

# Leaving Dayton Behind: Constitutional Reform in Bosnia and Herzegovina



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# Leaving Dayton Behind: Constitutional Reform in Bosnia and Herzegovina<sup>1</sup>

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More than a decade on from the Dayton Peace Agreement, which put in place a system of calculated checks and balances between three ethnic groups, Bosnia and Herzegovina (BiH) continues to be mired in political instability and ethnic mistrust. Nationalist rhetoric has been on the rise since last year's elections and state level institutions remain weak, poisoning the functioning of the state and Bosnia's bid for EU membership. While Bosnia's location on Europe's doorstep has provided the country with a unique opportunity for stabilisation and integration into the EU, moving towards such a goal has proven problematic. During the eighteen months in office of International High Representative and European Special Representative Christian Schwarz-Schilling, little progress was made on the EU's two declared priorities, namely the Stability and Association Agreement (SAA) and police reform. Only at the end of October 2007, as this paper was going to press, did six Bosnian parties sign a much-delayed agreement on police reform; the European Commission was to judge whether this agreement sufficed to sign an SAA, averting the risk of BiH becoming the only country in the region without such an agreement.<sup>2</sup>

The slow progress towards European-oriented reforms, along with other considerations such as the high cost of the intricate institutional arrangements created by Dayton, has turned constitutional reform into one of the EU's key priorities in BiH - even if this does not feature as an express condition for EU integration. Progress on this matter, however, has encountered many obstacles. On the domestic front, disagreements over the future form of the Bosnian state remain sharp, with Bosnian Muslims in favour of a centralised state; Bosnian Serbs in support of a loose federal formula; and Bosnian Croats caught in between. On the external

side, uncertainty reigns in the face of recently collapsed constitutional negotiations on the so-called April Package (AP), which was agreed upon by political leaders in April 2006 after a year of intense negotiations.

If the EU and BiH fail to find a wide-reaching solution to the current stalemate on constitutional reform (CR) and other reform processes such as police restructuring, Bosnia's progress towards EU membership will be seriously jeopardised. With the arrival of the new HR/EUSR Miroslav Lajcak the EU has another chance to invigorate the process, but it should act with unity and determination and move fast to avoid letting Bosnia's stalemate become intertwined with the challenges facing Kosovo's future status.

This paper examines the dynamics involved in constitutional reform in BiH since 2005. It assesses the shortcomings of the prevailing system of "Dayton democracy", before outlining the international community's role in recent attempts to reform this system. The paper explains why the so-called 2006 "April Package" of constitutional reform failed, and finds that the EU's rather hands-off and passive stance was one contributory factor. The implications for future European policy towards BiH are discussed. A key lesson to learn is that in contrast to previous rounds of enlargement, BiH presents a situation where the state remains contested by different ethnic groups. This calls for an adjustment of the "enlargement machinery" that takes full consideration of BiH as a post-conflict country and offers a framework for political stabilisation tailored to the conditions of the Western Balkans.

## Beyond Dayton?

The Dayton Peace Agreement provided Bosnia with both a regional solution to end the conflict and a constitutional framework to regulate ethnic relations in a highly decentralised state. Dayton signatories established a loose confederation comprised of two

<sup>1</sup> This working paper has been carried out with the support of the Center for Security Studies in BiH (CSS BiH) and the financial support of UACES (University Association for Contemporary European Studies) during a stay in Sarajevo from May to July 2007. All statements in this report are the author's own, and do not necessarily reflect those of the Centre for Security Studies or UACES.

<sup>2</sup> At the time of writing Serbia was due to sign its SAA.

<sup>3</sup> I use this term to refer to Bosnian Muslims.

already existing entities, namely Republika Srpska and the Federation of BiH, and introduced a detailed system of ethnic protections and power-sharing mechanisms to guarantee Serbs, Croats and Bosniacs<sup>3</sup> a say in virtually every decision taken at the state level. The system was wrapped up in the figure of the High Representative (HR), an international institution that was granted executive powers to implement the civil aspects of the agreement. The Constitution was stripped of democratic legitimacy as it was adopted without citizens' consent<sup>4</sup> and was not voted on in the Parliament.

Notwithstanding Dayton's various merits, particularly its contribution to stopping further bloodshed, the complicated institutional structure along with the unresolved ethnic questions left over from the war have effectively limited the nature and quality of Bosnian democracy. The multiple "ethnic veto points" and power-sharing mechanisms built into Dayton's constitution have put in place a system in which all decisions and important positions have to be decided and allocated equally between the three constituent peoples. The presidency, for example, is collectively formed by three members of each constituent people. Any of its members can effectively block any decision provided it is declared to be in violation of a vital national (ie: group) interest. The Parliament is meanwhile divided into two chambers, both of which observe strictly the country's division into three ethnic groups. The House of Peoples, for example, is comprised of five members of each ethnic community, the majority of which can decide whether any parliamentary resolution is a danger to a vital national interest. The House of Representatives (HoR), comprised of 28 members from the Federation and 14 from RS, makes decisions on a majority basis provided that they include "one-third of the votes of the members from each entity".<sup>5</sup> The so-called entity voting system means that just 10 members of RS

represented at the HoR can block any decision taken at the state level.

These particular power-sharing provisions have impaired the quality of Bosnian democracy in three important respects. First, institutions represent citizens only as members of one of the three constituent peoples, placing ethnic representation before general interest and making "nations rather than citizens the bearers of all rights".<sup>6</sup> Second, some provisions remain in violation of the European Charter of Human Rights, since people are forced to identify themselves with one of the three ethnic groups and the interests and rights of those "not belonging to the three constituent peoples risk being neglected".<sup>7</sup> Finally, the system provides incentives for parties to cultivate popular support along ethnic lines, usually on rather extreme nationalist platforms.

The political system in BiH has as a result evolved towards one that is ethnically based and highly fragmented, featuring an inordinately low level of trust among ethnic groups at both the political and societal levels. Except for the SDP, an opposition party at the state level whose appeal is directed to all ethnic groups, major parties in BiH can be defined along three main divides: first, the ethnic social base, ie: Serb (SNSD, SDS and PDP),<sup>8</sup> Bosniac (SDA, SBiH and SDP)<sup>9</sup> or Croat (HDZ BH and HDZ 1990)<sup>10</sup>; second, the nationalist divide, which places parties along a continuum between moderate and radical ethnic-nationalism; and finally ideology, which is of either right-wing or left-wing orientation. In practice, however, the latter has been superseded by the prominence of the ethno-

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<sup>6</sup> G. Katana and G. Igric, "While international players claim Bosnia's leaders have been secretly drafting a new constitution", Balkan Investigative Reporting Network, 18 November 2005.

<sup>7</sup> The Presidency of Bosnia and Herzegovina can only consist of members of the three constituent peoples. This constitutional stipulation prevents members of other minorities from holding public office.

<sup>8</sup> Party of Independent Social Democrats (SNSD), Serb Democratic Party of BiH (SDS) and Party of Democratic Progress (PDP).

<sup>9</sup> Party of Democratic Action (SDA), Party for Bosnia and Herzegovina (SBiH) and Social Democratic Party of BiH (SDP).

<sup>10</sup> Croatian Democratic Union in Bosnia Herzegovina (HDZ BiH) and Croatian Democratic Union 1990.

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<sup>4</sup> Venice Commission, "Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative," Council of Europe, Venice, 11 March 2005.

