

Reshaping international priorities in Bosnia and Herzegovina

Part Three

The end of the nationalist regimes and the future of the Bosnian state

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EXECUTIVE SUMMARY

This report sets out to define the international role in Bosnia and the path towards completing the peace implementation mission. It suggests that, with the right focus of international efforts, the core Dayton agenda can be completed within the next 2-3 years, leaving European institutions to tackle the longer term task of transforming Bosnia's post-communist state and integrating it into the European Union.

Over the last two years, Bosnia has changed dramatically. The ethnic power structures left over from the war have begun to crumble. Political changes in Croatia and Serbia have cut external revenues, forcing the political elites in Bosnia to reorient themselves towards the international community and participate in the Bosnian state. Although the *nationalist parties* continue to enjoy widespread electoral support, the post-war *nationalist regimes*, built on the ideology of ethnic cleansing and dedicated to the objective of dividing Bosnia, have gone. Determined international efforts to support the return of displaced persons, arrest indicted war criminals and challenge the security structures, including paramilitary and intelligence services, have yielded results.

However, the international community has been slow to appreciate the significance of these changes. It continues to use its authority within the political sphere in attempts to influence electoral outcomes and exclude the nationalists from power. It has also sought to redesign constitutional and electoral systems by stealth to favour moderates over nationalists. In recent times, this undeclared war against the nationalist parties has precipitated a serious constitutional crisis in the Federation. This report sets out some concrete recommendations for addressing this crisis. The withdrawal of any significant segment of Bosnia's political spectrum from the constitutional order is the gravest threat to the Dayton project. In fact, in the absence of hostile neighbours and significant internal security threats, it is the only way the peace process can fail.

As the parallel power structures wither away, constitutions in Bosnia have suddenly started to matter. The next phase of the peace process will be one of elaborating the Dayton system, defining the relationships between the different levels of government and among the ethnic communities. The international community should mediate a broad process of constitutional dialogue, with the aim of creating a lasting constitutional structure that ties the Bosnian state together. In the search for common interests to tie the three people together, process will be more important than outcomes.

Over the coming period, the international mission in Bosnia must make a conscious effort to refocus its efforts towards the outstanding Dayton tasks. In some areas, such as refugee return, arresting war criminals and dismantling repressive structures such as intelligence services, the international instruments are already in place, and it is simply a matter of persevering until the job is done. In others, particularly the state-building agenda set out in the Brussels PIC in June 2000, there will have to be a process of reorganisation within OHR and among the international community as a whole to be more effective.

In pursuit of the longer term goals of completing economic transition and creating an effective Bosnian state capable of integrating into Europe, international organisations in Bosnia should increasingly be treating Bosnia like any other country of the region – as a weak but sovereign state. Using protectorate-type powers to accomplish basic governance tasks is not a long-term solution to Bosnia's development as a functional state. In order to extricate himself from his present position as central pillar of Bosnia's 'real constitution', and allow the state structures the chance to operate autonomously, the High Representative should renounce the use of his Bonn powers outside of the core Dayton mandate.

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"If I were to stay for five years, it seemed important to set out from the very first exactly what I intended to do. People needed to know my programme right across the board: a clear blueprint would help to give the administration a sense of direction and purpose throughout my term".

Chris Patten, last governor of Hong Kong¹

I. INTRODUCTION

The international mission to "implement the Dayton Peace Agreement" has never seemed as broad and open-ended as it is now. More than five years after the war, after the death of Tudjman and the fall of Milosevic, after five rounds of elections and a new generation of Bosnian leaders, the international community still resembles Laocoon wrestling with the sea-monster: the more it struggles, the more it becomes embroiled in the intricacies of Bosnian politics.

Two years ago, the incoming High Representative proclaimed a strategy of "ownership", which he defined in the following way:

"We are trying to instil the idea to the citizens of Bosnia and the leadership alike, that this is their country, these are their problems, and that they bear the primary responsibility for sorting those problems out. We cannot do it for them – although we can and will assist."²

Only a year ago, a consensus seemed to be forming among key international actors on the need for a refocused approach; that to do less might in fact be to do more. Today, the idea of focusing international efforts or passing responsibility to local institutions is receiving little attention. It is therefore an opportune moment to reconsider the role of the international mission in Bosnia, and where it is headed.

In the few months since the general elections on 11 November 2000, the High Representative has imposed 38 laws and binding decisions on an ever-expanding range of subjects, from privatisation to travel documents to witness protection. This compares to 45 laws imposed by the former High Representative Carlos Westendorp over his entire two-year term, showing the rapid acceleration of international involvement. Over the same period, OHR dismissed eight public officials, including a member of the presidency and a former prime minister. International representatives have played an increasingly assertive role in domestic politics, brokering new governments at State and Federation level and setting the initiative in economic affairs, from approving budgets, restructuring pension funds and reforming the payments system, down to ordering audits of particular companies and investigating individual allegations of corruption. Despite all this activity, domestic institutions seem no closer to taking responsibility for running the country, while the political system remains in an atmosphere of perpetual crisis. A prominent Sarajevo liberal intellectual recently stated:

"international bodies and organisations should increase their efforts to make sure that, to the degree possible, decisions for which state authorities are responsible are made in the responsible organs... Should this not happen, government bodies will increasingly find themselves in an inferior, second-rank position and will lose even basic authority in the eyes of the people of BiH, a very undesirable scenario for any state."³

¹ Chris Patten, *East and West* (1998), p.44.

² Wolfgang Petritsch, Address to the Permanent Council of the OSCE, Vienna, 2 March 2000.

³ Nedo Milicevic in UNDP, *Early Warning System*, July-September 2000

This paper examines the current international role and proposes an alternative view of how it should evolve. It separates the core tasks derived from the Dayton Agreement from the broader problems of economic transition and institutional reform which are common across South Eastern Europe. The international protectorate structure, and particularly the stronger powers in the High Representative's armoury, are properly used in support of the first category of tasks. They include (1) eliminating the ability of any political actor to use violence for political ends and (2) determined action to promote the voluntary return of the victims of ethnic cleansing, a core promise at the heart of the Dayton Agreement. For some of these tasks, such as implementing property rights, the instruments and strategies are already in place.⁴ For others, such as (3) building a core of functioning central institutions, there is an urgent need for the international mission to improve its methods and managerial structures. However, if the international community becomes properly focused it is quite possible to envisage the key tasks of Dayton implementation being completed within the next 2-3 years.

The wider questions of economic transition and development, the weak institutional capacity of the post-communist state, and the many pressing post-war social problems of Bosnia cannot be 'solved' by the international mission through discrete projects. The only lasting solution is for Bosnia to develop the governance capacity to manage its own reform and development. For the international mission to take decisions on behalf of domestic institutions may alleviate some of the most pressing problems, but ultimately brings Bosnia no closer to a functioning system.

If the target is developing competent domestic governance, then the use of international power in an unpredictable and heavy-handed manner outside the core Dayton mandate is counterproductive. Nor has the international record of transforming Bosnia by decree been particularly distinguished, whether in the field of promoting 'rapid' privatisation or fighting corruption. In areas such as these, international assistance will be needed over a long period, but should become more like the help offered to other weak but sovereign states in the region: technical and financial assistance in support of domestic reform efforts, backed by strategic use of political and economic conditionality, but without the protectorate powers.

A clearer sense of priorities will help define the international division of labour. The special Dayton institutions, with the all-important United States participation in the security structures, will push to complete the core Dayton tasks over the next two years. During this period, the European Union will put in place the institutional structures (and the necessary resources) to help an extremely weak state embark on the long path to European integration. Separating these two phases will help maintain a transatlantic consensus, satisfy US concerns about an open-ended commitment to state building, while at the same time encouraging the European actors to adopt a more credible time frame for building sustainable governance structures. This is not an exit strategy, but a strategy for adapting the international instruments to the needs of the next phase of Bosnia's development.

II. THE CHANGING CONTEXT OF BOSNIA

A. War-time power structures

In October 1999, the ESI report *Bosnian Power Structures* set out to examine the nature of political power in Bosnia, and the conditions under which the international community could begin to entrust "ownership" to Bosnian institutions. It argued that, at the time, few of these conditions had been met. The three dominant nationalist parties – the Bosnian Croat HDZ, the Bosnian Serb SDS and the Bosnian Muslim (Bosniac) SDA – controlled local power structures whose strategic interests ran directly contrary to the international agenda in Bosnia. Within these power structures, public

⁴ In the field of refugee return and property rights implementation this is the OHR-led interagency Return and Reconstruction Task Force. The institutional mechanism to address the issue of war-crimes is the International Criminal Tribunal for the Former Yugoslavia in The Hague.

institutions were kept subordinate to the political parties through a *nomenklatura* system of control over public appointments. The nationalist regimes relied on direct, extra-constitutional control of the bureaucracy, public companies, secret police forces and local media, undermining any separation of powers. They were assisted by substantial outside funding, particularly in the case of the HDZ. These war-time power structures resisted any development of the Bosnian state which might threaten their autonomy. Before any meaningful democratic and constitutional process could be established, these structures had to be dismantled.

