

Democratization Policy Council

Understanding and Breaking Bosnia and Herzegovina's Constitutional Deadlock: A New Approach for the European Union and United States

Executive Summary

Bosnia and Herzegovina (BiH) is currently in a severe crisis that could yield total political paralysis, and perhaps eventual disintegration of the state.

The international community in BiH has no discernable strategy. While rejecting Republika Srpska (RS) Premier Milorad Dodik's desire for eventual RS independence and international acquiescence to it, there has been no effective response. The international community's acquiescence leaves BiH in a "neither secession nor success," limbo. Unable to align its desire for a reduced commitment to the ugly on-the-ground reality, the EU nevertheless has clung to its standard script of progress and "transition" brought about solely through EU inducements – a theoretical nirvana of carrots without need of sticks. This lack of strategic engagement has fostered political decay. BiH requires far more tailored reform than the off-the-peg *acquis communautaire*, which treats BiH as if it were Slovenia.

Last December, the desire to proclaim "success" at any cost by initialing a Stabilization and Association Agreement (SAA) led to an ignominious surrender on police reform – a surrender that has now proved futile, as reform is once more blocked. Even if the SAA is signed later this year, it will not transform BiH into a functional state.

The stumbling block for BiH is its constitutional order. Robust international engagement through the Office of the High Representative (OHR), equipped with its executive "Bonn Powers" has allowed a project of state-building from above over the past decade. This has resulted in a number of institutions, laws, and reforms that have helped BiH recover from its 1992-1995 war. But the durability of these accomplishments in the face of hostility from established political elites is questionable – as the degeneration of the past two years has shown.

The BiH political elite forms an oligarchy, and while the Dayton order suits no faction leader perfectly, it is the second-best option for all of them. Dayton's Annex IV deters linkages among citizens who consistently profess similar priorities and concerns. With weak international engagement, Dayton BiH defaults toward *de facto* partition.

Until there is a constitutional order capable of allowing BiH to advance toward the EU under its own steam, all the Dayton instruments, including the High Representative with Bonn Powers, must be maintained – and strengthened. The EU holds the carrots and the HR wields the sticks. Creative thinking regarding new sticks is urgently needed.

As the external guarantor of peace and stability, the EU must leverage its vaunted "soft power" to catalyze a considerably de-ethnicized constitutional and electoral order as the price of admission into the EU. Its conditions should be simple, and include the following:

- 1) Respect for BiH territorial integrity, including continuation of external guarantees;
- 2) Gradual de-ethnification of franchise and public office, while ensuring more efficient and less disruptive ways of protecting Vital National Interests. Rejection of ethno-territorial principles;
- 3) Greater local control over revenue and governance.

By applying its influence on cross-cutting wedge issues such as:

- 1) broad visa liberalization;
- 2) rural development;

- 3) conditional aid to finance BiH rail and road links with the EU and neighbors;
- 4) foreign currency accounts reimbursement; and
- 5) rationalization of governance structures with a focus on delivery of services,

the EU can encourage BiH citizens and constituent peoples to escape the Dayton straitjacket through a constitutional convention. Meanwhile, to facilitate a domestic consensus on an EU-compatible constitution, and to capitalize on remaining US credibility in BiH, a senior US diplomat or politician should be appointed as special envoy to wield an additional set of incentives and disincentives.

One creative homegrown idea worthy of BiH popular consideration and the EU's support is 'municipalization' as proposed by Zdravko Krsmanović, Mayor of Foča Municipality, and widely supported by a number of Mayors across BiH. This plan would leave BiH with two layers of government, state and municipal. Its consolidation of some of the current 142 municipalities to a more rational number would free up vast financial resources, providing long-neglected regional centers greater local control over revenue and greater weight while expanding common areas of interest, transcending the pervasive ethnic divide by directly appealing to citizenry ignored by local elites and international actors alike.

RECOMMENDATIONS

To the EU and EUSR:

- 1) Make it clear that the price of EU accession is an efficiently functioning BiH, and that this in turn demands genuine constitutional reform:
 - a. Admit publicly the reality that the EU is in BiH for the duration, until BiH has a constitutional order that enables the state to function without constant intervention,
 - b. Develop a specific BiH EU accession strategy, considering long-term results.
 - c. Recognize the EU/EUSR's potential leverage of sticks and carrots, and marry these incentives to specific steps toward domestic development of a constitutional solution.
 - d. Assist BiH civic and municipal level actors in developing EU-compatible constitutional models for consideration at a constitutional convention.

To the U.S.:

- 2) To maintain visibly strong American engagement in maintaining BiH integrity and developing a new constitutional order, task a high-visibility special envoy with necessary sticks and carrots, and increase troop presence in BiH by way of Partnership for Peace, perhaps in Brcko District. Coordinate approach with the EU to ensure solidarity and maximization of political leverage.

