> David Chandler, ‘Bosnia: Faking Democracy After Dayton’, 2nd Edition, London, Pluto Press, 2000

<sup>87</sup> Parliamentary Assembly of the Council of Europe, “Resolution on strengthening of democratic institutions in Bosnia and Herzegovina”, 23 June 2004.

<sup>88</sup> EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION): OPINION ON THE CONSTITUTIONAL SITUATION IN BOSNIA AND HERZEGOVINA AND THE POWERS OF THE HIGH REPRESENTATIVE CDL-AD (2005) 004 Venice, 11 March 2005



reform measures that could cost them the loss of support at the polls. The irresponsible local political elites responded pragmatically by waiting for the international community to take the necessary reform measures. Depending on the success of these measures, the blame would be apportioned to the international community, while the credit for the few successfully implemented reforms would be claimed by the local political elites.

Harsh criticism of the OHR's actions, the inability of the key PIC member countries to achieve agreement on its actions, as well as the inevitability of the OHR's closure ultimately led to a decision setting out the objectives and conditions to be met prior to the official termination of the High Representative's mandate (the 5+2 Agenda).

Political Directors of the Peace Implementation Council Steering Board (PIC SB) at their meeting in Brussels on 26 and 27 February 2008 set out the requirements that need to be met by the BiH authorities prior to the closure of the OHR. These requirements are well established, approved by the PIC SB and have all been previously recognised by authorities in Bosnia and Herzegovina. The objectives that need to be delivered by the BiH authorities prior to OHR closure are:

- Acceptable and Sustainable Resolution of the Issue of Apportionment of Property between State and other levels of government;
- Acceptable and Sustainable Resolution of Defence Property;
- Completion of the Brčko Final Award;
- Fiscal Sustainability (promoted through an Agreement on a Permanent ITA Coefficient methodology and establishment of a National Fiscal Council); and
- Entrenchment of the Rule of Law (demonstrated through Adoption of a National War Crimes Strategy, passage of Law on Aliens and Asylum, and adoption of a National Justice Sector Reform Strategy).

In addition to these objectives, the PIC SB agreed that two other conditions need to be fulfilled prior to OHR closure;

- signing of the SAA; and
- a positive assessment of the situation in BiH by the PIC SB based on full compliance with the Dayton Peace Agreement.<sup>89</sup>

In December 2009 the European Court of Human Rights issued a decision ruling on the applications lodged by two citizens of Bosnia and Herzegovina (Sejdić – Finci), complaining that the Constitution of BiH and the electoral law deny passive suffrage to the group of so-called “others”, i.e. those who do not belong to the three constituent ethnic groups eligible to stand for election to the Presidency of BiH and House of Peoples of BiH. In this regard, the Court’s decision ordered that changes should be made to the relevant provisions of the Constitution and the laws that discriminate against “others” rendering them ineligible to stand for election.<sup>90</sup> The Council of the EU emphasised the implementation of the Court’s judgment as a requirement stemming from the SAA and a key element for submitting a credible membership application.<sup>91</sup> The SAA was signed on 16 June and the Interim Agreement on Trade and Trade Matters entered into force on 1 July 2008. Upon the signing of the SAA, Bosnia and Herzegovina entered into the first contractual relation with the European Union. Considering its mixed character, in order to enter into force the Agreement has to be ratified by parliaments of all EU Member States and the European Parliament. The BiH Presidency ratified the SAA in November 2008 and the ratification process was completed in 2011.

The SAA has not yet entered into force because the country has not met the remaining requirements, notably the implementation of the ECHR

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<sup>89</sup> “5+2 agenda” [http://www.ohr.int/ohr-info/gen-info/default.asp?content\\_id=46773](http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=46773)

<sup>90</sup> European Court of Human Rights, Grand Chamber, *Sejdić and Finci v. Bosnia and Herzegovina*, nos. 27996/06 and 34836/06, 22 December 2009

<sup>91</sup> Council conclusions on Bosnia and Herzegovina, 3076th FOREIGN AFFAIRS Council meeting, Brussels, 21 March 2011

[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/120066.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/120066.pdf)

judgement in the Sejdic – Finci case regarding discrimination against citizens on the grounds of ethnicity and the establishment of an effective coordination mechanism on EU matters. Therefore, the EU relations with Bosnia and Herzegovina are still governed by the Interim Agreement (IA) of 2008.

The European Stability Initiative sharply criticised this approach of the EU, calling it hypocritical and citing examples of Brussels and Cyprus, where there are also similar discriminatory provisions. Thus, prior to submitting its application, BiH is required to abolish discriminatory provisions that also exist in the legal arrangements of some EU countries.<sup>92</sup>

After four years of negotiations under the auspices of the OHR, EUSR and European Commissioner for Enlargement and European Neighbourhood Policy, which were conducted directly with political leaders, no compromise has been reached on the implementation of the ECHR judgment. In the course of the negotiations, at least 40 different solutions were proposed by political parties and their leaders, seven by the NGO/civic sector, and six by international actors.<sup>93</sup>

The ambivalent attitude of the EU towards BiH's next steps in the association process is best illustrated by the conclusion of the General Affairs Council of 2009,<sup>94</sup> stressing that the Council will not be in a position to consider an application for membership by BiH until the transition of the OHR to a reinforced EU presence has been decided. This conclusion practically means that the powers to define the requirements for filing the application, as well as the assessment of eligibility, were transferred to an *ad-hoc* body – the Peace Implementation Council. This condition-setting method has important implications for political views of ethnic political

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<sup>92</sup> Lost in the Bosnian Labyrinth - Why the Sejdic-Finci case should not block an EU application, ESI discussion paper, 7 October 2013  
[http://www.esiweb.org/pdf/esi\\_document\\_id\\_143.pdf](http://www.esiweb.org/pdf/esi_document_id_143.pdf)

<sup>93</sup> Houdini in Bosnia - How to unlock the EU accession process, ESI discussion paper, 17 October 2013  
[http://www.esiweb.org/pdf/esi\\_document\\_id\\_144.pdf](http://www.esiweb.org/pdf/esi_document_id_144.pdf)

<sup>94</sup> General Affairs Council, Brussels, 7 December 2009, pt 39, Press Release 17217/09

elites in the country. While the Bosniak political elite insists that the OHR should stay in the country until constitutional changes leading to the strengthening of the state government are implemented, seeing it as a guarantor of the functioning of the state in the current constitutional context, the Serbian political elite demands unconditional cessation of the OHR's mandate, seeing its continued survival as counterproductive and openly opposing the decisions issued by the OHR. In such a constellation of relations, Croatian political parties are bringing their indifferent attitude towards the OHR closer and closer to the Serb stance, especially after the OHR's decision to suspend the Central Election Commission's decision regarding the formation of government in FBiH after the 2010 election. The OHR issued a formal suspension of the CEC decision, which said that the election of the entity president and two vice-presidents, as well as Government in FBiH was not conducted legally.

Having consulted the ambassadors of member countries on the Peace Implementation Council (PIC), HR Valentin Inzko decided to suspend the CEC decisions. The suspension aims to remove legal uncertainties about the status of elected government bodies in FBiH until the Constitutional Court of this entity reaches a decision about demands coming from officials who dispute the formation of the new Government, the OHR explained, and underlined that HR Inzko's decision ensures legal security for vital functions until the time the domestic judiciary has finished its work. This means that the government bodies were those named by the entity's Official gazette, unless the Constitutional Court finds otherwise, the OHR explained, and urged all parties to wait for this final decision. This decision was the last major intervention by the OHR, when it suspended the CEC's decision regarding the election results, caused confusion and further compounded the already complex situation in the country. The situation in FBiH today is indicative of the situation in BiH as a whole. The incumbent FBiH government lost a vote of confidence a year ago, and a major split between the two key political parties prevents the proper functioning of the government.

The entire period after the collapse of the April package of constitutional reforms has been marked by severe political crises and constant challenging of the state institutions by RS, with repeated calls for a referendum on the laws imposed by the High Representative which established a significant number of institutions at the state-level of BiH. In such a state of affairs, when it was impossible to achieve consensus even on issues such as the adoption of the state budget (in 2011, BiH was in a temporary financing regime during the entire year, and the state budget had not been adopted for 2012 either), it was difficult to expect the adoption of reform laws or appointments to leading positions in state agencies.

The situation was compounded after the general election in 2010, when political parties failed to form the new government for over a year, while the situation in FBiH culminated following the election of the FBiH Government, which was claimed by the political parties that had received a majority support of Croatian voters to have been elected in contravention of the FBiH constitution. After that, the cantons with a Croat majority refused to recognise the FBiH Government, and the two leading Croatian political parties started the process of forming the Croatian National Parliament, as a body that should articulate and represent the interests of Croats in BiH.

The political agreement concluded in 2012 between SDP and SNSD, which included a number of amendments to the laws crucial for the functioning of the state, continued the practice of pulling down the institutions established by the international community.<sup>95</sup> The international community and non-governmental organisations strongly condemned the proposed package of amendments seeing it as a major step backwards, but the signatories decided to refer the said amendments to the respective parliaments for speedy passage. The agreement contained a set of proposed amendments to a number of important laws: Public Procurement Law,

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<sup>95</sup> Sporazum SDP - SNSD [*the SDP-SNSD Agreement*]  
<http://balkans.aljazeera.net/vijesti/sporazum-sdp-i-snsd>

Conflict of Interest Law, Law on High Judicial and Prosecutorial Council, the Law on Central Bank, and the law on the state-owned electricity transmission company (“ELEKTROPRENOS”). The proposed amendments to the Public Procurement Law envisaged a decentralisation of the Procurement Review Body by splitting it into Sarajevo, Mostar and Banja Luka offices, making it easier for political parties to have control over public procurement. Although a new law was being prepared under the auspices of the EU, which was aligned with the relevant EU directives, the ruling state-level coalition (SDP, SNSD and HDZ) did not accept it, instead opting for amendments that would make the whole process even less transparent. Via amendments to the Law on High Judicial and Prosecutorial Council, the proposers intended to transfer the responsibility for the election of prosecutors from the HJPC to parliaments, which would formally render the election of prosecutors dependent on the ever-changing parliamentary majority. Amendments to the Conflict of Interest Law were also a huge step backwards, given that conflict of interest cases were to be decided by a committee of the Parliamentary Assembly instead of by the Central Election Commission (CEC), as had been the case prior to the amendments. Also, the proposed amendments to the ELEKTROPRENOS law envisaged the division of accumulated income from the company’s account to ensure the liquidity of entity budgets. The EU and the international community openly opposed this proposal because the accumulated income, along with further donations, was intended for improvements to the electrical network.<sup>96</sup>

### **Conclusions**

Characteristic of this phase is that the EU for the first time formally cited constitutional amendments in regard to the implementation of the Sejdić-Finci judgment as a condition for progress in the EU integration. Also

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<sup>96</sup> “OHR calls on MPs not to support amendments to Elektroprenos law”, *Oslobođenje* daily news, 11 December 2013 <http://www.oslobodjenje.ba/daily-news/ohr-calls-on-mps-not-to-support-amendments-to-elektroprenos-law>

characteristic was increased involvement of representatives of the EU as mediators in police reform, constitutional changes and implementation of the ECHR judgment in the Sejdić-Finci case. The conditions that were set out with regard to police reform and the implementation of the Sejdić-Finci judgment encroached deeply onto the question of sovereignty, and as such were fraught with high costs for the political elites. Also, the perceived legitimacy of these requirements by political elites was very limited, given that there was no single organisational model for police in EU countries and that the discrimination identified in the Sejdić-Finci case also exists in some EU countries.<sup>97</sup> Also, it was evident in the process of police reform that, faced with fierce resistance from RS, the EU was insufficiently consistent in its requirements. In this phase there was a noticeable trend of open opposition to the EU conditions, unlike the previous phase when imposed compliance and simulated consent were dominant. The key reason for this change was the abandonment of the practical use of the Bonn powers. In previous phases the political elites accepted the conditions largely for fear of being removed by the OHR. Abandonment of the practical use of the Bonn powers led to a power vacuum which was quickly filled by political parties using nepotistic appointments to ensure absolute control over key institutions in the country.