However, it was also clear that these power structures were not sustainable. Even in October 1999, there were visible signs of fragmentation brought on by the loss of external subsidies and the gradual normalisation of social and political life in Bosnia.

“There is a growing constituency for fundamental change in Bosnia, which the nationalist parties are less able to resist over time. The challenge is to build new institutions capable of taking on responsible governance before the old structures collapse.”⁵

A year and a half down the track, this process has accelerated dramatically. The combination of internal stresses, political changes in Croatia and Serbia and determined international action have fatally weakened the war-time structures. A series of arrests of highly placed indicted war criminals, action against illegal repressive structures (paramilitary and intelligence services), sharp reductions in external financing (particularly from Croatia) and a focused international return strategy have not merely improved the atmosphere, but changed fundamentally the nature of political power in Bosnia. The changes are readily apparent in Republika Srpska, where the SDS has been through the critical process of losing power through a democratic election. It is now a very different political animal to the Pale regime of Radovan Karadzic. Despite the recent breakdown in relations between the HDZ and the international community, this paper argues that the changes are equally profound in Croat-controlled territory. The material and political preconditions for maintaining parallel Herzeg-Bosna structures have disappeared. The current crisis is not a revival of war-time Croat separatism. Rather, following the collapse of the HDZ-SDA power-sharing arrangements which until recently constituted the backbone of the Federation, the HDZ now feels the need to secure a more favourable position within the Bosnian constitutional structure. Although this is a dangerous moment for the peace process, it also offers an opportunity for achieving a stronger and more lasting constitutional compact.

B. Nationalist parties

While the war-time power structures are collapsing, the nationalist parties themselves continue to enjoy widespread electoral support. The HDZ commands up to 80 percent of the Bosnian Croat vote, and a still higher percentage in its Herzegovinian heartland. The SDS reinvented itself during a stint in opposition, and has retaken the Republika Srpska presidency and a strong position in the governing coalition. The SDA suffered the most in the last election, and following the breakdown of its coalition with the pro-state Party for Bosnia and Herzegovina (SBiH), it has seen a narrowing of its electoral appeal to its rural and religious base. However, the nationalist parties do not show any signs of disappearing. They are likely to remain a feature of the political landscape, whether in government or opposition, for the foreseeable future.

Implicit in a lot of international thinking on Bosnia is the idea that the international community will be able to hand over responsibility to domestic institutions only once it “finishes the job” of driving the war-time nationalist parties from office. International officials publicly lay the blame for slow progress on the shoulders of irresponsible politicians, and thereby implicitly condemn the Bosnian electorate for its poor judgment. They place their hopes in a new (or sometimes old) generation of

⁵ ESI, *Bosnian Power Structures*, October 1999

civic-minded leaders. As the High Representative put it on 8 March, the day after dismissing the Croat member of the Presidency,

“In banning Ante Jelavic from public office yesterday, I fulfilled my mandate to protect the Dayton Peace Accords and so secure the hard-won peace in Bosnia and Herzegovina.... It is time to exorcise some Balkan ghosts... Time is not on the side of the nationalists or the institutionalised banditry that has plagued Bosnia, Serbia and other Balkan states for too long.”⁶

Many observers are all for accelerating this process, using the High Representative’s authority for more high-level dismissals, corruption investigations, and the tweaking of electoral laws and constitutional provisions to favour moderate parties. The new governments at State and Federation level represent the international community’s hope that the corner may finally have been turned, and that after a last bout with the nationalists, the Bosnian peace process will be on the home straight.

This view of Bosnian politics is a very limited one. The elimination of nationalist parties – that is, parties with predominantly ethnic identities – is neither feasible nor essential to the objective of creating a self-sustaining Bosnian democracy. National identities have been a prominent factor in voting patterns in Bosnia throughout its history. Even the League of Communists employed an unofficial ‘national key’, ensuring that opposing candidates for any given position were from the same ethnic group in order to prevent elections from being dominated by ethnicity.⁷ The division of Bosnia into separate voting blocs is remarkably stable, as can be seen by comparing the results of the 1990 and 2000 elections (see Table 1).

Table 1: Comparison of overall electoral results November 1990 general election and November 2000 election to the House of Representatives of Bosnia and Herzegovina

| Election of 18 November 1990 | | Election of 11 November 2000 | |
|------------------------------|--------|------------------------------|------|
| SDA | 30.4 % | SDA and SBH | 32 % |
| HDZ | 15.5 % | HDZ | 12 % |
| SDS | 25.2 % | SDS | 15 % |
| SDP & others | 28.9 % | SDP | 22 % |
| | | PDP ⁸ | 5 % |
| | | Others | 14 % |

This segmentation of the voting population does not of itself imply anything as to the ideology or political behaviour of the parties.⁹ What should matter to the international community is whether the parties demonstrate a respect for constitutionalism and the rule of law in pursuing their political interests.

Today, from the perspective of Dayton implementation, the nationalist parties are no longer inherently a threat to the peace process, and focusing international resources on eliminating them from the

⁶ Wolfgang Petritsch, *Financial Times*, 8 March 2001.

⁷ See: Xavier Bougarel, “In the eye of the storm” in Dyker, D. & Vejvoda, I. (eds), *Yugoslavia and After* (London, 1996), p. 97.

⁸ The PDP is a new party, led by incoming RS prime minister Mladen Ivanic. It is in parliamentary coalition with the SDS following the 2000 elections.

⁹ This can be observed throughout the Balkans: the behaviour of the different “ethnic” parties in Macedonia has changed according to whether they were in government or opposition; the “ethnic” party of the Bulgarian Turks has shifted ideological stance many times without losing electoral support; the same is true for the parties representing Hungarians in Romania, which have supported both conservative and socialist governments.

political scene is a diversion from the real tasks at hand. This is not to say that all is well. The nationalist parties still have extremists within their ranks. They still have shady business and underworld connections. Their leadership may or may not be sincere in its rhetoric, whether moderate or nationalist. There are still indicted war criminals who should be arrested and removed from the political sphere. There are still remnants of war-time intelligence structures that need to be brought under democratic control. And there is a need for continuing determination on the part of the international community to support the process of refugee return.

However, without external financial flows, opponents of the Bosnian state can no longer maintain wasteful parallel institutions. Dependent on international aid, they are forced to stay on good terms with the international community. Unable to buy votes by redistributing the spoils of war, they face regular elections in which they can and will be excluded from power. This forces them to become more responsive to public demands. Most importantly, they can no longer call on paramilitary police, intelligence services or gangs of thugs to persecute minorities, intimidate political opponents or bully the general public. In other words, they are on their way to becoming mere political parties within a constitutional order. The way to consolidate that progress is to stabilise the constitutional order and strengthen the institutions of a self-sustaining democracy, enabling the Bosnian state to perform real services and protect the vital interests of all its citizens.

As ESI has argued in the past, using intrusive international power to disarm nationalist paramilitaries, disband intelligence services, arrest war criminals and prevent organised violence against returnees is both legitimate and a necessary part of preparing the ground for Bosnian democracy. However, using international power in an unpredictable fashion within a fragile democratic process risks undermining the very goals the international community is pursuing.

C. In search of moderates

Because there are few genuinely new faces in Bosnian politics, in its search for moderate allies the international community has frequently been obliged to accept that nationalists can change their stripes. The difficulty is judging when they are sincere. Biljana Plavsic, a prominent war-time SDS figure, was embraced as a moderate for three years, before surrendering to the Hague. Ante Jelavic's election as a member of the presidency was welcomed in 1998 by some in the international community who had worked with him as a young Federation minister of defence. Similar hope has led the OSCE to see the new vice-president of Republika Srpska, SDS politician Dragan Cavic, as a leader of a moderate wing in his party, even though he was previously sacked by Carlos Westendorp for allegedly advocating violence against SFOR.¹⁰ Long-serving SDA prime minister of the Federation, Edhem Bicakcic, who for many years had a positive reputation as a moderate, technocratic leader of the most stable government in the country, fell drastically out of favour with the international community and had the rare honour of being dismissed after he had already left office. The complete list of Bosnian politicians who have fallen in and out of favour with the international community would be too long to recount.

The time and energy which has gone into determining which politicians should be encouraged or opposed has been a distraction from the structural determinants of political behaviour. Along the way, the distinction between "moderate" and "extremist" has begun to seem increasingly arbitrary. Consider the international response to the following events:

1. In July 2000, a high-level round-table organised in Banja Luka by the Republika Srpska government of Milorad Dodik and the National Assembly, in which Dodik's Sloga coalition had a majority, declared that various key international objectives, including the state border

¹⁰ Cavic's appeal against his dismissal to the Human Rights Chamber was unsuccessful because the Chamber had no jurisdiction. The dismissal was then reversed by Carlos Westendorp on his last day in office, clearing the way for his political comeback as an SDS leader.

service, public utility regulation, common passports and the Independent Media Commission, were unconstitutional. It attacked the legitimacy of the State Constitutional Court and its “constituent peoples” ruling, on the basis that the Court had “turned into a political arbitrator using judges with foreign citizenship”.

