

HOSTAGE STATE: HOW TO FREE BOSNIA FROM DAYTON'S PARALYSING GRIP

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November 2020

SUMMARY

- A quarter of a century after the Dayton agreement, Bosnia and Herzegovina enjoys peace. But, in the last 15 years, the EU and US have failed to press for reform in the country, a neglect that has enabled ethno-political leaders to capture the state.
- Reformist political actors have carved out space for economic and governance reforms in scattered municipalities. For such initiatives to expand, however, change in the governing modus operandi is needed at higher levels of government.
- Restoring independence to the judiciary and strengthening the rule of law are key to the country's future stability and success, including boosting its economy and stemming emigration.
- Organised crime and corruption are already worries for EU capitals – and the new Biden administration appears to share this concern. Concerted EU-US action and judicious use of sanctions can jumpstart reform in Bosnia-Herzegovina.

INTRODUCTION

In 2009, in what was the last high-ranking visit by a US government official to Bosnia and Herzegovina, as vice-president Joe Biden addressed the parliament of Bosnia and Herzegovina. Speaking without notes, he delivered a clear message and a simple question to parliamentarians: “When will you get tired of this divisive nationalist rhetoric? The United States expects you to start working across party lines to make Bosnia function as a normal state.”

Biden was right then. And, 25 years on from the conclusion of the Dayton Peace Agreement, Bosnia still suffers from divisive ethnic discourse and a severe lack of functionality. Worse, domestic political players continue to use such rhetoric to distract from their own governance failures.

Bosnia and Herzegovina has a population the size of Berlin’s – just 3.5 million – and an annual GDP per capita of \$6,073. But its citizens are obliged to finance no fewer than 13 governments and parliaments, five presidents, and a total of 149 ministries, many of which function inadequately. Two years on from the 2018 general election, the government of the Federation of Bosnia and Herzegovina (FBiH) – the larger of the two entities that constitute the country, the other being the Republika Srpska – has not yet formed. During 2019, the parliament of Bosnia and Herzegovina did not hold a single regular session, while its members continued to receive full salaries. In December this year, the city of Mostar will hold its first municipal elections in more than a decade. Jews and Roma are still unable to stand for the presidency in a country formally aspiring to membership of the European Union.

Bosnia remains troubled on the economic front too: the GDP gap between Bosnia and neighbouring countries has widened in the past six years. According to the Public Integrity Index, Bosnia is 111th out of 117 countries on judicial independence. Its state-owned enterprises have incurred debts of as much as 26 per cent of the country’s GDP. The country’s young people are leaving in large numbers, two-fifths of employed workers are over the age of 50, and one in five inhabitants is a pensioner.

The answer to Biden’s question is straightforward, even though the task is enormous. Achieving the goals implied in his short speech would mean eliminating the underlying factors that drive dysfunctionality and perpetuate divisive ethnic discourse. Both are closely linked to state capture by corrupt ethno-political elites and are not products of some insurmountable ethnic cleavages. The problem in Bosnia is not one of frozen ethnic conflict but of state capture that the international community has effectively permitted. The starting point in solving this problem is for European and

American decision-makers to rid themselves of the misconception that the agendas of ethnic leaders in Bosnia and Herzegovina are incompatible, that they cannot get along, and that the path to resolving Bosnia's problems is through endless conflict mediation or more ethnic autonomy. Ethno-political group leaders make much of regularly being in conflict with one another – but they get along well when it serves their narrow interests. And these interests too often do not represent the interests of their constituencies.

The good news is that the story of Bosnia and Herzegovina 25 years after Dayton Peace Agreement is not only one of the destructive effects of the state capture by unaccountable elites on the economy and society. It is also a story of remarkable societal resilience and individual triumphs in entrepreneurship, sport, and the arts, withstanding decades of divisive politics and irresponsible governance. The story is also one of successful governance initiatives headed up by reformist municipal and cantonal leaders. Together, these figures and organisations – from the private sector to civil society, to local government – can be the agents of change that Bosnia and Herzegovina needs to overturn the state capture holding the country back.

THE CONSTITUTIONAL PROVISIONS OF THE DAYTON PEACE AGREEMENT

To understand the story of state capture, it is important to first understand the shape of the state that elites have captured.

The present-day constitution of Bosnia is an integral part of the 1995 Dayton Peace Agreement, which formally ended the war. It sought to reconcile two conflicting policy objectives: maintaining the territorial integrity of the Bosnian state while satisfying the autonomist ambitions of the Bosnian Serb wartime nationalist parties (the autonomy and political representation of Bosnian Croats had previously been secured via the Washington Agreement). The constitutional compromise agreed in the Dayton Peace Agreement combined power-sharing in the central government with asymmetrical arrangements for territorial autonomy between the two entities.

But these arrangements would prove vulnerable to abuse by opportunistic and unaccountable elites. The Dayton constitution's power-sharing agreement is organised on consociational principles and mandates representation of the three main ethnic groups in all branches of government and a

complex decision-making system that allows for a large number of ethnic and territorial veto opportunities. At the central level, it entails representation of the three constituent peoples in the Bosnia and Herzegovina executive, the upper chamber of the parliament, and the constitutional court; a collective three-member presidency with a rotating chair; and a 'vital national interest' (VNI) veto for the three constituent groups in the presidency and in both chambers of the legislature.

The constitution also established a complex mechanism that prevents the adoption of decisions in the legislature without a certain degree of support from the two entities that comprise the country. It also granted far-reaching territorial autonomy to the Republika Srpska, which is now largely Serb; and the Croat-Bosniak FBiH, which was further decentralised into ten cantons. Thus, the constitution already provides a large amount of autonomy to its three groups.

In the years immediately after Dayton, the central government had only a minimal number of exclusive competencies and the role of the Bosnian state was largely symbolic. Without its own sources of revenue, the central government was financed through monthly transfers from the entities. In the limited number of areas in which the central government did have authority, the consociational rules governing state institutions allowed for a significant number of entity veto opportunities, allowing obstructionist-minded politicians and officials to seriously impair decision-making processes.

For the last quarter of a century, the US, the EU, and international organisations in charge of implementing the peace agreement have invested significant funds and political capital in strengthening the ability of the central government of Bosnia to carry out its functions. In the early years, this included establishing a single currency, a central bank, a single market, unified vehicle number plates, and a national flag and other symbols. Numerous competencies were also transferred from the entities to the central government – including, critically, those in the areas of finance, justice, security, intelligence, and defence. Crucially for Bosnia and Herzegovina, these reforms allowed the country to function as a sovereign state, while retaining one of the most decentralised federal systems in the Western world, with the highest degree of autonomy for constituent groups.

Thus, the central government has become somewhat stronger. But, over the last 15 years, a parallel strengthening of sub-state institutions in the Republika Srpska and deliberate obstruction of national state institutions has rendered the system dysfunctional, while key provisions of Dayton remain unimplemented. For example, defence property and other state property remains unregistered with the Bosnia and Herzegovina government, in violation of the requirements laid down by the national constitutional court. And refugees have not been able to exercise their right to return to Republika Srpska; this is a crucial aspect of the implementation of the Dayton Peace Agreement that was

supposed to restore the Republika Srpska to its pre-war, multi-ethnic status. Despite the existing constitutional guarantees for non-Serbs in the entity, Republika Srpska has been consolidated as a Serb-dominated territorial unit. And this has, in turn, emboldened the Bosnian Croats in their request for a third entity within Bosnia and Herzegovina. Meanwhile, the Bosniak party, Stranka Demokratske Akcije (SDA), has consolidated its political grip over select state, entity, and cantonal institutions in Bosniak-majority areas. The consolidation of mono-ethnic control over government institutions thus appears to be an objective shared by the three ethnic leaders, who otherwise pose as enemies in public.

Because of the many ways that exist to block decision-making processes, the role of the Office of High Representative (OHR) has proved especially important. The OHR is the key civilian peace implementation agency in Bosnia. Its mandate was defined in Annex 10 of the Dayton Peace Agreement, according to which the designated high representative is responsible for ‘monitoring’ the peace settlement, ‘promoting cooperation’, and ‘facilitating ... the resolution of any difficulties arising in connection with civilian implementation’. The so-called ‘Bonn powers’ entitle the high representative to use extraordinary executive measures to implement the Dayton Peace Agreement and safeguard the Bosnia and Herzegovina constitution. They include some controversial measures such as the power to remove government officials from office if they obstruct the implementation of the agreement.

