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The European Union and Member State Building in Bosnia and Herzegovina

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List of Acronyms

BiH	Bosnia and Herzegovina
CAP	Common Agricultural Policy
CARDS	Community Assistance for Reconstruction, Development and Stabilisation
CEE	Central and Eastern Europe
CFCU	Central Financial and Contracting Unit
CFSP	Common Foreign and Security Policy
CIVCOM	Committee for Civilian Aspects of Crisis Management
CSCE	Conference on Security and Cooperation in Europe
CSOs	Civil Society Organisations
DEI	Directorate for European Integration (BiH Council of Ministers)
DF	Democratic Front (Bosnian party)
DG AGRI	Directorate-General for Agriculture and Rural Development
DG NEAR	Directorate-General for Neighbourhood and Enlargement Negotiations
DIPR	Directorate for Implementation of Police Restructuring
DIS	Decentralised Implementation System
DPA	Dayton Peace Accords
DPC	Democratisation Policy Council (think tank)
EBRD	European Bank for Reconstruction and Development
EC	European Commission
ECHO	Directorate-General for Humanitarian aid and Civil Protection
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	The European Court of Human Rights
ECJ	Court of Justice of the European Union
ECMM	European Community Monitoring Mission

EEA	European Economy Area
EEC	European Economic Communities
EFC	Economic and Financial Committee
ENP	European Neighbourhood Policy
ESI	European Stability Initiative (think tank)
EUAM	European Union Administration of Mostar
EUD/EUSR	EU Delegation / EU Special Representative in Bosnia and Herzegovina
EU MFF	EU Multi-annual Financial Framework
EUMM	European Union Monitoring Mission
EUPM	European Union Police Mission
EUSR	Special Representative of the European Union
FBiH	Federation of Bosnia and Herzegovina (Bosnian entity)
GFAP	General Framework Agreement for Peace (Dayton accords)
HDZ	Croat Democratic Community (Bosnian party)
HDZ BiH	Croat Democratic Community of BiH (Bosnian party)
HDZ 1990	Croat Democratic Community 1990 (Bosnian party)
HJPC	High Judicial and Prosecutorial Council
HLAD	High Level Accession Dialogues
HR	High Representative
HVO	Croatian Defence Council
ICB	International Commission on the Balkans
ICFY	International Conference on former Yugoslavia
ICG	International Crisis Group (think tank)
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICO	International Civilian Office (Kosovo)
ICTY	International Criminal Tribunal for the former Yugoslavia

IEBL	Inter-Entity Boundary Line
IFOR	Implementation Force
IMF	International Monetary Fund
IPA	Instrument for Pre-accession Assistance
IPTF	UN International Police Task Force
ISP	Indicative Strategy Papers
ISPA	Instrument for Structural Policy for Pre-Accession.
JHA	Justice and Home Affairs
JSRS	Justice Sector Reform Strategy
LPD	Law on Prevention of Discrimination
MEI	Ministry of European Integration
MoFTER	BiH Ministry of Foreign Trade and Economic Relations
NATO	North Atlantic Treaty Organisation
NGOs	Non-Governmental Organisation
NIPAC	National IPA Coordinator
NWCS	National War Crimes Strategy
OECD	Organisation for Economic Cooperation and Development
OHR	Office of the High Representative
OSCE	Organisation for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
PAR	Public Administration Reform
PBS	Public Broadcasting System
PFM	Public Finance Management
PHARE	Poland and Hungary: Assistance for Reconstructing their Economies
PIC	Peace Implementation Council
PRC	Police Restructuring Commission
PSC	Political and Security Committee

RBiH	Republic of Bosnia and Herzegovina
RS	Republika Srpska (Bosnian entity)
R2P	Responsibility to Protect
SA	Stabilisation and Association
SAA	Stabilisation and Association Agreement
SAP	Stabilisation and Association Process
SAPARD	Special Accession Programme for Agriculture and Rural Development.
SASE	Safe and Secure Environment
SBB	Party for a Better Future (Bosnian party)
SBiH	Party for Bosnia and Herzegovina (Bosnian party)
SBS	State Border Service
SDA	Party for Democratic Action (Bosnian party)
SDS	Serb Democratic Party (Bosnian party)
SFOR	Stabilization Force
SIPA	State Investigation and Protection Agency
SNSD	Party of Independent Socialdemocrats (Bosnian party)
TAIEX	Technical Assistance and Information Exchange instrument
TEU	Treaty on the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMiBH	United Nations Mission in Bosnia and Herzegovina
UNSG	United Nations Secretary General
USIP	United States Institute of Peace
VNI	Vital National Interest veto
VRS	Army of Republika Srpska
WB	World Bank
WTO	World Trade Organisation

Abstract

The EU enlargement policy aims to transform applicant countries into fully-fledged member states, committed to abiding by the EU acquis and able to take part in the EU decision-making and policy implementation processes. However, the contestation of the state, or contested statehood, has been identified as the key variable hindering Europeanisation in the Western Balkans. This has led the European Union (EU) to fall into cycles of mismanaged conditionality, such as in the police reform process and the constitutional reform process in Bosnia and Herzegovina. Yet, the EU has learned to adapt, enacting practices of state building to cope with contested statehood.

By bridging the literature on European integration, state building, and Europeanisation, this study traces the transformations of sovereignty and of the state throughout European integration, and identifies the polity ideas that underpin EU practices of 'member state building' in the notion of sovereignty as participation. Member state building is interested in reinforcing administrative capacities with the aim of participation in EU processes, while also enhancing the legitimacy of institutions via the export of consensus-generating mechanisms.

Two case studies, exemplifying the two statehood dimensions of legitimacy and capacity, allow examining how the EU interacts with Bosnia and Herzegovina. In the framework of the Structured Dialogue on Justice and of the Instrument for Pre-Accession Assistance, the EU introduced in Bosnia and Herzegovina consensus-generating mechanisms, aimed at restoring both administrative capacities and domestic legitimacy of institutions.

The role of the EU as an interested mediator and the emancipatory potential of the accession perspective set member state building apart from 'liberal peace' international state building. Member state building thus emerges as an enlargement-specific form of EU-led state building, allowing the EU to cope with contested statehood in its candidate countries and potential candidates and to build member states while integrating them.

Introduction and methods

The dissertation identifies the practices adopted by the European Union (EU) when confronted with issues of state contestation in the framework of its enlargement policy, looking specifically at the case of Bosnia and Herzegovina (BiH). While in previous enlargement rounds the EU could limit itself to accompanying the process of double transition to democracy and market economy, in the case of the Western Balkans the EU has to confront the additional issue of state contestation, or contested statehood, that hinders the causal mechanisms of Europeanisation, i.e. conditionality and socialisation. This has led the EU to perform ineffectively and to fall into cycles of mismanaged conditionality, such as the police reform process (2005-2008) and the Sejdić–Finci constitutional reform process (2008-2014) in Bosnia and Herzegovina.

In this dissertation I argue that, in order to cope with contested statehood, the EU has adapted its enlargement policy over time and developed a ‘member state building’ strategy, different from the usual ‘liberal peace’ international state building that is aimed at strengthening state structures *per se*. Member state building, rather, aims at establishing or reinforcing those specific structures which are required in order to take part in the EU decision-making and policy-implementation processes, while at the same time preserving and enhancing their domestic legitimacy via the export of consensus-building mechanisms and procedures. Member state building thus emerges as an enlargement-specific form of EU-led

state building, set apart from ‘liberal peace’ international state building by its specific aim to build future EU member states, the ensuing need to preserve and restore internal democratic legitimacy, and the policy tools chosen to achieve this – softer tools of capacity-building and consensus-building aimed at restoring both administrative capacities and domestic legitimacy.