To Bosnia and Herzegovina's citizens and mayors:

- 3) Work in concert with the EU to organize a constitutional convention, including members of civil society, mayors of all municipalities, as well as the BiH Parliamentary Assembly.
- 4) Encourage the further development, through civil society and municipal leaders, of an alternative model of governance based on Mayor Krsmanović's municipalization proposal, to be publicly presented for consideration at the constitutional convention.

Sarajevo/Gross-Umstadt/Brussels, February 2008

I. How We Got Here: Peace Implementation and State-Building since Dayton

The events of the past two years have shown with great clarity what happens in Dayton Bosnia and Herzegovina (BiH) when the international community abdicates its steering and compensating role: the country drifts into crisis and closer to total dysfunction, with the specter of partition rearing its head. To overcome entrenched opposition to Dayton implementation, the “Bonn Powers” were given to the High Representative at the end of 1997 – as the international community finally began to admit its role in BiH would last far longer than originally stated.

Soon after, the Bonn Powers were used, directly or through explicit and implicit coercion, to press forward with reforms to increase state functionality. The Bonn Powers made it politically risky to obstruct even those initiatives that could never be imposed. These powers were augmented by the prospect of membership in the EU and NATO. Together, these offered a wide array of potential carrots and sticks to the High Representative. This toolbox was used with increasing effect earlier this decade to achieve a number of reforms that would have been thought impossible just years before, such as laws on property restitution, defense reform and VAT.

But the success of state-building from above – and there was no other way to approach it at the time – masked an inherent weakness. A functioning BiH, transparent and accountable to its citizens, is anathema to the established political elites, who have, almost without exception, controlled BiH in what amounts to an oligarchy since 1990. Dayton helped secure their positions by granting them control over electoral and territorial fiefdoms, with a thin veneer of democratic practice to legitimate their capture of state and public assets. These elites, the generation that came of age in the 1980s, continue to control almost all aspects of society to date. Their opposition to change is neither out of obstinacy nor stupidity, but out of self-interest and clientelism. The stability of this class is remarkable: only death, jail, or a war-crimes indictment can remove the members of this club. Membership, as in the case of Milorad Dodik, Prime Minister of Republika Srpska (RS) and the most notable newcomer to BiH-level politics, meant the ultimate adoption of the tried-and-tested politics of fear and resentment. “Partnership” with this political class was seen by them as accepting and ensuring their continued political dominance.

While there are genuine differences among the members of the political elites, and a divergence in terms of what sort of BiH they would like to see (if at all), they share a vested interest in the current system, which is the second-best option for all of them after their mutually incompatible first choices. All fear a threat to their monopoly or any competition for support within “their” constituent people. To be a senior-level BiH politician is to occupy perhaps the coziest political position in Europe – decent pay, no responsibility, no accountability. Dayton is their political life-support system, compelling most citizens into supporting their “own” crook or abstaining from the political process altogether.

The international community’s headlong and ill-strategized “transition” away from peace implementation and toward an EU-driven approach based on the eventual integration of BiH helped create a false sense that the previous domestic political limitations no longer applied. The announcement that the Bonn Powers would no longer be used except in narrow circumstances, the “rehabilitation” of some of BiH’s more infamous political actors, and the tacit message to Milorad Dodik that he could threaten an independence referendum for RS so long as he didn’t organize one, further diminished the credibility of the international community. Dodik’s success in facing down the international community on police reform in December 2007 dug that hole even deeper. No intellectually honest reckoning will suggest that the Dayton peace implementation agenda has been completed, or that the situation currently warrants the reduction of international engagement.

At the same time, the United States spent most of its remaining real leverage in the region in its forceful, but ill-timed and ill-executed, push for the April 2006 package of constitutional reforms. By removing full cooperation with the Hague war-crimes court as a condition for Serbia’s membership in the Partnership for Peace (with BiH and Montenegro as afterthoughts), Washington’s continued political leverage in the region is more a legacy of its relatively forceful engagement in years past than

its current power or resources. Yet the US Embassy door still remains the default address for BiH political actors seeking crisis intervention, despite the EU's overwhelming presence and strategic interest. The EU's unwillingness to exercise hard power has hamstrung its credibility among the Bosnians as a policy actor.

II. *The Downward Spiral: Dodik Exposes the Fragility of BiH Today*

Two years ago, many heralded Milorad Dodik's ascent to the position of RS Prime Minister as a positive turn away from the dominance of the Serbian Democratic Party (SDS), which created hope for a functioning non-nationalist state government following the October 2006 elections. That optimism was short-lived. Dodik almost immediately applied the brakes to all state-building, even on issues for which it would be hard to develop a nationalist popular groundswell, like banking supervision. His government's obstruction became consistent even before the 2006 "April package" failure led by Haris Silajdžić of the Party for BiH. Dodik had built an RS political consensus to support the April package as the first and last amendments to Dayton, and an end to the OHR. This act was the opening volley of what became the ugliest election campaign in BiH since 1996, with Silajdžić and Dodik as the main antagonists loudly exploiting the political fear factor. Dodik soon after took a cue from the Montenegrin independence referendum, maintaining that Silajdžić's statements calling for the abolition of the RS could lead to the latter's secession.