<sup>5</sup> The General Framework Agreement: Annex Four, Art. IV.3.d), December 14, 1995.

nationalist divide, turning ethnicity into the key political cleavage in the country.<sup>11</sup> In fact, the political situation in BiH has evolved in such a way that left-wing parties have developed a more radical nationalist agenda than right-wing parties. As for the levels of social trust, a UNDP survey conducted in 2007 shows that only seven percent of the population in BiH expresses readiness to trust others, one of the lowest rates of social trust worldwide, including countries such as Iraq.<sup>12</sup>

In addition to Dayton's troubled democracy, Annex Four of the agreement has also failed to establish the basis for a functional state that is capable of responding to both the needs of Bosnian society<sup>13</sup> and the requirements for EU accession. Two key institutional factors have become rather problematic in this respect. First, the state has not only been stripped of key competences such as the control of the security apparatus, but its functioning has also been made highly dependent on the cooperation of the entities.<sup>14</sup> The introduction of laws with further regulatory functions and the externally induced transfer of competences from the entities to state-level institutions have provided the state with some breathing space, but the outcome is an intricate institutional collage that lacks a rational structure. Furthermore, numerous contradictions and inconsistencies remain built into the system, including an imprecise description of the national interest veto, an imprecise allocation of competences between different institutions, without the provision of subsidiary mechanisms, and a bicameral system with similar competences granted in both chambers.<sup>15</sup>

Second, the many provisions aimed at protecting ethnic interests<sup>16</sup> have not only made the figure of the HR fundamental for holding the system together, but have also slowed down the state-level decision-making process to the point of outright paralysis at times. One of these provisions includes entity voting in the HoR, which, in contrast to the national veto in the House of Peoples, fails to provide legislators with a mechanism to overcome any blockage. This mechanism has given entity delegates a powerful tool for blocking decisions at the state level, which is reported to make EU accession almost unfeasible. Harmonising BiH's legal system to European standards will likely require enacting 100 to 150 laws per week.<sup>17</sup> The BiH Parliament has enacted an average of 60 laws per year in the last three years.<sup>18</sup>

In addition to the institutional shortcomings, there is an argument to be made about the high cost of maintaining BiH's multiple layers of government, which were put in place by Dayton. Each entity has its own constitution, government and bicameral parliament, its own army, its own judiciary (including supreme and constitutional courts) and legal system as well as its own education system and tax and customs systems.<sup>19</sup> There are at present three constituent peoples, two entities, ten cantons (within the borders of the Federation), one special district (Brcko), fourteen prime ministers, over 180 ministers, 760 members of legislative bodies, 148 municipalities, and three official languages with two alphabets in a country of 4 million.<sup>20</sup> The maintenance of such a complex structure

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<sup>16</sup> The state government can for example be paralysed by the non-attendance of ministers from one constituent people. See Foreign Policy Initiative BH and SIDA, "Governance structures in BiH. Capacity, Ownership, EU Integration, Functioning State", Sarajevo, 2007.

<sup>17</sup> Personal interview with Western diplomat, Sarajevo, June 2007. Prior to its entry into the EU, Slovenia enacted on average 1200 laws in 2003. See Anes Alic, "Crawling towards Europe", TOL, 22 July 2004.

<sup>18</sup> See Vecernji list, "Parliament will be enacting 150 laws a month" p. 5. Quoted from OHR BiH Media Round up, December 12, 2005.

<sup>19</sup> Some of these double structures have been eliminated as a result of the reform process induced by the international community. As a case in point, Bosnian politicians signed an agreement to unify military forces and create a unified Ministry of Defense in 2005.

<sup>20</sup> Council of Europe Parliamentary Assembly, "Honoring of Obligations and Commitments by Bosnia and Herzegovina", Report, Doc 10200, June 4, 2004.

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<sup>11</sup> M. Keating, "The Creature from the Dayton Lagoon: Institutional Design in BiH," *Puls Demokratije*.

<sup>12</sup> See UNDP, "The Silent Majority Speaks: Snapshots of Today and Visions of the Future of BiH", July 2007.

<sup>13</sup> Barely more than half the population of BiH (50.3%) believes that Dayton has not been effective, reaching almost 60 percent among Bosnian Muslims and more than 70 percent among Croats. Only the Serb community shows greater acceptance of Dayton. Seventy percent of Serbs think Dayton has worked in BiH. See UNDP 2007, op.cit.

<sup>14</sup> See Venice Commission 2005.

<sup>15</sup> Ibid.



has absorbed more than 60 percent of GDP annually. The situation in the Federation is complicated further by the fact that each canton has its own constitution, government and cantonal assembly and exclusive competences, for example in the fields of education and internal affairs.<sup>21</sup> The cost of public institutions in the Federation reaches more than 70 percent of GDP.

As a result of all of these institutional, economic and political shortcomings, the EU has expressed a desire to revisit Dayton. In October 2005, EU commissioner for enlargement Olli Rehn stated that “the constitutional structure is too complex and fiscally unsustainable”, and encouraged Bosnian authorities to work together “to streamline this expensive and multilayered bureaucracy”. He also expressed doubt about the current BiH structure allowing the state “to meet the terms of the agreement as well as of negotiations on [EU] admittance”.<sup>22</sup> Constitutional reform has thus become one of the “27 conditions or issues that need to be resolved in the course of the preparations for European integration”.<sup>23</sup>

## The April Amendments

The first comprehensive attempt at reforming Dayton<sup>24</sup> came about in 2005 under the private initiative of former HR Deputy Principal Donald Hays.<sup>25</sup> Negotiations took place in three separate formats. The first - from April to November 2005 - was facilitated by Hays and enjoyed the financial support of European

countries such as Sweden, Switzerland and Norway. It involved preparatory, exploratory talks among party representatives without public knowledge. The second phase - from November 2005 to January 2006 - was more formal and public. Party leaders were directly involved and the US embassy led the process with the backing of the US Department of State. Finally, the third phase got underway in February 2006. At this point, bilateral meetings took place behind closed doors until a set of constitutional amendments was agreed upon by party leaders in March 2006. These amendments included a new format for the election of the Presidency along with a reduction of its powers; new competences granted to the state; the creation of two new ministries, namely agriculture and technology; the strengthening of the Council of Ministers; and an increase in the number of MPs in both parliamentary chambers.

The April Package has often been portrayed as an American initiative with only partial or limited European support. Even though the role of the US was more prominent in the last two phases, Donald Hays stressed that EU countries were engaged from the beginning: “the European Parliament and the Venice Commission had already spoken about the need for this change”.<sup>26</sup> The European input came through three channels. First, the supply of financial resources in the first phase of negotiations. Second, the provision of a benchmark for constitutional negotiations through the opinion of the Venice Commission on the status of the Constitution in BiH.<sup>27</sup> And third, the provision of declaratory support through public and private statements to infer a sense of inevitability. As a case in point, the European Parliament’s resolution in April 2005 questioned Bosnia’s constitutional framework as a viable model for the Bosnian state and urged the Commission “to support the country’s political forces in finding a consensus to reform the political framework as set out in the Dayton agreement”.<sup>28</sup>

<sup>21</sup> Ibid: 75-76

<sup>22</sup> OHR media roundup, October 20, 2005.

<sup>23</sup> Dani, “Interview: Miroslav Lajčák, High Representative / EU Special Representative for BiH: ‘I have not come here to divide.’” 17 August 2007.

<sup>24</sup> The main goal of the initiative was to build a functional state. Prior to the AP, the international community supported an incrementalist reform process in BiH based on the transfer of competences from the entities to the state level. In addition to state level initiatives, the High Representative imposed amendments to the constitutions of both entities in 2002 so that all three ethnic peoples had equal rights through the territory of BiH as ruled by the Constitutional Court decision on July 1, 2000. See Venice Commission 2005, op. cit.

<sup>25</sup> Prior to this initiative, a few domestic politicians had tried to bring up the debate on CR but it failed to gather enough support within RS and international circles.

<sup>26</sup> Personal interview, Amb. Donald Hays, Washington DC, July 2006.

<sup>27</sup> Venice Commission 2005.

<sup>28</sup> European Parliament, “EP resolution on the state of regional integration in the Western Balkans,” April 14, 2005.

Once negotiations entered a more official dimension, however, the role of the EU became rather ambivalent. Even though the UK - at the time Chair of the rotating EU Presidency - became actively involved, Europe became more of a spectator than an active engager, giving mixed signals and waiting until very late in the process to support it overtly. While some European actors such as the European Parliament were still vocal in their support for constitutional negotiations, other European members expressed concern over several issues:<sup>29</sup> first, the way in which negotiations were conducted, with the US sometimes imposing solutions rather than letting domestic politicians lead the process; second, the quality of the resulting legal product, given that negotiations were discussed by politicians and not legal experts; and third, the danger of having constitutional negotiations interfere with other more advanced, yet fragile reform processes such as police restructuring. As a result, the EU adopted a rather low profile. EU actors assured domestic forces that constitutional changes were not a prerequisite for EU accession and expressed readiness to become more engaged in a second phase of constitutional negotiations, should the AP be approved and effective.