2. In December 2000, the leaders of the SDS issued a statement following a meeting with the High Representative in which they committed themselves to all Peace Implementation Council obligations, including full and unconditional implementation of property rights, the reconstruction of all religious buildings, and establishing self-sustaining state institutions and regulatory bodies. Dodik’s SNSD responded with a press release accusing the SDS of selling out to international pressure: “the SDS promises that it will work on the strengthening of the joint institutions and establish regulatory agencies at BiH level, all of which will strip the RS of its sovereign rights. In their crawling collaboration they are even ready to arrest Serbs indicted for committing war crimes.”¹¹
3. On 3 March 2001, in his speech to the Croat National Congress which became the cause for his dismissal, Croat member of the state presidency Ante Jelavic responded to concerns expressed by Central Bosnian HDZ delegates by assuring them: “we are not speaking in favour of radicalism, nor are we looking for some exclusive and special territorial-administrative solutions for the Croat nation; we are aware that Dayton prescribed two entities and that none of them is really a Croat entity, and that solutions for annexes to the DPA will have to be reached through a consensus, towards the creation of federal units... We are pleading for a general consensus on the internal organisation of BiH, which will not be imposed nor will it be against the will of any nation or citizen in Bosnia and Herzegovina.” The Croat National Congress voted to withdraw from the Federation constitutional structure “until such time as full constitutional and genuine equality of the Croat people in Bosnia and Herzegovina is provided.”

In the first instance, strong anti-Dayton sentiments expressed by members of the Sloga government, considered moderate and a key ally of the international community, were disregarded. There was no reaction to the round-table, or to any similar statements by Dodik and his allies over his two year term of office asserting the ‘statehood’ of Republika Srpska. In the second instance, attempts by the SDS to stand for election on a moderate platform and court international support were treated with suspicion and hostility. Although the agreement reached between the SDS and the High Representative went further towards expressing its support for the state-building agenda than had any previous Serb official, some international officials still advocated banning the SDS from government. In the third instance, the international reaction was to dismiss the four most senior HDZ party leaders. HDZ objections to specific international policies were treated as presumptively illegitimate. The OSCE head of mission Robert Barry noted that “we have to remember what really lies at the heart of these efforts of the HDZ - their determination, at whatever price and through whatever means, to maintain control over the economic assets that it has gained control of over the past decade.”

There are of course ample reasons not to take political rhetoric by the SDS or the HDZ at face value. The point here is that, if the international community sets out to exclude nationalists from the political process as a goal in itself, it lacks any convincing yardstick to guide its political interventions. It therefore risks coming across as either arbitrary or partisan, which is damaging both to the integrity of Bosnian democracy and to the credibility of international efforts to strengthen the rule of law.

¹¹ SNSD Press release, 15 December 2000

IV. ELECTORAL POLITICS IN REPUBLIKA SRPSKA

In the ESI report “Bosnian power structures”, we described how a series of strategic interventions by the international community helped to accelerate the demise of Karadzic’s SDS para-state.¹² A critical factor were the actions taken by SFOR from 1997 onwards, arresting indicted war criminals and preventing paramilitary and intelligence services from playing an overt political role. In 1997, a campaign by SFOR and OHR cut SDS control over public broadcasting, and from 1998 onwards, the SDS no longer controlled key economic assets. By 1999, the SDS regime had fragmented into a series of municipal fiefdoms. A number of war-time SDS leaders are now in the Hague, including Krajisnik, Plavsic and several senior military commanders.

As a result, some parts of Republika Srpska have now changed beyond recognition. Prijedor, site of some of the worst atrocities of the war, is one. In 1997, it saw the first arrests of war criminals by British SFOR troops. The arrests had a dramatic and lasting effect in repressing the climate of impunity surrounding the local leadership. Now, some 10,000 individuals – more than a quarter of the pre-war Bosniac population – have been able to return to their housing in surrounding villages. Freedom of movement has been re-established on a key return axis between Prijedor and Sanski Most. Village mosques razed to the ground by Serb paramilitaries during the war are now being reconstructed. Prijedor illustrates a key lesson: once the repressive political structures are dismantled, the ideology of ethnic separatism begins to dissolve.

This is increasingly true across Republika Srpska, although progress varies from one municipality to the next, depending on diverse local factors. Today, places such as Zvornik and Doboj have accelerating return figures, and even Foca has seen the first Bosniac returns. The fact that SFOR took considerably longer to arrest indicted war criminals in Eastern Republika Srpska than in Central Bosnia or Prijedor goes a long way to explaining the regional variation. Though there is still widespread suspicion of the Bosnian state, Republika Srpska no longer displays the uniform ideological orientation of previous years. This has changed the political environment significantly. The key actors now compete to capture the centre ground of Bosnian Serb politics and to win the support of the international community.

As part of this process of change, the split within the SDS in 1997 and the formation of a new political coalition (‘Sloga’) in 1998 led by Milorad Dodik was a major victory for the international community. The new government offered a new rhetorical tone, promising the return of 80,000 minorities in its first year of office and a new relationship with the Bosnian state. It also moved the seat of government from Pale to Banja Luka, a change of both symbolic and practical importance which left the old regime isolated.

Over the next two years, keeping Dodik’s fragile parliamentary weak coalition intact became the international community’s overriding objective. The government was courted by international officials, and in early 1998 was offered extraordinary budgetary support to pay arrears in salaries. During the 1998 elections, the international community tried to prevent the Bosniacs from Republika Srpska from standing a candidate against the Sloga presidential candidate, Biljana Plavsic, in the false hope that she would attract Bosniac support. When she was defeated by the leader of the Serb Radical Party, Nikola Poplasen, the latter was dismissed by High Representative Carlos Westendorp for failing to respect Dodik’s parliamentary majority. Vice-president Sarovic from the SDS was prevented from succeeding to the presidency, leaving the office vacant for almost two years. Dodik was left in place as a caretaker prime minister for two years, and even after his parliamentary coalition broke apart, the international community allowed him to survive votes of no confidence.

As an international favourite, Dodik was exempt from the standards which the international community required of other local politicians. International officials avoided placing pressure on his

¹² ESI, *Bosnian power structures*, October 1999

government to perform unpopular Dayton obligations, so as to assist it to retain power. In most key Dayton areas, it failed to deliver on its promises. The voting record of Sloga candidates in state institutions was no different to the SDS, and the government-controlled National Assembly passed a number of unconstitutional resolutions affirming the primacy of Republika Srpska over the state. Although minority return improved over that period, this did not correlate with the municipalities controlled by the Sloga parties. Following repeated warnings, Dodik's minister for refugees was forced to resign for obstruction of the return process, while his deputy was dismissed. Dodik openly repudiated his promise of 80,000 minority returns to Republika Srpska.

In other areas of governance, the government performed equally poorly, overseeing a period of institutional and economic decline. It made little attempt to address Republika Srpska's pressing economic problems, and by the end of its term public finances were close to collapse, with a deficit of more than DM 200 million, and pensions and public-sector salaries many months in arrears. Among a series of incidents indicating political mismanagement, the government signed contracts with companies from Dodik's home municipality for the construction of an extravagant new government building (construction never commenced), and spent public money on last-minute gifts, including housing, for its own members. Throughout, not a word was raised by the administration's international sponsors.

As the 2000 elections approached, despite changes to the electoral rules (the introduction of preferential voting) which were intended to favour Dodik, it became clear that the SDS was likely to return to power. During the election campaign, many international officials informed voters in plain language that continuing international economic support to Republika Srpska was conditional upon the government's re-election. US officials proposed publicly to ban the SDS from the electoral race, even after it had been certified by the OSCE as a candidate party, on the basis of accusations that there were war criminals in its ranks. It later transpired that a Sloga leader, Biljana Plavsic, had been on the indictment list.

International support was not enough, however, to prevent Dodik losing the presidential elections. Because Dodik's key constituency was the international community, it is not surprising that his government became increasingly out of touch with its voters, and by November 2000 was widely perceived as arrogant and corrupt. The international community had to persuade Dodik to campaign at all. The government's weakness gave the SDS the opportunity to restore its political fortunes, recapturing the presidency and a position in the government.

Dodik's defeat brought to a close one of the most instructive chapters of the international mission in Bosnia. It offered several crucial lessons. First, direct international action against illegal, repressive power structures can have a dramatic and lasting effect on the political environment. Second, international pressure on the electorate to support a particular candidate is likely to backfire. Third, a moderate leader who is shielded from the democratic process is unlikely to act in a democratic fashion. Responsible governance is not about installing a 'democrat' in power; it is about ensuring that political power is subject to a democratic process.

III. THE FEDERATION CRISIS

A. The decline of Herzeg-Bosna

From its establishment in August 1990, the Bosnian HDZ was under the strong influence of the Zagreb-based Herzegovinian lobby led by Gojko Susak, the Minister of Defense of the Republic of Croatia. This group, with its roots in the arid mountain areas of West Herzegovina around Siroki Brijeg, owed much of its ideology to ultra-nationalist fringe groups among the large Croat diaspora, which cultivated a nostalgia for the fascist Independent State of Croatia of World War II and a fervent

hatred of both Serbs and communists.¹³ With the rise to power of Franjo Tudjman, these radical elements came to control the extensive funds arriving from the diaspora to support the new Croatian state and its war of independence. They diverted these funds, together with large sums from the Croatian defence budget, into building the political, military and intelligence structures of Herzeg-Bosna which were needed for the war, politically marginalizing Central Bosnian and Posavina Croats. Their goal was the union of ethnically-cleansed parts of Bosnia with Croatia. They established concentration camps, engaged in brutal ethnic cleansing, and relied on criminals such as Mladen Naletilic (“Tuta”), the leader of the infamous Convicts’ Brigade, to rid their fiefdoms of Bosniacs and Serbs and spread fear among moderate Croats.