1. EU enlargement and state building in Bosnia and Herzegovina

The rules of entry into a club are usually the first element in the definition of identity and otherness. This is also valid for international organisations, especially for those that do not aspire at universal membership but rather posit themselves as regional and functional organisations. The European Union here represents a crucial case, since it is the international organisation with the most developed and demanding policy of membership, reflecting both the degree and the differentiation of its internal integration.

Over the decades of EU deepening and widening, from a six-country area of free circulation of goods and workers to the current 28-country political union based on a unified internal market, the EU has developed and specified its enlargement policy in relation to the applicant countries it was faced with. Over the last thirty years, EU enlargement has reshaped the international system of the old continent. Following the end of the bipolar structure in Europe, and accompanying processes of democratisation and economic liberalisation, the countries of Central and Eastern Europe introduced deep reforms in their state structures to achieve EU membership between 2004 and 2007. Six more countries from the Western Balkans¹ as well as Turkey are currently engaging in the same accession-driven

¹ Well aware of the profound connotations of the term “Balkans” (see Todorova, Maria N. *Imagining the Balkans*. Oxford: Oxford University Press 1997), I use the “Western Balkans” label—defined as all post-

transformative effort, while other applicants have expressed their desire to embark on the same integration process, which appears to promise peace and prosperity.

It is against this backdrop that the enlargement policy has been dubbed the EU's most—and arguably the only—successful foreign policy². Starting from the basic “rules of entry in the club” set by the Treaties since 1957, the EU has developed over time an enlargement policy acting as a framework of its relations with Europe at large.³ The EU enlargement policy may be interpreted as an ever more demanding pre-accession strategy that aims at transforming applicant countries into fully-fledged member states, committed to abiding by EU *acquis* commitments and able to take part in the EU decision-making and policy implementation processes.

If the first enlargement in 1973 proceeded without particular conditions besides free market access, the perspective of accession of post-authoritarian Mediterranean countries since the 1960s fostered the development of an understanding of the EU as a community of liberal democracies, leading to the inclusion of democratic conditionality in its pre-accession policy.⁴ While the inclusion of neutral countries in 1995 helped the EU differentiate its own

Yugoslav countries, minus Slovenia, plus Albania—as more accurate and appropriate than alternative terms such as Southeastern Europe to refer to the countries of the current EU enlargement agenda. As remarked by Elbasani “the Western Balkans grouping is distinguished as a separate region in terms of European enlargement, as all countries share a common perspective and framework of European integration”. Elbasani, Arolda. “Europeanization Travels to the Western Balkans: Enlargement Strategy, Domestic Obstacles and Diverging Reforms.” In *European Integration and Transformation in the Western Balkans: Europeanization or Business as Usual?* London: Routledge 2013.

² Bertoincini, Yves, and Chopin, Thierry. *Politique européenne. Etats, pouvoirs et citoyens de l'Union européenne*. Paris: Presses de Sciences Po 2010, p. 54.

³ Sedelmeier, Ulrich. “Enlargement: from rules for accession to a policy towards Europe?” In H. Wallace, A. R. Young, & M. A. Pollack, *Policy-making in the European Union*. Oxford: Oxford University Press, p. 401–430.

⁴ Thomas, Daniel C. “Constitutionalization through enlargement: the contested origins of the EU's democratic identity.” *Journal of European Public Policy*, 13(8), 2006, p. 1190–1210.

identity from the transatlantic integration projects based on US leadership and centred upon NATO, it has been in particular the fifth eastward enlargement of the EU in 2004/2007 that fostered the development of a comprehensive pre-accession strategy within the EU enlargement policy. Faced with applicant countries undergoing a double transition to democracy and market economy, the EU enlargement policy developed into a complex process of conditionality and compliance, led by the European Commission and based upon contractual agreements and the “Copenhagen criteria” (democracy, functioning market economy, capacity to abide by the commitments of the EU *acquis*). This process crucially contributed to the transformation and consolidation of liberal market democracies in Central and Eastern Europe.

The EU enlargement process is still ongoing, and seven more countries from the Western Balkans to Turkey are engaging in the same accession-driven transformative effort, relatively unhindered by the crisis that has shaken the economic and political governance of the EU in the last period. The countries of the current enlargement agenda, though, bring along a different challenge for the EU. With the exception of the case of Turkey, they are recent countries, less consolidated in their statehood, born out of either the violent dissolution of Yugoslavia or the collapse of state institutions in post-Cold War Albania. Both their will and capacity to introduce reforms and respond to EU incentives are hindered by open issues of statehood, related equally to the (lack of) administrative capacities and popular legitimacy of state structures.⁵

⁵ Paris, Roland. “Peacebuilding and the limits of liberal internationalism”. *International Security* 22(2), 1997, p. 54–89.

Chandler, David. *International statebuilding*. London: Routledge 2010.

Richmond, Oliver P. “Failed Statebuilding versus Peace Formation.” In *Routledge handbook of international statebuilding*. Abingdon ; Oxon: Routledge 2013, p. 130–140.

The EU has responded to such challenges by strengthening its pre-accession strategy in several ways. First, compliance conditionality is no longer limited to legal compliance (“box-ticking”) but extends to the track record of implementation. Moreover, the Copenhagen criteria have been complemented with region-specific conditions for each applicant (regional cooperation, ICTY cooperation, normalisation of relations with neighbours): the ‘Copenhagen plus’ *acquis*. Finally, the EU is getting increasingly involved in issues of state building, linked to its own involvement (from military to police missions and international civil administration powers) in international efforts to stabilise and reconstruct post-conflict countries.

Since the 1990s, statehood issues have been addressed by international state-building efforts, led by the UN and other international institutions (WB, IMF, NATO), and aimed at strengthening state capacities to achieve sustainable peace. Yet, early state-building approaches, based on military stabilisation and a guided democratic transition, have been criticised for not taking into account local agency and for ending up reinforcing dependency from abroad.⁶

The state-building conducted by the EU, in particular when accession-driven – member state building, i.e. “building functional member states while integrating them into the EU”⁷ – is different, I argue, from the kind of state building conducted by international organisations. This is so, among other things, because of the different identity of the European Union as a supranational organisation, and the different experience of its member states with sovereignty. The latter is seen more as a source of the troubles that haunted Europe in the 20th century rather than as a solution to them, and at least partly overcome by regional integration. As the EU-led accession-driven form of state building, member state building is a distinct process,

⁶ International Commission for the Balkans (ICB). *The Balkans in Europe's future*. Sofia: Centre for Liberal Strategies 2005, p. 29.

⁷ Ibid.

resulting in a different outcome: the construction of state structures which are able to participate in the EU framework of regional integration, rather than the strengthening of state structures *per se*.

As such, member state building employs a wider set of tools than international state-building. Over time, it has grown into a project that does not only seek to strengthen the administrative efficiency through capacity-building projects (“capacities”), but it also takes into consideration the relationships between state and society (“legitimacy”), which it tries to address through political dialogue instruments and through the inclusion in the process of local authorities, non-state actors and civil society organisations. The double emphasis on both capacities and legitimacy of state institutions in candidate countries gives a broad transformative potential to the EU member state building process, and highlights how the identity features of the EU emerge in its enlargement policy – the reproductive moment of the regional integration process.