All this occurred in an environment of international lack of coordination and resolve. The rapid degeneration of political discourse did not fit the EU's script of progress and "transition" brought about solely through EU inducements – a theoretical nirvana of carrots without need of sticks. This lack of will emanated from the national capitals of those states obliged to oversee peace implementation in BiH. Political capital was further reduced by the challenging dialogue with Serbia over Kosovo. The Serbian Government, on the other hand, exploited BiH's vulnerability and the ready collaboration of Dodik in order to bolster its bargaining power with the EU. The result was a further sharp deterioration within the BiH political scene through orchestrated Serb threats to withdraw from state institutions.

As a canny political operator, Dodik recognized that the Dayton constitution made his adoption of the mantle of protector of the RS and its prerogatives the most politically profitable course. And it has paid handsomely, with his party now utterly dominant in RS politics. Dodik, who began his political career as a moderate, is living evidence that the Dayton system generates nationalist division.

III. *Constitutional Reform: The Genie Out of the Bottle*

The constitutional reform genie, now definitively out of its bottle, permeates every other item on the international agenda for BiH. No issue has been more contentious than police reform, because the police are the last and most crucial guardians of the Greater Serbia project in BiH and of the comfortable dominance of Serbs within the RS. Whoever controls the RS police prevents change from below and controls criminal investigations. The RS police, many of whom were active during the project of ethnic cleansing, remain the key discouragement to non-Serbs attempting to live in the RS.

Despite some gallant efforts to insist on reform as a clear and inevitable precondition for the signature of the SAA, the EU allowed the RS to tie it in knots. In December 2007 the EU and OHR ignominiously surrendered, accepting Banja Luka's bottom line and initialing the SAA. This was accompanied by pressure on the Bosniak parties (which had accepted the EU's original conditions) to go along. The trophy of the SAA seems the only goal, but there is no clarity on the EU's follow-on strategy – now challenged by the intransigence of Sulejman Tihić and his Party of Democratic Action (SDA).

It seems that there is less confidence than before that the panacea of the *acquis communautaire* and accession process will draw BiH inevitably into the EU family. The EU machinery seems to be on

autopilot, unable to adapt to a situation that doesn't fit its mold. Unless this changes, it will guarantee that BiH remains in dangerous limbo for years to come.

IV. *Kosovo: The Tacit Bargain*

This policy paralysis comes at a time of major regional stress from Kosovo's declaration of independence. Kosovo and its political impact in Serbia dominates international and especially EU policy-making. Yet while the situation of Kosovo is troublesome, it will affect long-term stability in the region to a far lesser degree than will continued dysfunction in BiH, as the current Slovenian Presidency of the EU has warned on several occasions.

For years the international community has insisted that Kosovo and BiH have nothing to do with each another, yet its policies tacitly link them. High Representative and EUSR Miroslav Lajcak recently admitted that the two situations are linked, and that this makes it imperative for BiH to sign an SAA to ensure its stability. In a February 7th interview with *Oslobodjenje* daily, Mr. Lajcak stated that "For me the connection between Kosovo and BiH is another obvious reason why BiH must find its place in the European structures as soon as possible. That is why it is irresponsible for the state to slow down its way toward the Union which is the only clear guarantee of stable relationships in the region." This linking places even greater pressure on SDA leader Sulejman Tihić to climb down from his belated opposition to the watered-down police reform deal he accepted in December. But admitting this linkage does not help BiH preserve its sovereignty. Despite a subsequent OHR/EUSR statement depicting, in a dry and legalistic manner, the differences between Kosovo and the RS, an impression of confusion and lack of resolve on the part of the international community remains.

It is clear that the only policy actor in BiH, domestic or international, with a coherent strategy is Dodik. His aim is clear: to ensure *de facto* independence of the RS, and maintain state dysfunction. This will lead either to consolidation within BiH of a client mini-state for Serbia - ready to destabilize BiH whenever Serbia needs to bargain with the EU - or to eventual secession. Given the current trajectory, this policy is shrewd enough. But even if it has not yet led to an active referendum in the RS, it ensures continued bitterness among Bosniaks. Their great sense of grievance was fed by last year's International Court of Justice verdict, which Silajdžić has used as a rallying cry.¹ If nothing is done to relieve the situation, this bitterness will have further destabilizing consequences.

V. *Constitutional Disorder*

The stumbling block for BiH is its constitutional order. It is the make-or-break issue for BiH, and for the EU's credibility as a policy actor region-wide. The Annex IV Dayton Constitution, and the ethno-political elites it preserves and generates, is *the* impediment to the country's ability to function and provide accountable governance and services to its citizens.