Nationalist parties such as Hrvatska Demokratska Zajednica (HDZ) and Savez Nezavisnih Socijaldemokrata (SNSD) regularly argue for further decentralisation by offering interpretations of the Dayton constitution different to that given by the national constitutional court. Whereas the SNSD sees Bosnia and Herzegovina as a confederation, the HDZ has demanded further electoral reforms by stretching the concept of the equality of constituent peoples.

The Dayton system could function well enough were there the will to make it work. But the problem of Dayton in practice stems from the fact that nationalist parties are primarily interested in consolidating their political grip over institutions and undermining the system’s capacity for checks and balances rather than in creating structures that can work through compromise. State capture lies at the heart of this problem.

WHY BOSNIA AND THE WESTERN BALKANS MATTER TO EUROPE AND AMERICA

European interest in Bosnia and Herzegovina, and the Western Balkans more broadly, may have waned of late, but it remains a crucial region – one that the EU and its member states want to be stable and secure. Bosnia and Herzegovina is the linchpin of regional stability due to its central location in the Western Balkans, its recent history of enormous destruction, and the way neighbouring states interfere in its affairs.

The question of eventual EU enlargement to the whole of the Western Balkans remains. But, regardless of that issue, events in the region have implications for what happens across Europe today. From 2015 onwards, the region became a key migration route to the EU. And, from the point of view of the national security objectives of EU member states, the single most important challenge in the Western Balkans is to shut down the smuggling routes that bring illicit goods and weapons, returning foreign fighters, far-right extremists, and other criminal groups into the bloc. The EU and member states cannot achieve this without having reliable local partners – that is, accountable governments and functional institutions based on the rule of law. Add to this the increasingly obstructive policies taken by the Russian government in the region, as well as the growing influence of China, Turkey, and the Gulf states, and it becomes clear that disengagement is not a viable option for the EU. Thus, for Europeans, the real choice is not whether to stay engaged but which framework of engagement to choose.

Over successive administrations, the US has linked its national security interests to the issues of Islamist radicalisation and the expansion of Russia's military, economic, and media influence. Chinese and Turkish influence has also grown in importance in the last four years. Addressing these issues effectively means strengthening the rule of law to prevent opaque dealings between local officials and foreign autocratic regimes. Critically, it means preventing any further division of Bosnia into areas dominated by one ethnic group, each of which then gravitates towards their respective external patrons – Russia, Turkey, the Gulf states, or China. A functioning multi-ethnic Bosnia is the best way to achieve this in such a contested geopolitical situation.

BOSNIA'S POST-DAYTON EXPERIENCE: NOT ALL BAD

There are positive aspects to Bosnia and Herzegovina's current situation. Twenty-five years on from the signing of the Dayton Peace Agreement, a large number of citizens accept the fundamental existence and legitimacy of the Bosnian state. This is despite decades of divisive political discourse promoted by Bosnia's ethno-nationalist leaders. On average, 74 per cent of the population is proud of having Bosnian citizenship. This sentiment is the strongest in the Brcko District, where 88 per cent say they are proud of their citizenship; in the FBiH, 82 per cent do. And 66 per cent of those living in the Republika Srpska share this view – despite decades of messaging from the Republika Srpska leadership either criticising the Dayton arrangements or even calling for secession.

Individual success stories illustrate society's overall resilience to the destructive effects of opportunistic nationalist politics. Arts, culture, and civil society are particular sources of hope. The Sarajevo Film Festival hosts large numbers of artists and guests from the region each year. Rock bands from Sarajevo can attract up to 12,000 people a time when performing in Belgrade. And the Bosnian football association removed ethno-political quotas that it had in place. Across the country, there are inspiring stories of how the state could be run differently – and not along the Dayton lines of tripartite ethnic representation.

Visionary leadership – when it exists in government – is found almost solely at the local level, in cantons and municipalities. In 2019 a short-lived administration in Sarajevo canton showcased what good governance in Bosnia could look like: just a few months into office, the government had introduced measures on transparency, accountability, and financial audits, revealing massive abuses of public funds in various sectors. Elsewhere, over the last ten years, the mayor of Tuzla has developed his region into an entrepreneurial hub, whose 2,500 companies export to more than 70 countries around the world, making up 3.4 per cent of the total exports of Bosnia and Herzegovina. As a result of the covid-19 crisis, the first eight months of 2020 saw exports from Bosnia and Herzegovina fall by 14.1 per cent compared to the same period in 2019. Yet, during this period, production and exports from Tuzla rose by 15 per cent.

Since the start of the pandemic, Bosnia's enterprises have launched initiatives to reorientate their production towards pandemic-driven demand for masks, disinfectants, and other medical products. For many years, the Dita Tuzla company served as an example of privatisation gone bad. But it

recently transformed itself into a successful exporter of medical and cleaning supplies to the EU after it was acquired and restructured by Bingo, one of the biggest companies in Bosnia and Herzegovina.[1]

Individual success stories in the arts, governance, and entrepreneurship show that ethnic divisions need not be a barrier to success in Bosnia. A large number of constructive political actors – especially in local government, among politically engaged civil society, and in the still-embryonic private sector – want to see the country develop and prosper. Indeed, many people in Bosnia and Herzegovina know where the problem lies. Despite decades of divisive political rhetoric, the number of citizens who perceive organised crime as the number one security threat outnumber those who view distrust or violence between ethnic groups in this way.[2]

THE ABUSE OF DAYTON INSTITUTIONS BY ETHNO-CRIMINAL NETWORKS

While pockets of society have proven resilient, Dayton's institutional problems have persisted. The agreement brought peace but, instead of protecting the rights and national interests of constituent groups, the constitution ended up protecting the ruling elite from accountability. The veto mechanisms and legal loopholes it created have allowed Bosnia's ethno-political leaders to drain public resources and capture key government institutions. What has emerged in Bosnia is a government and a set of administrative structures that suffocate the private sector and the country's prospects for development. Among other things, this has led to an exodus of young people searching for a better future in the EU.

State capture enabled within the framework of the Dayton constitution has its roots in the criminal dimension of the war and genocide in Bosnia. This criminal dimension is vital to understanding the country's history and present situation, but is regularly lost in the popular narrative of inter-ethnic conflict. Large numbers of criminal combatants participated in war operations in Bosnia between 1992 and 1995. Many were attracted by the prospect of looting and selling stolen goods on the black market, and they were often recruited by the wartime political leadership through promises of a reduction in the jail sentences they were serving.[3] Even during the war, battlefield rivals would cooperate given the chance for mutual profits; they would regularly announce ceasefires to allow the exchange of smuggled goods.[4]

STATE CAPTURE

through constitutional mechanisms



HOUSE OF REPRESENTATIVES

Entity majority requirements: To adopt a decision, a simple majority is needed, including one third of votes from delegates elected from each entity.



HOUSE OF PEOPLES

Decision requirement: A quorum from each constituent people & a simple majority, including one third of votes from each entity. Vital National Interest can be raised to block decisions.



PRESIDENCY BIH

Vital Entity Interest: Each of the three members of the presidency can invoke Vital Entity Interest veto to block a decision and protect the entity.

Political control



THE JUDICIARY



CIVIL SERVICE & PUBLIC ENTERPRISE

Laws that contain high standards that guarantee independence (HJPC Law) or non-partisan appointment (Civil Service Law) have been ignored to enable parties to influence appointments and decisions in these branches of government.

Corruption and abuse of office

STATE OWNED ENTERPRISES

The parties in power, through political agreements and control over appointments, control the work of public enterprises and employ political loyalists. They are the main source of funding for political campaigns.

PUBLIC PROCUREMENT

Abuse of the public procurement system enables state-owned enterprise contracts to go to companies affiliated with political parties. In this way, public funds are misused to finance the political parties.

TAX SYSTEM

Political control over the tax administration can be used for repressive action: inspections and racketeering over private SMEs, which have no recourse to appeal to the courts given the political control over judiciary.

Economic impact



LIMITED ECONOMIC GROWTH

Constitutional blockages, corruption, nepotism, politically controlled recruitment, and politicised system of inspections have led to limited economic growth and a poor business environment.