The dissertation highlights this process with case studies from Bosnia and Herzegovina. As the country with the most layers of complexity in governance, among those of the region, Bosnia and Herzegovina is the product of multiple, overlapping and unfinished transitions. Bosnia and Herzegovina shares with the whole Central-Eastern Europe the heritage of socialism, with its related two transitions to democracy and to market economy (two of the three Copenhagen criteria for EU membership). In addition to this, it shares with the other post-Yugoslav and post-Soviet states the heritage of recent independence, with its transition to sovereignty and statehood. Finally, it shares with other post-Yugoslav states the heritage of conflict, with its transition to peace. Due to the way peace was achieved in Bosnia, though, through external intervention and imposed federal compromise backed by international supervision, it also faces additional transitions to functional governance and to self-rule. When analysed under the lens of contested statehood, Bosnia and Herzegovina appears to be

fully in control of its territory and enjoying universal recognition, yet being severely constrained in its domestic ability to take and implement policy decisions. An asymmetric and highly decentralised federal system, with most competences in the remit of sub-state levels, and the embeddedness of international organisations with executive powers such as the Office of the High Representative (OHR), are all testimony to Bosnia and Herzegovina's "problematic sovereignty".⁸

With the exception of executive and sanctioning powers, which remain vested in the OHR, the EU retains full instrumentality in Bosnia and Herzegovina. Its toolbox straddles enlargement policy, with policy dialogue and financial assistance; Common Foreign and Security Policy, with the EU Special Representative in Bosnia and Herzegovina (EUSR, since 2011 double-hatted as Head of EU Delegation) conducting activities of political dialogue and mediation, including the Structured Dialogue on Justice; and Common Security and Defence Policy, including the EUFOR Althea military mission. With such a wide policy arsenal at its disposal, it is puzzling that the EU has chosen to use softer tools, such as financial assistance and political dialogue, to conduct state building activities in Bosnia and Herzegovina. This, I argue, can be understood if the latter are considered as part of a member state building strategy that aims at overcoming state contestation by strengthening domestic legitimacy and supporting the consolidation of the institutions needed by a future EU member state, remaining strictly within the perimeter of the EU *acquis*.

Overall, this makes of Bosnia a crucial case to study the approach of the EU to non-typical (i.e. long established, unitary, nation-state) enlargement countries, and the strategies put in place by the EU to cope with the contestation of statehood as an intervening variable of the Europeanisation process. If the EU has been able to find and enact strategies to cope with

⁸ Krasner, Stephen D. *Problematic Sovereignty: contested rules and political possibilities*. New York: Columbia University Press 2001, p. 2.

contested statehood in the case of Bosnia and Herzegovina, then we may assume that similar or more limited adaptations may be successful in other cases too.

2. Analytical aims

The proposed research aims to contribute to the literature on European integration by offering a social constructivist reading of the EU through its actions towards its candidate countries (“member state building”). The identity of the EU as a supranational union of states influences its concept of sovereignty, apparent from the notion of member state, and its state-building actions in the framework of the enlargement policy. The EU reproduces itself by fostering the development of compatible state structures across its borders and then integrating them. Moreover, I also highlight how the EU may learn from its failures and adapt its policy tools to react to different environments.

Moreover, this thesis adds to the debate on the external action of the EU by establishing a dialogue between the literature on the Europeanisation of candidate countries and the literature on state building. I propose to reconceptualise them through the notion of member state building, focusing on the accession-driven strategies of EU state building as a way to overcome the limitations of traditional state-building approaches, and reframing the debate on the limits of Europeanisation and of the transformative power of Europe. Finally, on a policy level, this thesis also shows which features are necessary for the EU to achieve an impact in an unfavourable context such as the one of Bosnia and Herzegovina.

More broadly, the study offers a contribution to international studies by proposing an analysis of the transformations of the state, highlighting the factors and mechanisms that may allow international actors to foster the consolidation and transformation of state structures

abroad, while at the same time underpin state legitimacy and democratic politics. Member state building points to an unprecedented process of state transformation by interaction and integration, which contributes to the current academic debate on the transformations of states and democracy.

I investigate member state building along two dimensions of statehood, defined as follows. The first, capacity, measures the effectiveness of administration, which may enable the country to take part in the definition and implementation of EU policies after accession (e.g., the build-up of a decentralised implementation system in order to access pre-accession funds).⁹ The second, legitimacy, highlights the interrelation between state and society and refers to the absence of state contestation and competitive nation-building projects.¹⁰ I single out legitimacy and capacity as the two significant dimensions of statehood in order to ensure that they are theoretically independent from each other.¹¹

3. Research questions

The dissertation addresses member state building in Bosnia and Herzegovina with the aim to develop an analysis of the transformation of the state within the context of EU enlargement

⁹ Denti, Davide. “Did EU candidacy differentiation impact on the performance of pre-accession funds? A quantitative analysis of Western Balkan cases”. *Croatian International Relations Review*, 19(68), 2013, p. 61–91.

¹⁰ Börzel, Tanja A. 2013. “When Europeanization Hits Limited Statehood: The Western Balkans as a Test Case for the Transformative Power of Europe.” In *European Integration and Transformation of the Western Balkans: Europeanization or Business as Usual?*, by Arolda Elbasani. London: Routledge 2013, p. 173–207.

¹¹ Other diads of statehood dimensions used in the literature, such as capacities and willingness, appear to be in a spurious relation, as “limited statehood... impair[s] both the capacity and the willingness of candidate countries to implement EU norms and rules”. Börzel, When Europeanization Hits Limited Statehood, 2013, p. 180.

from the vantage point of social constructivism. Secondly, it offers an interpretation of the EU as a state-building agent starting from its actions in the framework of its enlargement policy in the context of the Western Balkans, highlighting the features that set it apart from other international state building actors. The final aim of the study is to provide an interpretation of the EU as a political system with a peculiar identity that reproduces itself by fostering the development of compatible state structures in the countries across its borders before integrating them.

The first set of research questions of this study include *which notions of statehood and sovereignty underpin EU practices of state-building*, and *to what extent the EU's practices of state building differ from those of other international agencies*. With the notion of member state as a reference point, I trace the transformations of the state as seen through different theories of European integration, highlighting how this may be best understood under a social constructivist ontology able to show the mutual constitutiveness between the Union and its member states. I then inquire the transformation of sovereignty within the context of theories of International Relations, showing how the relations between the EU and its member states are best understood through a notion of sovereignty as capacity and participation, rather than of sovereignty as control or as responsibility. As a next step, I look into the framework provided by the literature on Europeanisation, as a prism to explain the transformative power of 'Europe', both towards EU member states and towards candidate countries and potential candidates. Here I highlight the issue of contested statehood as a crucial intervening variable in the literature to explain the apparent failure of Europeanisation in the Western Balkans. In order to move forward, I then propose to reconceptualise the issue under the notion of "member state building", looking at how 'Europe' affects statehood in the Western Balkans – not anymore as an intervening but as a dependent variable. My emphasis is not on the

outcomes of this process, i.e. on the effectiveness of the EU's actions, but rather on the practices that it enacts, and on the notions underpinning them.