By slicing the electorate into ethnic factions prone to being manipulated by self-serving demagogues into fearing one another, the Dayton system deters alliances among citizens who consistently profess similar priorities and concerns [see the 2007 UNDP Report 'The Silent Majority']. It prevents establishment of a true marketplace of ideas and a political center, since politicians need not win the votes of anyone but "their" voters. The March 2004 Venice Commission report was explicit about these deficiencies, some of which are under current challenge at the European Court of Human Rights, and the EU supported the last attempt at constitutional amendments - without, however, asking for constitutional change as the price of admission into the EU.

Change to the Dayton order can only take place with the consent of all peoples. Both Russia and Serbia have, moreover, made it very clear that they stand as explicit guarantors of the Dayton

¹ The ICJ found Serbia not guilty of genocide, but judged that a genocide did occur in BiH. It also judged that Serbia remained in violation of the Genocide Convention for not handing over the perpetrators of genocide.

Republika Srpska. The EU organizations and member states appear inclined to avoid this fight, instead gravitating to the more familiar and comfortable ground of “implicit conditionality” and “partnership” with established authorities.

But the ugly truth is readily apparent to all who are willing to see: BiH cannot survive without a) constant international intervention in Dayton BiH – amounting to perpetual triage; or b) a considerably de-ethnicized constitutional and electoral order. Dayton BiH could only function; even theoretically, with the requisite political will among the elites, but Dayton makes their polarization politically profitable. Furthermore, perpetuation of the Dayton system is not only a political and diplomatic inconvenience to the EU and US. It is also a question of long-term peace and stability in the Balkans.

The partial successes in state-building and increasing government accountability, made through robust international engagement and coordination, are much more fragile than some appear to believe. Given the degeneration on the political scene in BiH in the past two years, an attenuated timeline to attain functioning BiH governance in an evolutionary fashion is not a promising approach.

This document, therefore, looks for creative measures to improve the process of constitutional change, hand-in-hand with establishment of benchmarks that the EU can with full justification demand as a minimal prerequisite for taking BiH into the fold.

VI. *The EU Holds the Key*

Those who argue that constant intervention to compensate for BiH’s systemic dysfunction is unsustainable are absolutely correct. But there is as yet no sign that this is leading to a new approach, and the old tools are not as effective as they once were.

The ultimate strategic goal for the EU, as lead actor for the broader membership of the Peace Implementation Council (PIC), has to be a constitutional order that enables the state to function to the minimum level required of EU members. However, in order to achieve this ambitious goal, the entire international community in the country must work in concert. Specifically, the situation requires broader involvement by EU, US and other concerned powers. This involvement would add to the seriousness of future talks on the constitutional reform and their outcome.

In the case of BiH, the EU’s potential leverage is far greater than with other countries, owing to the EU’s deep engagement in the governance of the country, by way of the PIC and the EUSR. The EU is the external actor with the greatest interest in BiH’s survival and stability. The irony is that it has never developed a strategy on how to leverage its vaunted “soft power” toward development of a state it can do business with.

Hope that the *acquis* and the laundry list of requirements contained in the Partnership Document will deliver a functional state is misplaced at best and proven to be counter-productive. The EU should address the problem frontally by applying its power and influence to aid Bosnian citizens in developing a sustainable solution, that they can impress upon their politicians in order to adopt a new constitutional arrangement. Actions toward this end should include definition of minimum constitutional standards, and defining benchmarks after signing the SAA, the delivery of which would yield immediate tangible benefits for the population.

Such an effort will require greater resourcing of the EUSR, far greater intra-EU coordination on the ground and in Brussels, and the continued existence of an OHR with Bonn Powers. It will require high visibility for the EUSR/HR himself, a number of members of his team, and the larger EU family – including ambassadors. Anything less guarantees failure and EU engagement in a crisis response and maintenance capacity *ad infinitum*. Soon, the EU may not even have this choice.

VII. Other Major Players

The United States, in particular, should be encouraged to participate in this process more actively, perhaps through the presence of a senior diplomat or politician acting as a special envoy who would wield an additional set of incentives and penalties. The US has been largely willing to perceive BiH as a case of successful intervention, to be handed off safely to the EU integration process, yet it is currently confronted with the specter of BiH disintegrating under the aegis of the EU. The US must insist on keeping the existing tools of Dayton implementation – OHR and its Bonn Powers – while helping to develop new ones. A display of real unity and genuine shared concern between EU and US for the future of BiH would work as a deterrent to reckless and unproductive political brinkmanship exhibited by local political leaders in prior negotiations.

There is also the problem of Russia. Moscow has been vocal in its opposition to US and EU policy on Kosovo, and has openly aligned itself with RS Prime Minister Dodik in his efforts to keep BiH state institutions weak. It is highly unlikely that Moscow will play a constructive role in helping ensure a functioning BiH. The unity of the US-EU approach, together with other democracies, is therefore all the more essential.