The flows of money from Croatia continued after the Dayton Agreement, allowing the para-state of Herzeg-Bosna to thrive. Football stadiums, marble shopping centres and other prestige building projects sprang up in formerly poor Herzegovinian towns. In late 1998, HDZ leader Ante Jelavic acknowledged that Herzeg-Bosna could not survive without Croatian money, and praised the role of the Bosnian HDZ in “diverting that assistance from the Republic of Croatia to settle pension, invalid and other compensations to the victims of the Homeland War”.¹⁴ So long as Herzeg-Bosna enjoyed this support, it proved a formidable opponent to peace implementation, particularly in West Mostar where the HDZ was adamantly opposed to any form of reintegration or common institutions.

These were the unique circumstances in which the para-state of Herzeg-Bosna was able to flourish. However, they could not last. Within a few years, Susak, Mate Boban and Tudjman had died, and Tuta, Stela and a number of key HVO officers were in the Hague or in prison in Croatia. The advent of a new Croatian government in January 2000 left the Bosnian HDZ politically isolated, with a discredited ideology. Croatian funding was no longer available to fund parallel education and health care systems, and the HVO became an unsustainable financial burden. Concerted actions by SFOR and IPTF against intelligence infrastructures in Mostar, Vitez and Livno helped to eliminate intimidation and the threat of force from the political sphere. As a result, political change became inevitable.

The results of these developments can best be seen in Central Bosnia Canton, Bosnia’s multi-ethnic heartland, where intense fighting between Bosniacs and Croats had left behind ethnically cleansed enclaves facing each other in tense stand-offs. In 1997, the Croat war-time leaders from Central Bosnia were arrested and sent to the Hague. From the summer of 1997 onwards, Bosniacs began returning into Croat areas with vigorous support from the international community. Despite opposition from Croat authorities, Croats also began returning to Bosniac areas. After setbacks and occasional violence, the dam burst in 1999. Central Bosnia now boasts the highest return figures in the country, with close to 60 percent property law implementation. HDZ-SDA coalitions at cantonal and municipal levels are co-operating in an expanding range of areas. The cantonal police and ministry of interior are now integrated as a result of UN persistence, and the two parts of the canton share a common budget. Educational segregation is being tempered by fiscal pressure and the demands of returning parents, and Bosniac and Croat children have begun to attend some common schools, although with separate classes. As a result, HDZ leaders from Central Bosnia since 1998, at first quietly but now more vocally, have opposed schemes for a separate Croat ‘third Entity’ advanced by the hard-liners from Western Herzegovina.

¹³ When Gojko Susak left Siroki Brijeg in 1967 to embrace the cause of radical émigré politics, he was just one of thousands of angry young men blaming the backwardness of Herzegovina on the regime of the day. Paul Hockenos, *unpublished manuscript* on the role of the Croat diaspora.

¹⁴ “Croatian people cannot be bought”, *Slobodna BiH*, 11 October 1998.

Table 2: Implementation of the property laws
in selected municipalities under HDZ control, 30 November 2000

| Municipality | Number of property repossessions as a percentage of total claims |
|---------------------------------|--|
| Orašje (Posavina) | 42.7 |
| Odžak (Posavina) | 26.7 |
| Zepce (Central Bosnia) | 80.1 |
| Kiseljak (Central Bosnia) | 79.7 |
| Vitez (Central Bosnia) | 65.1 |
| Capljina (Herzegovina) | 7.3 |
| Mostar South-West (Herzegovina) | 7.8 |
| Stolac (Herzegovina) | 1.6 |
| Drvar (Canton 10) | 4.9 |

Central Bosnia is not the only sign of the collapse of centralised Herzeg-Bosna structures. In the divided municipality of Zepce, OHR recently succeeded in dismantling most of the Herzeg-Bosna parallel structures, with HDZ agreement. The HDZ has begun to split into a number of factions, and has suffered from high-level defections. In Mostar and other places in Herzegovina, until recently totally closed to property law implementation, return to vacant housing has begun to pick up, and there has been a noticeable drop in violence against returnees compared to previous years. The enormous variation in return figures in different HDZ-controlled municipalities (see Table 2) shows the widening political divisions within the HDZ and the Bosnian Croat community as a whole.

Table 3: Implementation of the property laws
in selected locations, 30 November 2000

| Location | Number of property repossessions as a percentage of total claims |
|--------------------------|--|
| Central Bosnia Canton | 54.3 |
| Sarajevo Canton | 20.7 |
| Federation average | 27.4 |
| Republika Srpska average | 12.3 |

It is against this background that recent fears of a revival of Herzeg-Bosna must be assessed. The present leadership of the HDZ has neither the resources nor the political support for such a policy. The social, political and economic preconditions of Herzeg-Bosna no longer exist.

The danger now is rather different. As the economic bubble bursts, West Herzegovina is likely to return to its former poverty. Unless the area becomes integrated with a Bosnian economy and establishes the rule of law, social and economic conditions will continue to decline, setting the stage for long-term resentment, pockets of extremism and a potential slide towards the kind of anarchy the international community finds in Livno Canton.

B. Disputed election rules

According to Carl Bildt, one of the most controversial issues raised at Dayton concerned the “mechanism for one constituent people to block a decision deemed contrary to its vital interests”. His description of the dilemma remains accurate:

“On the one hand, there was an evident need for a means to prevent decisions taken by a simple majority which conflicted with what one of the ethnic groups perceived to be its vital interests. The country would soon fall apart if there were no such safety device. On the other hand, there was a clear risk that such a device might be abused to block less crucial decisions. There would then be a risk that no decision would be taken at all, and the country would fall apart for that reason.”¹⁵

This dilemma, present at both State and Federation level, was eventually resolved by a compromise formula at Dayton, although at the price of a certain ambiguity, with no agreed definition of “vital interest”. A recent decision by the international community to vary this formula in the Federation House of Peoples has challenged this compromise and triggered a constitutional crisis in the Federation.

In 1997, the idea first began to circulate among the international community that an electoral system could be designed which would systematically favour moderate candidates over the nationalist parties. The OSCE and OHR spent considerable time and effort developing a draft election law which would accomplish this. When the draft law was rejected by the state parliament in January 2000, the issue was temporarily set aside. With the endorsement of the PIC, the OSCE nevertheless incorporated various aspects of the draft into its provisional rules for the November 2000 elections, including open lists, multi-member constituencies and preferential voting.

On 19 October, only three weeks before the election, the Provisional Election Commission introduced two additional changes to the system of selecting delegates to the Federation House of Peoples. One changed the allocation of delegates among the cantons. The other changed the method by which delegates are selected by cantonal parliaments. Previously, the Bosniac and Croat caucuses each voted separately to select their respective delegates. Now, all members of the cantonal parliament vote on all the delegates. In the OSCE’s words: “The proposed rules strike a good balance between the ethnic and political dimension of the election by giving due consideration to the representation of all parties in the entire assembly.”

The main impact of the decision is on the Croats, as the smaller partner in the Federation. It means in practice that, while there is still a Croat ‘vital interest veto’ in the Federation parliament, the party with the majority of Croat votes does not necessarily control its use. The merits of this as an electoral reform will not be discussed here. However, as a process for changing the structure of ethnic representation in the Federation, it proved to be disastrous. First, the OSCE used a provisional electoral rule to change a basic provision of the Federation constitution, which is of doubtful propriety. Second, the decision was taken hastily by a Chairman’s decision in the Provisional Election Commission, with consultation only among the international community, not among the Bosnian political players. Whereas in 1998-9, the OSCE expended considerable effort and money on trying to build a consensus among interest groups, political parties and the general public about the draft electoral law, the choice on this occasion was to present the change as a *fait accompli*.

The OSCE decision was pounced upon by the HDZ in its election campaign. It conducted a “referendum” on the day of the election, asserting the political autonomy of Bosnian Croats. Always sensitive to its position as the smallest of the three constituent peoples, the Croat electorate responded to this campaign, giving the HDZ close to 80 percent of its vote. For its conduct during the election, the HDZ was penalised by the Election Appeals Sub-Commission, which removed 10 HDZ representatives from cantonal assemblies. Objecting both to the new electoral rules and to this punishment, the HDZ refused to participate in convening the Federation government or parliament. Its absence was circumvented, on OHR’s recommendation, by convening the House of Peoples with less than a full roster of delegates. The dispute escalated into a game of brinkmanship, leading the HDZ on 3 March 2001 to declare a “temporary Croat self-government” made up of intra-cantonal and intra-

¹⁵ Carl Bildt, *Peace Journey*, p.138

municipal councils, pending reversal of the House of Peoples decision, and the High Representative to dismiss Ante Jelavic from the Presidency and three HDZ deputy leaders.