EMIGRATION OF THE POPULATION

The same factors have led to mass emigration from Bosnia and Herzegovina. The European Union issued 155,000 residence and work permits for B&H citizens in 2014-2018.

12 adopted laws

For the term of office 2014-2018, only 12 new laws were adopted in the B&H Parliament, not counting amendments. Of this number, state parliamentarians proposed only one law.

377 days

Between December 2018 and December 2019 the B&H Parliament has not held one regular session, due to political blockades and lack of agreement in the B&H Council of Ministers.

2 years

The Federation B&H government has had a technical mandate since the last elections.

This model survived into the post-war era, and war profiteers on all sides emerged as major benefactors of the territorial and administrative divisions put in place by the Dayton Peace Agreement. This laid the basis for the abuse of power, smuggling, customs and tax evasion, and money laundering that takes place today. Legitimised as “the pursuit of autonomy for ethnic minorities”, administrative fragmentation and muddled jurisdictions in the original Dayton Peace Agreement created legal grey zones and a favourable environment in which organised crime could flourish. The country’s cross-border regime with Serbia and Croatia was uncontrolled and enabled cross-border crime.^[5] For instance, evidence seized in an OHR-led and NATO-supported raid on Hercegovacka Banka in Mostar in 2001 revealed massive financial embezzlements of funds from Croatia’s budget that had been earmarked as assistance for families of war veterans or pension funds but that never reached the intended recipients. International investigations found that financial assets in Hercegovacka Banka were used to support political-criminal networks, finance the boycott of the institutions of Bosnia and Herzegovina, and support the creation of the unconstitutional third, Croat entity.

HOW ETHNO-CRIMINAL NETWORKS CAPTURED THE STATE

The judiciary

Some parts of the original Dayton system – such as indirect taxes and customs services, the judiciary, intelligence agencies, and the border police – were reformed and centralised between 2002 and 2006 following robust US and EU interventions led by the then high representative, Paddy Ashdown. However, since that time, the US and EU have ceased to closely monitor Bosnia’s institutions or pursue reform of the judiciary. Into this void stepped two key ethno-nationalist leaders, Bosnia Serb Milorad Dodik and Bosnian Croat Dragan Covic. Together, they have challenged the legitimacy of the Bosnia and Herzegovina state and its legal framework – in the case of Dodik, through repeated calls for secession. In return, they have obtained concessions in the one sector that really mattered: the judiciary. While the Bosniak SDA adopts a pro-Bosnia discourse, it has also facilitated this process by participating in state capture.

In 2003 the OHR launched a far-reaching judicial reform backed by the US and EU that included the

wholesale vetting of prosecutors and judges. This was carried out through the High Judicial and Prosecutorial Council (HJPC), an independent watchdog that formed the same year and was initially presided over by international judges and prosecutors. By 2006, the judiciary in Bosnia, while far from perfect, had begun processing high-level cases of corruption and organised crime, in part due to the presence of international prosecutors and judges in the Bosnia and Herzegovina court and Prosecutor's Office. Some key political leaders were put on trial; in 2006 the Bosnia and Herzegovina court sentenced Covic, who was president of the HDZ, to five years in prison for abuse of office during his term as FBiH finance minister. However, while that guilty verdict was issued by an international judge, two years later it was struck down by a cantonal court after the second instance panel chaired by a local judge transferred the case to cantonal jurisdiction. In 2005 Dodik stood trial for corruption in a Republika Srpska court and was freed in a verdict issued by a local judge.

The campaign promulgated by the HDZ and the SNSD against the Dayton institutions had begun. From 2006 onwards, the Bosnian Croat and Bosnian Serb leaders framed their calls for reform in terms of the reversal of state-building reforms, greater autonomy, or secession. But a central part of their initiative focused on eliminating international judges and prosecutors for corruption and organised crime from the Bosnia and Herzegovina court and Prosecutor's office.

The OHR reports submitted on a yearly basis to the UN Security Council illustrate the way in which Dodik has been threatening secession since 2006, consistently claiming that the Republika Srpska competencies were stolen by the central government against Bosnian Serbs' will. The reports also record his demand that NATO integration measures be contingent on the removal of international judges. The reports identify HDZ leader Covic too as pushing for a Croat entity in Bosnia. The SDA, in turn, receives blame for the failure to hold elections in Mostar and for promoting the ethnic partition of the city.

In 2009 the HDZ-led Bosnia and Herzegovina Ministry of Justice proposed amendments to the law on the Bosnia and Herzegovina court designed to end the mandate of international prosecutors and judges for organised crime from 2012 onwards. The same year, the SNSD chair of the Council of Ministers, Nikola Spiric, initiated an executive order not to extend the mandate of international judges and prosecutors on cases of terrorism, organised crime, and corruption in the Bosnia and Herzegovina court and the Bosnia and Herzegovina Prosecutor's Office. While a proposal on the extension of the mandate of international judges and prosecutors was considered in the Bosnia and Herzegovina parliament in 2009, the voting requirements for entity majorities were used to block the legislation.

The three most senior members of the judiciary – the president of the Bosnia and Herzegovina court, the chief prosecutor of Bosnia and Herzegovina, and the president of the HJPC – launched a joint appeal in 2007 to the international community and pledged to extend the mandate of international judges and prosecutors, warning that the judiciary would collapse if the mandate was not extended.

The international community did nothing. In 2009 the high representative extended the mandate for judges and prosecutors focused on war crimes, but failed to do the same for those focused on corruption and organised crime. This decision effectively ended their mandate. Ethnic leaders opposed not the extension of the mandate for international judges dealing with war crimes but rather that for judges dealing with organised crime and corruption.

In parallel, the HDZ embraced a strategy of hollowing out relevant state-level legislation – by, for instance, challenging legal provisions in the Criminal Procedure Code that allowed for a more effective approach to prosecuting organised crime cases. According to the October 2018 OHR Report to the UNSC, the HDZ amendments would have significantly limited the state’s ability to exercise its criminal jurisdiction.

While the SNSD and HDZ leadership drove the initiatives to purge international members of the judiciary, the SDA has had no real strategy to protect Bosnian central or entity institutions. Its approach appears to have been to make deals with Dodik’s SNSD and Covic’s HDZ on how to divide up institutions and positions in order to establish a political monopoly and strengthen control over those government institutions headed by SDA political appointees. There were shocking examples of the SDA’s activity uncovered by the short-lived 2019 reformist administration in Sarajevo canton noted earlier. During the pandemic, SDA officials used an expedited procurement process to direct public funds to a company owned by members of their political party.

The gradual but systematic capture of judicial institutions has opened up space for unsanctioned abuse of office. The highest judicial institution, the HJPC, has lost its independence and reportedly operates under the strong influence of political parties. The nomination and eventual appointment of the president of the HJPC, Milan Tegeltija, was accompanied by media reports of his alleged entanglement in organised crime networks while holding the position of president of the district court in Banja Luka. A 2019 European Commission report described Bosnia’s judicial system as being perceived as “a centre of unaccountable power in the hands of persons serving the interests of a network of political patronage and influence”.

The establishment of political control over key institutions in the judiciary of Bosnia and Herzegovina

has made judges unable to prosecute high-level cases of abuse of office. When such cases emerge, it is mostly through the work of investigative journalists rather than judicial institutions. An OSCE report from 2018 on the judicial response to corruption concluded that most high-level cases of corruption ended in acquittals due to judicial flaws and “conflicts of jurisdiction”.

Finally, a recent SNSD and HDZ campaign to remove international judges from the Bosnia and Herzegovina constitutional court appears similarly inspired by the desire to insulate entity governments from independent oversight. In February 2020, the Bosnia and Herzegovina constitutional court ruled that agricultural land in Republika Srpska was official property of the state of Bosnia and Herzegovina, meaning it could not be treated as a possession of the government of the Republika Srpska. After the three international judges supported this decision, the Republika Srpska parliament – acting on the initiative of Dodik – adopted a decree on the so-called “Anti-Dayton Activities of the Constitutional Court of Bosnia and Herzegovina” and announced the suspension of the work of the Republika Srpska representatives in federal bodies until foreign judges were excluded from the constitutional court. Dodik made renewed secession threats and linked them directly to the issue of international judges’ presence on the court: “either political leaders will come to a new agreement on what the constitutional court should look like or Bosnia will be no more”. The HDZ joined the initiative and a joint SNSD-HDZ proposal to legislate to remove the international judges began the Bosnia and Herzegovina parliament in February 2020. The proposal was struck down after the constitutional commission of the parliament of Bosnia and Herzegovina gave a negative opinion on the law.