VIII. Keeping the Lid On: Maintain the Current Tools While Developing New Ones

The Bonn Powers are dramatically weakened as a result of the police reform showdown late last year. Dodik's assessment is that anything short of active preparation for an independence referendum is below the Bonn response threshold. But there remains a compelling case to be made for the retention of the Bonn Powers and OHR until a) peace implementation can be declared complete with objective grounding and b) the BiH governance system is such that OHR with its Bonn Powers is no longer needed as an arbiter of and compensator for dysfunction.

There is sure to be considerable advocacy among PIC members, especially Russia and perhaps some of the non-Contact Group members, for OHR closure. The BiH political situation clearly does not warrant such unilateral disarmament. Those who argued that BiH can and should progress under its own power were largely silenced by the events of 2006-2007, when this experiment was tried to disastrous effect. OHR's Bonn Powers have in the past facilitated for international coordination by allowing all international actors the opportunity to make their agenda the High Representative's agenda. Without this tool, there is no perceived benefit to being coordinated, leading to the current international community incoherence.

While much has been said about the death of the High Representative's Bonn Powers, they maintain some deterrent effect among BiH political actors. That Dodik in particular covets their elimination pre-peace implementation, suggests a lingering fear they may yet be employed against him. Creatively sharpening this deterrent by developing new pressure tools is essential.

While the missions of the OHR and EUSR are distinct, they can only succeed if they complement each other. The OHR wields the sticks, whilst the EU distributes the carrots. Both should be employed to complete peace implementation while impelling forward movement toward EU and other international standards.

The effort to separate these roles and to close the OHR, results more from bureaucratic imperatives in Brussels than any intellectually honest, on-the-ground analysis. All the tools at the disposal of the HR must remain in hand through to the point they are no longer needed in the BiH context, i.e. when there is a governing system that no longer requires an external arbiter at every turn.

IX. New Carrots and Sticks: Between SAA and EU Membership

In addition to the standard list of *acquis* requirements that kick in following the SAA, linkage of long-stalled policy objectives via publicly articulated *quid pro quo* arrangements, predicated on

conditionality, can assist in building the momentum to achieve meaningful constitutional reform. This method is already employed, with (now watered-down) police reform and PBS requirements needed to sign the SAA. But other long-standing problems also can be approached in this way. Big-ticket carrots attached to resolution of these benchmarks can generate broad public support – and thereby apply pressure on politicians, who will be clearly to blame for any failure to meet these benchmarks. Politicians will be compelled to respond to the popular will between electoral cycles, helping institute the virtuous circle of public engagement toward responsive governance.

Below is a list of “wedge issues” with immediate resonance to the BiH public. These can be harnessed to issues on which the Bosnian political oligarchy (or elements thereof) is notoriously resistant, and thus produce popular will to pressure politicians to deliver.

- 1) **Broad Visa Liberalization** – There has been a stunning lack of creativity on this issue, as well as an unconscionable tilt toward Serbia during its electoral cycle. Belgium is to be commended for insisting on a region-wide visa liberalization process. If the EU can begin discussion on making it possible for Serbians to get EU visas in exchange for obstinacy towards ICTY, then it ought to be able to summon the will to begin discussing visas with BiH in exchange for *something* that could be delivered with BiH political will – like a resolution of state property issues, perhaps subject to binding arbitration. The pressure on politicians from below to deliver will be overwhelming, in the Republika Srpska as much as in the Federation.
- 2) **Rural Development** – Rural and agriculture issues are very much underrepresented within present BH government institutions and policies and do not at all reflect the importance which agriculture and rural development have in BiH both in economic and social terms. The present status also does not reflect the importance agriculture has inside the EU *acquis*; with almost 50% of all EU legislation addressing the agricultural sector. Rural development support is the complex of measures intended to a.) infrastructure support for rural, less favored areas, b.) basic social welfare for the rural population, c.) investments in agricultural and non-agricultural holdings, d.) environmental protection for a sustainable and unpolluted countryside, e.) promotion of agro-tourism, producer groups and producer associations, etc. BiH will have access to EU structural and rural development pre-accession funds once it has obtained the status of an EU Candidate Country. Currently, however, most people in the country have no idea what opportunities they are missing because of their own politicians’ obstruction. The knowledge of this additional rural development funding will put positive political pressure on politicians from rural voters.
- 3) **Conditional Aid to Finance BiH Rail and Road Links with EU and Neighbors** – There is universal frustration with the state of BiH’s linkages by road and rail, and it is a significant handicap to economic growth. Obstruction under guise of national interest, but usually for patronage, remains a serious impediment for railways and road projects such as Corridor 5C. These would become untenable politically were the leaderships seen to be obstructing a massive infusion of funds dedicated to BiH companies to upgrade this infrastructure to EU specifications under state supervision. The EU should offer this aid on condition of a comprehensive road and rail development and implementation plan – which may assist establishing greater competencies at State level, since RS and Federation citizens will again be supportive.
- 4) **Foreign Currency Accounts** – There is a strong sense of injustice that the international community has pressed the BiH public not to demand that governing authorities repay foreign currency assets seized during the war, as it would bankrupt the state. This cuts little ice for citizens who do not receive passable public services at any level – including health and pensions. Meanwhile, thanks to VAT, the state is awash in more funds than ever before and is proposing to enlarge its budget considerably. It could be made clear that these arrears could be paid off, at least in a far larger proportion, with a constitutional rationalization of governing structures. This would also provide a direct incentive for accepting framework change.