What is so striking about this episode is that the HDZ had no strategic interest in a breakdown of communications with the international community, nor in withdrawing from the constitutional structures. There is no evidence of a premeditated strategy to declare a “third entity”, an issue on which the Bosnian Croat community and the HDZ remain deeply divided. Some weeks before the PEC decision, HDZ leader Ante Jelavic explicitly warned OSCE officials not to alter the election rules. No preparations were made to withdraw from the Federation administration, where Croat officials have remained in their posts. At the meeting of the Croat National Council in Mostar on 3 March, Jelavic was at pains to reassure the Central Bosnian delegates that the goal was not a separate, territorial-based structure. Since then, the establishment of the “temporary Croat self-government” has been deferred on several occasions, to allow more time for negotiation with the international community. Even following the dismissal of its leadership, the HDZ’s publicity campaign was based on the slogan: “equal rights for all three peoples – the future of Bosnia and Herzegovina.” None of these actions are consistent with a plot to destroy the Federation or the Bosnian state, which was the objective of the founders of Herzeg-Bosna. Rather, a significant part of the HDZ leadership appears throughout to have been driven by genuine alarm that the constitutional status of Bosnian Croats could be altered by unilateral decision of the international community – a sentiment which is widely shared among the Croat community.

The crisis is undermining the confidence of Croats in both Bosnia and Croatia in the international community. The Bosnian bishops conference, which includes liberal and pro-Bosnian members of the church, has condemned these changes to the constitution. A leading Croatian politician, Drazen Budisa, called for a revision of Dayton to ‘cantonise’ the whole of Bosnia and abolish the Entities. Croatian foreign minister, Tonino Picula, made it clear that his government could not stand back from the dispute without risking political damage. He noted that “unless we eliminate the processes which de-stabilise BiH, those processes will soon influence the most stable country in the region, Croatia.” In response to signals from Western capitals that “the Bosnian issue should not be opened”, he warned that “if we keep silent about BiH, we open up the space to extremists and their way of resolving the problems.”¹⁶

The High Representative decision dismissing Jelavic states that he “must have known perfectly well that all matters of concern to him are matters which may be redressed by normal constitutional means.” However, when the HDZ referred the issue to the Bosnian Constitutional Court, the HDZ received the response that the Court had no jurisdiction to assess whether provisional electoral rules adopted by the OSCE complied with the Federation constitution.¹⁷ Because the decision was taken by the international community unilaterally, and not through any constitutional process, there was no way to challenge the decision “by normal constitutional means”.

This conflict shows the dangers of a widely held misconception among the international community: the idea that constitutional change to exclude the nationalist parties from power can be brought about by stealth, or by international imposition. To be sustainable, constitutional structures must be accepted as legitimate by all the major political players. A consensus on the political rules of the game is a fundamental precondition for a functioning democracy. Conversely, the withdrawal of any of the constituent peoples from the constitutional structure is the gravest danger to the peace process.

¹⁶ *Vjesnik*, 14 March 2001.

¹⁷ The Federation Constitutional Court is for the time being not operational, as the mandate of its members expired in January 2000 and awaits renewal by the new Federation government.

V. THE ALLIANCE FOR CHANGE

Following the November 2000 election, the international community has invested considerable effort in assembling the 'Alliance for Change' – a loose political coalition which has now formed governments at State and Federation level. The new governments, which are openly committed to supporting international goals and the development of the Bosnian state, could prove to be important allies over the next years. At the centre of the Alliance is the Bosnian Social Democratic Party (SDP), led by Zlatko Lagumdžija. The SDP is the most promising of Bosnia's non-nationalist parties, with a proven history of moderate political behaviour. Its electorate includes the urban population most determined to see Bosnia become accepted into European structures.

In the November elections, the SDP improved its performance at Federation level by 100,000 votes over 1998, largely at the expense of the former SDA-SBiH coalition (KCD) member parties, whose combined vote over the same period dropped by 91,000. The SDP is the most multiethnic party in Bosnia, both in terms of the candidates it fields and its electorate. However, in common with all other Bosnian political parties, its support base is regional. Nearly 90 percent of the SDP vote is concentrated in five Federation cantons (Sarajevo, Zenica-Doboj, Tuzla, Bihac and Central Bosnia). This compares to 89 percent of HDZ voters concentrated in the remaining Federation territory (Posavina, Neretva, West Herzegovina, Livno and Central Bosnia). The SDA and the SDP strongholds are in the same regions, putting these parties into direct competition. The SDP also shares with the SDA the fact that nearly all its voters and candidates come from those who fought the war on the side of the Republic of Bosnia and Herzegovina.

The SDP gains in 2000 were not sufficient to allow the party to govern in its own right. It therefore entered into a coalition with Haris Silajdzic's Party for Bosnia and Herzegovina (SBiH), as well as a number of smaller parties, ranging from Kresimir Zubak's NHI to the DNZ of Fikret Abdic. At State level, the coalition includes various parties from Republika Srpska (Mladen Ivanic's PDP, Dodik's SNSD, Plavsic's SNS), some of whom are in opposition, and others in parliamentary coalition with the SDS. This coalition was assembled well after the election, under close international management. For lack of a pre-election programme of its own, the Alliance adopted the Brussels PIC objectives.

The Alliance enters government in the most difficult of circumstances. It has only a year and a half to tackle Bosnia's pressing economic and social crises before it must face re-election. At the State level, administrative structures are underdeveloped, with no professional civil service in place. At Federation level, the Alliance inherits a complex and unwieldy constitutional structure in a state of crisis. Since 1996, Federation institutions have been developed according to the needs of SDA-HDZ power-sharing arrangements, and will need to be restructured. The HDZ continues to control a number of cantons, whose co-operation is needed for any serious policy programme to be implemented. As a result, it is difficult to see how the Alliance will have the capacity in its first term of office to deliver on its larger promises of reversing Bosnia's economic decline. The electoral fortunes of its member parties are likely to depend largely on their ability to deliver results at the *cantonal* level, where much economic and social policy is made.

The Alliance is strongly reminiscent of the political constellation that governed the war-time Republic of Bosnia and Herzegovina from October 1993 onwards, when Haris Silajdzic became Bosnian prime minister, with included the SDP and moderate Central Bosnian Croats. The Republican government always had solid civic credentials, promoted the integrity of the Bosnian state, and enjoyed multi-ethnic support in the major urban centres. However, it remained confined in its popular support to the territory controlled by the Army of Bosnia and Herzegovina. It is the renewed international willingness to support the construction of a Bosnian state, rather than any dramatic shift in the preferences of Bosnian votes, that has allowed this constellation of interests to re-emerge.

This development opens up an opportunity and a danger at the same time. The Alliance now has a real opportunity to reach out to former supporters of Herzeg-Bosna and Republika Srpska, drawing them

into the common constitutional arrangements which Bosnia will need if it is to survive. However, if it fails to build broad-based support for the development of the Bosnian state, it risks simply reconstituting the war-time Republic: a multi-ethnic urban elite governing on the territory formerly controlled by the Army of Bosnia and Herzegovina. The dividing line in Bosnian politics is not between ethnic groups, but between those who stood on different sides in the last war. To date, the Alliance has succeeded in attracting certain individuals to its ranks who played a role within the former Herzeg-Bosna (Kresimir Zubak, Ivo Lozancic and Jadranko Prlic). The main challenge, however, is to create a vision of Bosnia which will be supported by voters right across Bosnian territory.

The Alliance government offers an opportunity for substantial progress towards building a functioning Bosnian state, laying a foundation which will last beyond the next election. The international community should support the Alliance programme by vigorously implementing the core Dayton agenda, from refugee return to the arrest of indicted war criminals, and focusing its efforts on building sustainable state institutions. It should not, however, repeat the experience of the Sloga government and make the survival of the Alliance *per se* its primary strategy. The ultimate goal is political reconciliation between those who once fought for Herzeg-Bosna and Republika Srpska and those who defended the state of Bosnia and Herzegovina, on the basis of respect for the Bosnian constitution.

VI. THE PROCESS OF STATE BUILDING

A. Building upon the Dayton constitution

One of the most striking developments over the past year in Bosnia is that constitutions have suddenly started to matter. In the early years of the peace process, real political decisions were taken outside the formal structures, and deficiencies in the design of the Dayton constitution were largely academic problems. With the breakdown of extra-constitutional power structures, debates on the design of the Bosnian state have now entered the political mainstream. The international community can now assume the role of mediating a process of constitutional development.

Many observers have noted the ambiguities and internal contradictions of the Dayton constitution. The great achievement at Dayton was to preserve the legal continuity and territorial integrity of the Bosnian state. However, in doing so the Dayton and Washington Agreements established an almost entirely novel state structure, incorporating very few pre-existing institutions. The new structure was only partially elaborated at Dayton, and can be interpreted in widely divergent ways. On the one hand, the explicit grant of power to the state organs is so limited that, in the words of one commentator, Bosnia “seems to be essentially a customs union with a foreign ministry, thus indeed a government with no authority within its territory”.¹⁸ On the other hand, the constitution contains an implicit grant of power which allows it to:

“assume responsibility for other matter as... are provided for in Annexes 5 though 8 of the [Dayton Agreement]; or necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.”¹⁹

The constitution therefore “provides an express grant of authority to central institutions that is so limited as to be meaningless, and an implicit grant of authority that is so broad as to be unlimited.”²⁰

¹⁸ Hayden, Robert, *Blueprints for a House Divided : The Constitutional Logic of the Yugoslav Conflicts* (1999), 126.