The legislature and the executive

Ethnic parties have also had success in capturing legislative bodies. Ruling elites have learned to use procedural mechanisms, such as the entity majority requirements, to block draft legislation. In addition, quorum requirements to fill employed posts and ethnic voting requirements in governments and parliaments at all levels provide a number of veto opportunities.^[6] In combination, these requirements have been used to block decisions and laws, often without regard for the wider public interest.

During the covid-19 pandemic, for example, ethnic parties effectively sabotaged legislative amendments in the Bosnia and Herzegovina parliament that would have helped the private sector cope with the covid-19 crisis, such as legislation on VAT relief for enterprises. Another example is a set of amendments proposing the temporary abolition of excise duties on alcohol in order to support

companies seeking to reorientate their production to meet the coronavirus-related demand for medical supplies. Both were struck down via requirements of entity majority vote. As noted, in 2009 a proposal to extend the mandate of international judges and prosecutors for organised crime and corruption received majority support in the lower chamber of the Bosnia and Herzegovina parliament, but was struck down by the HDZ and SNSD votes in the upper chamber.

The most direct instances of abuse of the entity veto mechanism can be found in the Bosnia and Herzegovina presidency, whose members are entitled to use a veto to protect what they consider to be the vital interests of the two entities. The veto in the Bosnia and Herzegovina presidency was used by Dodik as its Bosnian Serb member to block the decisions on Bosnia and Herzegovina participation in the next PISA test and to obstruct a lawsuit regarding Croatia's violation of Bosnia's open sea access through the construction of the Peljesac bridge. Dodik also used, on that occasion, the tool of 'vital entity interest' to prevent a state visit by Milo Dukanovic, president of Montenegro, to Bosnia and Herzegovina for the commemoration of the 25th anniversary of the genocide in Srebrenica.

In the Republika Srpska National Assembly, the vital national interest was used – again, following a proposal by Dodik – to block the deployment of the EU Border and Coast Guard Agency to reinforce the State Border Service on the border between Bosnia and Herzegovina and Serbia, leaving its problems unresolved. The director of the State Border Police has used the term “Swiss cheese” to describe the state of Bosnia's borders because of the extent to which they allow the smuggling of goods and persons.

A more indirect abuse of Dayton works through ethno-political control of key bodies. Quota requirements stipulate equal representation of all three ethnic groups in both the leadership of government institutions and the management and supervisory boards of state-owned enterprises. This system disregards the criterion of merit and allows political parties to establish control over institutions. The result has often been unsanctioned use of public funds that cannot be kept in check in the absence of functioning judiciary.

While the abuse of public funds in Bosnia is at least as old as Dayton itself, it became particularly acute during the covid-19 pandemic. Between mid-March and the end of May this year, 416 procurements in Bosnia and Herzegovina were negotiated without a public tender. Although this was made legal by an emergency measure issued by the Bosnia and Herzegovina Public Procurement Agency, a large number of irregularities appear to have been geared towards channelling funds to companies affiliated with political parties' leaderships.

Other institutions built with considerable amounts of US and EU political and financial support prior to 2006 have similarly been weakened by the political grip of ethno-nationalist parties. The institutions in Bosnia that have often come under fire from the SNSD have jurisdiction to investigate terrorism. They include the Bosnia and Herzegovina State Investigation and Protection Agency, the Bosnia and Herzegovina Prosecutor's Office, and the Bosnia and Herzegovina court.

A 2003 merger of customs administrations into a single institution eliminated certain avenues for customs evasion from within. However, cross-border smuggling continues, with large amounts of counterfeit goods being produced in neighbouring countries and smuggled across the border by criminal gangs. Reports suggest that government officials continue to support smuggling, turning a blind eye in exchange for monetary reimbursement or due to their political interests. EU member states such as Germany and Sweden appear to be aware of the large-scale presence of Balkan counterfeit goods on their markets: the Swedish government has already appointed a special envoy on organised crime in the Western Balkans. Illegal smuggling channels also facilitate the trafficking of migrants through well-established 'Balkan route' to the EU. Since 2018, around 60,000 migrants trying to enter neighbouring EU countries through Croatia have been temporarily registered in Bosnia.

Finally, ethno-political control over government institutions and public companies and institutions helps established parties tend to a voter base, sometimes going so far as to blackmail state employees, even publicly, to vote for ethnic parties in exchange for public employment. Before the 2018 general election, Dodik – as president of the Republika Srpska – openly warned that the contracts of public sector employees who voted for the opposition would effectively be terminated. That same year, the Bosnian civil society group Pod Lupom found instances of illegal pressure on voters, including conditional dismissals and offers of new employment in exchange for votes.

The problem in Bosnia is not one of suppressed conflict but of repressive capture by political elites abusing the institutions. This has significant effects. Citizens have chosen to vote with their feet, triggering a mass exodus to EU countries – which they perceive as providing better opportunities for work and the future of their children. Bosnia's economic and demographic decline is at least partly a result of this deleterious situation.

HOW STATE CAPTURE AFFECTS BOSNIA'S ECONOMIC AND DEMOGRAPHIC DECLINE

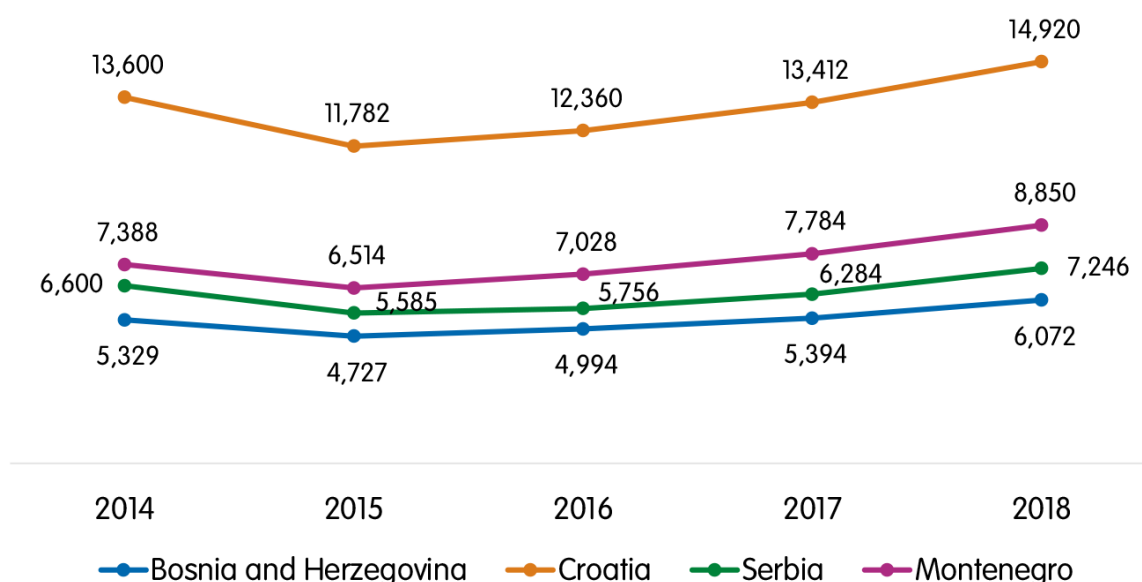
State capture in Bosnia has had negative political and economic consequences. In terms of GDP, Bosnia and Herzegovina has fallen further behind other countries in the region since 2014. Bosnia's business environment indicators have either stagnated or worsened over the past five years, as exemplified by the fact that Bosnia is in 90th place out of 190 countries assessed by the World Bank in 2020 on the overall ease of doing business. Only six countries assessed worldwide rank worse than Bosnia when it comes to starting a new business. Since 2014, more 226,000 so-called 'first permits' have been issued by EU member states to citizens of Bosnia and Herzegovina.