The second set of research questions of this study include *whether and how the EU has adapted over time to take into account the contestation of statehood within its enlargement policy and which specific practices have been enacted by the EU to respond to the contestation of statehood*. In order to answer these questions, I analyse the actions of the EU as a state builder in its enlargement policy in the concrete case of Bosnia and Herzegovina, showing how they emerge from a trial-and-error process in which the EU slowly came out at the helm of the international community in the country and had to calibrate and adapt its instruments to the domestic situation and to its own elements of relative advantage. In particular, I look at the actions and practices of the EU in two different processes: the Structured Dialogue on Justice, as a policy dialogue instrument aimed at fostering consensus around institutions and reforms in the justice sector, and thus at restoring *legitimacy*; and the funds for pre-accession assistance (IPA), as a financial instrument aimed at strengthening state structures to create the necessary *capacities* for the management of EU funds, including by fostering consensus around the overall policy aims of the country (debate on the countrywide strategies).

I argue that the EU, as a post-national supranational union, has a different understanding of domestic sovereignty than other international organisations, closer to a concept of sovereignty as participation, and that this leads the EU to enact practices of accession-driven state-building which address both legitimacy and capacities issues of state contestation, and which remain distinct from the international state-building model which is based mainly on capacity-building alone. In particular, among my findings I note that, in order to strengthen both capacities and legitimacy in the target country, the EU tends to export its own consensus-

building mechanisms and to resort to instruments of network governance, rather than making use of more coercive measures that would undermine the legitimacy side of state-building.

4. Methods and instruments

In order to advance a solution for any given research problem, one has to clarify one's own assumptions regarding epistemology and ontology, the range of data which needs to be collected and the rationale for choosing any methodology to link theory to data. The choice of methods is instrumentally linked to the research question which awaits explanation. "It is the research question that drives the selection of a research design", as stated by McNabb.¹² Also, in the words of Gee, "there can be no sensible method to study a domain, unless one also has a theory of what the domain is".¹³

The research questions of this study deal with the dynamic relation between the European Union and its enlargement countries in a context of state contestation. The chosen approach thus needs to accommodate both agency (actors' behaviour) and structure (systemic influences), and take into account ideational factors (the EU notion of member state, domestic legitimacy) together with material ones (administrative capacities, EU incentives and funds). To do so, I adopt a qualitative methodology based on social constructivism. Qualitative research is deemed the most appropriate for "small-sample studies, often analyzing a single case or a few cases".¹⁴ Obviously, this involves a trade-off: the in-depth knowledge of a phenomenon involving a small number of cases will come at the price of the generalisability

¹² McNabb, David E.. *Research methods for political science: quantitative and qualitative approaches*. Armonk, NY: Sharpe 2010, p. 42.

¹³ Gee, James P. *An introduction to discourse analysis theory and method*. London: Routledge 1999, p. 5.

¹⁴ McNabb, 2010, p. 24.

and applicability of findings to different contexts. Nevertheless, this seems to be a necessary choice to make given the small number of cases available, hindering the use of statistical tools, and given the difficulty in comparing across widely different regions. Moreover, qualitative methods have the advantage of not limiting themselves to the establishment of correlation among variables, but rather on being able to investigate, through methodologies such as process tracing, the mechanisms of causality.¹⁵

In fields such as political science and international relations, where the number of possible cases is usually limited, the small-*n* comparative method appears as “often the *only* scientific method available for the study of macrodimensional, interdimensional and institutional processes”.¹⁶ This study thus combines within-case analysis based on process tracing¹⁷ with cross-case comparison. My aim is to produce a structured, focused comparison, embedding the thick description of a few cases within a comparative framework.

Process tracing aims at refining broader theories by providing them with more fine-grained explanations, at an analytical level which is closer to the data. This method is well-suited to take into account the role of both agents and structures, and to accommodate both positivist and post-positivist elements, since it is deemed epistemologically “compatible with a positivist or, to be more precise, scientific realist understanding of causation in linear terms”.¹⁸ Faring strongly on issues of interaction whilst showing limitations on establishing context, process tracing is conveniently complementary to discourse analysis methodologies,

¹⁵ Panke, D. “Process Tracing: Testing Multiple Hypotheses with a Small Number of Cases.” In T. Exadaktylos & C. M. Radaelli, *Research Design in European Studies: Establishing Causality in Europeanization*. Basingstoke: Palgrave Macmillan 2012, p. 125–140, p. 136.

¹⁶ Della Porta, Donatella. “Comparative analysis: case-oriented versus variable-oriented research”. In D. Della Porta & M. Keating, *Approaches and methodologies in the social sciences: a pluralist perspective*. Cambridge: Cambridge University Press, p. 198–222, p. 202.

¹⁷ Checkel, Jeffrey T. “Process Tracing.” In A. Klotz & D. Prakash, *Qualitative methods in international relations: a pluralist guide*. Basingstoke: Palgrave Macmillan 2008, p. 114–127.

¹⁸ Checkel, Process Tracing, 2008, p. 116.

to which it adds a dynamic perspective. Process tracing will be particularly useful to identify the scope conditions and mechanisms that explain the presence or absence of a certain outcome.

Throughout the study, I analyse the conceptual notions that underpin EU practices of state building. Discourse analysis, interested in how words allow action, seems appropriate to define and analyse notions such as “member state” as a product of the discursive power of the European Union.¹⁹ According to discourse analysis, perception is mediated by meanings that are socially reproduced—representations. The reiteration of such representations normalises and institutionalises them, producing reality.²⁰ Discourse analysis is predicated on the assumption that ideas matter, which fits well with the importance of an ideational notion such as member state building. The notion of EU member state is a case of “polity ideas”,²¹ i.e., “normative ideas about a legitimate political order”.²² Applying a discourse analysis approach to the state building practices of the EU in its enlargement policy falls within Wæver’s suggestion that “discourse analysis could handle the more interesting question of how (and why) supposedly ‘objective’ and ‘apolitical’ interpretations are produced politically”.²³

The research is based upon the in-depth analysis of two case studies from Bosnia and Herzegovina in the 2007-2016 period. Case selection is driven by the puzzle of the perceived

¹⁹ Diez, Thomas. “Speaking ‘Europe’: the politics of integration discourse”. *Journal of European Public Policy* 6(4), 1999, p. 598–613.

Schmidt, Vivien A. “Discursive Institutionalism: The Explanatory Power of Ideas and Discourse.” *Annual Review of Political Science* 11(1), 2008, p. 303–326.

²⁰ Neumann, Iver B. “Discourse Analysis.” In A. Klotz & D. Prakash, *Qualitative methods in international relations: a pluralist guide*. Basingstoke: Palgrave Macmillan 2008, pp. 61–77, p. 61.

²¹ Jachtenfuchs, Markus, Diez, Thomas, & Jung, Sabine. “Which Europe?: Conflicting Models of a Legitimate European Political Order.” *European Journal of International Relations*, 4(4), 1998, p. 409–445.

²² Wæver, Ole. “Discursive approaches.” In A. Wiener & T. Diez, *European integration theory*. Oxford: Oxford University Press 2009, p. 169.