Given the ample support and vigorous leadership provided by the US during constitutional negotiations and some parties' interest in discrediting the process, the April Package has very often been portrayed as nothing more than an external imposition. Other critical voices have also claimed that the international community focused on constitutional reform to the detriment of the issues of real concern to local actors. But even if heavily assisted and facilitated by the international community, the April Package was a domestically driven process. The trigger of the reform process came from domestic circles. The leaders of the Bosniac and Croat communities at the time, Sulejman Tihic and Dragan Covic, were the ones to first approach the international community separately in order to put the issue on the agenda.<sup>30</sup> It was only when initial negotiations, which were facilitated by

Donald Hays in an NGO capacity, seemed fruitful that the international community became fully engaged.

The April Package also marked a clear shift in the relations between domestic and external actors from previous reform processes. It was chaired and led for the first time by domestic actors. "What we did was the job of a secretariat, to write information, steer conversation, take notes, clarify issues, redistribute notes, set the agenda for the next meeting and ensure that the right atmosphere was created."<sup>31</sup> Even when the US took over the process, "at no time in the process, either in Brussels or Washington, were any of the political leaders compelled ... to agree to a specific set of constitutional reforms. Every option under discussion [was] worked out and agreed upon by the political leaders."<sup>32</sup> Bosniac member of the AP negotiating team and SDA President Sulejman Tihic stated, "If we tried to say how much came from each side, I would say 70 percent domestic politicians and 30 percent the IC, and that's because in BiH no negotiation can take place without the involvement of the IC".<sup>33</sup> Serb member of the AP negotiating team and PDP President Mladen Ivanic also stressed, "the best value of this process is that we did this, we did it our own way and the result was a compromise with a little bit of pressure and some suggestions from the US".

Controversy over the April Package of constitutional changes has also focused on the value and worth of the amendments agreed upon. Representatives of the parties that rejected the AP claimed that it was purely cosmetic, failing to address some of the key issues preventing the state from being fully functional. Members of the international community and other party representatives have asserted, however, that even if the AP was not groundbreaking, it represented a first step in the right direction, as part of an ongoing

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<sup>31</sup> Personal interview, Donald Hays.

<sup>32</sup> Bruce Hitchner, "From Dayton to Brussels: The Story Behind the Constitutional Governmental Reform Process in Bosnia and Herzegovina," *The Fletcher Forum of World Affairs*, Vol. 30 (1), Winter 2006.

<sup>33</sup> Personal interview, President of SDA Sulejman Tihic, Sarajevo, July 2007.

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<sup>29</sup> Personal interviews with diplomatic sources.

<sup>30</sup> Serb parties became involved at a later stage and agreed to take part on the process. Personal Interview, Donald Hays.

process that would entail further negotiations. An official from the European delegation in BiH stated, “the American package was not a big change, but for the EU it would have been important. It would have shown political will and opened the door to the second phase in which the EU was planning to have a bigger role, the one dealing with the cantons and the entities”.<sup>34</sup> Following this line, a Western official suggested that from a technical point of view the package was very poor: “It contained many inconsistencies and many issues were not addressed, but it was the right step in the right direction, especially in terms of the process of EU integration. If you had the Venice Commission’s recommendations included in it,<sup>35</sup> it would have been good.”<sup>36</sup> The package also provided BiH with the means to ease its way into the EU, as two new ministries were created and state-level institutions were given the responsibility of negotiating, developing, adopting and implementing the laws necessary for the fulfillment of European standards. The persistence of entity voting in the AP remained a significant drawback, however, given its potential for blocking decisions on EU related matters.

Notwithstanding the heavy international backing and arm-twisting by both the US and the EU, the AP was not approved in the House of Representatives in April 2006. It fell two votes short of the two-thirds majority needed for it to be passed. Fundamental disagreements over the AP, not only across ethnic lines but foremost within ethnic communities, led to the outright collapse of the package and subsequent talks. While all major Serb parties, both Bosniac parties, SDA<sup>37</sup> and SDP, and the Croat HDZ BH stayed firmly behind the April Package, SBiH, the only Bosniac party that withdrew from negotiations in the last stage, and the Croat HDZ 1990 – a splinter of HDZ BH created shortly prior to the voting of the AP – rejected the package along with other independent MPs.

SBiH’s rejection of the AP was made on two basic grounds. First, SBiH refused to approve any “cosmetic” constitutional solution that did not envision the elimination of both RS and entity voting. The second reason for the rejection of the AP was the belief that the adoption of the April Package would imply ratification of Dayton’s constitution, which was never voted on in the Bosnian Parliament. Such arguments are allegedly misleading, however. As a Western diplomat has stated, “by exercising the very functions of the Parliament or any other institution created by Dayton, SBiH is implicitly ratifying and accepting the legal effects of the constitution and the structures created by it”.<sup>38</sup> Even though SBiH’s position received some momentary support from the International Court of Justice’s ruling in February 2007, which blamed Bosnian Serb forces for genocide in Srebrenica in July 1995, the international community has tended to regard SBiH’s platform, based on a state with no entities, as too idealistic, impractical, and unrealistic. “They just don’t want to see that structures have become solid on the ground and that you cannot erase something that has been working for a decade and against the will of people.”<sup>39</sup>

Constitutional discussions also pushed the Croat community further apart as HDZ 1990 split from the leading Croat party HDZ BH in March 2006 because of disagreements over constitutional matters and the centralisation of power in the figure of HDZ President Dragan Covic. Both HDZ 1990, which enjoyed the support of the Catholic Church and members of the Croat business community, and SBiH, capitalised politically on the failure of the AP and made significant headway in the October elections, which were marked by a highly nationalist rhetoric regarding the issue of constitutional reform between SBiH President Haris Silajdzic – who returned to politics prior to the failure of the AP – and SNSD President Milorad Dodik. SBiH, which has long sought to take over SDA’s historic role as the speaker of the Bosniac community, partially succeeded in the 2006 October elections.

<sup>34</sup> Personal interview, European official, Sarajevo, December 2006.

<sup>35</sup> Venice Commission, 2006.

<sup>36</sup> Personal interview, Western diplomat, Sarajevo, June 2007.

<sup>37</sup> Except for one MP within SDA ranks who voted against the constitutional set.

<sup>38</sup> Personal interview, Western diplomat, Sarajevo, July 2007.

<sup>39</sup> Personal interview, European diplomat, Sarajevo, June 2007.

## After the April Package

Even though the international community has been of one mind on the need for constitutional changes in BiH, some divisions have emerged over tactics between the US and the EU. This difference of approach, which became apparent once the US formally took over the AP process in November 2005, has led to two slightly different courses of action over the past year.

The US approach to constitutional reform in BiH has been rather hands-on. As Ambassador Donald Hays suggested, from the moment the US took over the process there was a clear difference of approach. "The Europeans wanted the Bosnians to actually do this, while the US was much more interested in having an outcome. However, the Bosnian parties indicated from the very beginning that without the American presence they would not sit at the table ... they could only see the US ensuring the consensus."<sup>40</sup> In addition, the US views the reform process in BiH as an inclusive one; constitutional reform representing just one facet of a larger process. After the failure of the AP, the US has also shown a manifest interest in putting the April Package back on the table either in its originally agreed form or "adjusted" to the new constellation of forces resulting from the October 2006 elections. This suggests a US preference for limiting constitutional negotiations to the issues that prevented approval of the AP, rather than engaging in a broader constitutional debate.

In contrast, Europe's approach to CR in BiH has been characterised by a rather subtle, hands-off diplomacy despite the fact it has access to far greater sticks and carrots than the US. Europe's preference is to have Bosnian politicians approve a new constitution that streamlines the process of EU accession but in their own terms. As a result, little has been done in the past

overtly to support this process except for some declaratory statements that have fallen short of pushing domestic politicians to stop employing nationalist rhetoric and to engage in talks in a constructive manner. The head of the European Commission delegation to BiH, Mr Dimitros Kourkoulas, stressed on April 4 2007 that the EU supported constitutional discussions, but was "not going to enforce constitutional changes".<sup>41</sup>

The EU's policy on constitutional issues has also followed a step-by-step approach. EU High Representative for Common Foreign and Security Policy Javier Solana stressed in June 2007, "it is necessary to separate constitutional reform from police restructuring, as this would most likely allow for swifter overcoming of these problems".<sup>42</sup> As for the status of the AP after its failure, the EU was inclined to start a broad, open-ended process starting from scratch rather than reducing constitutional talks to the discussion of the AP. There was the belief within European circles that "the US is taking the wrong approach to Bosnia's constitutional problem, by trying to breathe life into a set of proposals that have no real democratic legitimacy".<sup>43</sup> Some divisions within the EU remained, however, with countries such as the UK being more supportive of the AP. In general, Europeans accept that the AP should be taken into consideration but on the condition that it is improved. "We believe that it would be good to start the whole process of constitutional change from the beginning and in a proper way and that representatives of civil society and others participate in it."<sup>44</sup>

While different, both approaches have been ill-designed. In a meeting held with Dodik and Silajdzic in Washington DC at the end of May 2007, the Bush administration failed to reach a comprehensive

<sup>40</sup> Personal interview, Donald Hays.