At the heart of Bosnia's financial predicament is the freeloading, overblown government apparatus's unsustainable relationship with state-owned enterprises and the private sector. While the embryonic private sector helps finance Bosnia's bureaucracy, the bureaucracy persistently suffocates the growth of the private sector. Besides cumbersome business regulations and administrative burdens, anecdotal evidence suggests that the private sector is crippled by non-functioning legal mechanisms that fail to enforce contractual obligations. And while Bosnia and Herzegovina has made some progress on the index of economic freedoms – it is currently ranked in 82nd place in the world – the main impediment to greater economic freedom remains failures in the rule of law: property rights, judicial effectiveness, and government integrity. In addition, the court system is too slow when it comes to enforcement of commercial (and any other) law. This makes it difficult to enforce contractual obligations within a timeframe that makes sense for businesses.

The country's state-owned enterprises have become a liability rather than a productive asset. Ethno-political control over the appointment of public companies' governing boards means that political parties control key business functions, from strategic, economic, and financial decisions to tenders and public procurement procedures. This has led to asset-stripping and state-owned enterprises amassing huge debts. Collectively, state-owned enterprises owe about €4 billion, including around €1.7 billion in taxes. According to the International Monetary Fund (IMF), half of Bosnia and Herzegovina's public enterprises are illiquid and completely reliant on state support. Furthermore, state-owned enterprises are in arrears to private enterprises, which do not receive payments for their goods and services but nevertheless have to pay VAT to the government. This creates a liquidity trap in the private sector.

It is, therefore, unsurprising that Bosnia has been underperforming economically. Between 2014 and 2019, Bosnia and Herzegovina's GDP per capita rose by only \$744, whereas it rose by \$1,253 in Croatia, \$1,444 in Montenegro, and \$802 Serbia. Some experts suggest that, at this rate of growth, it would take Bosnia and Herzegovina more than 20 years to catch up with Croatia. The World Bank recently estimated that, at the same rate, it would take Bosnia 60 years to catch up with the EU.

GDP per capita in the Western Balkans in current US dollars



Source: World Bank
ECFR · ecf.eu

This falling behind is partly due to the country's heavy reliance on remittances: between 2010 and

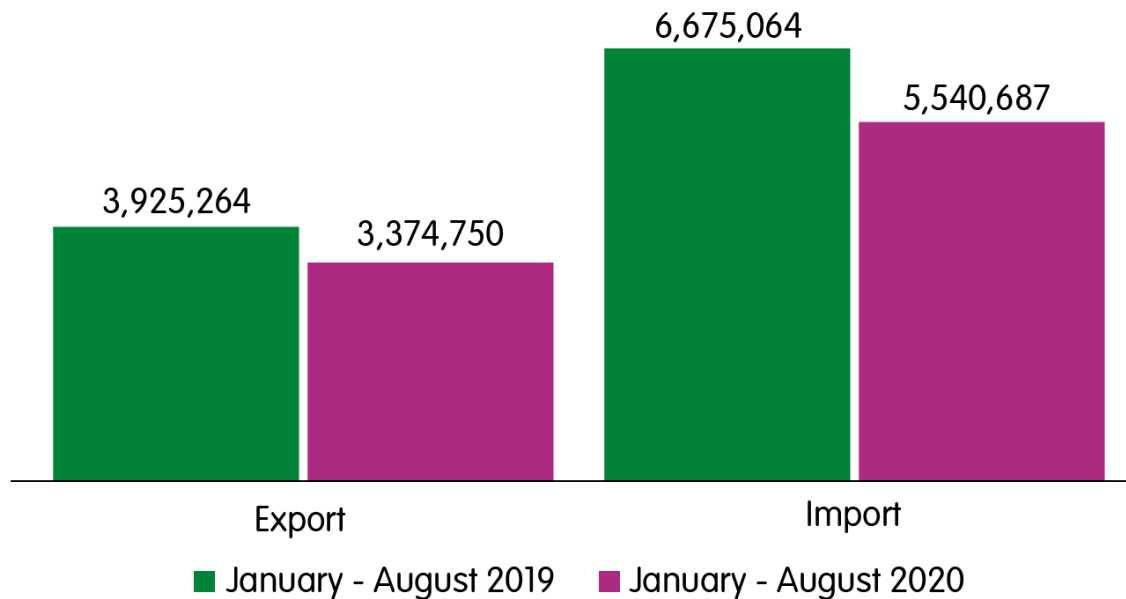
2019, GDP growth was sustained by high rates of consumption enabled by money sent home from abroad. The implications for the economy are alarming: a sharp drop in such income would trigger a corresponding fall in GDP. It appears that remittances fell by 3.6 per cent in the first quarter of 2020 – and they are only expected to decrease further.

Furthermore, both public and private investment has remained low over the past decade. The economic consequences of Dayton's institutional set-up is that one-quarter of total government spending in Bosnia and Herzegovina goes on salaries in the public administration, while less than 9 per cent is used for investment. Private investors are deterred by a poor business environment, slow procedures, and a lack of transparency and predictability. In the last ten years, foreign direct investment as a percentage of GDP has been low, peaking at just 2.9 per cent in 2014 before falling back again. It is notable that overall employment numbers in Bosnia have not increased since 2016, even as the unemployment numbers have been driven down by emigration. The embryonic private sector continues to provide financial life support to the Dayton institutions – as do external sources such as remittances, commercial loans, and international funding.

In fact, it is puzzling how Bosnia's large and inefficient government apparatus manages to survive at all. A small population with one of the lowest GDPs per capita in Europe is financing a dizzying array of often-redundant bureaucracies.

Such fiscal architecture is unsustainable. The challenges of financing Dayton's institutional system will only grow with covid-19, which has delivered additional blows to the economy of Bosnia and Herzegovina. The closing of borders, the decline in the population's purchasing power, and the fall in demand from key export markets such as Germany and Italy have all increased layoffs and reduced industrial production, trade volumes, and revenues. Compared to the first eight months of 2019, Bosnia's imports in the same period of 2020 decreased by €1.1 billion, while exports fell by €550m.

Bosnia and Herzegovina trade balance in euros

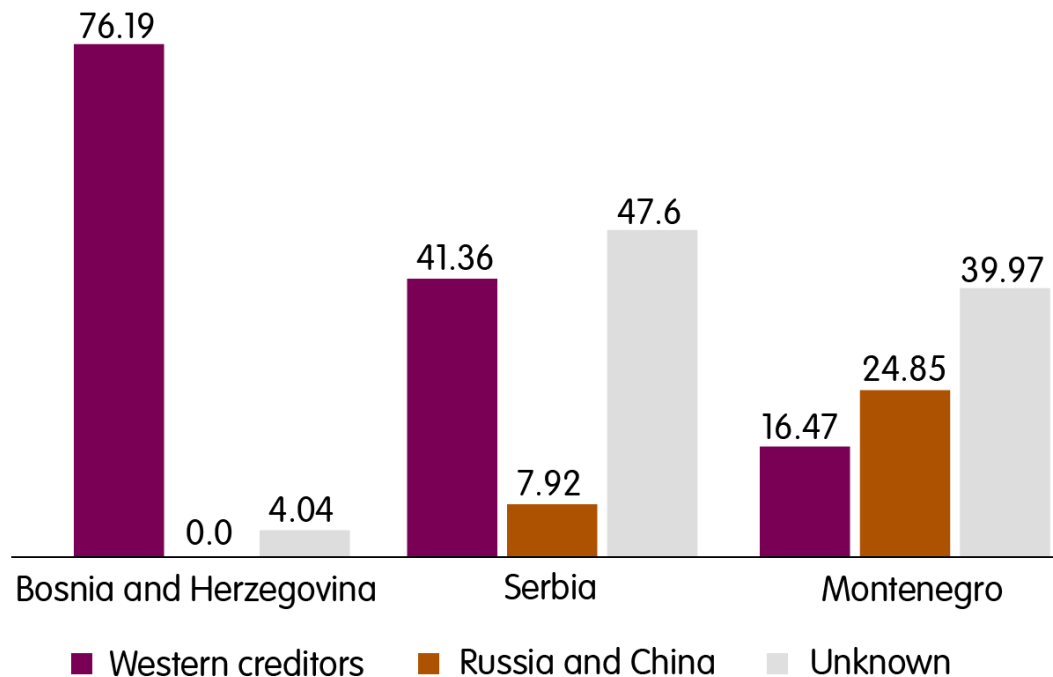


Source: Bosnia and Herzegovina Statistical Agency
ECFR · ecf.eu

On top of this, mass emigration from Bosnia has led the labour force to decrease by just over 10 per cent in the last five years. The impact of this is visible among the young in particular: between 2014 and 2020, the number of registered students fell by nearly 8 per cent in elementary schools and by more than one-fifth in high schools and universities. This poses not only a challenge for the productivity of the private sector, but also places additional strains on the public budget, as pressure on pension payments in next 10-15 years increases, foreign loans come due, and the private sector stagnates.