¹⁹ Article III.5.

²⁰ Hayden, *Blueprints*, 127.

Between these two poles, there is wide scope to develop practical working relationships between the state and the two Entities.

For the first few years of the peace process, political realities forced all actors, both local and international, to accept a minimal state. In recent times, however, this has begun to change, for a number of reasons. One critical factor has been an evolution in the way the international institutions have approached the problem. As described in a previous ESI report,²¹ agencies working on reconstruction or security issues in the post-war period had little choice but to work with existing power structures, and therefore simply ignored the state. Even the international financial institutions, which are usually obliged to deal only with central authorities, found ways to bypass the state and deal directly with the Entities. Since the Brussels PIC in June 2000, building a credible state has become an explicit international objective. The PIC Declaration sets out concrete institutions, including a professional civil service, state treasury, first-instance court, public corporations and the regulatory bodies and structures necessary for a Bosnian common market.²²

A second factor has been the gradual weakening of the parallel power structures. With three parallel revenue, budgetary and payments systems, the design of the state did not impact on the material well-being of citizens or political elites. Constitutional mechanisms such as “vital interest vetoes” were rarely used, because they were not needed. However, as external subsidies have dried up, the political elites on all sides realised that it is in their strategic interest to participate in the state on the most favourable terms. Their renewed interest in constitutional matters is therefore a sign of progress.

A process of constitutional debate and development is therefore the next stage of the peace process. This should not have anything to do with the ‘Dayton Two’ proposed by some commentators, which conjures up the image of a large international conference with diplomats and neighbouring states poring over maps. What is needed is a well-designed process for constitutional debate *within* Bosnia, in which the communities, political actors and elected representatives from different levels of government all have a chance to participate. The international community will play a vital role in setting the ground rules for such a debate.²³

B. Fiscal federalism and functional integration

At the heart of the Bosnian constitutional design is the question of fiscal federalism: the collection and disposition of public resources across different levels of government. The World Bank noted in 1996 that building a “viable structure for economic management” requires clarity in the fiscal arrangements between the State and its two constituent entities, and between the Federation and cantons. This concerns both the assignment of revenue and expenditure responsibilities across levels of government and the establishment of intergovernmental revenue distribution mechanisms.

Fiscal issues are central to constitutional development. The creation of a state civil service, for example, involves both defining the responsibilities of the institution and ensuring that it has the financial means to operate. Developing constitutional structures without attention to how they are to be funded produces artificial and unsustainable results – both the interim statutes of the City of Mostar and the Decision establishing the District of Brcko suffered from this problem. Leaving the State (or indeed the District of Brcko) dependent on transfers from the Entities, without a system for securing agreement on the size of its budget, is an obvious structural weakness.²⁴ Another is the mismatch

²¹ European Stability Initiative, *International power in Bosnia*, March 2000

²² European Stability Initiative, *Turning point – The Brussels PIC Declaration*, June 2000

²³ See: Conclusions and Recommendations

²⁴ At present, the State parliament can decide “upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina” (Article IV.4b), independently of the entities, on which the state depends for most of its funding.

between revenue assignments and spending responsibilities, which is particularly prevalent in the Federation. Under the Federation constitution, Federal responsibilities may be exercised jointly by the Federation and the cantons, or separately by the cantons under federal direction. The Federation and the cantons exercise joint responsibility for health, environmental policy, communication and transport infrastructure, social welfare and internal affairs. This is a complex and inefficient system under the best of circumstances, which has never been fully established. For the time being, the greatest share of Federation revenue is spent on the two (Croat and Bosniac) components of the Federation Army and the separate war invalids' pension funds.

In 1997, the World Bank noted that:

“the tax and expenditure assignments are imprecise, leaving the potential for disagreements and requiring difficult political negotiations to reach accords. Even where there is greater precision in the rules, some of the assignments are inefficient and need to be reconsidered... The state's roles are very limited, and its funding sources are precarious. As a result, the state's sustainability is in question.”²⁵

The Bank therefore predicted:

“Disagreement between the state and the entities regarding what are necessary expenditures should be expected, and the entities are likely to balk at times at paying their share. Difficulties with funding of the United Nations may be an appropriate parallel. Tax rates will need to be higher in the Serb Republic than in the Federation to generate the respective revenue contributions because of the greater aggregate population and incomes in the Federation. As a result pleas of unfairness can be expected.”

Although these issues are fundamental to creating stable constitutional structures, the *interrelationship* between Bosnia's constitutional evolution and the fiscal system has received insufficient attention from international organisations, with lawyers and diplomats working on the first and the World Bank and the International Monetary Fund (IMF) concentrating on the second. As a result, state institutions have been established by decree of the High Representative with no identified source of funding, requiring subsequent negotiations between the OHR and the IMF on the proper composition of the state budget. At present, the World Bank is undertaking a major Public Expenditure and Institutional Review (PEIR) of fiscal relations. Its findings should be widely distributed, not only to the Bosnian decision makers and parliaments, but to all those in the international community working on constitutional reform. While technically complex, these questions raise intensely political questions. Resolving them will require a carefully structured debate among the different levels of government, which necessarily includes the cantons which are not governed by the Alliance.

It is in this context that the implications of functional integration – announced at the Brussels PIC and often stressed by the High Representative – should be understood.²⁶ Functional integration is based on the constitutional requirement of a common market and on Annex 9 of the Dayton Agreement. It is not simply about shifting powers from the Entities to the State, or setting up free-floating public utility regulators. Nor is it about ‘de-politicising’ issues of public management, which are central to Bosnia's political economy and touch upon issues of particular interest to the public, such as the reliability and cost of different forms of energy. Rather, functional integration is about creating incentives for the different government levels to work together for common benefits in strategic sectors.

In the network industries (energy, telecommunications or railways), creating public corporations and state-level regulators is only part of the process. Common markets in energy or telecommunications will require the State and the two Entity governments to co-operate, agreeing policies and ensuring

²⁵ World Bank, *Fiscal federalism in Bosnia and Herzegovina*, Sarajevo, 1997, p. 9.

²⁶ See: ESI Report, *Taking on the commanding heights – integration of network industries as a tool of peace-building*, May 2000

their consistent implementation and enforcement across the country. The essence of functional integration is to facilitate a common economic space in sectors in which there is an economic interest of the country as a whole. A single regulatory regime is a prerequisite for such a market, since it guarantees that the same rules apply for all participants. It is also needed to make certain sectors more attractive to investors, which is vital for their development and will foster the emergence of cross-entity coalitions of interest. But regulators cannot be isolated from the rest of the political and legal system. Decisions by regulators must be based on information supplied by companies and entity ministries. There must also be a possibility for operators and specific interest groups to appeal against decisions. As one review of UK energy regulation noted:

“The need for acceptability is summed up in the phrase ‘justice must be seen to be done’. People must have confidence in the regulatory system if it is to survive. That does not imply that they must agree with every single decision, but they must believe that decisions take their interests into account. The best way of achieving acceptability is through increased openness and consultation”.²⁷

The potential of functional integration in strategic sectors lies in creating working relationships between the different governments, institutions and companies. Intergovernmental relations, until now confined to informal contacts between the ruling parties and guided by the international community, must become institutionalised. This process will create the web of common interests and functional links which will bind the Bosnian state together and enhance security for all of its citizens.

However, it will not be enough to enact (or impose) a set of laws. International institutions will also be involved in elaborating the detailed steps to be taken in appointing and training staff, the design of procedures, tendering concessions and management contracts, and ensuring that the political consensus is maintained throughout. Such a robust strategy will require significant human and financial resources, on a par with those required by other key peace building initiatives such as the Return and Reconstruction Task force. Only in this way will functional integration move beyond a paper construct.

To achieve this, there must be greater clarity not just about which powers and resources should shift to the state, but also about the long-term role of the entities, cantons and municipalities. So long as the mechanisms for deciding on the distribution of resources and functions are uncertain, Serb and Croat politicians (and their electorates) may perceive functional integration or a functioning system of fiscal federalism as a threat – the thin edge of a wedge leading towards a centralised state. The international community should emphasise that the goal is not a centralised state *per se*, but an integrated state which functions effectively and in the interests of its constituent units, and which is capable of integrating into European structures.

C. The rights of constituent peoples

Only against the background of the wider questions of the design of the Bosnian state is it possible to identify the real issues raised by the “constituent peoples” debate. Ethnicity is only one dimension of the constitutional puzzle. Discussions of ethnic relations in abstraction from the wider picture reduce to zero-sum questions of status, and are not easily subject to compromise and accommodation.