The transition from an authoritarian state-building and institution-building model to a member-state building model made all reform processes come to a complete standstill and marked the beginning of a collapse of the existing institutional structure and subordination of institutions to formal and informal centres of power.<sup>98</sup> While not formally amending the powers of the OHR, this transition effectively meant almost total relinquishing of the Bonn powers and a beginning of treatment of BiH as any other country undergoing the accession process, with conditionality

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<sup>97</sup> ESI Report: Lost in the Bosnian labyrinth. Why the Sejdic-Finci case should not block an EU application, 2013

[http://www.esiweb.org/index.php?lang=en&id=156&document\\_ID=143#sthash.qf1l1zS7.dpuf](http://www.esiweb.org/index.php?lang=en&id=156&document_ID=143#sthash.qf1l1zS7.dpuf)

<sup>98</sup> National Integrity System Study 2013, Transparency International BiH

being used as a key approach that should lead to progress in implementing reforms.

This led to the collapse of the institutions established earlier by the OHR. The failure of the so-called 2006 April Package of Constitutional Reforms, as noted by many analysts and commentators, was the crucial moment that heralded the beginning of a permanent political crisis threatening the results achieved earlier in the state- and institution-building process.



#### **5.4. How to reform the reformers or the EU as a state builder in denial**

In 2013, in one of the numerous meetings of the then EU Commissioner Štefan Füle with BiH leaders on constitutional reform, the Commissioner made it clear at the very beginning that the meeting would have to be made significantly shorter because of his trip to the Ukraine, where the conflict was just flaring up. This example is very illustrative for understanding the EU's relationship towards BiH. The emergence of new trouble spots and challenges for the EU on the one hand, and almost a decade-long severe political crisis and failure to achieve significant results in the implementation of the EU requirements on the other, have led to a kind of passivity and lack of ideas on the part of the EU on how to untangle the Bosnian Gordian knot.

An attempt to change this state of affairs took place after the October 2014 general election, when the British and German foreign ministers launched an initiative with a view to propelling BiH from its current standstill in the EU integration process. The basic premise of the initiative was that the implementation of the decision in the Sejdić-Finci case as a precondition for the entry into force of the Stabilisation and Association Agreement should be postponed temporarily and the focus placed on economic reforms, which would effectively lead to ending years of deadlock on the country's European path.<sup>99</sup>

Following a further elaboration of the initiative, the so-called Reform Agenda was developed to serve as an operational plan of reforms, which had to be accepted by all levels of government.

After initial disagreements, all levels of government and all political parties accepted the Reform Agenda in July 2015 and committed themselves to working actively on its implementation. The Reform Agenda was adopted for a period of three years (2015-2018) and contains six areas of importance as

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<sup>99</sup> Senada Šelo Šabić: "Will the New Initiative for Bosnia and Herzegovina Succeed", Balkans in Europe Policy Blog, Centre for South East European Studies, Graz, 14 November 2014

follows: 1) Public Finance, Taxation and Fiscal Sustainability; 2) The Business Climate and Competitiveness; 3) The Labour Market; 4) Social Welfare and Pension Reform; 5) Rule of Law and Good Governance; and 6) Public Administration Reform.

Not even a full month later commendations for successful implementation of the Agenda started coming in from EU officials, in particular the EU Special Representative Wigemark, who spared no praise for the authorities in Bosnia and Herzegovina.<sup>100</sup> However, it remains unclear what it is that the authorities in BiH did, apart from having formally accepted the Agenda.

Furthermore, there is a crucial as yet unanswered question regarding the said initiative, namely what is the qualitative novelty of this last initiative compared to the more or less unsuccessful reform initiatives undertaken in the last ten years, which were delivered in the form of EU conditions. All previous initiatives launched over the past decade were always accompanied by ample doses of optimism, but concrete results were generally absent. Therefore, objections may also be raised with regard to this most recent initiative, in that it did not take into account the initial, but also the most important, assumption, namely that the fundamental interest of the political elite in BiH is to maintain the *status quo*, and that progress on reforms, especially in the field of rule of law, is a major risk for the political elite. This risk is primarily reflected in the fact that the establishment of a functional rule of law would lead to significant reduction in what is now the almost unlimited power of political leaders, and then quite certainly to the prosecution of a vast majority of them.

It is important to note a major change in the political context of the EU which occurred during the operationalisation of the Reform Agenda, caused by the influx of refugees from Syria and other countries ravaged by war and instability. It is exactly the Western Balkan route that has become a key

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<sup>100</sup> “Wigemark: Zadovoljni smo ostvarenim napretkom u provođenju reformi” [*We are pleased with the progress achieved in the implementation of reforms*], Vijesti.ba 9 October 2015 <http://m.vijesti.ba/clanak/281253/zadovoljni-smo-ostvarenim-napretkom-u-provođenju-reformi>

corridor for war-fleeing refugees. Disagreements between the EU countries and the inability to reach consensus on a common response to the refugee crisis have highlighted the vulnerability of the common European project. Officials of the Member States and the EU itself go so far as to express fears over the possible break-up of the EU.<sup>101</sup> This crisis has an undoubted impact on the Western Balkans which is so serious that some statespersons, as was recently the case with Chancellor Merkel, warn of a possibility of armed conflict in the Balkans if Germany closes its borders to refugees.<sup>102</sup> The logical consequence of such a situation is that the EU shifts the focus of its attention exclusively to this problem, while EU enlargement remains on the margins of interests of the EU and its member states. This is further obvious from the fact that the publication of progress reports for the Western Balkan countries and Turkey was postponed. The refugee crisis has led to an increasingly overt hostility towards refugees which even includes expressions of racism by individual member state governments. These developments will undoubtedly reduce the overall legitimacy of the EU in the Balkan countries as well as the conditions that it places before these countries, which will lead to the reduction in the potential for socialisation as an important way of Europeanisation.

The internal political dynamics in BiH and current developments in the EU do not provide sufficient grounds for optimism that the British-German initiative and the Reform Agenda will lead to notable progress on the country's EU integration path. By its structure and the manner in which it is meant to be implemented, the Agenda does not offer any substantially or qualitatively different approach. It is therefore difficult to expect its results to be significantly different from those seen in the past decade.

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<sup>101</sup> "Mogerini: EU prijeti raspad bez kolektivnog odgovora na migrante", [*Mogherini: EU at Risk of Disintegration If There Is No Collective Response to the Migrant Crisis*], Vijesti, 29 October 2015 <http://www.vijesti.me/specijali/mogerini-eu-prijeti-raspad-bez-kolektivnog-odgovora-na-migrate-857928>

<sup>102</sup> "Merkel: Opasnost od izbijanja oružanog konflikta na Balkanu zbog migracija" [*Merkel: The Balkans at Risk of Armed Conflict Due to the Migrant Crisis*] Slobodna Evropa, 3 November 2015. <http://www.slobodnaevropa.org/archive/news/20151103/500/500.html?id=27342255>

## **6. EU actors**

This chapter will consider the role of EU institutions that play a key role in the EU enlargement process. Additionally, the chapter will examine the role of institutions that did not appear in previous rounds of enlargement (such as EUFOR and EUSR). Also, key trends in EU policies within the enlargement process will be identified.

The European Commission has been a key actor in the accession process as it was entrusted by the European Council with broad powers to develop an accession strategy and supervise and manage the entire process. The European Council laid down the basic accession criteria, following the Commission's proposal. These were primarily the "Copenhagen criteria", which were elaborated in meetings in Madrid in 1995 and Helsinki in 1999. A country that aspires for EU membership becomes a potential candidate if it meets the basic requirements laid down in the Treaty and if the European Council gives its approval. A potential candidate country becomes an actual candidate country only after the European Council so decides following the positive opinion of the Committee.

The most important role of the European Commission included the development of specific requirements based on the general conditions accepted and defined by the European Council as well as the monitoring of their fulfilment.

The EU Special Representative as an instrument of the CFSP is the key EU actor on the ground. Article 33 of the Treaty of the European Union stipulated that:

"The Council may, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, appoint a special representative with a mandate in relation to particular policy issues. The special representative shall carry out his mandate under the authority of the High Representative."

Lord Ashdown was appointed by the Council as the first EUSR in BiH on 11 March 2002.<sup>103</sup> The EUSR mandate was coupled with the HR mandate until 31 August 2011. The EUSR was in a personal union with the HR for more than nine years.

The idea behind the establishing of the EUSR presence was “complementing the role of the HR with the tasks of the EUSR, thereby maximizing synergies. In other words, the ‘hard power’ of the Bonn powers was complemented by the ‘soft power’ of the EUSR, charged with accompanying the country towards the negotiations of the [SAA] and to pursue the European destination of BiH [...], proclaimed by the European Council of Thessalonica in June 2003.”<sup>104</sup>

Considering the fact that all EU member states are members of PIC and four EU member states are members of the PIC Steering Board (France, Germany, Italy and United Kingdom) and the fact that the European Commission and the Presidency of the European Union are also members of the PIC Steering board, it may be justifiably argued that the relationship between these two institutions was even more symbiotic.

The mandate of the EUSR was based on the EU policy objectives in BiH and contained in the Council Decision 2010/442/CFSP. According to Article 4 of the decision, the EUSR was responsible for the implementation of the mandate acting under the authority of the HR.