Bosnia and Herzegovina has one feature that is normally considered to be a liability: its debt. This could be an important source of leverage for the EU and the US. The country has a relatively transparent foreign debt structure and is strongly orientated towards Western creditors (certainly in comparison to Serbia and Montenegro). Together, the European Bank for Reconstruction and Development, the European Investment Bank, and the World Bank make up 76 per cent of Bosnia's total debt structure (in Serbia, the comparable figure stands at 41.3 per cent; in Montenegro, it stands at 16.5 per cent). The highly opaque and problematic category of "unknown lenders" makes up just 4 per cent of total loans in Bosnia and Herzegovina, as compared to almost 49 per cent in Serbia and 40 per cent in Montenegro.

Western Balkans countries' debt structure in per cent



Source: Ministries of Finance of Serbia, Bosnia and Herzegovina, and Montenegro
ECFR · ecfre.eu

Such a debt structure means that Bosnia is heavily reliant on the EU. And Western financial institutions could exercise a greater amount of leverage over the country than they currently do. The Republika Srpska and the FBiH turned to the IMF and the EU for substantial financial assistance during the early months of the pandemic. They jointly received €330m as part of the IMF rapid's financing instrument in April 2020. It took months to distribute these funds because of political quarrels. It was not until July 2020 that the funds were allocated to recipients in the FBiH – and they were eventually used to pay for pension arrears. The EU plans to allocate a total of €250m to Bosnia under its macro-financial assistance package. The IMF is in the process of defining the conditionality for the new extended facility funding, which will amount to \$750m. This means that the IMF will have provided \$1 billion to Bosnia and Herzegovina within the space of 12 months. The IMF and the EU must leverage this to enforce greater governance accountability.

CONCLUSION AND RECOMMENDATIONS

Any reform of the Dayton arrangements, be it minimal or more ambitious, has always been a chicken and egg story. Constitutional reform is procedurally impossible without the support of a two-thirds

majority in each ethnic group in state and entity parliaments. Yet these groups' leaders cling to power by maintaining the status quo. As a consequence, the success of even minimal reforms to the constitution – such as removing bottlenecks by reforming decision-making requirements – is entirely dependent on pressure from other countries. Particularly important in applying this pressure are the Quint (the US, the United Kingdom, Germany, France, and Italy) and international organisations. In the absence of political will at home and among these international players to fix the problems of the Dayton settlement, numerous past attempts at reform have failed – as seen in a major attempt at constitutional reform in 2006, when Bosnia and Herzegovina ranked higher on the list of US and EU foreign policy priorities.

The problem is, therefore, one of agency and incentives: since domestic politicians are unwilling to enact reform, and the US and Europe are unwilling to push for an ambitious constitutional overhaul, what other options remain? It is important to be realistic and avoid attempts at far-reaching reforms to the Dayton arrangements that will convince few domestic players but still allow Dodik to claim a threat to the political autonomy of Bosnian Serbs or to the Republika Srpska. It is also important to shift the focus from ethnically framed discussions that polarise the electorate and that give ethnic leaders ammunition to legitimise their own role on issues of corruption and state capture. The most effective way to eliminate ethnic and political instability in Bosnia is to remove its sources – above all, to reverse state capture by political leaders who use ethnic divisions as a method of distraction. Reform efforts should, therefore, focus on restoring the integrity of the judiciary and the rule of law, thereby creating the conditions to dismantle the networks that have captured state institutions.

A laser focus should be trained on defending institutions that were built under international oversight in the early 2000s, to block further efforts to dismantle Bosnia's statehood. This entails defending the constitutional court from becoming a political instrument of the executive. In the past, the constitutional court has proven independent and capable of defending Bosnia's sovereignty against frequent attacks from nationalist politicians. The reason the constitutional court retained its independence, despite politicised appointments of local judges, is the presence of three European judges appointed by the European Court of Human Rights (ECHR).

Without these three judges, the court could easily become a political instrument of nationalist parties and be used to pick apart Bosnia and Herzegovina as a state through 'constitutional' channels. This has already been attempted: Dodik has challenged the constitutionality of the state institutions that were built through transfers of competencies in the early 2000s. The constitutional court has ruled that the creation of these institutions, such as the state court and the HJPC, is in line with the country's constitution. This ruling has not prevented Dodik from further denying legitimacy to state

institutions, and claiming that Republika Srpska competencies such as defence and taxation were wrongly taken away.

The policy of removing international members from Bosnia's judicial bodies has, at times, been supported by the EU in the name of domestic ownership. In fact, the European Commission's Opinion on Bosnia and Herzegovina's application for EU membership defines reform of the constitutional court and addressing the issue of international judges as requirements. Unfortunately, basing such a critical policy trajectory on the assumption of local ownership is premature. The departure of international judges would not produce local democratic ownership in the truest sense. Rather, it would surrender this critical institution to state capture. The European judges on the constitutional court ensure that it maintains its neutrality. They constitute the main mechanism of defence against attacks on the country's sovereignty.

The inclusion of this recommendation in the European Commission's Opinion should not, therefore, lead to the weakening of the position of the European judges. Instead, it should mean instituting a more transparent and merit-based election of local judges. The constitutional court should also be strengthened to give it the authority to impose temporary solutions in cases where the parties cannot agree on legal solutions to constitutional deadlocks. One should explore the instruments that would strengthen the capacity of the constitutional court to ensure its decisions are implemented. The path towards removing ECHR judges from the constitutional court must only run through a stronger, more credible, and more independent constitutional court. (For similar reasons, it is critical to maintain current international stabilisation instruments, such as the OHR and the Brcko Tribunal – an issue explored below.)

Place tackling organised crime and corruption at the heart of policy: A basis for renewed EU-US cooperation

The current moment presents an opportunity for strong EU-US partnership focusing on anti-corruption. Neither Bosnia nor the Western Balkans more broadly will be among the top foreign policy priorities of the new US administration. The Biden administration will be preoccupied with domestic matters, and US foreign policy will concentrate on bigger issues such as climate change and China. However, these factors notwithstanding, Biden's victory creates an opportunity for a reinvigorated joint transatlantic approach to the region.

Writing for Foreign Policy earlier this year, Biden made the fight against corruption and nepotism one

of his domestic and foreign policy priorities. Bosnia and the Western Balkans is a perfect place for the EU to join with the US under Biden in implementing this pledge. Both Brussels and the EU's biggest member states, such as Germany and France, are more than eager to mend relations with the US after four years of pain under Trump.

The EU has already made the fight against corruption and state capture the centrepiece of its efforts in the Western Balkans. In its February 2018 Strategy for the Western Balkans, the European Commission made the rule of law one of its priorities. The strategy explicitly acknowledged the link between organised crime and government administration. The European Commission's progress reports for 2018 show that all countries in the region are lagging on three key priorities laid out in the strategy: reducing corruption, tackling organised crime, and establishing a well-functioning judiciary. Bosnia and Herzegovina performed better on these indicators in the early 2000s than it does today.

This backsliding in the past 15 years was partly the result of disengagement by the Obama administration, which largely followed the EU's lead on the Western Balkans, reasoning that it was Europe's backyard. But this approach rarely paid off, since there was no EU consensus on the question of how to confront the obstruction of Bosnian state institutions by local nationalist politicians. A strong partnership between the US and the EU is, therefore, vital to the success of both parties in Bosnia and Herzegovina.

Fortunately, even a relatively limited investment of European and American political capital in Bosnia could yield great dividends in defending the rule of law and state institutions. Just as importantly, it could prevent the emergence of a political and security crisis that would require intervention on a much larger scale. But, in order for such modest political investment to produce dividends, the international community needs to agree on a clear set of priorities and pursue them in a sustained manner. To this end, the EU – jointly with the US, the UK, and relevant international financial institutions – should identify a limited number of priority areas for which joint policy should be unambiguous and consistently upheld.