<sup>41</sup> "We're near Agreement on Police Reform," *Dnevni Avaz*, p. 5. April 4, 2007. Quoted from *Constitutional Changes Monitor*, N. 22, Sarajevo, Centre for Human Rights.

<sup>42</sup> "Separate Police and Constitutional Reforms," *Bosnia Daily*, N. 1531, June 21, 2007.

<sup>43</sup> S. Mustajbegovic and G. Katana, "Washington Summit and Reviving Bosnia's Reforms," *Balkan Insight*, N. 84, May 24, 2007.

<sup>44</sup> "Start Constitutional Negotiations," op. cit.

agreement on a united police, a change in the name of RS and an amended version of the April Package. Even though Dodik seemed to be willing to accept the reduced formula of entity voting<sup>45</sup> and agreed to a Bosnian Serb police force coming under joint control in legal and administrative terms,<sup>46</sup> “once Silajdzic realised there would be no agreement on changing the name of RS, they would not discuss anything else, not even the distribution of competences between the state and the entities”. A RS government official stressed that “the problem with the US initiative a year after the AP was that the ambassador’s idea of compromise was to reach an agreement somewhere between the AP and centralisation. They are asking us to make a compromise on a compromise. But if we are to find compromise, we go back to our starting position, Dayton, as then we can talk and reach a compromise from there.”<sup>47</sup>

Europe’s approach to untangling the deadlock over constitutional reform has met similar fortunes to those of the US. Constitutional talks initiated by former HR/EUSR Christian Schwarz-Schilling prior to his departure failed to garner enough support among domestic forces. EU proposals included a political agreement by which domestic actors would commit themselves to achieving initial results by the end of 2007 and final results by the end of 2009. The agreement included willingness to agree the following: (1) To follow on from negotiations started in 2005 on the basis that BiH remains indivisible. (2) To launch an open, transparent process on constitutional reform aimed at both enabling BiH institutions to fulfill EU integration requirements and increasing the functionality of the state. (3) To establish a commission within the Parliament to manage such negotiations, which would be fully funded by the European Commission<sup>48</sup> and assisted by a series of international experts.

Despite the vagueness of Schwarz-Schilling’s proposal, political divisions along the “April Package divide” remained. The leaders of SDA and HDZ BH did not attend the meeting that was called by Schwarz-Schilling,<sup>49</sup> while the leaders of SBiH and HDZ 1990 greeted and welcomed the proposal. As for the parties from RS, they remained united in the acceptance of both alternatives, although they expressed a preference for approving the AP as a first step. SDS MP Momcilo Novakovic stressed, “the parliamentary commission that is to be formed to reach amendments to the BiH constitution is doomed to failure from the start ... Solutions ... should be reached at the level of political leaders”.<sup>50</sup> Similarly, SDA’s President Tihic suggested that with such an open-ended process with no specific goals laid out, the project would be doomed to fail. “Schilling had the wrong approach. If you go directly to the Parliament it is going to be a waste of time. You need a political agreement between the political leaders prior to that in which the status of the AP is included.”<sup>51</sup> Following the same line of thought, an SDP party official stated, “the OHR agreement is very vague. It says we’ll engage in negotiations but what is the idea behind it? For parties this is great, they are buying time. They can say yes now, but it gives them three years and then we will see”.<sup>52</sup>

Division and recurring vacillation on the part of the international community reflect a lack of understanding of political dynamics in BiH. Since the April Package was rejected, both the US and the EU have failed to gather all parties around a basic framework for pushing the reform process further. They have failed to offer sufficient assurances to parties and to lay out a set of guidelines to steer and lead negotiations. Furthermore, by providing domestic actors with alternative courses of action from which they can pick selectively, the international community has missed the chance to offer a credible, legitimate

<sup>45</sup> Personal interview, Western diplomat, Sarajevo, June 2007.

<sup>46</sup> “US wants Bosnians to end rift for reforms”, *The Peninsula*, May 24, 2007.

<sup>47</sup> Personal interview, RS government official, Banja Luka, June 2007.

<sup>48</sup> Germany had already committed funds for the set-up of the commission for the first year.

<sup>49</sup> SDP’s President Lagumdžija left the meeting before it was called to an end.

<sup>50</sup> “Constitutional Changes Can Result Only Through Agreement of Political Parties”, *Oslobodenje*, p. 9, June 25, 2007. Quoted from *Constitutional Changes Monitor* No. 33, 20-27 June, 2007.

<sup>51</sup> Personal interview, Sulejman Tihic.

<sup>52</sup> Interview, member of SDA Presidency, Sarajevo, June 2007.



process and has instead given domestic politicians a golden opportunity to buy time.

As for the US, by bringing negotiations down to the lowest common denominator and excluding key players from the political game, it gave the wrong impression within BiH. Right after the meeting between Dodik and Silajdzic in Washington DC, HDZ 1990 published a press release criticising the US approach towards CR as politically unacceptable and “not productive”.<sup>53</sup> Additionally, as one American diplomat has suggested, “the US Administration entered into negotiations ... with absolutely no effective or important carrots or sticks with which to persuade them to reach any sort of compromise. Moreover, they did so with no real coordination with the European Union, which now has the lead in Bosnian affairs”.<sup>54</sup>

The EU’s initiative, for its part, started off on the wrong foot, as it was presented only a few days after US talks collapsed and only a few days before the end of the HR term in June 2007. With such unfavourable timing, the process failed to confer credibility and was doomed to failure from the start. Moreover, even though the process envisaged the opening of a forum for discussion, the proposal did not take on board useful lessons from the AP. Presenting final results right before the elections in 2010 could well keep negotiations hostage to electoral politics once again.

## Accounting for the stalemate

There are four key underlying issues that account for the failure of the April Package of amendments and the subsequent attempts by the international community to revive the process of constitutional reform in BiH.

<sup>53</sup> HDZ 1990 press release: “Against Federalisation of BiH”, Cited in *Oslobodjenje*, May 30, 2007. Quoted from CCM, n. 30, 30 May-June 6, 2007.

<sup>54</sup> W. Montgomery, “Gravitas”, *B92*, 7 June 2007.

1. The first set of problems is of a structural nature and is related to Dayton’s institutional set-up. Both the absence of a long-term solution to the ethnic question and the persistence of wartime politicians in the aftermath of the conflict have contributed to the “ethnification” of politics in BiH. Indeed, the carefully balanced system created by Dayton laid the groundwork for politicians to pursue the war by non-violent means. The resulting situation, which has put a premium on nationalist and maximalist platforms in politics, has undermined the reform process and held the country in a state of outright paralysis on more than one occasion. As Keating suggests, the system has led to a situation in which political survival depends on the game of ethno-politics; “the mechanisms for representation and decision-making solidify ethnic boundaries, penalise those unwilling to play ethnic politics, and effectively disenfranchise those not belonging to any of the three recognised groups”.<sup>55</sup> The endurance of such dynamics over time has also given way to institutional inertia and the creation of deeply entrenched interests that benefit from the status quo. “Some people do not see the need for reform. The present situation gives them stability in which they can move.”<sup>56</sup>

Constitutional reform has been no exception to the game of ethno-politics. Despite the good political atmosphere created in the early stages of the process of constitutional reform, the AP derailed once negotiations became public and elections drew near. PDP President Mladen Ivanic stated, “at the beginning I was very optimistic, if we decide to change what we need to change, I thought we could do it. But discussions started to go around entities,<sup>57</sup> entity voting, and even if nobody was putting independence on the table, SBiH presented a very unitary model, which received resistance from RS. From that point, I knew negotiations would fail. The question then was who would take the blame in the eyes of the IC”.<sup>58</sup>

<sup>55</sup> Keating, op. cit.