The subsequent HRs/ EUSRs were Christian Schwarz Schilling (February 2006 - June 2007), Miroslav Lajcak (June 2007-January 2009) and Valentin Inzko (March 2009-August 2011).

The prospect of phasing out the OHR and establishing the European External Action Service (EEAS) offered the opportunity to redefine the

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<sup>103</sup> Council Joint Action on the appointment of the EUSR in Bosnia and Herzegovina, 11 March 2002 <http://consilium.europa.eu/uedocs/cmsUpload/L70-13.3.2002.pdf>

<sup>104</sup> Giovanni Grevi, ‘Pioneering Foreign Policy: The EU Special Representatives’, European Institute for Security Studies, Chaillot Paper, No.106, Paris 2007. See also European Security Strategy - Bosnia and Herzegovina - Comprehensive Policy, adopted by the European Council, 17/18 June 2004.

mandate and functioning of the EUSR. On 1 September 2011 the EUSR-hat was decoupled from the HR and transferred to the Head of the Delegation of the EU to BiH. The Council appointed Peter Sorensen as the first EUSR Head of Delegation (EUSR/HoD).

The mandate of the EUSR remained practically unchanged as it was in Council decision 2010/442/CFSP, based on the following policy objectives of the EU in BiH: continued progress in the Stabilisation and Association Process, with the aim of a stable, viable, peaceful and multiethnic and united BiH, “cooperating peacefully with its neighbours and irreversibly on track towards membership of the Union. The Union will also continue to support the implementation of the DPA.”<sup>105</sup>

Thus ended the use of the authoritarian model of state building by the EU, and any further influence of the EU will consist solely of conditionality as a way to achieve the set goals. Especially challenging will be the role of the EUSR/HoD once the OHR has been closed. Even though the OHR has now taken on a completely passive role, its existence and potential use of the Bonn powers as a measure of last resort still remains a deterrent to political decisions that could have a strong destabilising impact. If past experience is anything to go by, the toolbox that is available to the EUSR/HoD seems hardly sufficient for the exercise of its mandate. Suspension of IPA or other forms of financial assistance or technical assistance projects seems to have had no significant impact on political leaders in terms of reaching a compromise on the reform agenda.

An important aspect of EU presence in BiH has been the military and police missions. In 2004, nine years after the war ended, the EU launched a military operation in BiH entitled Operation ALTHEA. This followed the decision by NATO to hand over its own peacekeeping mission that had maintained security in the country since the war ended. United Nations Security Council (UNSC) Resolution 1575, adopted unanimously on 22

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<sup>105</sup> COUNCIL DECISION 2011/426/CFSP of 18 July 2011 appointing the European Union Special Representative in Bosnia and Herzegovina  
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:188:0030:0033:en:PDF>

November 2004, welcomed the EU's intention to launch an EU military operation in BiH. It authorised the Member States acting through or in cooperation with the EU to establish a multinational stabilisation force (EUFOR) as a legal successor to SFOR under the unified command and control of the EU, to fulfil its missions in relation to the implementation of Annex 1-A and Annex 2 of the Dayton/Paris Agreement. EUFOR is to have the main peace stabilisation role under the military aspects of the Peace Agreement. ALTHEA is the third and largest military operation that the EU has embarked upon to date.<sup>106</sup> The operation is part of the overall European Security and Defence Policy (ESDP) mission in BiH and part of a closely co-ordinated EU presence in BiH. The EUSR promotes the overall EU political co-ordination in BiH. EU Commanders co-ordinate closely with the EUSR in BiH with a view to ensuring consistency of the EU military operation with the broader context of EU activities in BiH.<sup>107</sup>

The EU Police Mission in Bosnia and Herzegovina (EUPM BiH), was the first mission under the European Security and Defence Policy (ESDP). Initially launched on 1 January 2003 for a period of three years, EUPM continued its mission beyond this date at the request of the authorities of BiH, regularly adjusting its size and role as necessary as part of the EU's efforts to support the rule of law; it completed its mandate in 2012.<sup>108</sup> The EUPM was entrusted with the necessary authority to monitor, mentor and inspect, the various Bosnia and Herzegovina Police structures at medium-high level, including the Entities, Public Security Centres, Cantons, State Intelligence Protection Agency, State Border Services and within the Brcko District.<sup>109</sup>

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<sup>106</sup> Official web site of EUFOR – About EUFOR, [www.euforbih.org](http://www.euforbih.org)

<sup>107</sup> Marise Cremona, "External Relations and External Competence of the European Union: The Emergence of an Integrated Policy" in G. de Búrca and P. Craig (eds.) *The Evolution of EU Law*, 2nd edition, OUP, 2011

<sup>108</sup> The Status of Forces Agreement (SOFA) between the European Union and Bosnia and Herzegovina on the activities of the European Union Police Mission (EUPM) in Bosnia and Herzegovina.

<http://www.eupm.org/Documents/4.2.EUPM%20SOFA%20legislative%20act.pdf>

<sup>109</sup> *ibid*

The endlessly reiterated commitment of the EU and its member states to the European future of the Balkan countries has been significantly relativised by the dynamics not directly related to problems within BiH and other Balkan countries. There are several factors at play within the EU further reinforcing the argument that the EU membership remains a “moving target” for BiH and other countries of the Western Balkans.

The first of these, according to Hillion, is the recent trend of the “creeping (re) nationalisation” of the enlargement process, leading to a noticeable strengthening of the role of the Council at the expense of that of the Commission, as well as an increasingly important role of the member states and their institutions in the enlargement process.<sup>110</sup> This threatens to undermine the credibility of the integration process, as well as the credibility of the main EU mechanism in relations with the countries of the Western Balkans – conditionality. Besides weakening the EU’s position towards the Western Balkan countries, this process leads to the creation of distrust towards the EU, because new conditions are being constantly delivered to the countries of the Western Balkans, which only goes to provide additional arguments to Eurosceptics within the Western Balkan countries.

In this regard, the most striking examples are those of France and Germany. According to the 2008 amendments to the French Constitution, which came into force with the ratification of the Treaty of Lisbon: “Any Government Bill authorising the ratification of a treaty pertaining to the accession of a state to the European Union shall be submitted to referendum by the President of the Republic.” Germany followed suit and amended its Ratification Law following the Bundesverfassungsgericht judgment on the Treaty of Lisbon. The amended law now provides for an increased involvement of the Bundestag in the accession process by requiring that the German government seek the opinion of the Bundestag prior to giving approval to the opening of accession negotiations.

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<sup>110</sup> Christophe Hillion, ‘EU enlargement’ in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press)



A significant problem is found in the fact, as Noutcheva notes, that the EU has no clear rules governing state building, as well as that the *acquis communautaire* does not regulate the very wide area of the institutional setup of the state.<sup>111</sup> Therefore, it is not surprising that there are a number of obstacles to clearly defining the requirements and performance indicators for potential candidates. A perfect example of this was the attempt of the police reform in BiH, where the EU explicitly insisted on a model which had no basis in the relevant EU policies or a common EU model of organising policing structures.<sup>112</sup> What is more, the then HR/EUSR Paddy Ashdown avowedly convinced the European Commission to include the police reform as a condition for signing the SAA. Given that the proposed model demanded a significant change in the constitutional setup of the country, and that the proposal met with fierce opposition from the RS leadership, the whole process ultimately came down to technical establishment of coordinating police agencies at the state level.<sup>113</sup>

These and other examples have significantly compromised the position of the EU, providing strong arguments to EU critics.

What has also been frequently pointed out by numerous commentators is the fact that the international community and the EU quite often worked out of sync with each other. Thus, former judge of the BiH Constitutional Court Joseph Marko points out, “What is evident in BiH is that too often, the IC and even the EU does not speak with one voice but is divided along national lines and spheres of interest”.<sup>114</sup>

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<sup>111</sup> Noutcheva, (n54)

<sup>112</sup> Bieber, (n65)

<sup>113</sup> Kohsei Kurogi, Local Ownership Absence in the Police Reform in Bosnia-Herzegovina, November 6, 2013 [http://www.e-ir.info/2013/11/06/local-ownership-absence-in-the-police-reform-in-bosniaherzegovina/#\\_ftnref41](http://www.e-ir.info/2013/11/06/local-ownership-absence-in-the-police-reform-in-bosniaherzegovina/#_ftnref41)

<sup>114</sup> Joseph Marko, Post-conflict Reconstruction through State- and Nation-building: the Case of Bosnia and Herzegovina. European Diversity and Autonomy Papers - EDAP, 2005. (4). Available from: <http://www.eurac.edu/edap>

## **Conclusions**

The EU accession process constitutes the framework in which the existing legal framework needs to be upgraded and institutions enabled to ensure proper implementation. Approach to the EU accession process will be very important for the success of reforms. The use of conditionality by the EU, which proved a relatively successful model in previous rounds of accession, has not proved successful enough in the case of BiH. The reason for this is the lack of interest among the political elites in the country to take responsibility for reform and to abandon the populist style of governance aimed at ensuring maintenance of power and benefits for narrow oligarchies.

In any case, the attitudes within the EU towards the WB as a whole and towards BiH joining the EU, and the readiness of BiH to undertake reforms needed for this to happen are in a fixed cause-and-effect relationship – the stronger that there is determination and steadfastness of BiH in implementing necessary reforms, the greater will be the support within the EU to this process. However, the accession of BiH will remain a slow process with an uncertain outcome unless the EU commits to providing stronger support, maintains consistency in fulfilling its promises, and shows respect for the specifics of the process, which will require extra patience and understanding.

## **7. Bosnia and Herzegovina – local actors and incentives for reforms**

The vast majority of citizens in BiH strongly support the country's accession to the EU<sup>115</sup> and have been doing so on a sustained basis. Such a strong and continuing public support to the EU accession process has led to the vast majority of political parties paying lip service to EU accession as one of their top political priorities. However, particularly during election campaigns, issues related to EU accession remain largely in the shadows of nationalist and populist rhetoric, and expression of concern for national interests put forward by the political representatives of each ethnic group constitute the main orientation of their political activities.

If one is to understand the attitude of the political elites towards EU accession, i.e. meeting the conditions for EU membership, it is necessary to bear in mind the very structure of these political elites. The current political elite in the country emerged in the early 1990s, with the introduction of the multiparty system in BiH. A considerable proportion of this political elite was formed during the war and post-war ethnic strife, a period that was marked by utter lawlessness and absence of the rule of law. This allowed them to amass enormous wealth through direct budget transfers, black-marketeering or illegal privatisation of state property.