The “constituent peoples” issue was raised by a decision of the Bosnian Constitutional Court in July 2000, in response to an action brought by former President Izetbegovic in February 1998. The Court ruled that various provisions of the Entity constitutions violated the State constitution. The judgment affirms the right of the three peoples of Bosnia to equality across the entire territory of the state:

²⁷ Richard Green, *Checks and Balances in Utility Regulation – the UK experience*, in World Bank, Public Policy for the Private Sector, June 1999, p. 35

“The constitutional principle of collective equality of constituent people following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenisation through segregation based on territorial separation.”²⁸

The Court ruled that Bosniacs, Croats and Serbs enjoy equal political rights in both Entities. It indicated wherever the Entity constitutions violated this principle, but quite properly left it to the political process to determine how the problems should be fixed.

The amendments required in Republika Srpska are not particularly substantial. Originally conceived of as a unitary, mono-ethnic state, the Republika Srpska does not have any ethnic structures of representation. In the Federation, the issues are much more complex, raising the question of how the three constituent peoples and ‘others’ should be represented across Federation, cantonal and municipal levels of government. The reservation of executive and legislative posts exclusively to Bosniacs and Croats is no longer permissible. However, that still leaves a range of choices - for example, to extend the system of proportional representation and vital interest vetoes to all three peoples, or to move away from ethnic-based representation altogether. As the Court put it:

“Provisions granting minimum or proportional representation in government bodies are not per se unconstitutional. The problem is to whom they give preferential treatment.”²⁹

To prepare the required constitutional amendments as quickly as possible, the High Representative established Constitutional Commissions in each Entity with sixteen delegates appointed by him, four from each constituent people and four ‘others’. Proposals for constitutional amendments were first prepared by an International Task Force made up of representatives of OHR, OSCE and the Council of Europe’s Venice Commission. These were forwarded to the Constitutional Commissions on 6 March, which must select their preferred text by 16 April. The amendments are then to be submitted to the Entity parliaments for adoption through the normal procedure. The implication seems to be that the High Representative intends to use his Bonn powers to ensure that the amendments are adopted in a timely fashion, even if the Entity parliaments are unable to agree. The HDZ has already declared that, as long as the Federation House of People’s issue is not settled, it is unwilling to participate in this process.

This process is designed to be controlled by the international community. The extremely short deadlines are driven by international institutional considerations. In so far as it represents an attempt to bypass a wider political debate about the future of the Federation, it is extremely dangerous. The constitutional status of the three constituent peoples should not be altered without their agreement, without threatening the legitimacy of the entire Dayton settlement. The key element of constitutional reform is not to achieve the ‘right’ outcome, in a technocratic sense, but to produce an outcome which the main political actors are all prepared to accept. The goal is a complex balancing of interests, which will leave the parties with an incentive to participate in the constitutional system.

If the Constitutional Commissions are to make a valuable contribution to the wider constitutional debate, a number of things need to happen. First, the artificially short deadlines need to be abandoned. No democratic system could hope to achieve fundamental constitutional reform in a matter of a few months. Second, the Constitutional Commissions must not be a closed forum, but should be encouraged to develop and incorporate a wider process of consultation and debate. Third, the High Representative should undertake not to use his Bonn powers to bypass the consent of the constituent peoples, nor to exploit the current non-participation of the HDZ in the Federation Parliament to engineer an artificial majority. Fourth, the process of constitutional debate should be broadened to address the question of distribution of functions and resources across Bosnia’s complex constitutional structures.

²⁸ Constitutional Court of Bosnia and Herzegovina, *Constituent Peoples case*, U5/98 Pt. III, para. 60.

²⁹ *Constituent Peoples case*, Pt. III, para. 117.

In practice, this means that the process of constitutional reform will take considerably more time to complete. However, the alternative – using international power to bypass a genuine political process – only leads in the direction of constitutional breakdown.

VII. CONCLUSIONS AND RECOMMENDATIONS

An analyst of the Bosnia peace process is confronted with a paradox. On the one hand, Dayton implementation is succeeding. Over the last two years, Bosnia has changed beyond recognition. With the proper determination and focus, the core issues raised by the Dayton Agreement could be resolved within 2-3 years. On the other hand, it is readily apparent that Bosnia remains an extremely fragile state. The lack of governance capacity, the depth of the economic crisis, the level of corruption and the weakness of public institutions risk undermining the long-term stability of the country.

This apparent contradiction is central to understanding the current loss of direction of the international mission. International organisations have now developed the instruments to tackle the most critical Dayton issues, from dismantling war-time power structures to facilitating ethnic reintegration through the implementation of the property laws. At the same time, an increasingly expansive interpretation of what ‘Dayton implementation’ entails has made every problem of governance an issue for the international mission and the PIC Steering Board. Thus, OHR finds itself reforming witness protection laws, supervising privatisation investment funds, dismissing corrupt officials, approving the allocation of municipal land and trying to develop a strategy for Bosnia’s agricultural sector. Through poor definition of the international division of labour and a tendency to take on such broad objectives as ‘reforming the economy’ and ‘fighting corruption’, most aspects of social and political life in Bosnia are now matters of international responsibility.

The problems of weak governance in Bosnia will not be resolved quickly or easily, and international organisations lack the capacity to act as a shadow government. Frustration with slow progress and a lack of instruments often leads the international community to apply short-term solutions to long-term problems – dismissing corrupt officials, for example, rather than strengthening the legal and institutional environment, or using international influence to impose ‘democratic’ outcomes, rather than helping the democratic process to develop. Faced with an impossibly broad agenda, it is inevitable that the mission would develop a sense of failure, despite its many successes.

The danger that the Bosnian state and economy will fail is real – a danger shared with other weak states in South Eastern Europe. The challenge of reform is enormous, and will need strong external support. In the late 1980s, before the outbreak of war, Bosnia was already a weak state with an ineffective administration, regional income disparities, high unemployment, low investment and persistent corruption. These conditions made it easier for ruthless conflict entrepreneurs, whether from Serbia, Croatia or inside Bosnia, to set the country aflame. If these conditions are not addressed, new threats will emerge in the future.

The tools for tackling these longer term problems, however, must be different from those developed to implement the Dayton Agreement. This section recommends that the international mission be seen in three components: (i) core Dayton tasks; (ii) constitutional development; and (iii) issues of governance. Each of these will require different instruments and methods.

A. Core Dayton tasks

Over the past five years, an impressive list of immediate post-war priorities have been successfully addressed. Reconstruction of war damage has been extensive, and the humanitarian crisis is over. Many pressing human rights issues, such as post-Dayton ethnic cleansing, violence against minority returnees, illegal detentions, freedom of movement, intimidation of journalists and the most egregious

forms of ethnic discrimination in public institutions, have been resolved or dramatically reduced by monitoring backed by political interventions. Most outstanding territorial issues, such as the delimitation of the Inter-Entity Boundary Line, the status of Brcko and the integration of divided municipalities, are resolved, although the status of Mostar remains an issue. The military and security matters listed in Annex 1A of Dayton were completed early on, and as a result of an (even strongly reduced) SFOR military presence the threat of force is almost entirely eliminated from Bosnian politics. The central institutions of the state have been established, and free and fair elections are conducted regularly without incident. The peace enforcement mission is approaching completion.

The following core Dayton tasks still require sustained international attention:

- i) Property law implementation and return is a key priority for the coming period. Accelerating rates of property law implementation have been a critical success of the international community over the past two years, and have begun to transform the social and political environment of Bosnia. The instruments for completing the task are in place. They include international consensus on clear principles and a consistent strategy. Particularly important has been an effective organisational structure – the Return and Reconstruction Task Force (RRTF) and the Property Law Implementation Plan (PLIP) – which has provided for co-ordinated information collection, policy making and action on the part of different international organisations.

The task is, on average, about 20 percent complete, with wide regional variations, and progress is accelerating. If international pressure and resources are sustained, there is **a possibility that, by 2004, every victim of ethnic cleansing will have been given the opportunity to choose whether to return home.** This is eliminating what would otherwise be the most potent destabilising factor in Bosnia in the future. It is vital to continue with full determination and the required resources until the job is done.

- ii) Free and fair elections have now been held on numerous occasions. By the end of 2001, OSCE must leave behind a fully domestic legal and administrative infrastructure capable of running them independently. It must also develop consensus on a permanent election law (which should not be imposed).
- iii) Numerous war-criminals have been arrested, and wherever this has occurred, it has helped to transform the local political environment. **This is one task which must be completed through continued arrests by SFOR and sustained pressure on the Federal Republic of Yugoslavia.**
- iv) The armed forces have been brought under control, and no longer play a role in the political sphere. There is, however, **a continuing need for an international security presence, with US participation, while the rest of the Dayton mandate is being completed.** The international community should work to cut the remaining financial links between the entity armed forces and neighbouring states, and work towards enhanced co-operation between the military leadership. Bringing the intelligence services under democratic control is the last outstanding security task which has not yet been attempted.

In these areas, the necessary international instruments are already in place. This is not the case for the following two objectives, which will require reorganisation of the international community if they are to succeed.