- 5) **Re-argue the Case for Rationalization of Governance Structures with a Focus on Delivery of Services** – Previous attempts to point-out to citizens the massive waste of the current system were never linked to proposals for a different structure. RS politicians retort that they have no need for the state bureaucracy; Croat politicians demand that the Federation be abolished. The argument has become further clouded by the Russian petroleum fiasco: RS citizens received the message that the State will work directly against the interests of the RS, wherever it has competencies. EU experts are uniquely placed as outsiders to voice arguments for rationalization in terms of concrete benefits. A financial analysis should determine what real increases the RS budget would see if certain competencies were transferred to the state, also allowing the case to be made for a number of simplified and therefore cheaper governing structures, for example, municipalization.

Other carrots to consider are assistance in other public infrastructure projects (especially utilities which are special source of grievance), and investment in public education in exchange for genuine reform.

Looking at the upcoming local elections brings another *de facto* carrot to mind, particularly relevant to the RS but also of broader importance. If the states are “laboratories of democracy” in U.S., then municipalities are the equivalent in BiH. The international community should actively take advantage of the opportunity to aid those mayors prior to the October 2008 local elections. Greater investment and public support should be directed to those mayors who are innovative and defy stereotypes, regardless of party. The entire PIC/EU community should also, to the extent decorum allows, foster through access and visibility alternative centers of power as opposed to monolithic political parties. The EU should insist on full implementation of the European Charter on Local Self-Governance.

X. *Sticks Remain Essential*

Among some EU actors, especially the European Commission, the mere denial of a carrot is considered a stick. However, this approach is ineffective in Dayton BiH where the public, resigned to little or nothing from its politicians, has never felt able to hold them accountable for lost opportunities. Not only is this doctrinaire approach oblivious to BiH political realities, it projects weakness. A more robust and bare-knuckles approach is demanded. The EU and US should together develop lists of realistic “sticks and carrots” for the coming negotiations.

Perhaps the most effective way to confront the general disregard for the law, abuse of power, bureaucratic manipulation, and financial malfeasance by public officials, is to reinvigorate the policy of fining, removing and/or banning them. The decline of OHR’s institutional effectiveness can be dated to the declaration that such removals would cease, and the accelerated “rehabilitation” of these faithful public servants, who in almost no case had popular constituencies as a result of their removal. The intimidation value of removal was the most effective mechanism the HR and IC had to adjust the attitudes of obstructionist politicians. Resurrecting it in a creative fashion would supplement the carrots outlined above.

To make this stick more credible, international troop levels in BiH should be increased, perhaps under the auspices of Partnership for Peace, a stance confirmed by British Conservative Party leader David Cameron who argued: “as we enter this period of tension, I believe there is a strong case for reinforcing the troop presence in Bosnia as a precautionary measure, to reassure the local population, to deter trouble and to send a clear signal that our commitment to the implementation of the Dayton agreement remains absolute.”² Dayton’s architect, Richard Holbrooke, also noted in a recent interview

² http://www.conservatives.com/tile.do?def=news.press.release.page&obj_id=140726

that BiH “is a classic case where a few troops now might prevent the need for more troops later, and we have to try to get some additional troops in fast.”³

However, the international community must also be more creative in preparing and applying other sanctions against obstructionist leaders, rather than inflicting collective punishment on the entire country. Such sanctions could include reduction in high-level visits, invitations to international conferences and other events; and more intrusive inspections of political parties, their finances, and transparency of work. The international community in BiH still has capacity to seriously inconvenience those who stand in the way of progress and stability.

XI. With the People: Toward a New Constitutional Order

The EU’s vaunted “soft power” could have a salutary effect on BiH, but only if used far more strategically toward the goal of creating popular support for a constitutional system that will obviate the need for continuous intervention.

The EU can set its own standards for entry without consulting non-EU actors, like Russia and the U.S. The conditionality it sets is solely its own; it is gatekeeper to its own club. By setting clear and logical criteria in BiH, the EU can set the international pace and build its credibility as a policy actor in the region.

The singularly missing factor is the one in which the survival of BiH as a state in whatever configuration, ultimately hinges upon – its citizenry, ignored by local elites and international actors alike. There is no solution for BiH unless the general population is enlisted in helping to design and enforce one. The public needs to be broadly included in the European project and clearly informed about what type of BiH constitution is acceptable to Europe.

XII. Getting the Message Across

To reduce the temperature of what is already an overheated political environment, the EU needs to accept certain immutable realities, and make clear to the BiH population that it understands its role. To be blunt, the EU is stuck with a role it has never had to exercise to the same extent in any other transition country: that of external guarantor of peace and stability. This is the responsibility that it undertook by adopting NATO’s role in 2005. The whole of the EU machinery has yet to recognize that this is a common responsibility, and it will remain until the structural reasons for instability, and public perception of insecurity, are obviated. That is far longer than a mere extension of the joint OHR-EUSR mission to the end of 2008.