In this regard, it is important to note a relatively new form of corruption, namely state capture, which occurs together with the process of transition and is conceptually defined precisely on the examples of East and Southeast European countries.

The state capture phenomenon differs from corruption in a key feature: "While most types of corruption are directed toward changing how existing laws, rules, or regulations are implemented with respect to the bribe payer,

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<sup>115</sup> Istraživanje javnog mijenja u BiH 2013, Ipsos za potrebe Direkcije za evropske integracije BiH

state capture refers to corrupt efforts to influence how those laws, rules, and regulations are formed.”<sup>116</sup>

This particular form of corruption is exactly what occurred following the collapse of what was a strong socialist country with robust centralised institutions, when new actors used the resulting power vacuum to form new rules to suit their own purposes. It is exactly these ethno-political elites, which came into existence immediately before and during the armed conflict in BiH, having amassed enormous wealth by controlling the movement of strategic resources, that would ultimately become the key actors in the process of state capture by creating a legal framework to fit their own narrow particular interests.

The best example of this is the process of privatisation in BiH, governed by 13 different laws at the entity, cantonal and district levels, which have been changed a number of times depending on the current interests of the ruling structures and their closely associated companies in specific privatisation processes, with direct sale being a particularly favoured process. Such privatisation, which coincided with the end of the post-conflict phase of robust donor support, against a backdrop of a lack of basic rule of law and institutional framework, was the principal method used for siphoning off huge amounts of money through illegal transactions to political leaders and their closely related oligarchies.

The narrow political elite exercised its influence through clientelistic or nepotistic appointments to key positions in state institutions, the judiciary, the media, academia, etc. Complete deletion of boundaries between private and business interests of public officials and the public interest is a feature that characterises all forms of state capture. During the period of institutional vacuum, absence of the rule of law and total discontinuity of the state, the ethno-national elites were able to achieve full and effective

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<sup>116</sup> Joel Hellman and Daniel Kaufmann, ‘Confronting the Challenge of State Capture in Transition Economies’ Finance and Development, Quarterly magazine of International Monetary Fund, September 2001, Volume 38, Number 3 <https://www.imf.org/external/pubs/ft/fandd/2001/09/hellman.htm> p 2

control and influence over all key social institutions, putting up strong resistance to all reform initiatives, most of which came from the international community.

“Yet in the context of weak states and underdeveloped civil societies, such forms of influence have had a powerful impact on the pace and direction of reforms, on the design of economic and political institutions and, ultimately, on the general quality of governance in the transition countries.”<sup>117</sup> In this regard, particular emphasis is placed on the complexity of simultaneous political and economic transition.<sup>118</sup> If such a process, which is already complex in itself, is placed in the context of high post-conflict ethnic fragmentation, it becomes even more complex and uncertain.

Although the accelerated election cycle (a two-year election cycle was conducted by the OSCE mission until 2002) and direct interventions by the HR, through his use of the Bonn powers, caused removals of various officials or even the transfer of power between political parties, the *modus operandi* and influence channels have not changed significantly. In general, after removal of officials from key positions or transfer of power, there was always a huge migration from the parties that lost the election to those that won it, so that the ruling elite always succeeds in recruiting new members.

Removals and transfers of power were typically followed by a new round of nepotistic and clientelistic appointments to all key positions in state institutions and public companies as well as securing control over the institutions and actors that are not under direct formal control.<sup>119</sup>

This has led to a situation where the public sector, instead of being subjected to radical reforms, has become a purpose in its own right, continuing to grow abnormally, incessantly creating new administrative

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<sup>117</sup> Hellman and Kaufmann, (n11)

<sup>118</sup> Claus Offe, ‘Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe’, *Social Research*, 58/4, 865-92

<sup>119</sup> Boris Divjak and Michael Pugh, ‘Political Economy of Corruption in Bosnia and Herzegovina’, *International Peacekeeping*, Volume 15, Number 3, June 2008, pp.373-386 (14)

procedures and giving large and uncontrolled discretionary powers to all levels of government. This has created new opportunities for corruption.

A huge portion of GDP which is distributed through the government at various levels of administration (over 50% of GDP), without basic transparency and citizen participation in decision-making, has completely subverted the order of priorities and placed public interest well below the interests of a narrow circle of the ethno-political oligarchy. When comparing the level of public spending across WB countries, only Serbia is on same level, while the level of public spending in other WB countries is significantly lower. If we look at the phenomenon of state capture as a closed circuit, the influence of political elites and powerful oligarchies is manifested in the adoption of laws that suit their own interests.<sup>120</sup>

Administrative corruption and political influence have prevented law enforcement agencies from identifying illegal activities. Political influence on the judiciary hampers the prosecution of major corruption cases, and the media only act to make this vicious circle complete being used for anaesthetising the public and presenting a completely distorted list of social priorities.

Therefore, if we apply rationalist hypotheses (cost-benefit analysis) to these political elites, it becomes obvious that the primary interest of political elites in the country is maintaining the *status quo*. Implementation of reforms aimed at strengthening the rule of law and building strong and independent institutions, which is a prerequisite for the accession process, would lead to a decrease or loss of the immense power and wealth enjoyed by the political elites and, in many cases, to their prosecution. Ethno-political elites in BiH can find a very good example of such a scenario in neighbouring Croatia, where the completion of the accession negotiations eventually led to the

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<sup>120</sup> National Integrity System Study, Bosnia and Herzegovina 2013, Transparency International BiH

prosecution of a significant number of members of the political elite, including a former leader of the ruling HDZ and a former prime minister.

Therefore, in the context of a rationalist cost-benefit analysis, maintaining the *status quo* is emerging as the dominant short-term interest of the ethno-political elite.

This explains the ethno-political elite's concern for the protection of the so-called vital national interests, which the legislative framework and institutional mechanisms provide for through the institution of the protection of the vital national interest as part of parliamentary procedure. The protection of the so-called vital national interest very often includes issues that are largely outside the scope of national interest and usually represent the particular interests of political elites and oligarchies.

If we look at the political elites' attitude towards the EU through the prism of constructivist hypotheses (i.e. the logic of appropriateness), we can see that the positions of the three ethno-political elites differ markedly, but their fundamental premises are identical. The shared fundamental premise is built on distrust of EU policy and problematisation of EU policy towards BiH. The Bosniak political elite is very critical of EU policies as it believes that they are not sufficiently pursuing the creation of a centralised state based on the "one man – one vote" principle. This criticism has been particularly strong after the abandonment of the authoritarian state-building model, which was used before 2006. The Bosniak political elite sees Europe's commitment to and support for the establishment of a centralised state without entities and cantons as a kind of "debt" owed to BiH because of Europe's undecided role in the 1990s war in BiH. Hence, the current constitutional setup is seen by the Bosniak political elite as the result of the war and they see Republika Srpska as founded on genocide, whose existence as such is completely unacceptable. Therefore, the EU position that the political elites in BiH need to reach an internal consensus about constitutional changes and reforms necessary for EU

accession is seen by the Bosniak political elite as the best confirmation of the EU's unprincipled approach to BiH and abandonment of the EU's fundamental values.<sup>121</sup>

The Serbian political elite, by contrast, sees the EU's increased demands for strengthening the central government, as part of the EU accession process, as being at the expense of the entities. This political stance was adopted during the period of authoritarian state-building, when high representatives imposed a number of laws strengthening the central government level, and a number of Serb politicians and public officials were removed from office for opposing this imposition. This position was further strengthened after the recognition of the right to secession for Montenegro and Kosovo, and the EU was accused of applying double standards as it did not recognise Republika Srpska's right to self-determination. Therefore, any initiative or proposal aimed at strengthening the central government is in advance met with suspicion and rejection by the political elite in Republika Srpska.

The Croatian political elite in BiH is of the opinion that the current constitutional setup is extremely unfair given the two-entity division of the country, where only the Croats, albeit a constituent people, are actually deprived of the protection of their own interests in a separate Croat entity. Therefore, the demands for a third, Croat entity are renewed every time a discussion on constitutional changes is opened up in BiH. This position gained strength especially after the election of Željko Komšić as the Croat member of the tripartite Presidency of BiH, as the Croatian political elite believe that he was elected by Bosniak votes and as such does not represent the Croat people in BiH. In this regard, the Croatian political elite see the fact that the EU has not recognised the right to its own entity only to the Croatian people in BiH as a proof of the EU's inconsistency.

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<sup>121</sup> Ivan Lovrenović, 'Povijest nezavršenog rata', Novi Liber, Zagreb 2010



### ***Conclusions***

The dominant paradigms and interests of the political elites have not significantly changed since the end of the war, primarily due to the complete exclusion of citizens and civil society from the decision-making processes, which has significantly impeded the bottom-up impact in terms of change in social priorities at the practical policy level.

The ruling political elites, whose legitimacy is itself questionable due to illegal use of dominant positions in the electoral process and numerous irregularities in the conduct of elections, show no interest in establishing a harmonised legal framework on all four decentralised levels of government in the country. Formation of government, distribution of functions or the adoption of the budget can take years after elections. Vast, illegally acquired personal wealth and privileges make the political elite uninterested in the implementation of reforms that would lead to themselves potentially becoming the subject of judicial proceedings.

## **8. The record of state building**

The overall functioning of the state and its key institutions will be used as a criterion to assess the results of a nearly two-decades-long state building effort. The requirements of the EU that were aimed at establishing and strengthening the state level of government (executive, legislature and judiciary) were discussed at length in previous sections. This section will, therefore, focus on the performance of these institutions in terms of their functionality, capacity, independence and sustainability. Also to be discussed will be the overall ability of institutions to create laws and policies, as well as their capacity to put these into practice. This analysis will answer the question of how successful the state building efforts have been. The first part provides an overview of the general situation in the country based on indicators that measure the quality of governance and standards relating to democracy, rule of law and human rights. The second part of this chapter looks at the individual pillars of government with a view to identifying their functionality.

Foucault's reinterpretation of the famous Clausewitz dictum "politics as the continuation of war by other means" best reflects the situation in BiH, almost twenty years since the process of state building was started.<sup>122</sup> The constitutional structure of the state created by an international agreement, and the institutional context, subsequently largely shaped by direct impositions and pressures by the HR, has led to the creation of non-viable institutions that cannot function without external stimulus. Such institutions have been unable to significantly improve the quality of government, the rule of law, and protection of fundamental human rights and freedoms. Moreover, following the reduction of the HR's operational impact, such institutions have become easy prey for political parties, being easily subordinated to individual and party interests through political appointments and financial blackmailing. Effective governance is

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<sup>122</sup> Michael Foucault, 'Society Must be Defended', Lectures at the Collège de France 1975-76, trans. D. Macey, London: Allen Lane/Penguin, 2003

prevented by veto mechanisms built into the policymaking system, while abuse of constitutional mechanisms designed to ensure fair ethnic representation within state institutions has led to ethnically motivated behaviour by elected rulers. Furthermore, BiH's inadequate coordination among the different levels of government and between the institutions of individual governments leads to a lack of policy coherence.