²³ Wæver, Discursive approaches, 2009, p. 178.

failure of Europeanisation when facing contested statehood; as Elbasani and Börzel note, statehood levels are highly correlated with the levels of European integration of Western Balkan countries.²⁴ In particular, the specific features of state contestation in Bosnia and Herzegovina already led the EU to remain embroiled at least twice in cycles of mismanaged conditionality, as described in Chapter II. At the same time, and differently from Kosovo, Bosnia and Herzegovina enjoys universal recognition among the EU member states, and it does not therefore raise issues within EU institutions that may hinder the credibility of the magnetic pull of EU enlargement. Bosnia and Herzegovina emerges as a crucial case, thus, to explore how the EU learns to react to environmental conditions that hinder the functioning of its usual instruments and policies, and which state building practices it is able to enact within its enlargement policy.

Within Bosnia and Herzegovina, the study focuses on two policy areas, in relation to the two dimensions of statehood identified in the literature. On the one hand, I inquire the practices of the EU in the context of the Structured Dialogue of Justice, as a policy dialogue instrument which between 2011 and 2016 was used to reinforce the *legitimacy* of domestic institutions in the justice sector by fostering domestic consensus around their reform via a deliberative and transgovernmental method of work. On the other hand, I consider the functioning of EU financial assistance for pre-accession countries, and look into how its procedures are aimed at fostering the development of EU-compatible institutions, and lately also the agreement on broad policy aims at country level, thus once again restoring capacity via consensus-building. The two case studies are chosen under a “most different” approach: they exemplify very different policy areas, in which, yet, a striking similarity emerges on the

²⁴ Börzel, *When Europeanization Hits Limited Statehood*, 2013.

Elbasani, Arolda. “Europeanization Travels to the Western Balkans: Enlargement Strategy, Domestic Obstacles and Diverging Reforms.” In *European integration and transformation in the Western Balkans: Europeanization or business as usual?* London: Routledge 2013.

independent variable , i.e. the practices of EU state building.: in order to cope with the issues deriving from state contestation, the EU resorts to the export of consensus-building mechanisms, already established in its own internal framework, through which the EU may support both the strengthening of state capacities and legitimacy at the same time. Although selected as the most different, the cases all pertain to the same context of Bosnia and Herzegovina. A within-country comparison among them thus also “reduces the number of ‘disturbing’ variables to be kept under control”.²⁵ Finally, an in-depth analysis of the development of specific policy process serves the specific purpose of uncovering the ideational factors (strategies, interests and ideas) of the actors involved; process tracing may then allow to identify the mechanisms linking dependent and independent variables.

Time-wise, the study takes into account the period between 2011 and 2016. This takes into account the consolidation of a reinforced EU presence in the country in 2011, and the launch of the Structured Dialogue on Justice in the same year. At the same time, I analyse the framework of financial assistance from 2007 onwards (first IPA financial period 2007-2014 and second IPA financial period 2014-2016).

Aware of the trade-off between cultural competence and “home blindness”,²⁶ I combine three types of inquiry to reconstruct the EU practices in Bosnia and Herzegovina. First, I conduct document analysis of primary sources of both an institutional (EU treaties, EU Council decisions) and policy nature (Commission communications, speeches, press releases). These are coupled with insight from secondary sources: academic literature and policy analyses by independent experts. Finally, this corpus of sources is complemented by a set of semi-structured interviews with policy makers and observers well acquainted with the subject matter, in Brussels and Sarajevo (European Commission and EU Delegation / EUSR officials;

²⁵ Della Porta, *Comparative analysis*, 2008, p. 214.

²⁶ Neumann, *Discourse Analysis*, 2008, p. 64.

members of the European Parliament; representatives of EU member states' embassies in Bosnia and Herzegovina; as well as academic and policy analysts)

Since the project includes interviews as source material, it is necessary to discuss their advantages and limitations. Interviewing, though tempting as an “easy” research method, might ensnare the researcher in daunting and time-consuming tasks if not properly targeted and managed. To begin with, in this project interviewing will not consist in a method to access the truth by collecting behavioural data susceptible to quantitative analysis. Rather, I consider interviews as an appropriate avenue to gain access to the subjective understanding of the people involved in the social facts which are the subject of the study, since “social abstractions... are best understood through the experiences of the individuals whose work and lives are the stuff upon which the abstractions are built”.²⁷ Interviewing can thus be a useful tool to evaluate the presence and importance of agency and ideational factors, especially when triangulated with other primary and secondary sources. I conduct semi-structured open-ended interviews (a method that allows minimising problems of reactivity) with participants who are closely associated with the subject matter, according to a purposeful sampling methodology and chain referral (snowball method). Sampling aimed at a maximum variation to ensure that the subjective understandings collected include a wide range of views and thus can be deemed representative.²⁸

²⁷ Seidman, Irving. *Interviewing as qualitative research: a guide for researchers in education and the social sciences*. New York: Teachers College Press 2006, p. 10-11.

²⁸ Ibid., p. 52.

5. Thesis structure

The thesis is composed of four main chapters. Chapter I is devoted to the notion of EU member state and its transformations throughout European integration. It thus introduces a thicker notion of EU member state, and presents different theoretical approaches to EU/member state relations, starting from theories positing their separation and the primacy of one level over the other, to theories that assume instead their interaction and interdependence. Positing the mutual constitutiveness between the Union and its member states, social constructivism emerges as the ontological perspective best suited to explore the research questions. The following section problematizes sovereignty, following the theoretical debate which has led from a Westphalian notion of sovereignty as control to its opposite notion of sovereignty as responsibility. Here a notion of sovereignty as participation emerges as an alternative to both, underlining the functional autonomy of different state institutions in their transboundary relations, and pointing to a transformation of the form of the state, from the unitary to the “disaggregated” state, that is explored in the rest of the chapter. The next section introduces the widely-used framework of Europeanisation, its theoretical underpinning, mechanisms of action, and scope conditions. Europeanisation helps to explain the domestic effects of Europe and the transformation from nation states into member states via a double (domestic and international) relation of accountability. Yet, the explanatory power of the Europeanisation framework comes to a standstill when facing the issue of contested statehood. The chapter puts forward, as a complementary alternative, the concept of member state building as the enlargement-specific form of state building.

Chapter II introduces the context of Bosnia and Herzegovina as the setting of the case studies considered. After a short introduction to the Dayton political order, the chapter discusses the multiple transitions (to democracy, market economy, statehood, and peace) that

make it the country in the region with the most layers of complexity in governance. It then analyses Bosnia and Herzegovina as a state whose contestation stems from the simultaneous presence of a complex federal and consociational structure, and of sub-state centrifugal tendencies coupled with direct intervention by international actors with executive powers. The chapter also takes a look at the Dayton institutional framework under the lenses of the consociational and integrative models of power-sharing. The second part of the chapter looks at the interactions between the European Union and Bosnia and Herzegovina over time, highlighting in particular how the EU struggled to adapt its approach to the specific Bosnian post-conflict context and to get to the helm of the international presence in the country. The EU twice remained stuck in cycles of mismanaged conditionality, in the case of the police reform process (2005-2008) and of the *Sejdić-Finci* constitutional reform process (2008-2014). The shift towards a streamlined EU presence and the rescheduling of conditionality with the “new approach” to Bosnia and Herzegovina in late 2014 led to a rebalanced conditionality and a different standing of the EU in the country, which enabled the re-opening of the EU path and the achievement of relative successes in the 2014-2016 period, also highlighting the consolidation of a strategy of member state building as stateness-aware enlargement or “limited state-building”.