The policy framework has already been defined in the European Commission's 2019 Opinion on Bosnia and Herzegovina's application for EU membership. The problem with this framework is its sequencing and enforcement of priorities. For instance, the implementation of the European Commission Opinion's priorities on democracy, functionality, and procedural reforms tends to be kicked down the road in EU accession talks, in which the nationalist agenda still dominates. EU institutions need to be more assertive in setting their priorities – they cannot make progress on other issues, such as the rule of law agenda, until they remove mechanisms that create procedural

bottlenecks and other forms of blockage.

EU institutions and the Quint group should adopt a more assertive and uncompromising approach to the ‘state functionality’ recommendations in the European Commission’s Opinion on Bosnia and Herzegovina’s application for EU membership. In particular, they should work on the following:

- **Focus on implementing the functionality reforms contained in the European Commission’s Opinion.** The European Commission’s Opinion on Bosnia’s preparedness for EU membership provides an external framework for making the Bosnian state functional. The Commission’s opinion recommends ensuring the functionality of the government and administration by creating a clear division of competencies between different levels of government and eliminating key veto points in the decision-making process for the areas covered by the *acquis communautaire*. These recommendations should be priorities for the EU and the Quint.
- For more specific ideas on how to improve the functionality of decision-making, the Quint should follow the sensible recommendations provided by the Foreign Policy Initiative, based in Sarajevo. These centre on minimal reforms to the Dayton arrangements that would improve the functionality of the state without touching on Bosnia’s territorial arrangements. They include limiting the use of the blocking mechanisms to instances where the right of the entities or constituent peoples are truly endangered. For instance, the role of the House of the Peoples could be limited to cases of vital national interest on issues related to religious and cultural rights. This would prevent parties from using the upper house to block vital measures such as legislation that is critical to the private sector’s efforts to cope with the pandemic and to helping Bosnia deal with the detrimental effects of the economic crisis. As such a change can only be achieved through a parliamentary procedure and constitutional reform, it requires unwavering political support from Quint member states. It will require careful planning, a strategic approach, and sufficient political will from the Quint to mobilise support for procedural fixes without compromising on other aspects of the constitutional setup.
- **Focus energy and resources on the rule of law.** As with functionality issues, the European Commission’s Opinion provides the necessary framework for rule of law reform – and no progress on governance or the economy will be possible in Bosnia so long as the judiciary is politicised. International partners should, therefore, seek to improve and defend key institutions, particularly the HJPC, the Bosnia and Herzegovina Prosecutor’s Office, and the Bosnia and Herzegovina court. What is needed is much stricter conditionality, monitoring,

and an insistence that the benchmarks be met without lowering the bar. And, to implement such monitoring, the US and the EU should consider reappointing international experts to the Bosnia and Herzegovina court, the Bosnia and Herzegovina Prosecutor's Office, and the HJPC. If the US and EU were to choose just one action to really try to complete, it should be to restore oversight of the judiciary by reappointing international experts – prosecutors and judges – to the Bosnia and Herzegovina court, the Bosnia and Herzegovina Prosecutor's Office, and the HJPC. Their reappointment as fully-fledged members requires more political appetite than is available in the US and the EU at this point. Even initially bringing international judges and prosecutors on board in an advisory capacity could be useful, if the Quint was ready to stand behind their recommendations and insist on their implementation. Such investment would yield the greatest dividends in not only the rule of law but the economy, political stability, and security in Bosnia and the region. It would be in line with the EU, UK, and US priorities, creating conditions for all other reforms to follow.

- **Western countries should recognise that the type of reform needed is not solving frozen conflict, but frozen state capture.** There is no lack of awareness in EU capitals and Washington that state capture lies at the heart of instability in the Western Balkans. A coalition of individual countries that are already significant donors, are active within international financial institutions, and have growing security stakes at play appears keen to take on this challenge. On the other hand, EU leaders need to better understand the fundamental role that state capture and organised crime play in the region's problems. Emmanuel Macron has wrongly called Bosnia a jihadist "ticking time-bomb", not realising that the problem lies not in Bosnia's Muslim population, but in the smuggling routes kept alive by the captured system and used to traffic goods, weapons, radicalised individuals, and returning foreign fighters trying to reach the EU. Dismantling smuggling routes requires a different governing modus operandi, one based on greater accountability and support for the rule of law. The UK and Swedish governments appear aware that weak institutions and organised crime produce security spill-over at home. The UK has made organised crime one of its priorities in the Western Balkans: it has doubled its assistance across the region and increased its staff working on security issues such as transnational crime and illicit finance. EU member states such as Germany and France need to follow suit. The Biden administration's greater focus on corruption and organised crime would lend much-needed coherence to the European effort.
- **The EU and the US should make better use of their joint leverage – and available resources – to break the crime-state nexus.** This includes bringing together EUFOR, financial auditors, and US and EU embassies to conduct anti-corruption raids and break up

networks of organised crime. EUFOR's remaining troops, time, and resources could make a greater contribution to stability if they worked on detecting and combating organised crime and smuggling networks. EUFOR and SFOR previously participated in financial audits and intelligence operations; this should serve as a model. Similarly, reinforcing embassies' economic sections with customs and anti-fraud officers could strengthen monitoring of customs and tax fraud. On the rule of law, Quint states need to apply greater leverage and ensure a tighter monitoring approach. They can do this by re-establishing the reform commissions that existed in the 2000s, which closely monitored progress at that time. In a similar manner, Quint members should closely monitor progress on reforms, identify and publicly call out parties that block it, and implement penalties in cases of non-compliance.

Take a regional view to support political stability and economic interdependencies

The following principles can support the political stability and security of Bosnia and the region:

- **Defend international borders.** Quint members and the EU should jointly reiterate their red lines on the inviolability of international borders in the Western Balkans, as well as on meddling in Bosnia's domestic political affairs by Serbia and Croatia. Great caution is required not to exhaust political capital on the Serbia-Kosovo deal to the detriment of Bosnia. This happened in 2006, when Javier Solana – then the EU's high representative for foreign policy – decided to drop conditionality on police reform in Bosnia, with the aim of gaining concessions from Serbia on Kosovo.
- **Address economic interdependencies.** The economic shock of covid-19 will not be overcome by individual Western Balkans states alone, given that some of them have small markets of under two million consumers. A regional approach to economic recovery can help address this. There is a regional market initiative that seeks to bring down all barriers to the movement of goods and services, and involves the mutual recognition of diplomas. The government of Bosnia should complement this by devising a regional development strategy that focuses on specific sectors according to national and regional comparative advantages. This will Bosnia and the region integrate, as well as fulfil their potential in agriculture, tourism, and the IT sector. Bosnia, alongside Kosovo and Montenegro, exports little and persistently records the highest trade deficits with its neighbours in the region.

- **Increase Western Balkans countries' role in EU supply chains.** States in the region that export goods to the EU could seek to increase their share of trade with the bloc, which aims to reduce its dependence on suppliers in Asia. During the pandemic, many enterprises in Bosnia and elsewhere in the region saw a rise in exports due to new demand from EU countries. On the doorstep of the EU, the Western Balkans has comparative advantages in proximity, natural resources, and skilled labour. The region's labour-intensive industries have been an asset during the pandemic, and could continue to be so in its aftermath. The Western Balkans' underused agricultural potential could also draw member states' interest as they consider challenges around global food security.

The question of how: Make greater use of leverage and policy tools

Maintain existing executive safeguards

This paper focuses on institutional and economic issues, but the security dimension is vital too. Despite the significant number of competencies that Bosnia and Herzegovina's central government assumed in the early 2000s, the country is less stable and secure in 2020 than it was in 2005. Captured institutions, the unpredictable political environment, and the unstable regional context are just some of the factors that contribute to this situation.

The EU is surrounded by conflicts in its southern and eastern neighbourhoods, and can no longer rely on the US to maintain security in Europe. At the 2020 EU ambassadors' conference, the bloc's high representative for foreign affairs and security policy, Josep Borrell, argued that, to secure its neighbourhood, the EU needs to be willing to make full use of its toolbox – including suitable crisis management capacities. Nowhere is this more relevant than in its immediate neighbourhood, the stability of which depends on the stability of Bosnia and Herzegovina. Therefore, the EU should – at a minimum – maintain the executive safeguards it currently has at its disposal. This involves keeping ECHR-appointed international judges on the constitutional court and maintaining and using the OHR and the Bonn powers in the face of pressure from Dodik and Covic, who have recently sought to undermine these institutions. It also involves retaining the Brcko Tribunal, which has a critical mandate in the arbitration of the status of Brcko District. Retaining the tribunal will reduce the risk of the Republika Srpska annexing Brcko District and easing the path to secession.