As a result of a complicated and cumbersome constitutional structure, characterised by a high level of asymmetry, BiH has an oversized, ethnically divided and inept state apparatus which consumes around 50% of GDP, burdened with administrative shortcomings which are reflected in the government's policymaking, public finance management and human resource management functions. The government has a poor management of public expenditures which results in chronic underfunding and poor targeting of the sectors, especially education and health service provisions. The European Commission's 2013 Progress Report for BiH also identified BiH's complex decision-making system as the main obstacle to effective governance and European integration. During the last few years, numerous reforms have increased the capability at the central level, and efforts to professionalise the civil service, separate political and technical functions, and improve legislative and policy development have been made. However, a lack of regulation and procedures makes accountability of ministers and members of the executive branch a complicated matter.

The Nations in Transit study shows that since 2005 the country has made no significant progress in the fundamental areas that are a requisite for a functioning democracy, the rule of law and protection of human rights. In some areas the situation has even deteriorated. The overall democracy score has remained virtually unchanged compared to 2004. According to the Nations in Transit Ratings, the democracy scores of Croatia, Serbia, and Montenegro have changed little in recent years, while those of Macedonia, Albania, and BiH have suffered significant deterioration since 2006, declining 0.11, 0.43, and 0.35 points, respectively. Freedom House classifies

Albania and BiH as Transitional Governments, while Serbia, Macedonia and Montenegro are classified as semi-consolidated democracies.<sup>123</sup>

Nations in Transit Ratings and Averaged Scores										
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Electoral Process	3.50	3.25	3.00	3.00	3.00	3.00	3.25	3.25	3.25	3.25
Civil Society	3.75	3.75	3.75	3.50	3.50	3.50	3.50	3.50	3.50	3.50
Independent Media	4.25	4.00	4.00	4.00	4.25	4.50	4.50	4.75	4.75	4.75
Governance *	5.00	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
National Democratic Governance	n/a	4.75	4.75	4.75	5.00	5.00	5.25	5.25	5.50	5.50
Local Democratic Governance	n/a	4.75	4.75	4.75	4.75	4.75	4.75	4.75	4.75	4.75
Judicial Framework and Independence	4.50	4.25	4.00	4.00	4.00	4.00	4.00	4.25	4.25	4.25
Corruption	4.75	4.50	4.25	4.25	4.25	4.50	4.50	4.50	4.50	4.75
Democracy Score	4.29	4.18	4.07	4.04	4.11	4.18	4.25	4.32	4.36	4.39

Table 1: Nations in Transit 2013, Freedom House, Bosnia and Herzegovina (2004–2013).<sup>124</sup>

One of the key characteristics of the situation in BiH is a huge gap between the laws and reality, or the lack of consistent implementation of the laws.<sup>125</sup> Thus, according to the Global Integrity Report 2011, BiH ranks among the

<sup>123</sup> Freedom House, Nations in Transit 2013

<sup>124</sup> NOTE: The ratings reflect the consensus of Freedom House, its academic advisers, and the author(s) of this report. The opinions expressed in this report are those of the author(s). The ratings are based on a scale of 1 to 7, with 1 representing the highest level of democratic progress and 7 the lowest. The Democracy Score is an average of ratings for the categories tracked in a given year.

<sup>125</sup> National Integrity System Study, Bosnia and Herzegovina 2013, Transparency International BiH.

countries with the lowest level of actual implementation of the legislation.<sup>126</sup>

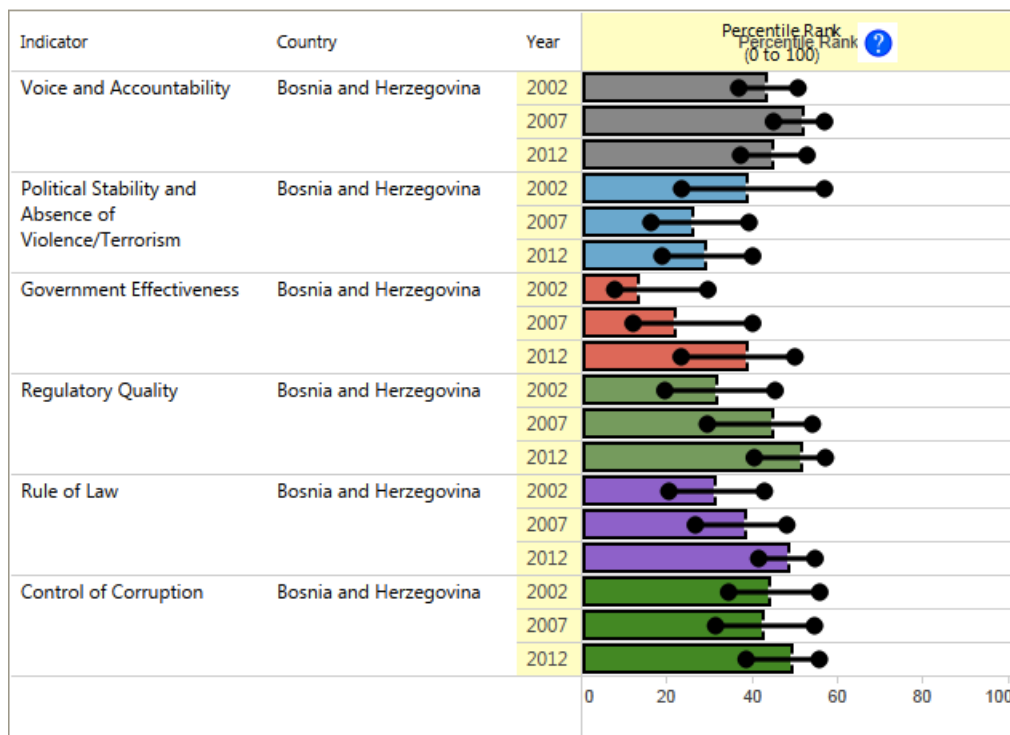


Table 2: Worldwide governance indicators<sup>127</sup>

<sup>126</sup> Global Integrity, Global Integrity Report 2011 Bosnia and Herzegovina. The survey ranks countries on a 0-100 scale, where 100 is the maximum score, measuring the quality of the legal framework and the level of its actual implementation. BiH's legal framework received a score of 92, and the level of its actual implementation a score of 35.

<sup>127</sup> Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi (2010). "The Worldwide Governance Indicators: A Summary of Methodology, Data and Analytical Issues". World Bank Policy Research Working Paper No. 5430 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1682130](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1682130) Full interactive access to the aggregate indicators, and the underlying source data, is available at [www.govindicators.org](http://www.govindicators.org). The Worldwide Governance Indicators (WGI) are a research dataset summarising the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. These data are gathered from a number of survey institutes, think tanks, non-governmental organisations, international organisations, and private sector firms. The WGI do not reflect the official views of the World Bank, its Executive Directors, or the countries they represent.

The Worldwide Governance Indicators for BiH show a very similar situation. In the last ten years the country has made no substantial progress in terms of the functioning of key institutions to ensure the rule of law, strengthening of democracy, and implementation of legislation. Neither has there been any significant movement towards increasing their efficiency, nor have they become sufficiently independent and professional.

## 8. 1 The legislature and the executive

Annex 4 of the DPA, which constitutes the Constitution of BiH, created a complex structure consisting of four parts: two entities – the Federation of BiH (consisting of 10 cantons) and Republika Srpska, a condominium of the two entities – the Brčko District, and the state-level government with limited powers. The legislative and executive branches of government mirror this constitutional structure, thus comprising a total of fourteen governments and fourteen parliaments – at the state, entity, cantonal and district levels. The Council of Ministers consists of nine ministries and the entity governments are composed of 16 ministries, while the 10 cantonal governments have a total of 95 ministries. The crucial problem for the functioning of the overall state structure is the fact that the country is not constitutionally organised according to the principle of subordination, i.e. the hierarchical relationship between higher and lower tiers of government, but according to the principle of shared responsibilities between various levels of government.<sup>128</sup> While Republika Srpska is organised as a centralised entity, the Federation of BiH is made up of 10 cantons. Although large in size, adequately resourced and founded on sound laws, the legislative and executive authorities in the country continue to be faced with a myriad of difficulties hampering a consistent and efficient performance of the functions stemming from the Constitution and the law. Therefore, the EU requirements for BiH have, ever since the 2000 Road Map, regularly referred to the establishment of a functional and efficient legislature and executive branch.

Owing to such a constitutional structure, BiH ranks among the countries with a very large public sector, whose wage bill was 13.1 percent of GDP in 2011, an increase from 11.1 percent of GDP in 2006.<sup>129</sup> Also, in 2010 other

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<sup>128</sup> National Integrity System Study, Bosnia and Herzegovina 2013 Transparency International BiH

<sup>129</sup> Public Expenditure and Institutional Review (PEIR) for Bosnia and Herzegovina, World Bank, 28 February 2012

operational expenditures of the governments reached 15 percent of GDP. Wages in the public sector, which employs 3,5 percent of the population, making up relatively large shares of the labour force (11 percent) and total employment (19 percent) (excluding state-owned enterprises and health workers), are on average significantly higher than those in the private sector.<sup>130</sup>

Following the 2010 general election, it was not until February 2012 – 480 days after the election – that the CoM was finally formed. Less than six months later another political crisis ensued, when one of the coalition partners was ousted from the ruling coalition for refusing to support the adoption of the budget.<sup>131</sup> A very good indicator of how efficient the executive authorities are is the fact that in the last seven years the Council of Ministers has never prepared a budget by 15 October, as required by the law.<sup>132</sup> Monitoring and comparing the performance of parliaments in the region, the local NGO Centre for Civic Initiative has come up with some interesting findings. In the first nine months of 2013 as few as 21 laws or amendments to the existing laws were adopted in BiH. Over the same period, the Croatian Parliament, in 71 days worth of sessions, adopted a total of 235 laws, or 11 times as many laws as the Parliamentary Assembly of BiH (PA BiH) in the same period. During the same period, the National Assembly of the Republic of Serbia, in 82 days worth of sessions, adopted 90 laws, or 4.3 times as many laws as the PA BiH, while the Parliament of Montenegro, in 44 days worth of sessions and 21 sessions, adopted 55 laws, or 2.6 times as many as the PA BiH.<sup>133</sup> If we take into consideration the difference between BiH and other countries in the WB regarding state-level parliament competences, it is clear that PA BiH work is far from a satisfactory level or from the average in the region.

