

Working Paper: The Working Group on the Western Balkans

Although the EU and the US agree that the long-term goal for the Western Balkans is European integration, progress has stalled. This series of working group meetings aims at launching a discussion on the hurdles to enlargement in the Western Balkans, the tools available to various international actors in the region, and how these resources might best be applied to reach the goal of integration most efficiently. These meetings, therefore, address issues that are at the core of the making the Transatlantic relationship work.

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Barriers to EU Conditionality in Bosnia and Herzegovina

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A key question popping up in 2011 will very likely continue to shape policy discussions and debates in the Western Balkans in 2012: why doesn't the "magnetic pull" of Europe seem to be resulting in reform and progress in Bosnia and Herzegovina? The "transformative power" thesis that grounds the European Union's engagements in pre-accession countries is predicated on the assumption that the promised riches of membership will drive domestic leaders in any EU-hopeful country to align their country's policies and practices with the norms required by the Club.¹ The wave of accession over the past decade is used as an illustration of the success of this model. Poland, Hungary and Malta benefitted from the technical rigors of EU accession preparation, followed not so long after by even Bulgaria and Romania. Surely this process promotes and results in the political, social and economic change desired to preserve and expand the European experiment, and to move towards an "ever closer union."

While one should not doubt the benefits to citizens in these recently minted members – the question of why Brussels' incentives have *not* worked as planned in BiH, leads one to wonder whether there has been a conflation of concepts which has led to a years-long effort to use the wrong tool for the necessary job. The old saying, "when you are holding a hammer, everything looks like a nail," comes to mind. The European accession process is the right tool for a country for which the main repair needed is preparation for EU membership. The potential economic benefits of EU membership to BiH are clear. However, there is little evidence to suggest that it is the right tool for repairs that are essentially conflict resolution and state-building problems.

¹ Dzihic, Vedran and Angela Wieser. "Incentives for Democratisation? Effects of EU Conditionality on Democracy in Bosnia and Herzegovina." *Europe-Asia Studies*. Vol. 63, No. 10, November 2011; Bugajski, Janusz and Heather A. Conley. *A New Transatlantic Approach for the Western Balkans*. Center for Strategic and International Studies. November 2011; Prelec, Marko. Balkans: No "Plan B"? *The Balkan Regatta, International Crisis Group Blog*, 30 November 2011.

In terms of conflict resolution, perhaps the best possible “test” of the EU’s powers would have been related to Cyprus. The decades-long frozen conflict in Cyprus offered a real chance for the EU to use its leverage to press the involved parties to continue to engage in balanced negotiations, with membership a significant carrot that could press the already more powerful Greek Cypriots to engage in dialogue with Turkish Cypriot counterparts in a series of incremental yet meaningful conflict management activities. However, this potential was dashed as a result of the EU’s own internal political dynamics, with Greece’s insistence on Cyprus’ membership without regard to the conflict resolution potential of the EU carrot. There has been no progress in terms of resolving the Cyprus conflict since membership, the balance of power in any potential future negotiations has been massively shifted, and progress will be even less likely in 2012, as Cyprus will hold the Presidency of the Council of the European Union in the second half of 2012.²

In terms of state-building, or state-strengthening, BiH may be the EU’s premier test of its model, as BiH holds the not enviable distinction of being one of two frozen conflict countries seeking EU membership (Kosovo being the other, though it is behind BiH, including in terms of EU recognition of its independence).³ Other recent member countries have had a singular advantage over BiH which seems quite simple, but is actually so critical it cannot be overstated: stateness. Leading into their respective accession journeys, Hungarians agreed that Hungary is a country with EU ambitions, Romanians agreed that Romania is a country, and so on. Such countries have continued to struggle with their own issues of national minorities; for example, Slovak inclusion of Hungarians, and Romanian inclusion of Hungarians in social, political and economic life continue to require active and concerted effort.⁴ However, these countries have had leadership and vision unified enough to at least be able to present a united front to Brussels to help them to actually achieve or at least fake the progress needed to receive a positive report card. Recent member states have had no serious movements for – let alone elected high-level officials calling for – possible disintegration to resolve lingering stateness problems.