- v) Build the core state institutions is a priority established by the Brussels PIC Declaration, and includes a professional civil service, a state treasury and court, and the state bodies capable of building a Bosnian common market. However, little has been done to organise a focused implementation, which is inhibited by the existing international division of labour. **The international community will need to improve its management structures, to as to allow**

effective co-ordination of the constitutional, technical and budgetary aspects of the state-building tasks. It may be appropriate to create an OHR-led interagency Governance Task Force.

- vi) OHR has identified functional integration of network industries as a key element of its overall strategy. Rather than attempt to supervise the entire process of “economic reform”, which goes well beyond the core Dayton tasks into the wider field of post-communist transition, **OHR should dedicate all necessary resources to overcoming the political and technical obstacles to integrated network industries**, in close co-ordination with other international agencies .

These issues are the responsibility of the special international structures mandated by the Dayton Agreement. On these areas, it is necessary and legitimate for the international community to continue to use its full authority, although it should try to do so in as predictable and transparent a fashion as possible, while giving every opportunity to domestic institutions to take over responsibility.

To complete these issues by 2004 will require the full resources of the international mission in Bosnia. In order to organise high-intensity, focused efforts, international organisations will have to consciously abandon tasks which fall outside the core Dayton agenda, or which have already been completed.

B. Constitutional development

There is no need for a ‘Dayton 2’, where the basic premises of the Bosnian peace settlement, including the territorial aspects, are revisited at a large international conference. Even the suggestion that this might take place is destabilising. There is, however, a need for a process of constitutional development addressing three issues in particular: (a) the competencies and relationships between the different levels of government; (b) a workable system of fiscal federalism; and (c) the methods of protecting the political equality and vital interests of the three constituent peoples.

These are not issues which the international community can solve by imposition. It involves a search for common ground among the different political interests, leading to structures which all the players accept as legitimate. Two years ago, with political power still exercised principally through extra-constitutional structures, there would have been no prospect of accomplishing this. Now the strategic environment has changed, and if the right process can be established, there are real prospects for a lasting constitutional settlement.

For this process to be successful, all parties must accept certain preconditions:

- i) The political actors, and in particular the HDZ and the SDS, must commit themselves to completing the core Dayton tasks, and particularly the continued implementation of the property laws. They must accept that all military and intelligence structures come under civilian control, and are completely excluded from the political sphere.
- ii) They must accept that the goal is to create a functional state structure, with the capacity to advance the interests of its citizens, and to integrate progressively with European and international structures. This is not, however, an open-ended process of centralisation. Bosnia will always be a decentralised state in which the Entities and their sub-divisions bear the largest share of public functions. They must retain the powers and resources to carry out their responsibilities. However, Republika Srpska in particular must accept that it can no longer hold a monopoly on public functions on its territory.

For its part, the international community must make certain commitments.

- iii) It must renounce the use of the High Representative's powers to effect constitutional change, or to redesign the electoral system. The constitutional guarantee of the equality of the constituent peoples starts here: their constitutional status may not be altered without their consent.
- iv) The international community must accept the HDZ and the SDS as legitimate political interlocutors. This does not mean weakening international standards on compliance with the Dayton Agreement. The international community will continue to use its authority to ensure that the core Dayton tasks are accomplished. However, it means measuring the nationalist parties by their conduct, and not by their history.

OHR should now give careful consideration to the design of a serious process for constitutional debate. It might include the following elements:

- Avoiding artificial time constraints, such as the April deadline for the Constitutional Commissions to debate the constituent peoples decision;
- Creating an expert commission on fiscal issues and intergovernmental relations, to generate concrete proposals for how to create financially sustainable constitutional structures and meet the requirements of European integration. This is not a purely technical exercise; it also involves identifying the core interests of the different levels of government and the opportunities and incentives for reform.
- Offer to appoint a respected international personality to act as moderator of intergovernmental, multi-party talks. International organisations in Bosnia are too close to the political fray to play this role effectively. OHR's role would be to generate information and creative proposals to support such a political table on constitutional reform.

The advantage of such a process is that it would generate hard information on the current financial crises of the Entity and sub-Entity levels of government. It will also force the Entity authorities to think seriously about their long-term future. This is how to generate the incentives and concrete interests which will bind Bosnia together. Constitutional debates which deal with question of ethnicity and status in the abstract, without bringing in these concrete interests, are much less likely to succeed.

Before progress can be made on these wider constitutional issues, it is essential to resolve the current stand-off with the HDZ. This is a struggle which neither the HDZ nor the international community can win. If it drags on over the coming months, it will compromise both the new Alliance government and the broader state-building project. The international community needs to make some tough decisions about which issues really matter.

The HDZ could be brought back into the political process by opening dialogue on the following points:

- The HDZ must accept, as a matter of basic constitutional principle, that it has no automatic right to participate in any level of government where other parliamentary majorities can be formed.
- The HDZ must demonstrate that it is fully committed to the core Dayton tasks, in particular the return of refugees and the implementation of property laws, wherever it holds power. This is a commitment which can be objectively measured by comparing repossession rates across the country. To date, the record in Herzegovina and particularly in Mostar is abysmal.
- OHR and OSCE must accept that the HDZ legitimately represents a majority of the Croats who live in the territory of the former *Croat Republic of Herzeg-Bosna* as a result of the 2000 elections. It has a right to be involved in any process affecting their constitutional status.

- OHR and OSCE should reopen negotiations on the composition of the current House of Peoples, developing a compromise formula which satisfies the HDZ that it retains its ‘vital interest veto’. There should be an agreed interpretation of the proper use of the veto, to avoid it being used to obstruct the work of the new Federation government.
- If the HDZ agrees to resume a responsible political role, the High Representative should hold out the possibility of reversing the dismissals of Ante Jelavic and the deputy HDZ leaders at an appropriate moment, following the precedent of Carlos Westendorp reinstating the current Republika Srpska vice-president, Dragan Cavic.
- International organisations and the Alliance governments make clear that there will be no attempt to launch criminal prosecution or corruption investigations *as a response to* genuine political disagreement. Such rhetoric undermines the principle of placing the rule of law above politics. Crimes and corruption (including allegations of war crimes) must be investigated *irrespective* of the political attitudes of those concerned.

C. Issues of governance

The weakness of the post-communist state remains the primary obstacle to security, democracy and sustainable economic growth right across South Eastern Europe. Regional overviews such as the World Bank’s *Road to Stability and Prosperity in South Eastern Europe*³⁰ have emphasised problems such as weak judiciaries, corruption in tax administration, ineffective police forces, porous borders, unsustainable social welfare systems and the lack of parliamentary oversight over executives. In Bosnia, these problems have only been exacerbated by the war, with the departure of a large part of the educated work force, the destruction of social environments through population displacement and institutions damaged both physically and culturally. The problems of the weak state confront international organisations in Bosnia at every turn.

However, the institutions mandated by the Dayton Agreement to accomplish peace implementation tasks are not necessarily the right instruments to address this broader challenge. In particular, the High Representative’s Bonn powers have proved largely ineffective in strengthening domestic governance. The imposition of legislation which has not emerged from a domestic political process has limited transformative effect. Rather, it tends to relieve domestic institutions of their responsibilities and inhibit the development of accountable government.

International support to institution building in Bosnia needs to adopt an entirely different mode of operation than is used in the core Dayton mandate. In areas such as judicial reform, capacity building in the police, education and most aspects of economic reform, the international community should increasingly proceed as though the Bosnian state were fully sovereign, renouncing the short-term solution of imposition. This will force domestic authorities to take on responsibility, and recreate the space for a genuine domestic political process in which reform priorities emerge from negotiations among different interest groups.

Dividing the core Dayton tasks from the weak state problem has concrete implications for OHR and other international organisations.

- i) From a certain moment, OHR should explicitly renounce the use of the Bonn powers outside the core Dayton mandate.
- ii) In a number of areas, OHR has been establishing independent or quasi-independent institutional structures, such as the Independent Media Commission and the Independent

³⁰ World Bank, *The Road the Stability and Prosperity in South Eastern Europe: A Regional Strategy* (March 2000).

Judicial Commission. This approach can be extended into other governance fields. There should be an increasing division between these bodies and the OHR's core mission, with a view to separating them completely at the appropriate moment. In this way, OHR can eventually conclude its mission while leaving in place a framework for longer term international assistance in priority areas.

- iii) Serious attention should be given to the question of how the process of European integration and the European Union's Stabilisation and Association process can be used to structure long-term international assistance on governance issues. As the peace implementation mission draws to a close, the EU's Road Map and funding instruments such as CARDS will play an increasingly important role. The Consultative Task Force mechanism should be developed so it can take on a political oversight role in a post-OHR phase.
- iv) There are many useful lessons to be learnt from the experience of institution-building initiatives in Bosnia, such as the Central Bank, the Independent Media Commission and the European Union's CAFAO in customs administration. These lessons and techniques will continue to be relevant in the post-peace-implementation phase, such as seconding expert international staff to work in domestic bodies and conditional budgetary support. These forms of assistance can continue by agreement with the responsible domestic authorities.

There is ample scope for innovative thinking on how to promote effective domestic governance in Bosnia. Many of the lessons learned in Bosnia are highly relevant to understanding the problems of other weak states in the region. Continuing to rely on the Bonn powers, however, ensures that Bosnians will remain incapable of solving their own problems.

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