Given the context presented in the previous chapters, Chapter III delves into the first case study, looking at the Structured Dialogue on Justice as an exercise in domestic legitimacy-building in JHA matters that ran from 2011 to 2016. The EU in Bosnia and Herzegovina enacted a strategy of governance by dialogue and deliberation, exporting in the context of EU enlargement the deliberative settings typical of, for example, comitology and governance networks. In the dialogue the EU, as an interested mediator, facilitated discussion between domestic authorities and stakeholders, contributing to restoring domestic legitimacy in the justice sector. As a consensus-building mechanism, the Structured Dialogue allowed the EU

to react to the contestation of statehood in Bosnia and Herzegovina, thus standing out as one example of the EU's strategy of member state building.

Finally, Chapter IV focuses on the other dimension of statehood, capacity. By looking at the instrument for pre-accession assistance, it highlights how EU-led capacity building focuses specifically on those bodies that are directly responsible or necessary for the implementation of the EU *acquis*, and requires target countries to develop their own institutional solutions to adapt their structures to the requirements of the EU *acquis*. EU practices of capacity building started from standard incentives of institution building, as in the thrust towards decentralised management, to then undergo a learning process leading the EU to shift its focus from *structure* to *function*, away from a pre-determined top-down blueprint and towards local adaptation to the domestic context. Finally, consensus-building mechanisms emerge in this area too, such as in the debate on the “coordination mechanism” for all competent institutions to agree on countrywide strategies. This evolution also shows a learning process of the EU on how best to support capacity-building in context of state contestation within its enlargement region.

The theoretical understanding provided in Chapters I and II and the empirical insights developed in Chapters III and IV allow conclusions to be drawn on the specific practices of member state building enacted by the EU to cope with state contestation in its enlargement policy. Based on a notion of sovereignty as participation, such practices aim to restore both legitimacy and capacity facets of statehood, via the export of consensus-building mechanisms that are typical of the EU's internal governance. The result is a specific form of state building, in line with the EU's identity and policy aims, which may prove able to bridge the gap inherent in the requirement of “building functional member states while integrating them”.²⁹

²⁹ ICB, *The Balkans in Europe's future*, 2005, p. 29.

I. Towards a theoretical understanding of member state building

Introduction

Differently from international ‘liberal peace’ state building approaches, the EU is not interested in expanding state features *per se*, but rather in transforming them in order to make them compatible with its own system of multi-level governance.³⁰ I refer to this as member state building— “building functional member states while integrating them into the EU”.³¹ Based on a notion of the EU member state as a “polity idea”³² – i.e., of what features are functionally necessary for a state to be able to participate in the life of the EU from decision making to implementation – member state building has the potential to be more open-ended and able to accommodate concerns about input legitimacy. Nevertheless, its success is by no means certain, as the EU faces two main challenges. First, the contradiction between the logic

³⁰ This chapter includes materials published as Denti, Davide. “The Europeanization of candidate countries: the case for a shift to the concept of EU member-state building.” *Contemporary Southeastern Europe* 1(1), 2014, p. 11-38.

³¹ International Commission for the Balkans (ICB). *The Balkans in Europe’s Future*. Sofia: Centre for Liberal Strategies 2005, p. 29.

³² Jachtenfuchs, Diez and Jung, 1998.

of sovereignty diffusion that is proper to integration and the logic of sovereignty concentration that is prevalent in contested states³³ and is impairing the working of Europeanisation by conditionality. Second, the development of modalities of interaction with candidate countries which do not impinge on their democratic legitimacy, but rather foster a domestic debate which underpins local ownership. The European integration process has proven able, in Western Europe, to make war unthinkable among its members and turn them from Westphalian states into a new kind of interdependent states, on the lines of Deutsch's³⁴ concept of "security community". Through the work of enlargement policy, this process has been extended to most of Central Europe, and is now tackling the issue of contemporary state building and sovereignty pooling in the Western Balkans region. This process represents an important example of state transformation by interaction and integration—a topical issue for international studies.

This chapter highlights how the relations between the European Union and its member states have been conceptualised over time and from different theoretical traditions by reviewing the academic literature on European integration, state building, and Europeanisation. The first section introduces a thicker notion of EU member state, going beyond the legal dichotomy to add substantial requisites of stateness, Europeanness, and behaviour, and taking into account the increasing differentiation of membership, blurring the in/out divide. The second section reviews different theoretical approaches to EU/member state relations in European studies. Departing from earlier theories that posited their separation and the primacy of one level over the other (neo-functionalism and liberal intergovernmentalism),

³³ Having defined statehood along the dimensions of legitimacy and capacity, I identify state contestation and limited statehood with the presence of statehood-related obstacles such as competing nation-building projects (e.g. secessionism), the lack of administrative effectiveness, and state capture.

³⁴ Deutsch, Karl W. *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience*. Princeton: Princeton University Press 1957.

later theories assume instead the interaction and interdependence between the two levels as the main feature of European integration (neo-institutionalisms, multi-level governance, neo-medievalist “empire Europe” approaches). I finally adopt social constructivism as an ontological perspective positing the mutual constitutiveness between the Union and its member states. The third section goes to the roots of the debate, by problematising the notion of sovereignty and following the theoretical debate which has led from a Westphalian notion of sovereignty as control (internal supremacy and external non-interference) to its opposite notion of sovereignty as responsibility, as an inherently social concept, based on the recognition of a privilege conditioned upon the fulfilment of certain behavioural requirements. It finally settles with a notion of sovereignty as participation, laying half-way between the two, that underlines the functional autonomy of different state institutions in their transboundary relations, and points to a transformation of the form of the state, from the unitary to the “disaggregated” state³⁵ – a phenomenon that is inquired in the rest of the chapter.

The fourth section introduces the framework of Europeanisation as the most widely used concept to frame the effects of European integration on the member states, their differential reactions, and the ensuing feedback at supranational level. I provide with a review of the definitions of Europeanisation, its theoretical underpinning in the different strands of neo-institutionalism, and finally its mechanisms of action, scope conditions, and outcome patterns. The fifth section then delves into how European integration has changed its participating countries, turning them from nation states into member states. Different strands of literature agree that delegation to supranational institutions has added a layer of international accountability to the previously only domestic non-majoritarian checks and

³⁵ Slaughter, Anne-Marie. “Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks.” *Government and Opposition* 39 (2), 2004, p. 159–90.

balances. Scholars then disagree on whether the ensuing relativisation of state-society relation may enhance or rather pose problems for domestic democracy. The sixth section undertakes a critical review of the concept of Europeanisation, in particular when applied beyond the borders of the EU, to candidate countries, identifying its weak points in the lack of clear conceptual boundaries, the shadow of hierarchy, the dangers of degreeism, and the dead-end issue of contested statehood. Then, the seventh section put forward, as a complementary alternative, the concept of member state building, as better able to frame the EU's task of "building functional member states while integrating them"³⁶ than Europeanisation and international state building.

1. The notion of EU member state beyond the legal dichotomy

What does it mean to be a member state of the European Union, and what kind of statehood is fostered by EU integration and enlargement? The relations between the EU and its member states are complex, and have been approached under different lights. This section argues that being a member state goes beyond a simple legal title to be added to that of sovereignty, and it involves substantial requirements and an ongoing transformation of state structures.