BiH is in a different league on this matter. The nature in which Yugoslavia dissolved and war erupted in BiH, together with BiH’s historic diversity, defies easy nation-state neatness. The complete takeover of the political debate by nationalist politicians in the late 1980s and early 1990s entrenched the discourse in a position of territorial mono-ethnicity. The war in BiH demonstrated the effect of this ideology on citizens unfortunate enough to get in the way of another side’s ethnic cleansing endeavors. The

² *Cyprus: Six Steps Towards a Settlement*. International Crisis Group, Europe Briefing Number 61, 22 February 2011; *Cyprus: Reunification or Partition?* International Crisis Group, Europe Report Number 201, 20 September 2009.

³ Biscevic, Hido. “Bosnia Stalemate Turning into ‘Frozen Conflict’”. EurActiv.com. March 2010. Web. 24 September 2011.

⁴ *Mechanisms for the Implementation of Minority Rights*. European Center for Minority Issues. Strasbourg: Council of Europe Publishing, 2004; Skovgaard, Jakob. “Power Beyond Conditionality: European Organizations and the Hungarians Minorities in Romania and Slovakia.” *Journal of International Relations and Development*. Vol. 14, No. 4, October 2011, pp. 440-468.

peace that followed thankfully ended the fighting, yet enshrined the language of ethnicity and territory into the government and in turn the polity, allowing the flexibility for reform, yet offering few structural incentives or structures to make that a politically feasible option. It made perverse sense to create the Dayton constitution along rigid and narrow ethno-national/territorial lines – the negotiators were the same individuals who started and fought the war on those same principles. Sixteen years later, the structural inadequacies remain, and challenges to the Dayton structure – and to the existence of the state of BiH itself – have become more and more prevalent, particularly by Republika Srpska President Milorad Dodik, who speaks so often of BiH’s dissolution that it has almost failed to be newsworthy - despite its impact on political and social confidence.⁵

The jury is out on whether stateness – or the conditions to foster stateness – can be built.⁶ However, the past 16 years of post-Dayton international intervention and engagement have been an effort to find out if in fact it can be constructed to a viable enough degree to allow for normalization. Particularly under High Representatives Wolfgang Petritsch and Paddy Ashdown, the theory was that strong *structures* could be put into place to at the same time build democratic institutions while also shaping or constraining political behavior. Once enough institutions, systems, structures, checks and balances were in place, then reform could be considered to be irreversible, and any remaining divisive political instincts would be clipped. Those observers arguing against such intervention would contend that the apparent failure of this approach reflects the basic failures of liberal interventionism,⁷ while other observers would blame the failure of this approach on premature international withdrawal and subsequent reversal of reforms before sufficient structures – including a reformed constitutional structure – had truly taken root.⁸

Is the EU accession process enough to develop or even solidify stateness?⁹ Some analysts have long promoted its potential in this role, arguing that the mere act of adopting and harmonizing thousands of pieces of legislation will stabilize and consolidate democracy. As an example, visa liberalization is often touted as an example of the

⁵ A survey of such language and public discourse is included in *Assessing the Potential for Renewed Ethnic Violence in Bosnia and Herzegovina: A Security Risk Analysis*, by the Atlantic Initiative and Democratization Policy Council, October 2011, pp. 14-23.

⁶ Fukuyama, Francis. “Stateness First.” *Journal of Democracy*, Vol. 16, No. 1, January 2005, pp. 84-88; Paris, Roland. *At War’s End: Building Peace after Civil Conflict*. Cambridge: Cambridge University Press, 2004.

⁷ Knaus, Gerald and Felix Martin. Travails of the European Raj.” *Journal of Democracy*, Vol. 14, No. 3, July 2003, pp. 60-74; Chandler, David. *Bosnia: Faking Democracy After Dayton*. London: Pluto Press, 2000.