In strategic terms, this approach requires no new investment. And yet it provides a greatly needed insurance policy, given the high risk of new crises. Although the Bonn powers have not been used

since 2011, they still formally exist and can be reactivated in a crisis situation to deal with political or security challenges. As such, they provide a legal basis as well as important political instruments that the EU and the US can use in case of a significant political crisis or renewed conflict. In 1997 it was Russia's vote on the Peace Implementation Council that backed the decision on the Bonn powers – but, today, such a vote is unimaginable.

In the 1990s, it took a war, genocide, and millions of refugees on the EU's doorstep for the US and the EU to intervene in Bosnia and establish stabilisation instruments such as the OHR. Having declared its ambitions to act as a “geopolitical” force in the world, the EU must keep the legal basis for intervention in Bosnia that EU member states have available under the peace agreement and UN Security Council resolutions. Were they to relinquish these powers too quickly, the EU and the US would be left without immediate legal and political tools for intervention and would subject themselves once more to a Russian and Chinese veto in the event of a crisis or a renewed conflict.

Financial leverage: Coordinating with international financial institutions

Bosnia and Herzegovina's Western-orientated debt profile means that outside financing should be spent strategically and devoted to backing up the urgently needed reforms outlined above. This can be done following the model used in the early 2000s, when international financial institutions coordinated effectively with the political representatives of other international organisations in Bosnia to press for reforms strengthening state institutions and economic governance.

Sanctions: EU member states to join the US sanctions in a coalition of the willing

The credible threat of sanctions and a willingness to act on these threats has been effective in fostering cooperation on the state-building agenda in Bosnia. During 2003-2004, the US and the EU jointly imposed targeted sanctions, including visa bans and asset freezes, on government officials involved in crime, corruption, or breaches of international law. The sanctions were backed up by evidence from raids and intelligence operations that exposed the violations of international law, most notably of UN Security Council resolutions and Bosnia's obligations to the International Criminal Tribunal for the Former Yugoslavia.

The Trump administration maintained the sanctions on Dodik for his anti-Bosnia and Herzegovina policies and actions that the Obama administration enacted in its last days. The US has also implemented sanctions for abuse of office and corruption on another member of Dodik's party, Spiric. [7] In his role as chair of the Council of Ministers, Spiric was the official proponent of the council's

decision not to extend the mandate of the international prosecutors and judges.

The full effectiveness of the US sanctions has been undermined by three factors: the unwillingness of the EU to follow suit by issuing the same or similar sanctions; the unwillingness of the US and the EU to consider applying these measures to similarly corrupt leaders in other ethnic parties; and the fact that, in the absence of joint strategy from Europe and America, the incentive structure weakens considerably once the sanctions have been imposed.

The EU has failed to follow suit on sanctions mostly because of its inability to secure consensus in the European Council by gaining the support of member states such as Hungary and Croatia. Key EU member states such as Germany have until now rejected calls for unilateral sanctions, arguing that the EU-wide financial and Schengen regime allow targets to circumvent such measures.^[8] However, the 2018 decision by the German government to impose unilateral travel bans on 18 Saudi officials implicated in the murder of journalist Jamal Khashoggi illustrates that individual member states can target rogue politicians or officials even in the absence of an EU-wide consensus. The imposition of travel bans suggests that EU member states have more instruments at their disposal than they have been willing to use to incentivise changes in the behaviour of politicians in the Western Balkans.

The UK has started to define what an independent sanctions policy looks like after Brexit, as seen in the sanctions it has imposed on the Belarusian regime for human rights abuses. Anti-corruption measures likely provide another policy tool that could prove especially powerful in Bosnia.

An additional difficulty related to the use of sanctions such as asset freezes and travel bans is that they require a complex US interagency or EU intergovernmental procedures. Given that the process of enacting sanctions is long and cumbersome – and local actors know this – it becomes difficult to remove and reimpose sanctions to reward cooperation or punish backsliding. The inflexibility of the sanctions-related incentive structure requires joint accompanying instruments and careful tactics in imposing – or threatening to impose – penalties to secure compliance

This is another reason keeping the OHR and the Bonn powers is important: if push comes to shove, the OHR provides the EU and the US with a more flexible set of political instruments than traditional sanctions. Sometimes, all that is needed is proper deterrence – and, if used correctly, the threat of sanctions on politicians who undermine stability in the region could be more effective than actually imposing measures. But, for this approach to succeed, the threat has to be credible – linked to clear policy demands, tactically pursued, and coordinated with other sources of leverage on the ground. The EU and the US should ensure that sanctions are accompanied by other, less formal, penalties that they

can use with greater flexibility: political measures such as declaring a corrupt or obstructive official *persona non grata* in one or more European capitals as well as in Washington would have a significant effect. Denying visas to political players who seek to destabilise the regional order would also be quick and easy to implement.

For many years, Europe and the US have taken an inadequate approach to obstruction and criminality in Bosnia and Herzegovina. In the last decade, the EU has pursued a mostly socio-economic agenda, during which time nationalist politicians have successfully captured the judiciary and reversed previous progress on state-building. This has considerably worsened the political climate in the country. Key EU member states are aware that their core security interests are being undermined rather than safeguarded by the current situation, not least because involvement with smuggling networks significantly undermines efforts to control the illegal cross-border movement of individuals or groups that potentially pose security threats. As long as the smuggling networks and their government patrons are not dealt with effectively, individuals with criminal backgrounds will be able to exploit these routes to enter the EU.

It is impossible to overstate the potential of stakeholders, especially those in the EU, to act in their national interests and take real action to ensure the implementation of existing reform benchmarks, such as those entailed in the European Commission Opinion in Bosnia and Herzegovina. This would mean driving reform by properly leveraging direct assistance, demonstrating political leadership, and enforcing strict accountability. At a bare minimum, all EU member states should – with the support of the US – seek to resist efforts to further soften EU policies or to remove international checks and balances such as the foreign judges on the constitutional court and the OHR. And they should stop formally inviting Bosnian politicians immersed in corruption to visit their capitals.

It also cannot be overstated how important it is to approach the problem of state capture in Bosnia and the region in a more determined manner. The Western Balkans is estimated to have lost 5 per cent of its population in the past five years. In Bosnia, 77 per cent of those who emigrate identify corruption as one of their primary reasons for leaving. And, especially in the wake of the covid-19 crisis, the EU and the US should make a more concerted effort to push for rule of law reforms in Bosnia and Herzegovina, as well as the wider region. There is a real imperative for doing so now, given the national security interests at stake in several key EU member states and the rapid changes to the geopolitical framework for dealing with Bosnia and the region wrought by Russia, China, and Turkey.

For the Americans, staying engaged with the Balkans does not mean denying the Europeans their leading role in the region. It simply requires the use of instruments that are already in place. For Europeans, it requires staying true to their pledges and starting to speak the language of power – not discouraging the Americans from doing the same. This might be the last opportunity to anchor the Western Balkans in what remains of the Western democratic order. European and American leverage is still sufficient, as well as necessary, to enact key policy principles and achieve meaningful constitutional change.

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ACKNOWLEDGMENTS

Faruk Hadzic from the University of Tuzla has contributed to this policy brief including by supplying data, tables, and the analysis in the economy section. The author would like to thank Benjamin Roesch for research assistance and all reviewers for their comments on the paper, especially Admir Cavalic, director of Association Multi in Tuzla, and Leila Bicakcic, director of the Centre for Investigative Journalism. The author is very grateful to Juan Ruitiña and Marlene Riedel for their work on the graphics and Adam Harrison's editorial work improved the writing greatly. This paper was made possible through the support of the European Fund for the Balkans, but does not necessarily represent the views of the European Fund for the Balkans.



[1] Interview with the director of the Privatisation Agency of Tuzla, October 2020.

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[4] Peter Andreas, “The Clandestine Political Economy of War and Peace in Bosnia,” *International Studies Quarterly*, Vol. 48, No. 1, 2004.

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[8] Discussion with EU member state officials throughout 2018.

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