1.1 Beyond the legal title of member state: stateness, Europeanness, and behaviour

As an international organisation with specific supranational characters, the European Union is founded upon a series of legal instruments (international treaties and national constitutions). In purely legal terms, being a member state is the legal title that a state acquires by being or becoming a contracting party of such international treaties. "Obtaining the status of member

³⁶ ICB, *The Balkans in Europe's Future*, 2005, p. 29.

state enables all such states to benefit from the same rights and be subject to the same obligations as stated in the European treaties”.³⁷ Being a member state is thus “a legal title to be added onto that of nation state... associated with an EU-specific set of rights and duties”.³⁸ In this sense, being an EU member state is not dissimilar from being a member of the United Nations, of NATO, or of the WTO.

Is this all that it is in the notion of EU member state? It would not seem so, for a series of reasons. The EU has introduced over time the most comprehensive and wide-ranging programme of pre-accession, through its enlargement policy, aiming at achieving deep transformation of state structures in candidate countries before their accession, thus shaping the contours of the would-be member states. This presupposes a thicker concept of member state than a simple legal title. Differently from other international organisations, recognised sovereignty and consensus are not enough to ensure a successful membership application. Article 49 of the Treaty on the European Union, dealing with the application procedure, provides some interesting elements about it.³⁹

First, to become a member state of the European Union, a political entity needs to be a state and, as for all other conditions, to be recognised as such by the other members. This rules out the possibility for other non-state subjects with international legal personality (as

³⁷ Bertoni and Chopin, *Politique européenne*, 2010, p. 154.

³⁸ Bickerton, Christopher J. *European Integration: From Nation-States to Member States*. Oxford: Oxford University Press 2012, p. 53.

³⁹ “(§1) Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. (§2) The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.”

e.g. the Holy See) or international organisations (as the Benelux Union) to apply for EU membership.

Second, a state needs to be recognised as “European”, as the EU sees itself as a regional organisation for Europe. Nevertheless, since Europe’s borders and status as a continent (or rather a peninsula of Asia) are contested and socially constructed, the EU has not taken its “European” character in a simplistically geographical or cultural-historical way. Europeanness, and the lack thereof, has been straightforwardly the reason for the rejection of the Moroccan candidacy for (then EC) membership in 1987.⁴⁰ On the other hand, other states whose territory lie totally or mainly on other geographical continents, such as Cyprus and Turkey, have been deemed “European” under the terms of art.49, so much that Cyprus is now a member state and Turkey is a negotiating candidate. The distinction between the European post-Soviet states, thus potentially eligible for membership, and the non-European North African states, deprived of such a potential, remains today a visible dividing line also within the EU’s European Neighbourhood Policy (ENP).

Third, beyond stateness and Europeanness, further conditions for a successful membership application are the political/behavioural criteria of being considered as respecting the EU values, listed in art. 2 TUE, and as being “committed to promoting them”. In this case, a normative element related to the construction of the identity of the EU comes into the picture. Moreover, the quote in the treaty article of “the conditions of eligibility agreed upon by the European Council” serves to refer to the 1993 Copenhagen criteria, which set the conditions for admissibility of membership application to liberal democratic states with functioning market economies, as well as taking into consideration the EU’s

⁴⁰ The application was rejected by the EU Council on the grounds that Morocco was not a European State Council of the European Union, Decision of 1 October 1987, cited in *Europe Archives*, Z 207.

integration/absorption capacity. In this sense, being a EU member state is “a legal title conferred upon an applicant state after that state has demonstrated beyond doubt that it has met the publicly-given criteria for membership of the EU”.⁴¹

2.2 Beyond the in/out dichotomy: the growing differentiation of membership

Even if conditional upon stateness, Europeanness, and appropriate behaviour, being a EU member state would still seem a dichotomous variable, the critical juncture of which lies in the moment of EU accession. In fact, things are more complex. The EU, as a political entity, is displaying a low level of overlapping of its functional borders in different policy areas, so much that it is being likened more to the pre- (or post-)modern empire rather than to the modern state form⁴². EU enlargement may thus be defined as “a gradual process of territorial extension of the EU and its integrated policy regimes”.⁴³ It is thus more difficult to define in a binary way the notion of being a EU member state, as several steps emerge in between full membership and lack of relations. The degrees of this graded membership include full membership, differentiated membership (with opt-out and transitional periods), quasi-membership (integration without membership, as in the EEA), and different degrees of association, both with and without a future membership perspective.

⁴¹ Bickerton, *European Integration*, 2012 p. 52.

⁴² Bartolini, Stefano. *Restructuring Europe: Centre Formation, System Building and Political Structuring between the Nation-State and the European Union*. Oxford ; New York: Oxford University Press 2005.

Zielonka, Jan. *Europe as Empire: The Nature of the Enlarged European Union*. Oxford: Oxford University Press 2006.

Beck, Ulrich, and Grande, Edgar. “Empire Europe: Statehood and Political Authority in the Process of Regional Integration.” In *Political Theory of the European Union*, by Jürgen Neyer and Antje Wiener (eds.). Oxford: Oxford University Press 2011.

⁴³ Schimmelfennig, Frank. “Enlargement and Integration Capacity. A Framework for Analysis”. *MAXCAP Working Papers Serie #1*. Berlin: Freie Universität Berlin 2014, p. 15.

2. From a Community of states to a Union of member states. EU integration as a tool for the state or an instrument for its transformation.

The criteria mentioned above to define what it means and what it takes to be a member state are merely static: they don't consider the dynamics which are at play between the European Union and its member states. The literature on European integration has long debated the ontology of the EU: what is the relation between the European Union and its member states, and how does it relate to the nature of the European integration process?

2.1 Together but separate: member states and the Community in earlier theories of integration

Different theories of EU integration should be considered, when trying to analyse this dynamic. On the one hand, a first set of theories, including neo-functionalism and liberal intergovernmentalism, keep the two levels separate: European integration is but a tool for the member states (liberal intergovernmentalism), or aims at establishing a new centre and divert the loyalties of national actors of politics and society towards it (neo-functionalism). In both cases, the two levels interact, in cooperation or competition, but do not influence each other's preferences and functions. On the other hand, another set of later theories (neo-institutionalism, multi-level governance, social constructivism), posits the reciprocal influence and transformation of the national and European levels. The linkage between the two levels is stronger, and interaction at EU level results in the transformation of the member states and their structures.

The earlier theories of European integration aim to explain European integration by reference to the action and preferences of agents, at both national and supranational level. On

the one hand neo-functionalism, focused on the role of non-state agents in the mobilisation process at supranational level, and in the inner drive of integration provided by the logic of functional spill-over, tends to privilege the supranational level over the national one. On the other hand liberal intergovernmentalism, looking at states as unitary actors in their negotiations at European level, and at international institutions only as their agents, puts the emphasis on the primacy of the national level over the supranational one.

Neo-functionalism, dubbed as “a harnessing of functionalist methods to federalist goals”,⁴⁴ endeavours in describing, explaining, and predicting, regional integration as the process of “creation of political communities defined in institutional and attitudinal terms”.⁴⁵ The final outcome, although differently described in the literature, may be equated with Haas’ concept of shift in the “loyalties, expectations and political activities” of the distinct national political actors “toward a new centre”, thus resulting in a “new political community, superimposed over the pre-existing ones”.⁴⁶ In so doing, and based on a pluralist and systemic vision of politics, neo-functionalism gives primacy to non-state actors (interest groups, supranational institutions) and portrays a process of integration which finds an automatic and compelling drive in the presence of functional spill-overs.⁴⁷ Once few sectors have been integrated to solve issues of interdependence, these will create new contradictions which will need to be solved through further pooling of sovereignty, thus providing an inner drive of integration.⁴⁸ The logic of spill-over derives from the rationalist assumptions of functionalism and foresees an increasing integration fostered by the necessity to solve dilemmas of interdependence,

⁴⁴ Tranholm-Mikkelsen, Jeppe. “Neo-Functionalism: Obstinate Or Obsolete? : A Reappraisal in the Light of the New Dynamism of the EC.” *Millennium : Journal of International Studies* 20 (1), 1991, p. 3.