⁸ McMahon, Patrice C. and Jon Western. “The Death of Dayton: How to Stop Bosnia from Falling Apart.” *Foreign Affairs*. September – October 2009, pp. 69-83; Chivvis, Christopher. “Back to the Brink in Bosnia?” *Survival: Global Politics and Strategy*. Vol. 52, No. 1, February-March 2010, pp. 97-110; Bassuener, Kurt and Bodo Weber. “Are We There Yet? International Impatience vs. A Long-term Strategy for a Viable Bosnia.” *Democratization Policy Council Briefing Paper*, Sarajevo and Berlin, 31 May 2010.

⁹ Borzel, Tanya A. “When Europeanization Hits Limited Statehood: The Western Balkans as a Test Case for the Transformative Power of Europe.” KFG Working Paper. Berlin: Free University of Berlin, 30 September 2011.

positive incentives of tangible carrots.¹⁰ However, skeptics may look at this case as *sui generis* at best (no other EU reform would have such an immediate, tangible, wide-ranging impact on citizens as providing visa-free travel), and an example of the actual *ineffectiveness* of soft, negotiable conditionality in BiH. One of the requirements for visa liberalization in BiH was the establishment of an anti-corruption agency. While on paper the steps were taken to establish this body, over a year after the promise of this reform, it is not functional, and, in effect, meaningless.¹¹ Citizens – and NGOs and activists in particular – see that empty political promises are enough, and that the country’s politicians have learned to walk the line to ensure obstruction without consequence. And politicians are reinforced in their knowledge that the EU will adjust their terms, rather than the other way around.

Further, the assumption that the EU membership quest is sufficiently transformative to affect stateness is predicated on a reading of the EU’s own norms and standards. If the EU accession processes *were* firmly grounded in sufficient state-strengthening activities to buttress a country with a stateness problem such as BiH, then, yes, the technical might one day become political, thereby entrenching a country into a position of shared vision, cause and future. However, if the EU’s norms and standards are flexible enough that they can be used to actually fix in place existing disintegrative political divisions under the banner of subsidiarity and a state’s particular “margin of appreciation,” then its potential in terms of promoting state consolidation becomes questionable. A writer for *The Economist* recently referenced the EU accession standards as applied in BiH, noting, “The European Union, for example, has set the bar deliberately low for Bosnia to apply for candidate status, in recognition of its unique complexity.”¹² The flexible conditionality of low expectations for reform may be contrasted with potential for firmer conditionality aimed at achieving the results needed for *lasting* state consolidation.

Two examples in particular illustrate this flexibility and the resultant negative impact on state-strengthening. These examples highlight the reasons behind the lack of credibility of EU conditionality in BiH. First, agricultural reform should be a holy grail of accession, as potential member states making such reforms can benefit from expanding export markets as well the unleashed floodgates of EU agricultural aid and subsidies. However, technical support efforts aimed at setting up needed state level structures have to date failed in BiH, in large part because there has not been a consistent public and private insistence from the EU regarding BiH’s deficiencies that can then counter the existing domestic political obstacles to reform. Such an argument should be aimed not solely at the country’s politicians, but should be presented in such a way that BiH citizens will *clearly* see what is at stake if the country fails to reform in a way that will allow it to maximally benefit from reform. Citizens are not getting this information from their leaders.

¹⁰ The European Stability Initiative has a project tracking “the road to visa-free travel” in the Western Balkans at www.esieeb.org.

¹¹ Jukic, Elvira. “Bosnia’s Anti-Corruption Agency Falls by the Wayside.” *Balkan Insight*. 16 November 2011.

¹² “Let’s Stick Together.” *The Economist*, 7 January 2012.

Instead, after years of recommending in its annual progress reports that BiH establish a BiH-level Ministry of Agriculture, in 2011 this recommendation was conspicuous by its absence.¹³ As every EU member state has *some* state-level body to regulate agriculture – even in federally organized states¹⁴ – an obvious application of credible conditionality would be to note this up front, cease the wasteful expenditure of funds in the current unsatisfactory structure and allow the citizens of the country to clearly see what they (and their pocketbooks) are missing in the absence of political interest in a common-sense, business-minded reform. Instead, dropping this requirement in the 2011 Progress Report sends a strong signal to reform-minded actors that everything is in fact negotiable.