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<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/o,,contentMDK:23129877~menuPK:258604~pagePK:2865106~piPK:2865128~theSitePK:258599,00.html>

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Centre for Civic Initiatives: Monitoring Report for the Council of Ministers 2013

<sup>133</sup> Centre for Civic Initiatives: Monitoring Report for the Parliamentary Assembly of BiH 2013



## **8. 2 The judiciary**

The establishment of a functioning and independent judicial system is highly prioritised in almost all the documents which set out the requirements that BiH needs to meet in the accession process. During the period of authoritarian governance some state-level judicial institutions were established, namely the Court of BiH, the Prosecutor's Office of BiH, and the High Judicial and Prosecutorial Council, and the procedural legislation was reformed as a pre-condition for the proper functioning of the judicial system. Despite all this, the fundamental problem besetting the judiciary still resides in the fact that the country has four nearly autonomous judicial systems – that of the state-level of Bosnia and Herzegovina, that of the two entity systems (Republika Srpska and Federation of BiH), and that of the Brčko District. These systems are virtually detached from each other in terms of their responsibilities (with some exceptions where cases of war crimes are concerned), which is actually a consequence of the country's constitutional structure. The existence of autonomous court systems means that the political authorities (parliaments) pass laws governing the judicial system, despite significant efforts to harmonise specific pieces of legislation in terms of both substantive as well as procedural laws, and this has resulted in uneven judicial practices and unequal treatment of the same or similar factual and legal situations by different courts.

Due to the constitutional setup of the country, the financing of the courts and the prosecutor's offices is even more complicated. Specifically, the courts and the prosecutor's offices are still financed from 14 different budgets, which makes the capacities and resources of the courts very unstable and unbalanced. This situation allows political influence to be exerted on the judiciary through budgeting and enactment of laws. Since

2006, progress reports have continuously warned of the lack of adequate progress in judicial reform.<sup>134</sup>

Ever since the initial stages of the international community's engagement in the country, the establishment of an effective and independent judiciary has ranked very high on the priority list and has been a condition in all stages of the accession process. However, due to the continued lack of progress and continuing political obstruction, the EU decided to open up a so-called structured dialogue on justice with BiH. This is a new tool of the EU, first established in BiH in 2011, aimed at supporting reforms of the justice system. So far, five thematic sessions have been held between representatives of the EU and BiH authorities on reforms that are necessary in the further integration process.<sup>135</sup> Except for identified recommendations, there have been no concrete results of this dialogue as yet.

The problem of non-enforcement of final court judgments only goes to confirm the subordination of the judiciary to other branches of government and the complete absence of the rule of law in the country. In excess of 80 judgments of the Constitutional Court of BiH have never been implemented although the failure to implement a judgment of the Constitutional Court constitutes a criminal offence.<sup>136</sup>

Political pressure on judicial institutions is often publicly manifested. The most striking example is that of SNSD sending an initiative to the Parliamentary Assembly of BiH for abolishing the state court and

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<sup>134</sup> Negotiating Conditionality: An Updated Review of the European Union Progress Reports for Bosnia and Herzegovina Democratization Policy Council, by Patrick Dick, November 2013 <http://democratizationpolicy.org/uimages/pdf/dpcpolicynotewseries5.pdf>

<sup>135</sup> EU Delegation BiH: '10 Facts To Know About The EU-BiH Structured Dialogue On Justice', <http://europa.ba/Default.aspx?id=87&lang=EN>

<sup>136</sup> 'Pravda koja malo kasni i ne ispunjava sve svoje ciljeve', Zvonko Mijan, interview, registrar of the Constitutional Court of BiH: [*Justice that is a bit slow and does not fulfil its purpose*], Oslobođenje Daily, 16 November 2013, V. Selimbegovic <http://www.oslobodjenje.ba/vijesti/intervju/zvonko-mijan-registrar-ustavnog-suda-bih-pravda-koja-malo-kasni-i-ne-ispunjava-sve-svoje-ciljeve>

prosecutor's office.<sup>137</sup> Another very common practice is for political officeholders to publicly accuse and place pressure on judges and prosecutors.

Although procedural laws (criminal and civil proceedings) were adopted as far back as 2003, enabling much speedier judicial procedure, and despite the fact that the staffing level has reached 96.52 percent for judicial functions and 93.85 percent for prosecutorial functions, the biggest problem continuing to afflict the judiciary in BiH is the excessive backlog of outstanding cases and long court proceedings.<sup>138</sup> Citizens and legal entities have to wait very long for courts to even start working on their cases, and the road to justice is time-consuming and expensive. According to the World Bank's study *Doing Business 2014*, it takes 595 days to resolve a litigation in BiH, which speaks volumes about the effectiveness of the judicial system in the country.<sup>139</sup> It should be said that the High Judicial and Prosecutorial Council of BiH has made some steps to reduce the backlog of cases. However, according to the 2012 HJPC Annual Report, as of 1 January 2013 there were 2,112,622 pending cases before the courts in BiH, of which 1,664,328 were so-called "utility cases" [i.e. cases requiring the payment of outstanding debts for public utility services].<sup>140</sup> Compared to 2011, the reduction in the number of backlog cases was negligible. This means that the backlog problem will, for a long time, continue to be a major impediment to expeditious court proceedings and exercising the right of access to courts and justice within a reasonable period.

If prosecution of corruption, especially political corruption and organised crime, is taken as a litmus test of the judiciary's independence, given the

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<sup>137</sup> SNSD i SDS protiv Suda i Tužilaštva BiH [*SNSD and SDS against the Court and Prosecutor's Office of BiH*], 22 January 2012, Aljazeera Balkans, <http://balkans.aljazeera.net/vijesti/snsd-i-sds-protiv-suda-i-tuzilastva-bih>

<sup>138</sup> Godišnji izvještaj Visokog sudskog i tužilačkog savjeta Bosne i Hercegovine za 2008.g. [*2008 Annual Report of the High Judicial and Prosecutorial Council of BiH*] ([www.hjpc.ba](http://www.hjpc.ba)), p.45

<sup>139</sup> *Doing Business 2014*

<sup>140</sup> Godišnji izvještaj Visokog sudskog i tužilačkog savjeta Bosne i Hercegovine za 2012.g. [*2012 Annual Report of the High Judicial and Prosecutorial Council of BiH*] ([www.hjpc.ba](http://www.hjpc.ba))

fact that the people involved in such activities are, as a rule, politicians and high-ranking civil servants who are very influential, powerful and have significant financial resources at their disposal, then it can be easily inferred that the judiciary in BiH is far from being independent. The EU 2013 Progress Report notes that BiH is still far from having effective prosecution of corruption and that only low-ranking officials are prosecuted.<sup>141</sup>

Numerous scandals and affairs, most of which have received wide media exposure, have never seen a proper response by relevant institutions. This suggests that judicial reform has brought about very few substantial changes in the functioning of the judicial system.

### **8.3 Public administration reform (state-owned companies)**

The establishment of an effective and independent public administration was a condition imposed on BiH as far back as in the list of priorities that the country was supposed to meet before the opening of the SAA negotiations. The public sector in BiH includes public institutions, organisations and enterprises at all administrative levels which provide public services to citizens and other entities. Therefore, this sector also includes ministries and other government bodies at all administrative levels, local governments, public organisations and institutions such as various agencies, public utilities, healthcare and educational facilities, etc. Overall, this complex system of organisations and institutions at all administrative levels falls within the definition of the public sector, i.e. public administration in the broad sense of the word. The number of public sector institutions is estimated to be in excess of 3,000, while the number of entities registered in the public procurement system is 1,739.<sup>142</sup>

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<sup>141</sup> EU Progress Report 2013

<sup>142</sup> Public Procurement Statistics for Year 2011 (Public Procurement Agency of BiH)

Every change of government in BiH was typically followed by a change of management in the executive, public institutions and public enterprises. Albeit often constituting a breach of employment contracts, this is more the rule than the exception. At the same time, this is a consequence of the legislation which provides that the recruitment process and employment in the public sector does not directly apply to a number of advisory and management positions. To illustrate this – following the 2010 election in the Federation of Bosnia and Herzegovina and formation of the new FBiH Government, an announcement was made that more than 200 people holding managerial positions in public institutions and companies were to be replaced.<sup>143</sup> At the same time, new management boards in public companies appointed new management structures that often brought with them new employees and associates.

It is difficult to avoid ‘politicisation’ in open competition recruitments because, in addition to people of the Civil Service Agency and those representing the employer institution, the committee for evaluation of candidates comprises representatives of certain political parties. This often results in candidates that match ‘political preferences’ of certain circles in the government being selected. Generally, legal regulations do not allow politicisation in the public sector or any partisan actions on the part of public employees. This is complied with only outwardly, whereas in reality party politics continue to have a strong informal influence on civil service recruitment.<sup>144</sup> This is especially true of local governments, where an enormous number of new civil servants have been employed in recent years through party influence.<sup>145</sup>

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<sup>143</sup> ‘Dnevni Avaz’ daily, 6 August 2011, article ‘*Smjene upravnih i nadzornih odbora neustavne i nezakonite*’ [Dismissals of Management and Supervisory Boards Unconstitutional and Unlawful]

<sup>144</sup> OECD SIGMA, BiH Assessment Report 2012

<sup>145</sup> Centri civilnih inicijativa, ‘*Načelnik i lokalna samouprava – liderstvo, demokratija, razvoj*’ [Centres of Civil Initiatives, ‘The Mayor and Local Self-Government: Leadership, Democracy and Development’], Sarajevo, 2010

The SIGMA Assessment 2013 report warns of a number of systemic problems facing public administration in BiH.<sup>146</sup> It particularly emphasises the problem of fragmentation of public administration in FBiH and unclear division of responsibilities in the regulation of public administration. This problem has become especially pronounced after the FBiH Constitutional Court ruled that FBiH has no legal authority to regulate public administration at the cantonal level.<sup>147</sup> The SIGMA report also warns that the system of ethnic quotas prevents establishment of a consistent merit-based recruitment system. Another important aspect of the problem relates to the work of the inspectorates and lack of judicial supervision over public administration. This often results in the non-enforcement of court decisions relating to public administration. This is illustrated by the fact that only 40 percent of the Ombudsman's recommendations to public administration are complied with in the required manner.

The financial aspects of public administration are still largely non-transparent and inefficient. Supreme audit institutions at all administrative levels continuously point to systematic and numerous violations of the Public Procurement Law, Budget Law and a whole range of other laws governing public finance. Despite the evidence of numerous violations of law and recommendations for improvement, institutions largely continue to ignore auditors' recommendations, and parliaments and law enforcement agencies fail to institute procedures to bring those responsible to account.