Unwillingness to admit this reality doesn’t change it – it simply makes the job more difficult and lengthy. The declaration should be made that there will remain a common EU-Western approach to BiH, including the full EU family of institutions and, pending sufficient constitutional reform, the OHR. This will guarantee stability until BiH enters the EU as a functional member, and will allow citizens to feel secure enough to think beyond the narrow horizons offered by their politicians.

As for what minimum standards should apply regarding BiH’s constitution, simplicity is best. Since BiH will need protections for “constituent peoples” to both prevent domination of any community and immediate knee-jerk resistance to change, acknowledgement that reasonable protection of group rights is acceptable should be made up front. The problem with the current constitution is not that there are such protections, but that they are present at every conceivable level. With this caveat in mind, the EU member states should urgently consider the decisions of the BiH Constitutional Court, the European

³ Holbrooke: ‘Kosovo Independence Declaration Could Spark Crisis’, Council on Foreign Relations interview, Dec. 5, 2007 at: <http://www.cfr.org/publication/14968/holbrooke.html>

Court of Human Rights, the Copenhagen Criteria and the findings of the Venice Commission, since these have immense implications for any future constitutional solution. These decisions should be laid before the public in a simplified form, and used to start a rational debate.

Three preconditions for a sustainable constitutional solution emerge from any study of the above, and are as follows:

- 1) Respect for BiH territorial integrity, including continuation of external guarantees;
- 2) Gradual de-ethnification of franchise and public office, while ensuring more efficient and less disruptive ways of protecting Vital National Interests. Rejection of ethno-territorial principles;⁴
- 3) Substantial local control over revenue and governance.

XIII. Constitutional Alternatives: Time for Creative Thinking

The above-proposed principles for BiH's entry into the EU allow a number of creative alternatives, including some that have not previously been suggested.

Various constitutional reform models have been presented by the leading political parties in the past few years. The only common theme between these models has been an agreement that the future BiH government would be divided into three levels – local (municipal), middle (entity/canton/region) and state. This common thread is interpreted in dramatically different ways by the Bosniak, Croat and Serb parties. Their views on the competencies of the middle- and state-level governments are polar opposites and offer little hope for any sort of compromise.

The EU has also been frustratingly tight-lipped about what level of state functionality it will require for BiH's candidacy for membership, insisting only that the final model is a result of an agreement between BiH parties. (That BiH's future constitutional arrangement might be even worse than the current one – given the EU's hands-off approach - seems not to have entered into the calculations in Brussels.) The result of this process has so far been disappointing. The leading nationalist parties and the EU representatives have shown little creativity in offering models that would reach across the ethnic lines and serve all citizens of BiH.

One of the key failures in generating meaningful constitutional reforms has been the international community's catering to the leading nationalist parties. The current political system is the second-best option for all of them, and they have a vested collective interest in preserving it. Allowing the "six parties" to be the only relevant actors in this process was therefore ill-conceived. Dodik's recent assertion that the SNSD will demand the right to self-determination be incorporated into the constitution is aimed at scuttling attempts to reform the constitutional order.⁵ The RS sees no need to make concessions. This approach ignores the more creative proposals offered by opposition parties, grassroots leaders, local analysts and civic activists.

XIV. Bypassing the Oligarchy's Blockade – BiH Constitutional Convention

For far too long, the BiH political elite has held the country hostage to its own self-interest. Furthermore, the Dayton Annex IV Constitution has never been subject to popular buy-in. It still has not been officially translated. While that was inevitable at the time it was drafted, it cannot be the foundation for a functioning state. A constitutional order needs a substantial majority to affirm it.

⁴ Legally, these were eliminated with the Constitutional Court's decision on Constituent Peoples in 2000, and enforced by an HR order in 2002. But plentiful examples remain.

⁵ *Glas Srpske*, February 19, 2008

The EU and international community at large can help BiH overcome this handicap by marshalling its potential carrots, listed above, as the reward for adopting an EU-friendly constitution. This would mean meeting all the Venice Commission, European Convention on Human Rights, local self-governance, and other standards.

To ensure popular participation in a process that affects all BiH citizens, a constitutional convention, including constructive members of civil society, mayors of all municipalities, as well as the BiH Parliamentary Assembly, should be convened. The convention would meet in regular sessions, with EU and IC representatives in attendance to help facilitate, but not control, the process. Should there be agreement on a constitution that meets all these standards, then Annex IV of Dayton could thereby be replaced. The process would be open-ended, with an ability to continue until consensus is reached on a constitution that meets all the requirements proposed in this paper. Until that point, Dayton's Annex IV would remain the BiH Constitution, and all the Dayton instruments, including OHR, would remain.