<sup>56</sup> Personal interview, Western diplomat, Sarajevo, June 2007.

<sup>57</sup> Parties from RS entered negotiations on the condition that RS would not be questioned.

<sup>58</sup> Personal interview, President of PDP, Mladen Ivanic.

2. The second set of problems is related to the psychology and mentalities of each ethnic group and the ongoing lack of political trust. Despite progress made in numerous reform areas,<sup>59</sup> widespread distrust among ethnic communities remains pervasive at the political level. "There is no common spirit nor trust yet, and there is no sense of statehood. We still don't see Bosnia as the best solution for us."<sup>60</sup> The basic underlying problem in BiH is that Bosnian society is yet to decide how to live together and under what political formula. This state of affairs has had a deep impact on how parties perceive their interests, other groups' interests and how best to achieve their political aims.

Bosniac parties are generally "committed to a highly streamlined, empowered, citizen-based state government that is no longer dominated by the entities".<sup>61</sup> They support EU accession but such a goal has been underplayed recently amid escalating nationalist rhetoric and the presentation of radical claims on CR. Bosniacs are fearful of two basic possibilities: (1) They fear that Bosnian Serbs will not make further concessions apart from those agreed upon in the AP. They also fear that Serbs will not genuinely engage in a second phase of CR should the AP be approved. These fears are partially founded as Serb politicians have declared that "a second phase would have to address the situation in the Federation, because this is where the main problems of institutional inefficiency exist". (2) Bosniacs are also afraid that the IC's withdrawal without first securing a strong state will lock them in an adverse situation from which it will be impossible to escape. Given the international community's long-standing support for their claims, Bosniac parties worry that international withdrawal will lead to a country in which decisions are made on an equal basis without the interference of an external actor levelling the playing field to their advantage.

<sup>59</sup> Six ministries have been established at the state level since 1995: the Ministry of Foreign Affairs, the Ministry of Civil Affairs and Communication, the Ministry of Foreign Trade and Economic Relations, the Ministry of Human Rights and Refugees, the Ministry of European Integration and the State Treasury (CARDS 2001). Additional recent key successes include the creation of a Ministry of Defense.

<sup>60</sup> Personal interview, Mladen Ivanic.

<sup>61</sup> Bruce Hitchner, op. cit.

Bosniacs, as a result, have sought to buy time and appeal to the international community on moral grounds. The risk of such a strategy, however, is two-fold: forcing an early international withdrawal without addressing much-needed reforms; and further slowing down the pace of reforms within the Federation, which is already lagging far behind RS. Slower reform of the Federation could ironically form the basis of a de-facto partition between both entities in terms of economic and administrative efficiency, posing further challenges for the future process of EU accession.

Parties from RS, namely SDS, PDP and SNSD, share a common view of the future of the Bosnian state – a federal state in which RS is one federal unit – and are solidly united on constitutional matters. They support the AP and favour EU membership on the condition that it does not put the existence of RS at risk. "RS has always known that the EU is the only solution for Bosnia. But if the EU makes us take a choice between the EU and the RS, we will take the RS."<sup>62</sup> While Serb parties understand RS is to remain part of BiH,<sup>63</sup> their position is poles apart from that of Bosniacs. They "are fearful of being politically outnumbered and thus marginalised in a unitary citizen-based state"; As a result, "they seek acceptance of their entity as a safeguard for their political survival".<sup>64</sup>

In contrast to Bosniacs, Serbs see the long-standing presence of the international community as an obstacle to their aims and seek to increase domestic ownership. They have long pursued an obstructionist approach consisting of blocking decisions at the state level that were perceived to weaken RS. During the AP negotiations, parties in RS became more pragmatic and adjusted their approach towards a more active modus operandi based on the belief that RS survival would be better secured through active engagement. Growing polarisation since the failure of the AP, however, has radicalised Serb positions and tactics

<sup>62</sup> Personal interview, Mladen Milosevic, Advisor to Dodik, Banja Luka, June 2007.

<sup>63</sup> D. Milorad, "Looking Towards Tomorrow", *The Washington Times*, May 25, 2007.

<sup>64</sup> Hitchner, op. cit.

once again. Republika Srpska Prime Minister Milorad Dodik has defied the international community on several occasions in the past few months and has launched a set of proposals aimed at raising the level of division, including the creation of a third Croat multi-ethnic federal unit so as to get Croats onboard, the inclusion of a referendum clause in the future BiH constitution and the announcement of proceedings to return to RS some of the competences already transferred to the state level.

Croats' fears are the result of their perceived disadvantageous position. There is a widespread belief within this community that Croats have no real power vested in the constitution. "We are not a political factor in central institutions, especially in the House of Representatives. That's why we need serious reform of the constitution, not cosmetic changes."<sup>65</sup> As a result, they are interested in keeping the three-pillared power-sharing structure for everything so that they are not outvoted, "but it is difficult to find a solution for them without undermining the need to address the Venice Commission".<sup>66</sup> Generally, they "support a state government that is genuinely decentralised but at the same time functional and efficient",<sup>67</sup> and often take a middle road between the Serb and Bosniac positions, aligning themselves closer to one camp or the other depending on the situation.

As for the Croats' strategy, the debate over constitutional reform has brought to light widespread vacillation about their role within the future state of BiH and their sense of misdirection over how to move forward. Even though Croat parties favour EU accession as a way to increase their political strength, they have been silent on how to find an acceptable solution. The AP represented a reduction of their powers - given that the competences of the two institutions in which Croat interests are protected, namely the Presidency and the House of Peoples, were diminished - but no proposals were put forward to

accommodate their concerns. Croat voices have started to become more vocal, however, expressing a desire to create a decentralised state, based on European standards and divided into three levels of authority: state, middle and local, with legislative, executive and judicial competences vested at the state and middle levels.

Some analysts have suggested that the Croat position has grown closer to Serbs' but further consideration of the political situation in BiH suggests that this assumption might be misleading. Even if some Croats have found Dodik's federal idea enticing, they are wary of his intentions. Serbs and Croats would indeed play hardball if some territory of RS that was formerly largely Croatian - such as Posavina - was put on the table for discussion.<sup>68</sup> "Serbs want Bosniacs and Croats to solve their issues in the Federation, but the Serbs will not be willing to give up any territory of RS."<sup>69</sup> HDZ 1990 stated in a press release in May 2007 that it rejected Dodik's idea on federalisation of BiH, on the grounds that it was "primarily directed to the preservation of Republika Srpska within the Dayton framework and wishes federalisation for the already existing Federation of BH".<sup>70</sup> HDZ BH, however, has moved closer to Dodik's proposal by advocating the creation of four federal units in BiH, including Sarajevo as a multiethnic district,<sup>71</sup> widening the rift between the two main Croat parties.

3. The third set of problems is related to the fragmented nature of the party system within ethnic groups. Disagreements over CR have been fundamental not only across ethnic lines but more importantly within each ethnic group. Even though parties in BiH have usually been portrayed as being divided between Bosniac, Serb and Croat, in practice divisions on constitutional matters within the Bosniac and Croat communities have been rather more significant.

<sup>68</sup> See Mustajbegovic and Katana 2007, op. cit.

<sup>69</sup> Personal interview, Western diplomat, Sarajevo, June 2007.

<sup>70</sup> HDZ 1990 press release: "Against federalisation of Bosnia and Hercegovina", *Oslobodenje*, p. 6, May 30, 2007. Quoted from CCM n. 30, May 30-june 6, 2007.

<sup>71</sup> "Four Federal Units: Best Solution According to HDZ BH," *Bosnia Daily*, No. 1585, Sarajevo, September 5, 2007, p. 1.

<sup>65</sup> Personal interview, HDZ 1990 MP Martin Raguz, Sarajevo, July 2007.

<sup>66</sup> Personal interview, Donald Hays.

<sup>67</sup> Bruce Hitchner, op.cit.