To this end, the Public Administration Reform Co-ordinator's Office (PARCO) was established, which was financially supported by international donors, and the Public Administration Strategy was adopted in 2006. However, the results of the implementation of the strategy were far from those planned. The reasons for this lack of progress are multiple, the main one being the absence of a subordination mechanism or hierarchical

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<sup>146</sup> OECD SIGMA Bosnia and Herzegovina – Civil Service and Administrative Legal Framework – 2013

<sup>147</sup> Constitutional Court of FBiH: Ruling no. U-27/9

organisation in the implementation of the strategy and the reform as a whole, given that three almost separate reforms are being carried out at the entity and state levels, with three different institutions implementing the law. Another important reason for the lack of progress is the lack of political will for implementing reform measures aimed at reducing and improving public administration, because political parties still use public administration extensively to buy social peace. Employment of people from party-made lists has been reported in the media on a number of occasions. The practice of employment along party lines is especially common in pre-election periods as a way of securing support to political parties.

The overall share of the state in the ownership structure of companies in BiH is still very significant. The private sector's share in GDP was around 60 percent of GDP in 2012.<sup>148</sup> Those companies that were privatised were mainly sold in non-transparent circumstances and very often through direct agreement. Total chaos in the institutional and legislative organisation of the privatisation process, with 13 different laws and institutions at different levels of administration (cantonal, entity and local), brought about a complete lack of transparency in the privatisation process, resulting in numerous breaches of the law and huge losses. State-owned companies are under the direct control of political parties and are the source of illegal funding of political parties and direct transfers to private individuals, as evidenced by reports of the public audit offices.<sup>149</sup>

This is what Fukuyama calls neopatrimonial networks, or networks created through clientelistic appointments that aim to provide a parallel non-institutional control of state resources by political leaders.<sup>150</sup>

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<sup>148</sup> EU progress report 2013

<sup>149</sup> See: Audit Office for the Institutions of the Federation BiH <http://www.saifbih.ba/Home.aspx>  
Supreme Office of the Republika Srpska Public Sector Auditing <http://www.gsr-rs.org/>  
Audit Office of the Institutions of BiH [www.revizija.gov.ba/](http://www.revizija.gov.ba/)

<sup>150</sup> Fukuyama, (n28)

## **8. 4 Police and law enforcement agencies**

The international community actors in BiH had worked on police reform even before the formal requirements were set by the EU. At the time, the OHR had been extensively involved in the issue of establishing state-level police forces. The police reform that was initiated in 2003, and was set as a condition for opening SAA negotiations, caused a lot of controversy, as was discussed earlier. BiH has an extremely decentralized and overlapping police structure with ten cantonal, two entity-level, and six state-level agencies.

After almost two decades of reforms, the 2013 Progress Report highlights the unsatisfactory cooperation between the police and law enforcement agencies. The report also notes that the cooperation between the different agencies remains insufficient and is practically reduced to informal communication with no clear procedures. It also identifies the problem of unclear and overlapping competences between the various police agencies. The cooperation between the judiciary and law enforcement agencies is also far from being satisfactory, which eventually results in the absence of any progress in the processing of corruption and organized crime. Part of the problem results from the fragmented legal system of the country and existence of basically four separate judicial systems and a large number of law enforcement agencies. The police system in BiH is based on the principle of coordination rather than subordination. This means that the Ministry of Security and state agencies have no formal power over entity Ministries of the Interior (MIs) and agencies, and the MI FBiH and police administration of FBiH have no formal power over the cantonal MIs. The absence of progress in strengthening the capacities of the Directorate for Coordination of Police Bodies and other police agencies at the state level established as a result of police reform in 2008 (the Agency for Forensic Examinations and Expertise, the Agency for Education and Professional Training and the Police Support Agency) also makes the strengthening of institutional cooperation in relation to law enforcement more difficult. A special obstacle for consistent cooperation between the institutions is the



political influence on law enforcement agencies and the judiciary, which is primarily exercised through the process of appointment of heads of the mentioned institutions. Clear political loyalty is thus an obstacle for consistent law enforcement and inter-institutional cooperation.

The state agencies SIPA (State Investigation and Protection Agency) and OSA (Intelligence-Security Agency) were founded by the OHR in 2000. They are a classic example of what Chandler calls virtual institutions. Managerial positions are subject to inter-party arrangements, which best illustrates the behaviour of these agencies.<sup>151</sup> There are conspicuous examples of attempts to place the police under the control of political parties. In April 2013 SIPA made a spectacular arrest of the President of the FBiH as per the order of the Prosecutor's Office of BiH. However, the arrest was ordered without any evidence, as was confirmed by the Constitutional Court of BiH. At the same time, an all-out media war was raging between the SIPA director and the Chief Prosecutor, who were accusing each other of illegal activity.<sup>152</sup> Also, the director of OSA made threats against the parliamentarians on several occasions during his presentation of an activity report to a parliamentary commission.<sup>153</sup>

Global Integrity reported in its 2012 Global Integrity Report for BiH that the corruption scandals that are publicised in the media are often ignored and that law enforcement agencies do not investigate them. Also, the same organisation, in its analysis of law enforcement agencies, rated the results of BiH agencies in investigating corruption in 2012 as very weak (a score of 45 on a performance scale of 1 to 100, where every score below 60 is rated as 'very bad').

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<sup>151</sup> "Dogovor političkih partija nelegalan" [*Agreement between Political Parties Illegal*], Radio Sarajevo,

13 January 2012 <http://www.radiosarajevo.ba/novost/71620>

<sup>152</sup> "Razmatra se prijava Zubca protiv Salihovica" Glas Srpske, [http://www.glassrpske.com/novosti/vijesti\\_dana/Razmatra-se-prijava-Zupca-protiv-Salihovica/lat/136061.html](http://www.glassrpske.com/novosti/vijesti_dana/Razmatra-se-prijava-Zupca-protiv-Salihovica/lat/136061.html)

<sup>153</sup> "Dzuvo prijetio objavljivanjem neprimjerenih komunikacija", Oslobođenje, <http://www.oslobodjenje.ba/vijesti/bih/dzuvo-prijetio-objavom-neprimjerenih-komunikacija>

However, the key problem lies in lack of a consistent and effective implementation of its legislative framework, caused by the complicated state structure which reflects on the structure and responsibilities of law enforcement agencies, as well as the ever present direct political interference in the selection of managers of agencies.

## **8.5 Media**

The legislative framework governing the establishment and operation of independent media outlets is very favourable. Freedom of the media is guaranteed in the Constitution of BiH, the European Convention on Human Rights (which is directly applicable in BiH), and the Law on Communications.<sup>154</sup> Thanks to the efforts of the international community, BiH was the first of all former Yugoslav countries to have adopted the Freedom of Access to Information Law. Also, decriminalisation of libel was a very important step in the development of the media. Reform of the public broadcasters has been part of all requirement packages since as far back as the 2000 Road Map. The efforts of the international community to create a public broadcasting system were brought to completion in 2005 with the adoption of the Law on the Public Broadcasting System in BiH,<sup>155</sup> (the PBS in BiH consists of four units: two entity systems, one state system, and a corporation acting as an umbrella institution of the public service), which, however, has not yet resulted in a functional and independent public broadcasting system.<sup>156</sup>

The entity public broadcasters are under the effective control of the ruling political parties and generally report pro-ruling-party views. When it

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<sup>154</sup> 'Law on Communications', *Official Gazette of BiH*, no. 31/03; *Official Gazette*, no. 75/06.

<sup>155</sup> 'Law on Public Broadcasting system', *Official Gazette of BiH*, nos. 75/05 and 35/09

<sup>156</sup> BALKAN MEDIA BAROMETER BOSNIA AND HERZEGOVINA 2011, Fridrich Ebert Stiftung Sarajevo  
[http://www.fes.ba/publikacije/2012/BMB/FES%20%20BMB%20BiH%202011\\_book%20BHS%2010\\_2\\_2012.pdf](http://www.fes.ba/publikacije/2012/BMB/FES%20%20BMB%20BiH%202011_book%20BHS%2010_2_2012.pdf)

comes to private media outlets, their editorial policies mainly represent the narrow interests of their owners, which often coincide with those of the ruling political parties. Such editorial policies result in financial gains, such as direct budget transfers, tax breaks, or the buying of advertising space by state institutions or enterprises.

The Helsinki Committee BiH states that hate speech is characteristic of a large number of media outlets and, worryingly, to a significant extent including public broadcasters as well.<sup>157</sup>

The media are divided along ethnic and entity lines, so that they do not cover the entire social and political spectrum, but are oriented towards particular segments of the predominantly ethnically divided public. Given the fact that the political centres of power and decision-making are a key factor in the financial viability of media outlets, the media often become tools in the hands of the political elites for their mutual confrontations.<sup>158</sup> The best example of this was a confrontation between the two entity public broadcasters exchanging heavy accusations against each other as well as against the leading political figures in both entities in a fierce months-long campaign.<sup>159</sup>

The general view permeating numerous studies made by both international and local organisations is that the situation in terms of the influence on the media has deteriorated significantly in recent years.<sup>160</sup> Political influence on the independent Communications Regulatory Agency (CRA) has increased through efforts to have a politically elected person appointed as the head of that institution. The appointment of the General Director of the CRA was

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<sup>157</sup> Helsinki Committee, *Izveštaj o stanju ljudskih prava u BiH za 2011. godinu* [2011 Report on the State of Human Rights in BiH] (Sarajevo: Helsinški komitet, 2012), p 14

<sup>158</sup> Interview with Ms Borka Rudić, general sec'y of the Association of Journalists BHN, Banja Luka, June 2012

<sup>159</sup> Entitetske televizije u medijskom ratu, Radio Slobodna Evropa  
[http://www.slobodnaevropa.org/content/bih\\_mediji\\_novinari/2312690.html](http://www.slobodnaevropa.org/content/bih_mediji_novinari/2312690.html)

<sup>160</sup> Global integrity report Bosnia and Herzegovina  
<http://www.globalintegrity.org/report/Bosnia-and-Herzegovina/2011>; Freedomhouse, Freedom press <http://www.freedomhouse.org/report/freedom-press/2011/bosnia-and-herzegovina>

blocked in the Council of Ministers for four years, precisely for the aforementioned reasons, which significantly affected the operation of the institution. During negotiations on the composition of the Council of Ministers, the leaders of the ruling political parties also agreed on the distribution of managerial positions in independent agencies, including the CRA.<sup>161</sup>

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<sup>161</sup> Odgađanje izbora bila bi nagrade za vlasti, M Osmović, Dnevni list, 14.3.2013  
<http://www.idoconline.info/digitalarchive/public/index.cfm?fuseaction=serve&ElementId=837161>

## 9. General conclusions

After two decades of an intense and robust state-building process unprecedented in the modern history of Europe, BiH still exhibits a number of characteristics of failed states. The EU integration process is completely blocked and the country has not yet submitted its candidacy and, as such, is last in the line among the Western Balkan countries for accession to the EU, with the exception of Kosovo. The starting situation of the state-building process was extremely complex. The DPA provided for a highly decentralised state structure without basic state functions at the central government level. The primary mission of the DPA was to end the war. The full institutional discontinuity with the pre-war period also represented a particular challenge. Also, the independent state of BiH as it is today has never existed as a political subject in modern history.