A second example is related to the judicial sector. In the spring of 2011 a crisis emerged as the Republika Srpska threatened a referendum in that entity on whether the entity should continue to recognize certain state-level judicial structures. This was largely viewed as the first step towards a future referendum on entity independence from BiH. Whether one saw this as a well-timed bluff by RS President Milorad Dodik, or as a genuine threat of dissolution, he clearly calculated that there was no way he could lose in this maneuver. In fact, he was right. To temporarily stave off the crisis the European Union foreign policy chief Catherine Ashton herself went to Banja Luka to promise what became known as “structured dialogue” on the justice sector in BiH.¹⁵ These dialogues to date have more or less been a re-statement of reform goals noted years ago through the Justice Sector Reform Strategy,¹⁶ and have been an illustration of negotiable conditionality that rewards political intransigence and disintegrative political strategies. This approach is already being challenged by the introduction of changes to the RS Law on Courts that could gravely challenge the role of independent state level judicial bodies.¹⁷ The response in 2012 to this law will be telling, as reference was made to the role of the HJPC in the structured dialogue talks themselves. Finally, nowhere in the structured dialogue talks to date has a seemingly simple act of non-negotiable conditionality been exercised: the confirmation that every EU member state in fact has a robust supreme judicial authority. Reiterating the need for such a reform requirement at the start of dialogue would demonstrate to politicians and citizens alike that the EU is firm in its reform and functionality expectations, but even more importantly, that it will not be blackmailed or pressed into a corner by domestic politicians.

There are other examples of the impact of negotiable conditionality on perceptions of EU credibility as well. The anti-corruption agency noted above, the 2011 IPA funding program process, and past efforts at police reform reflect a similar pattern. In each of these cases, the standards that might be set to improve the functioning of BiH as a

¹³ European Commission, *Commission Staff Working Paper, Bosnia and Herzegovina 2011 Progress Report*, 43, 12 October 2011.

¹⁴ European Commission, *Functional Review of the Agricultural Sector in BiH*, October 2004, available at: www.delbih.ec.europa.eu/files/docs/publications/en/FunctRew/Agriculture_en.pdf, p.106.

¹⁵ Hadzovic, Eldin. “Bosnia: Dodik Agrees to Drop Disputed Referendum.” *Balkan Insight*. 13 May 2011.

¹⁶ Drugi sastanak o “Strukturnom dijalogu o pravosuđu između Evropske unije i Bosne i Hercegovine.” Sarajevo, 10-11 novembra 2011, available at <http://www.dei.gov.ba/dokumenti/?id=8690>; *Bosnia and Herzegovina Justice Sector Reform Strategy, 2008-2012*. Bosnia and Herzegovina Ministry of Justice. Sarajevo, June 2008, available at http://www.mpr.gov.ba/userfiles/file/Projekti/24__SRSP_u_BiH_-_EJ.pdf

¹⁷ Jurisic, Duska. “Izvinite, ministre, ali rusite drzavu.” *Dani*. 23 December 2011.

possible future EU member state have been watered-down to both present a veneer of progress, and to forestall the need for a reassessment of what is in fact necessary to resolve BiH's lingering political crises. The on-going discussions related to Sejdic-Finci reforms will be interesting, as it is not yet clear whether "credible effort," "credible progress" or "credible implementation" will be required.

If the EU would like its expansion experiment to demonstrate the transformative power of Europe in a post-war, frozen conflict environment, there will be a number of opportunities over the upcoming months to acknowledge that negotiable conditionality has not worked, and must instead be replaced by a more rigorous interpretation of and insistence on EU membership requirements. Germany's hard-line approach to Serbia, together with the EU's denial of candidate status in December, provides a possible model for no-nonsense, "tough love". Serbia's December arrest of Zvonko Veselinovic - alleged to be a key ringleader of anti-NATO violence among Serbs in Northern Kosovo - is a demonstration of Belgrade taking a politically unpopular step in exchange for accession progress. The following highlights just a few issues that could bring EU accession efforts in line with those same reforms needed to ensure the functionality and integrity of BiH as a country:

- The efforts to reform the BiH constitution to ensure compliance with the European Court of Human Rights decisions in the Sejdic-Finci case should result in real, implemented reforms; credible progress should not be deemed sufficient, nor should any solution that would simply paper over the need to break down the country's institutionalized discrimination.
- The Council of Europe's clear and grim reports on the health of BiH's human rights record, as well as its compliance with the Councils' own membership requirements, should be endorsed by the EU, the US and other key players, and used as an opportunity to move forward with a reform agenda that is more determined than the haphazard wanderings of the past several years.
- Ongoing and likely new threats to the state's justice sector must be vigorously opposed, with requirements for state-level judicial authorities put up front, and subsequent less consequential structural and technical reforms following, rather than leading, the process.
- Relevant institutional reforms should be predicated on the EU's own commitment to subsidiarity (devolution of governance to the level closest to the citizens), but ensuring state-level enforcement mechanisms to ensure actual implementation and human rights protections
- Instrument for Pre-Accession (IPA) funds should be used to strengthen rather than detract from the functionality of BiH, should ensure that technical reforms do not reinforce negative political trends, and should be disbursed or withheld according to genuine political progress

Finally, there is a real need to ensure a closer and more institutional role of independent civic actors in all stages of EU negotiations. EU accession is based on a model in which the local political elites are the primary if not sole partners in the process. It is assumed that these partners are acting in the best interest of their country's citizens, and are prepared to do the heavy-lifting needed to meet the criteria for membership. The almost

total lack of reform progress suggests that both of these assumptions are false in BiH. Basic structural reforms are needed to create conditions for accountable, representative government. This should include institutional, legal and structural reform, as well as efforts to better engage citizens in the political process.

While EU-funded civil society efforts such as “Citizens for Europe,” “Europe for Citizens,” and “BiH Generation for Europe” have been initiated, a key weakness is that this track is very much separate from the “track one” political discussions. Civil society activities are put into a box, yet have not become an *integral* part of accession processes. An example of the ramifications of this approach emerged in late 2011, when, following the publication of the 2011 *Progress Report*, six BiH NGO networks (representing in total more than 800 CSOs) sent an open letter pointing out weaknesses in the 2011 Progress Report, criticizing what it referred to as *pro forme* coordination between the EU and civil society, and calling for improved cooperation.¹⁸ In response, the Delegation reiterated their past coordination with civil society (primarily through the EU-funded TACSO (Technical Support to Civil Society Organizations initiative)), and confirmed that the BiH Directorate for European Integration (DEI) is responsible for programming, and that systematic participation of civil society in working groups related to programming is not foreseen.

The top-down and bottom-up tracks fail to meet. Civil society involvement in the legislative process at all levels should be the norm, rather than the exception, and the absence of such engagement questioned. Common-sense civil society ideas for reform should be reinforced by EU (and other) international actors in their meetings with political leaders, so that the traditional marginalization of civil society by the political class will be lessened. The DEI should be pressed to open up channels for dialogue with civic actors, and the concerns of civic networks that take the time to make their opinions heard should be taken seriously.

Politicians in BiH are acting perfectly rationally considering the framework in which they operate. Obstruction makes sense when there are neither consequences from the EU in terms of hard reform demands, nor consequences at the ballot box due an electoral system that rewards intransigent political posturing over practical results. While the image of a “regatta” of Western Balkans countries busily rowing themselves to EU membership is nice, BiH’s skiff is structured in such a way that it is akin to racing with a lead weight, and with multiple coxins coaching multiple rowers whose paddles simply do not line up. The reality is that if there *were* real political will among the country’s leaders to move forward, then there *would* be little obstacle to finding ways to make reform – and EU accession - happen. However, in the absence of such will, and until governing structures and frameworks are established that reflect less the war of the 1990s and more the aspirations of the 21st century, meaningful and non-negotiable conditionality will be required if the EU experiment in the Western Balkans will include BiH as a success story.

¹⁸ “Reaction to the 2011 Progress Report on B&H,” Sarajevo/Banja Luka/Mostar, November 10, 2011. The letter was signed by the following networks of NGOs: The Volunteers’ Network; Agreement Plus; the Justice Network in BiH; The Network for Building Peace; the NGO Council; and the Women’s Network BiH.