Within the Bosniac community, while SDA has been more pragmatic and favourable of a consensus-building, step-by-step approach on constitutional matters, SBiH has adopted an all-or-nothing position. In the end, the fight has electoral and political ramifications. "There is a political and ideological fight over who was right about the AP and who is the spiritual leader of the Bosniac community. If SDA gives up on the AP for good, then it would admit that SBiH was right and the other way round."<sup>72</sup> Furthermore, SDA is undergoing a process of de-radicalisation and de-secularisation and there are strong tensions within the party between Tihic's moderate wing and a more radical group which is ideologically closer to SBiH's Silajdzic and the religious leader Reis-ul-Ulema Mustafa Cerić. Divisions flared up during the AP negotiations and prior to the 2006 elections. Tihic, who held the Bosniac presidency at the time, managed to keep most of the party behind him but lost the post to Silajdzic after a controversial election campaign that vilified him along with other AP supporters. After the elections, Tihic remained engaged and pragmatic,<sup>73</sup> but the polarised climate seemed to have pushed him towards a more radical platform and closer to Silajdzic's party. Tihic stated in August 2007 that there were no "serious differences" on CR between SDA and SBiH,<sup>74</sup> and revealed the upcoming presentation of a joint constitutional platform in September 2007 advocating a decentralised division of the country into five to seven regions "with administrative borders based on economic, historical and partially ethnical principles".<sup>75</sup> This rapprochement has been short-lived, however. The deal struck between Silajdzic and Dodik

on police reform aimed at clearing the way for BiH to sign a SAA before the deadline imposed by the HR of 15 October 2007<sup>76</sup> was explicitly rejected by Tihic, who instead accepted the police restructuring framework offered by Layčak days before.

On the other hand, the Croat party HDZ BH experienced a massive internal dispute during the AP negotiations that resulted in a new party being formed just before voting. Croat parties have remained divided over CR and the major focus of dispute has remained HDZ's support for the amendments. Since the failure of the AP, the splinter HDZ 1990 has campaigned against it and favoured the European initiative, while HDZ President Dragan Čović has done just the opposite by showing his support for adopting the first set of amendments.

The lack of unity within Bosniac and Croat parties worsened during the constitutional negotiations thanks to the proximity of elections and the formation of new parties. "Parties were counting how much they would win or lose so they could not discuss it in a calm atmosphere. There was not a rationalist approach," says former HR/EUSR Schwarz-Schilling.<sup>77</sup> Furthermore, for the first time, the electoral body could be defined clearly along basic "yes" or "no" lines, providing parties with a golden opportunity to build a differentiated electoral platform around a clear, straightforward issue. Given the close link between the AP and elections, disagreements over constitutional reform have remained unchanged and it has, as a result, turned into a highly divisive political issue both across and within ethnic groups. There has been a recent political rapprochement between HDZ BiH and HDZ 1990, although it is still unclear whether it will be maintained over time. On 21 September 2007, Croat parties, including HDZ BiH and HDZ 1990, adopted a joint constitutional platform in Kreševo in favour of the abolition of the entities and the creation of a state with local, regional and state-level institutions, where regional units would have legislative, judicial and executive powers and be

<sup>72</sup> Personal interview, Western diplomat, Sarajevo, June 2007.

<sup>73</sup> SDA President Sulejman Tihic presented three initiatives since the failure of the AP, including a revised, reduced formula for entity voting, which was dismissed during the US talks in May 2007; a comprehensive reform package that included a deal on the AP, unified police forces and granting special status for Srebrenica; and a reduced AP, including the deal on the Council of Ministers, the Presidency, and state-level competences. None of these proposals has been accepted, although the latter has yet to be put on the table for further consideration.

<sup>74</sup> "Leaders without serious diversities," *Oslobodjenje*, August 29, 2007. Quoted from *Bosnia and Herzegovina Media Monitoring*.

<sup>75</sup> "Agreement Instead of Imposed Dayton", *Oslobodjenje*, p. 2, August 26, 2007. Quoted from Constitutional Changes Monitor, n. 42, 23-29 August, 2007.

<sup>76</sup> This agreement failed to meet the criteria set up by the EU and lacked backing from some parties in BiH.

<sup>77</sup> Personal interview, July 2007.

organised along historical, ethnic, geographic and economic lines, “with the possibility of territorial discontinuity of the present organisational units.”<sup>78</sup>

4. The fourth problem centres on the role of the international community. Even though the offices of both the US and EU prior to the failure of the AP were highly regarded by domestic actors, the lack of unity within the international community contributed to making constitutional negotiations more challenging. As a member of SBiH stated, “there were too many approaches by the IC. You had for example the Venice Commission with their opinion on constitutional matters, the European Parliament, the US, different institutions and organisations with different opinions. As a result, each political leader used what they wanted to further their arguments”.<sup>79</sup> A member of SDS stressed, “The IC, in the end, did not come to unity on the AP, only at the very last moment, but it was too late. They should have been more assertive”.<sup>80</sup>

There were additional shortcomings related to how the international community proceeded with constitutional negotiations. The first of these shortcomings was a failure to engage all the significant forces within BiH with a stake in CR. “One of the deficits of the process was that they didn’t talk to the actors that didn’t like the AP and didn’t try to bring them to the table.”<sup>81</sup> A member of the working group, Zeljko Mirjanic, states that the IC made a mistake by not involving key institutions such as the Parliament until a very late stage. “Not all representatives of parties in the Parliament were included and we had their questions in public. ... One day all of these questions were going to be brought forward in the Parliament, so the Parliament should have been involved.”<sup>82</sup> Additionally, civil society was not only marginalised from the debate but also left uninformed. As the UNDP survey reveals,

only 20 percent of the respondents were informed about the efforts on CR.<sup>83</sup>

Bad timing and hurried deadlines also paved the way for negotiations to be misused and distorted for electoral purposes. “There is this obsession in the IC with quick solutions and this pushes the IC into a position of weakness. I don’t understand why the US tried so hard to achieve an agreement prior to the elections. They could have had this approved with no time constraints.”<sup>84</sup> Members of the AP working group argue that there were too many compromises to be reached in too short a period of time.<sup>85</sup> Additionally there was little room for maneuver for those who did not participate in the negotiations: “We were faced with this take-it-or-leave-it package. The US and the parties that negotiated the package left no room for discussion and there was no political will to discuss important issues such as entity voting.”<sup>86</sup>

Finally, there was a failure on the one hand to prepare the media for dealing with constitutional negotiations once they became public, and on the other to prepare domestic actors to manage such media. In the end, the media played a negative role through their depiction of constitutional negotiations, thereby contributing to polarising parties’ positions. Given the lack of information within civil society, this situation put a great strain on parties during the negotiations and in the lead-up to the elections in October 2006.

## Lessons learned

There are a number of lessons that both the European Union and the international community can draw from the process of constitutional reform in BiH.

The first lesson is that the international community needs to show leadership and regain credibility partly

<sup>78</sup> Quoted from “Bosnian Croats Adopt a Platform on Constitution”, Bosnia Daily No. 1598, Sarajevo, September 24, 2007.

<sup>79</sup> Personal interview, SBiH party official, Sarajevo, July 2007.

<sup>80</sup> Personal interview, SDS MP Momcilo Novakovic, Sarajevo, June 2007.

<sup>81</sup> Personal interview, Mr Schwarz-Schilling.

<sup>82</sup> Personal interview, member of the AP working group and SNSD representative at the RS national Assembly, Zeljko Mirjanic, Banja Luka, June 2007.

<sup>83</sup> UNDP 2007, op. cit.

<sup>84</sup> Personal interview, Western diplomat, Sarajevo, July 2007.

<sup>85</sup> Personal interview with party officials, Sarajevo, June and July 2007.

<sup>86</sup> Personal interview, Martin Raguz.

lost in recent years. This loss of credibility has been the result of two overlapping factors. The first factor is growing political maturity on the part of domestic actors, as international withdrawal draws nearer. The loss of credibility is also the result of the belief, shared among domestic actors, that the international community has grown disengaged from the situation in BiH in the face of more pressing issues such as Kosovo and Iraq, and lacks creative leadership in dealing with the many challenges facing BiH. The international community showed great leadership, according to domestic politicians, when it took a resourceful constitutional initiative in 2005, but now seems irresolute, paralysed and unable to resolve the deadlock over CR. "You now have an international community that is very similar to the one right after the war: with powers but with no long-term vision and not knowing how to proceed."<sup>87</sup>

Notwithstanding this loss of political clout, the international community still holds a prominent position and strategic role in BiH and needs to use it wisely. Given the stakes involved in CR, international assistance is still very much needed, according to both domestic analysts and politicians, even if only to push politicians to sit down at the table and discuss CR. "BiH is a state with special needs and nothing can be done without the support of the IC."<sup>88</sup> "The IC has to be the one to push for a new game, because with the current political climate, Bosnians cannot do that themselves."<sup>89</sup> The IC thus needs to recover credibility in order to be able to push for all the reforms that need to be in place before withdrawal.