The role of the EU in the state-building process has been discussed through the prism of rationalist and constructivist theories. From the perspective of rationalist logic of consequence, the response to the EU requirements by the political elites in BiH ranged from imposed compliance to fake compliance. The EU's approach within the conditionality mechanism with multiple phases within pre-accession preparations made the final reward, i.e. membership in the EU, look like a "moving target", which as such was not a convincing enough incentive for implementing reforms and meeting the EU requirements. Also, the conditions for the transition from one integration phase into the next were linked with high costs, often encroaching drastically onto the constitutional relations in the country. Likewise, the EU requirements often led to limiting the power of political leaders in BiH, which had very significant consequences for their particular interests.

The role of the EU as a state builder in BiH has for a long time overlapped with the role of the wider international community, the most obvious example of which is the nine-year long "personal union" of the EUSR and the HR. Considering the fact that all EU member states are members of PIC and four EU member states are member of the PIC Steering Board (France,

Germany, Italy and United Kingdom) and the fact that the European Commission and the Presidency of the European Union are also members of the PIC Steering Board, it may be justifiably argued that the relationship between these two institutions was even more symbiotic. This means that in the case of BiH, the EU has for the first time been practically involved in a state building process that can be characterised as a combination of authoritarian building and member state building.

Very poor socialisation effects were the result of the specific historical context, but also of the way the country was governed by the international community, which was fully authoritarian especially in the early state-building stages.

The state-building process, as noted above, had two turning points. The first turning point was in 2000, when the fully authoritarian phase of direct governance of the country by the international community came to an end. In that phase, the international community, embodied in the OHR, directly governed the country in cooperation with other international organisations and institutions (OSCE, IPTF, IMC, etc.). The second phase, combining authoritarian and membership state building, where the EU was directly involved by setting out the conditions that BiH must fulfil in the SAP process, lasted from 2000 to 2005. This phase was the most intense one in terms of institution building and strengthening state-level authorities. The third phase of the state-building process started in 2005, when the international community abandoned the practice of using the authoritarian Bonn powers, although *de jure* they remained in force. In this phase, the EU appeared as a moderator, insisting on the takeover by local elites of the responsibilities for implementing reforms and ensuring BiH's European path.

The primary objective of the first phase of state building was the stabilisation and physical reconstruction of the country as well as establishment of basic government functions and provision of basic services by the state. After the intense involvement of the EU in the state-building process starting in 2000, the primary objective shifted towards strengthening the central government as well as institution building,

capacity building and ensuring sustainability of newly established institutions. The general EU approach towards BiH within the SAP did not differ from the approach towards other countries in the region, except in that the EU relied rather heavily on the OHR to impose legislation necessary to meet the conditions. The conditionality-based approach was assumed in 2000 with the laying down of the first set of EU conditions for BiH. Since BiH is a country with limited sovereignty, the requirements encroached upon the domain of constitutional responsibilities and relationships between the entities and the state. Thus, their acceptance by local actors was fraught with significant costs. Although the EU did not directly and formally insist on constitutional changes up until the ECHR judgment in 2009, the requirements that were imposed from the start in 2000 directly interfered with constitutional matters in terms of strengthening the central government. This gave rise to strong and direct resistance to such conditions from RS. RS representatives justified such resistance by citing the double standards applied by the EU in the Western Balkans, primarily referring to the EU's support to the independence of Kosovo and Montenegro.

It was the key turning point in the state-building process in 2005 which, while not completely demarcating the different state-building phases, showed that the sustainability of reforms and newly established institutions is a huge challenge. Without adequate internal demand for reforms and institutions, conditionality alone cannot deliver the desired results, especially if it is applied with the use of authoritarian powers.<sup>162</sup>

While the vast majority of citizens have continuously expressed their support to the country's membership in the EU, the very few options available for influencing the decision-making process have prevented them from exerting any significant influence on the political elites. Political parties are probably the only social institution that has not undergone major reforms since the end of the war. Without basic internal democracy

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<sup>162</sup> Fukuyama (n28)

and organised on mafia-like principles, the parties are driven solely by the narrow particular interests of their leaderships.

Following the abandonment of the use of the Bonn powers, progress in meeting the EU requirements has been considerably slower. This goes to show that the influence of the socialisation mechanism on fulfilment of the EU requirements has been very limited. Furthermore, rationalist cost-benefit analysis by local decision-makers of the costs of meeting the EU requirements has largely shown that these costs are extremely high and fraught with great risks for the political elites. Above all, ever greater insistence by the EU on the rule of law, as manifested in changes to the negotiation process, i.e. the opening of membership negotiations with chapters 23 and 24 which govern the issues of the rule of law, justice and security, was a signal to the political elites that progress in the integration process would endanger the political elites that were involved in corruption. After the experience of Croatia in the accession process and the prosecution of Croatian political leaders, including the Prime Minister, for corruption, the political elites in BiH came to realise much more clearly that the integration process is linked with high risks.

Alina Mungiu Pipidi points to the EU's wrong assumption, which is based on the performance-based approach, that the political will for EU accession is there and that the problem lies solely in the lack of capacity.<sup>163</sup> It is exactly the example of BiH that goes to confirm all the shortcomings of this assumption because there have been numerous examples, from the failure of the April package of constitutional reforms to date, proving that the genuine political will to implement the reforms necessary for progress in the EU accession process has never existed. In the vast majority of reform processes, the matrix has largely been the same – after endless discussions and under strong pressure from the international community, even if a consensus on adoption of reform legislation has been reached, the

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<sup>163</sup> Alina Mungiu Pipidi, 'A house of cards? Building the rule of law in the Balkans' in James Rupnik (ed) 'The Western Balkans and the EU: "The Hour of Europe"', Chaillot Papers, June 2011



implementation of this legislation is thwarted by the failure to secure necessary budget funds or by the inability to agree on the appointment of the management, i.e. establishment of political control over the institution. Such was the case with the police reform and the establishment of state police institutions, as it was with provision of funds for the functioning of the state judiciary, the establishment of the state-level anti-corruption agency, etc.

The post-conflict context, deep ethnic and political fragmentation of society, lack of consensus over the basic organisation of the country, and constant calls by two of the three ethnic groups for greater autonomy from the already weak central government are important factors that have greatly influenced the country's progress in the EU integration process. As Gergana Noutcheva notes, this state of affairs may even lead to open political mobilisation against the EU conditionality.<sup>164</sup> While the impact of the EU conditionality in defining priorities and implementing reforms is undeniable and important, when it comes to the successful implementation and, in particular, sustainability of these reforms, it is necessary that internal preconditions should be met within each country. First of all, this includes a broad consensus among the political, economic and social elites, and especially reform-oriented political parties with broad public support.<sup>165</sup> It is the lack of the aforementioned internal preconditions that has been the constant characteristic of the entire post-war period in BiH. During the entire post-war period, the political elites that emerged from the war have skilfully instrumentalised the feelings of threat that ethnic groups felt for each other and turned them into convincing election victories under the banner of protecting the national interest. The exclusively lip-service orientation towards reforms and EU

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<sup>164</sup> Gergana Noutcheva, 'EU conditionality, state sovereignty and the compliance patterns of Balkan states', Centre for European Policy Studies (2006), <http://www.jhubc.it/ecpr-istanbul/virtualpaperroom/055.pdf>.

<sup>165</sup> Othon Anastasakis & Dimitar Bechev, 'EU Conditionality in South East Europe: Bringing Commitment to the Process', South East European Programme, European Studies Programme, St. Anthony's College, University of Oxford, April 2003

accession has rarely been affirmed in practice by decisive and concrete actions.

The reforms that were implemented have proved unsustainable, whereas the power vacuum created after the international community pulled out of the operational management of the country was quickly filled by kleptocratic ethno-political elites driven exclusively by their own particular interests. It appears that the establishment of a functional and sustainable state structure and corresponding institutions continues to pose a big challenge even though the armed conflict ended nearly 20 years ago. After Croatia becoming a full member of the EU in 2013, and Serbia and Montenegro opening membership talks, it is clear that BiH and Kosovo remain two states that will require further attention and commitment by the EU in the future.

After nearly fifteen years since the first formal commitment to the integration of the Balkans, there are increasingly vocal demands that the EU should review its policy towards the Western Balkans and views that the answer to the complex challenges in the Balkans cannot consist in a mere replication of the model applied to the countries of Central and Eastern Europe.<sup>166</sup> The consequences of failure or long-term stagnation in the Balkans could be very dangerous for the EU. First of all, because it would lead to the EU being drawn in the long run into running protectorates in unfinished countries in the Balkans, with significant political and financial implications. Therefore, as Krastev highlights, the real choice the EU is facing in the Balkans is enlargement or empire, which is certain to have an impact on the EU's role as a global actor.<sup>167</sup>

What seems to be the only proper response to the EU's failure to establish a sustainable and functional institutional structure in BiH is a further development of the *acquis communautaire* and policies to more clearly define the establishment and functioning of the state and institutions in

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<sup>166</sup> Rupnik (n1)

<sup>167</sup> Ivan Krastev, *European Union and the Balkans: enlargement or empire?*  
<http://trends.gmfus.org/doc/Krastev%20Paper.pdf>

cases like that of BiH, or those in which the state and the institutions are built from scratch, with the assistance of the EU. Certainly the need for such an approach in the future will be very much present.

In that regard Stephen Lehne's warning is probably even more accurate today than ten years ago when he concluded: "The EU will either succeed in absorbing this region successively into its own structures or risk importing instability in various forms, including through uncontrolled migration and illegal trafficking.... The EU's credibility as an international actor thus depends to a large extent on its success in the Balkans. If it fails to ensure lasting stability in its immediate neighbourhood, it need hardly try elsewhere. Moreover, the time when it was possible to shift responsibility onto their transatlantic partner has probably gone forever."<sup>168</sup>

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<sup>168</sup> Stefan Lehne, "Has the 'Hour of Europe' come at last? The EU's strategy for the Balkans", *The Western Balkans Moving On*, ED Judith Bath, Chaillot paper 2004

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