XV. One Homegrown Constitutional Alternative: 'Municipalization'

One such constitutional model that has emerged locally but received very little attention calls for a vastly simplified two-tiered governmental structure: municipal and state. The principal proponent of this idea is the Mayor of Foča Municipality, Zdravko Krsmanović. His proposal favors a highly decentralized government structure with local ownership of the majority of day-to-day administrative and fiscal decisions as well as capital investment projects. In his view, municipal governments are equipped to serve, and be accountable to, their citizens most effectively, if given appropriate financial and administrative independence.

Fiscally, this model would free up vast financial resources currently hogged by the less accountable mid-level government bureaucracies and put them to good use for such things as local capital investment projects, infrastructure, and social programs. Municipal government is also the only level where citizens can easily make their concerns known outside the electoral cycle.

But most importantly, as Krsmanović has witnessed in his municipality, common areas of interest and concern transcend the ethnic divide that is so pervasive in BiH society today. Focusing on economic, social, cultural and sports cooperation, he has been able to form strong connections with neighboring Gorazde Municipality in Federation territory - once considered an enemy stronghold, but pre-war a sister city.

In order to further streamline local governance, Krsmanović's model calls for consolidation of some of the current 142 municipalities to a more rational number. Furthermore, he believes that the status of Sarajevo should be clearly defined in a "Law on the Capital City". This view is shared by a group of pre-war mayors of Sarajevo, who add that Sarajevo's pre-Dayton municipalities should go back under the city administration because this makes political and economic sense. State government's role would be reserved to such issues as policing, foreign relations, defense, border security, customs, tax collection, social security, health care, and major public works.

This novel proposal for restructuring BiH's government preserves the country's unity, while decentralizing power from Sarajevo, Banja Luka and Mostar hubs outwards to municipalities. This would give long-neglected regional centers such as Tuzla, Bijeljina, Bihac, Trebinje and Zenica more resources and greater weight in central decision-making than they currently have. Thus, municipalization addresses key concerns of all three constituent peoples, as well as those BiH 'others', and safeguards heretofore sidelined members of localized minorities, such as returnee communities. This plan may require additional state-level oversight to ensure that where there are obstructionist local authorities, they respect civic rights across the board.

Greater decentralization would encourage the re-forging of economic and other ties between localities and resuscitation of regional hubs that are based on common interests rather than ethnic affiliation. Furthermore, BiH would garner a much leaner, more effective and transparent government with

greater accountability on public services at the level that citizens can actually understand and influence.

Finally, Krsmanović's proposal is in line with the European Charter on Local Self-Governance, the full implementation of which is one of the EU's pre-conditions for membership. The EU needs to highlight this conditionality to its BiH counterparts.

XVI. Harnessing Consensus

A cynical response to Krsmanović's idea is that it is not feasible given the current atmosphere and lack of political will. Nevertheless, there is a large potential constituency for his idea in both the Federation and RS: it is intuitive (as this was the pre-war setup) and it promises less expensive, but more accountable, governance, freeing up money for other expenditure and reduced taxation.

The potential constituency for municipalization includes many other mayors frustrated with their uneven relationship with the "middle layers of government." However, their voices have been stymied by ruling parties that monopolize media space and are adverse to alternative policies, especially from the opposition. Besides, given the entrenched positions on the constitutional reform and the unlikelihood of compromise, a progressive proposal by a Bosnian Serb from Foča could re-ignite the debate. At the very least, Krsmanović and other Bosnians and Herzegovinians deserve to have their voices heard, especially on such a make-or-break issue for the country as constitutional reform.

XVII. Conclusion

BiH has reached the point at which the dysfunction inherent in the Dayton constitutional order threatens the very survival of the country.

Dayton's ethno-territorialism stymies state functionality and makes divisive nationalist politics politically profitable, maintaining crony fiefdoms that impoverish municipalities across ethnic lines. So long as this order exists, peace implementation cannot possibly be completed.

The EU is the main actor that can help BiH overcome this structural impediment. But to do so it must:

- 1) Admit that the current state of affairs is dismal and the trajectory is downward, in part due to its own lack of strategic engagement, exhibited by lowering the bar on the SAA.
- 2) Accept that BiH constitutional reform is the key to the problem.
- 3) Develop a BiH-specific EU accession strategy, considering local necessities and long-term results. The EU must employ new sticks to go along with its carrots, applying these incentives to promote a homegrown and EU conditioned constitutionally re-organized functional state.
- 4) Continue its close collaboration with the US in maintaining the Dayton instruments, including the High Representative with Bonn Powers, which are essential to escaping the Dayton straitjacket.

This will be a time-consuming process in which the EU, with US support, will need to serve as a midwife for a functioning BiH state that can become a productive EU member. Unless it does so, the EU's members will remain perpetual triage medics and donors; or as undertakers to a failed state. The time to make that decision is now – further degeneration in the social and political fabric of Dayton BiH may prove fatal, leaving the EU with even less palatable options than it has at present.