In addition to the need to show leadership and clear determination, the international community must learn that constitutional reform can become an impossible task if they do not stand united on both substance and tactics. UK Ambassador Matthew Rycroft says that "we need to be more hands-on. We need to make sure

we reach a balance between the Americans and the Europeans".<sup>90</sup> Otherwise, "domestic actors will exploit the disagreements to their advantage".<sup>91</sup> As a member of the Parliament states, "The EU gave broad support to constitutional changes, but there was never specific mention of the April Package. That sent the wrong message to Bosnian politicians".<sup>92</sup>

There are additional lessons to be learned by the international community, the most important of which is that consensus can be achieved when the right political climate is created. One of the greatest achievements of the negotiations that led to the AP was the creation of a line of constructive communication between political leaders. As SDA President Tihic stated, "the most important value of the agreement was to create a communication between the parties, to create important relations that enabled us to start thinking about a possible agreement on constitutional reform".<sup>93</sup> A Western diplomat confirmed that the atmosphere between domestic actors was positive. "They were participating and trying to come up with solutions that were acceptable to the other parties."<sup>94</sup> But the international community should be careful about the challenges associated with relying on domestic ownership, including political passivity and unresponsiveness. The process of constitutional negotiations, as Hays suggested, showed Bosnian politicians' uneasiness about managing such processes. "Many were still waiting for the international community to lead the process so as not to take political responsibility for the agreed outcome." Furthermore, the failure of this experiment led to a highly destructive political atmosphere.

As for the EU, the key lesson is that the enlargement process requires flexibility in the context of BiH. As a Western diplomat suggested, the EU should not treat

<sup>87</sup> Personal interview, Ivan Babalic, President of ACIPS, Sarajevo, May 2007.

<sup>88</sup> Personal interview, Jasna Belkic, Professor of Law at the University of Sarajevo, Sarajevo, June 2007.

<sup>89</sup> Personal interview, Azim bejkic, Professor of Political Science, University of Sarajevo, Sarajevo, June 2007.

<sup>90</sup> Personal interview, UK Ambassador to BiH Mathew Rycroft, Sarajevo, June 2007.

<sup>91</sup> Personal interview, OHR official, Sarajevo, June 2007.

<sup>92</sup> Personal interview, Momcilo Novakovic.

<sup>93</sup> Personal interview.

<sup>94</sup> *ibid.*

Bosnia as any other country. “This is not like a transitional country in Eastern Europe where it was good enough to say, ‘this is what you need to do, do it and then come back to us’. This approach does not work in BiH.”<sup>95</sup> Even if consensus among political leaders can happen, as some reform success stories has shown in the past, there is a need to explore how the EU can use its carrots more effectively so that conditionality can work better in BiH. The key challenge is therefore striking the right balance between domestic ownership and adjusting the enlargement process to political conditions in BiH.

The integration strategy launched in 2000 with the Stability and Association Process (SAP) signalled a new impetus in EU relations with BiH. It represented an attempt to apply a more coherent strategy in the region by drawing on the process of European integration in Central and Eastern Europe. But while SAP goals were built along the lines of promoting stability, building self-sustaining states and establishing fully-fledged democracies, achieving these goals in BiH has proved challenging. The Commission has been mostly concerned with keeping the EU’s integration commitments and making BiH a more suitable candidate for EU accession, but the enlargement process in Central and Eastern Europe cannot be replicated in a complex political situation such as BiH. As a result, the EU’s lack of experience in dealing with non-functioning states and deeply divided societies within the enlargement framework has largely impaired its ability to lure domestic forces in BiH into the EU net.<sup>96</sup>

Three key shortcomings have made EU incentives less effective in the context of BiH: the lack of a united vision; the lack of determination in dealing with the key challenges facing BiH; and problems resulting from so-called “enlargement fatigue”. While the EU has managed to define its Balkan vision in a much clearer

way since the launch of SAP, the absence of a better-targeted strategy and creative leadership have contributed to making the role of the EU in the region more reactive than proactive, frequently resulting in conflicting policies. Furthermore, the EU is still perceived as speaking with many different voices and, even if the US has lost some of the clout it used to enjoy, it has long been seen as the only actor capable of hammering out consensus among the three ethnic groups. As a result, this wavering policy has affected the way domestic elites regard the process of European integration. It has also created confusion among both political elites and the population about the implications and requirements of the process of EU integration.

“Enlargement fatigue” has compounded the problem. The EU is thus in a process of internal reflection and “there is no political will at the moment among member states”.<sup>97</sup> While the commitment to Balkan integration has not diminished and the enlargement machinery continues to reproduce itself, there are wide disagreements between the Commission and the Council as to how to go about the next round of enlargement. Given that EU accession is still far away, further determination and resolution is needed so that domestic actors do not capitalise on the situation by confronting the EU.<sup>98</sup>

There are additional process-related lessons to be learned by both the international community and the European Union, including the need to keep as many social and political actors as possible engaged in the process of CR; to keep civil society informed in a constructive manner at all times; to prepare the media for constitutional discussions; and to avoid letting the process become intertwined with other political matters, such as municipal elections in 2008 and general elections in 2010. As an SDA member of the AP working group stated, “we need to move fast. We started negotiations more than a year and a half before the elections. Our intention was to finish in 2005 but it

<sup>95</sup> Personal interview, Western diplomat, Sarajevo, July 2007.

<sup>96</sup> Enlargement indeed presupposes the existence of a state that can both manage the process of EU integration and enact all required laws. The EU’s enlargement strategy has been tailored for countries with functioning states and there is little “enlargement experience” in contexts in which this condition is missing.

<sup>97</sup> Personal interview, European official, Brussels, June 2006.

<sup>98</sup> Personal interview, Western diplomat, Sarajevo, June 2007.

didn't happen. CR becomes an election question very easily. We must not wait until 2010".<sup>99</sup>

## Conclusions

The current situation in BiH demonstrates the dangers of power-sharing mechanisms when maintained over a long period or founded in the absence of other counterbalancing institutional mechanisms. Provisionally designed to stop the war and to implement the peace agreement, Dayton's constitutional framework failed to redress the causes of war or to create an efficient state trusted by all constituent peoples. Quite the reverse, it provided political elites with tools to pursue the goals sought during the war through civil means or to simply maintain the resulting status quo. The multiple ethnic veto points built into the system and the prominence of war-time leaders in the aftermath of the conflict significantly contributed to reinforcing the "ethnification" of Bosnian democracy, making the system prone to "endorse ethnic and political divisions" that originated and perpetuated the conflict.<sup>100</sup>

Irrespective of the caveats associated with the implementation of power-sharing formulas in specific circumstances, the debate on the reform of Dayton has offered BiH a new chance to redress Dayton's institutional inefficiencies and chart a course into the EU. It has also offered the opportunity for domestic politicians to respond to Bosnian society, which has firmly expressed a desire for change. In the UNDP survey conducted in 2007, three quarters of respondents favoured the transformation of BiH's complicated system into a more efficient state while only six percent saw no need for change.<sup>101</sup>

Additionally, according to the same survey, seven out of ten respondents believed that the future of Bosnia should be in the EU. Civil Society in BiH should therefore be encouraged to make its voice heard and demand Bosnian politicians stop employing nationalist rhetoric, cultivate the climate of trust that is needed to proceed with EU-induced reforms, and provide creative solutions that encourage consensus rather than widening divergences between ethnic groups. As current HR/EUSR Miroslav Lajcak stated recently, it is time for an end to rhetoric against the existence of the state and its constituent entities. "No one can secede unilaterally and no one can do away unilaterally with the entities."<sup>102</sup>

Recent developments, however, do not augur well. Dodik's declarations about establishing a loose confederation between three federal units have not been conducive to assuaging ethnic groups' anxieties, instead contributing to keeping the level of polarisation high. While some analysts suggest that politicians are merely presenting zero-sum positions in preparation for what could be tough negotiations once issues of constitutional reform are brought back to the table, such strategies are counterproductive. Bosnian politicians should observe the reality on the ground and acknowledge that the international community will never accept the division of BiH into federal units with the right of secession<sup>103</sup>, nor will it tolerate a solution that does not imply consensus by all ethnic groups. Escalating rhetoric will only nurture the international community's doubts about the capability of Bosnian politicians to take on full ownership. Bosnian parties' delay in reaching an agreement on the HR's streamlined proposal on police reform has placed BiH behind neighbouring countries in the SAA process and has prompted the international community to revert to a more forceful strategy in BiH, with HR Laycak

<sup>99</sup> Personal interview, Mirsad Ceman, member of SDA Presidency and member of the AP Working Group, Sarajevo, June 2007.

<sup>100</sup> CoE 2004, op. cit.

<sup>101</sup> Moreover, more than 90 percent of those who knew about the process expressed a desire for change. See UNDP 2007, op. cit.

<sup>102</sup> EU business, "Stalled reforms expose fragility of post-war Bosnia Document," Quoted from *BiH Media Monitoring* Sept 11, 2007

<sup>103</sup> Personal interview, European diplomat, Sarajevo, June 2007. The biggest concern regarding this idea is the underlying notion of organising these federal units on national and ethnic basis. As Sociologist Prof. Ivan Sijakovic stressed, "the suggested model of federalisation puts national questions first again and therefore it can only complicate political relations in BiH further. See "By Paths of Dodik Three Step..." *Osllobodenje*, p. 10, July 14, 2007. Quoted from CCM n. 36, 11-18 July 2007



enacting a set of measures on October 19, 2007, aimed at streamlining the decision-making process at both the government and legislative levels.<sup>104</sup> The set of measures, which will be imposed if Bosnian parties fail to approve them by December 1, has raised the level of confrontation between the international community and parties from RS, who perceive their influence over state-level institutions reduced. On November 1, the BiH Prime Minister of Serb origin Nikola Spiric presented his resignation in protest.<sup>105</sup>

The EU's most pressing priority in BiH is thus to assist the country in complying with EU requirements by getting more actively and constructively engaged than in previous enlargement rounds and contributing to lowering the level of confrontation among ethnic groups. In this context, the EU faces four basic challenges. The first of these is to define clear strategic goals and standards regarding the reform process in BiH. With respect to CR this means spelling out what are the specific issues that Bosnian authorities need to address to streamline the process of EU integration. The European Commission has repeated on many occasions that BiH needs to address CR on its own terms, but domestic politicians are unsure about the specific standards required. Just giving technical assistance is naïve.<sup>106</sup>

The second challenge is to take on the role that the EU is deemed to play in BiH, leading the reform process with further determination and encouraging domestic politicians to sit around the table with a constructive approach. The EU has generally succeeded in providing focus and orientation in the reform process over the past few years and has developed the ability to identify key reforms. Notwithstanding its ability for benchmarking, Europe has shown no united vision on how to lead the process and guide the country into Europe, however. Europe tends to explain its vision very warily and its

declarations often go ignored.<sup>107</sup> Furthermore, speaking with many voices has placed the EU in a position of weakness on many occasions, providing domestic politicians with the opportunity to play EU divisions to their advantage. The public declarations by the German ambassador to BiH in August 2007, who expressed a desire for BiH to build a single nation and to organise the state along five or six regions, sent the wrong message once again. The response from parties in RS was almost immediate. Serb Member of the Presidency Nebojsa Radmanovic stated that, "Instead of stimulating and encouraging us ... on reaching the compromises and agreements that would provide a long-term stability to our state, the international representatives are pulling us back from any constructive solution for BiH with their excesses in public".<sup>108</sup>

Finding solutions to break the stalemate on the reform process in BiH and exploring how conditionality can more effectively work represent the third set of challenges facing the EU. In order to tackle these issues, the EU needs to think creatively on at least three fronts: (1) Establishing a clear set of standards and principles for starting and conducting negotiations which prevent these from being held hostage to political bickering. (2) Designing possible carrots and sticks to engage all parties in a constructive manner. (3) Providing a set of guarantees and safeguards for each ethnic community, so that ethnic concerns and anxieties are addressed.

Finally, irrespective of the decision to terminate the mandate of the HR, the EU needs to start thinking about how to transition from the HR to EUSR. It needs to consider two particular issues: how strong the mandate should be, along with clear benchmarks and guiding principles for BiH accession into the EU, and how the EU will coordinate with other international and European institutions on the ground. Given the

<sup>104</sup> "Lajcak Suggests Measures to Improve Bosnia's Functionality", *Earthtimes*, London, October 20, 2007.

<sup>105</sup> "BiH PM Resigns to Protest Lajcak's Actions," *Onasa*, Nov. 1, 2007. Quoted from BiH Media Monitoring, November 2, 2007.

<sup>106</sup> Personal interview, Western diplomat, Sarajevo, July 2007.

<sup>107</sup> Personal interview, Beriz Belkic, SBIH member of the AP Working group. Current speaker of House of Representatives, Sarajevo, June 2007.

<sup>108</sup> "Schmunk Flare-Up Enrages Discussion Over Constitutional Reform In BiH," *Media Monitoring BiH*, August 17, 2007.

political climate and the prominent role of the HR in BiH, the EU should use HR/EUSR Lajcak's mandate to make as much progress as possible in preparing itself for the next stage in its relationship with BiH. European actors should avoid letting transition preparations become mixed up with any decision on the final status of Kosovo, as this issue will keep Brussels exceptionally busy.

Should the stalemate on the reform process in BiH not be resolved, particularly with regard to police restructuring and constitutional issues, BiH's prospects for EU integration risk being derailed. Current HR/EUSR Lajcak's first priority has been resolving the police reform process so that more important matters, such as CR and the signing of the SAA, can be immediately addressed. But even if police

reform remains the most urgent issue for unblocking the reform process and moving closer to Europe, European institutions and the international community alike should not lose sight of CR. If BiH fails to address such reform, European integration will become an insurmountable task. Furthermore, it is critical that the reform of Dayton does not become intertwined with other domestic political issues, particularly upcoming municipal and general elections, and other pressing regional issues such as the future status of Kosovo. Bosnian politicians also need to take responsibility. As the HR/EUSR put it recently, it is a question of "integration or isolation; either the country will succeed in joining Europe together with Serbia and Montenegro or it will stay in isolation, with all the accompanying consequences".<sup>109</sup>

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<sup>109</sup> Reuters, "West's New Reform Plan Key For Bosnia Future", quoted from *Bosnia and Herzegovina Media Monitoring*, September 6, 2007.

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More than a decade on from the Dayton Peace Agreement, which put in place a system of calculated checks and balances between three ethnic groups, Bosnia and Herzegovina (BiH) continues to be mired in political instability and ethnic mistrust. Nationalist rhetoric has been on the rise since last year's elections and state level institutions remain weak, poisoning the functioning of the state and Bosnia's bid for EU membership. While Bosnia's location on Europe's doorstep has provided the country with a unique opportunity for stabilisation and integration into the EU, moving towards such a goal has proven problematic. During the eighteen months in office of International High Representative and European Special Representative Christian Schwarz-Schilling, little progress was made on the EU's two declared priorities, namely the Stability and Association Agreement (SAA) and police reform. Only at the end of October 2007, as this paper was going to press, did six Bosnian parties sign a much-delayed agreement on police reform; the European Commission was to judge whether this agreement sufficed to sign an SAA, averting the risk of BiH becoming the only country in the region without such an agreement.

This paper examines the dynamics involved in constitutional reform in BiH since 2005. It assesses the shortcomings of the prevailing system of "Dayton democracy", before outlining the international community's role in recent attempts to reform this system. The paper explains why the so-called 2006 "April Package" of constitutional reform failed, and finds that the EU's rather hands-off and passive stance was one contributory factor. The implications for future European policy towards BiH are discussed. A key lesson to learn is that in contrast to previous rounds of enlargement, BiH presents a situation where the state remains contested by different ethnic groups. This calls for an adjustment of the "enlargement machinery" that takes full consideration of BiH as a post-conflict country and offers a framework for political stabilisation tailored to the conditions of the Western Balkans.

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