⁴⁵ Haas, Ernst B. *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957*. Library of World Affairs. Stanford University Press 1958, p. 611.

⁴⁶ *Ibid.*, p. 16.

⁴⁷ Niemann, A., and Schmitter, P. “Neo-Functionalism.” In *Theories of European Integration*, by Antje Wiener and Thomas Diez, 45–66. Oxford: Oxford University Press 2009, p. 45.

⁴⁸ Tranholm-Mikkelsen, Neo-Functionalism: Obstinate Or Obsolete?, 1991, p. 4.

independently from the actors' ideological preferences. Given its focus on non-state agents and on the supranational outcome of functional spill-over, neo-functionalism tended to assert the primacy of the Community over its member states, slowly marginalised in the daily conduct of politics by the new centre.

Contrary to the neo-functionalist reading, liberal intergovernmentalism posits the member states as “masters of the Treaties”, fully in control over the pace, speed, and consequences of integration.⁴⁹ Liberal intergovernmentalism is a composite theory that combines a liberal theory of formation of state preferences with an intergovernmental theory of bargaining among (big) member states, thus focusing on high politics and “celebrated intergovernmental bargains”.⁵⁰ It thus rejects *the sui generis* claim for European integration and purports to explain it according to standard International Relation theories. States, as unitary actors, cooperate and establish institutions in order to face externalities and reap benefits, though mainly on a lower common denominator level. The main rationale for institutions is to secure credible commitments and to reduce the costs of incomplete contracting, thus limiting transaction costs and providing information to shape the choice of the actors. Institutions work as a constraint for states in the attempt to fulfil their exogenous preferences through strategic behaviour and utility maximisation, fostering cooperation.⁵¹ Liberal intergovernmentalism thus tends to see the EU as “a successful intergovernmental regime designed to manage economic interdependence through negotiated policy-coordination”,⁵² concluding that European integration was helping to “rescue” member states from the

⁴⁹ Moravcsik, Andrew. “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach.” *JCMS: Journal of Common Market Studies* 31 (4), 1993, p. 473–524.

⁵⁰ *Ibid.*, p. 473.

⁵¹ Moravcsik, Andrew, and Schimmelfennig, Frank. “Liberal Intergovernmentalism.” In *European Integration Theory*, by Antje Wiener and Thomas Diez (eds.). Oxford: Oxford University Press 2009, p. 72.

⁵² Moravcsik. Preferences and Power in the European Community, p. 474.

irrelevance towards which globalisation was pushing them.⁵³ Reducing the Community-level actors to the role of agents of the member states, the principals, liberal intergovernmentalism thus asserts the primacy of the national level over the supranational one.

While neo-functionalism and liberal intergovernmentalism offer different understanding and prediction about the prevalence of one level over the other, they both consider them as separate layers of political life. In both theories, national and supranational actors and institutions are different, separate, and act alone according to own preferences and interests. This separation between the two level, common in earlier theories of European integration, comes under strain in later accounts, in which the interdependence and the interpenetration between the two levels is put in the focus of analysis.

2.2 From nation states to member states: blurring the distinction between national and supranational levels

Earlier literature and discourse on EU integration tended to keep a clear distinction between the Community and the nation-states. “The relationship between the two, whether it was adversarial or cooperative, was nonetheless distant. The tone was one of non-engagement. The nation-state and the community were waltzing together perhaps but in a very correct and formal manner”.⁵⁴ Such an assumption of detachment between levels started nevertheless to come under strain. Sbragia herself remarked rather the gradual knitting, embrace, or integration of the national and supranational level in Europe: “what strikes me – she noticed – is the gradual blurring of the distinction being made between the ‘Community’ and the ‘nation-states’”, thus pointing to the transformation of any Community member “from

⁵³ Milward, Alan S. *The European Rescue of the Nation-State*. London: Routledge 1992.

⁵⁴ Sbragia, Alberta. “From ‘Nation-State’ to ‘Member-State’: The Evolution of the European Community.” In *Europe after Maastricht: American and European Perspectives*, by Paul M. Lützeler (ed.). Providence: Berghahn Books 1994, p. 69–87, p. 70.

‘nation-state’ to ‘member state’.” Sbragia mentioned three factors as responsible for the gradual and incremental embrace between the two: the integration of nation-based elites (governmental, business, and judicial) through socialisation fora, the broadening in scope of the Communities’s activities from merely regulatory to redistributive, as in regional development policy and social regulation (policy), and the politicisation of the Community, as apparent in the public debate over the Maastricht Treaty (politics).

The integration between the national and supranational level became the assumption of later theories of European integration, including neo-institutionalism, governance, and “empire Europe” approaches, concerned with the interlinkages and mutual consequences of the European level as a structure on its member states and institutions.

Starting with Schepsle’s⁵⁵ rational choice institutionalist account of “structure-induced equilibrium”, and with Scharpf’s⁵⁶ historical institutionalist understanding of the conditions for policy paralysis and “joint decision traps”, a literature strand on neo-institutionalism developed, which has put emphasis on how integration develops over time, and in how particular institutional features may constrain or channel its evolution. “Institutions and policies generate incentives for actors to stick with and not abandon existing institutions, adapting them only incrementally”.⁵⁷ Member states are thus not seen anymore as free agents only, as in liberal intergovernmentalism, but their actions and preferences are constrained by the shape of institutions and by the deadweight of previous agreements, which under conditions of unanimity, intergovernmentalism, and default status-quo condition, get locked-

⁵⁵ Schepsle, Kenneth. “Institutional Equilibrium and Equilibrium Institutions.” In *Political Science: The Science of Politics*, by Herbert F. Weinsberg. New York: Agathon Press 1986.

⁵⁶ Scharpf, Fritz W. “The Joint-Decision Trap: Lessons from German Federalism and European Integration.” *Public Administration* 66 (3), 1988, p. 239–278.

⁵⁷ Pollack, Mark A. “The New Institutionalism and European Integration.” In *European Integration Theory*, by Antje Wiener and Thomas Diez. Oxford: Oxford University Press 2009, p. 27.

in in a pre-determined path of institutional inertia. According to Pierson,⁵⁸ the short-termism of political decisions, unintended consequences, and changes in governmental preferences due to electoral turnover, create gaps in the member states' control over supranational policies and institutions, which do not allow nevertheless for institutional reform until they reach a threshold. The path dependence of integration is thus punctuated by critical junctures, in which the accumulation of drift leads to a rupture point and to institutional reform. With historical institutionalism, the national and supranational levels start to be analysed in their linkages and mutual lock-in features.

A second theoretical path to the integration between the national and the supranational level is the one followed by governance approaches. Multi-level governance, notwithstanding having been vulgarised almost as a descriptive formula for the current system of European integration, is based upon a theoretical attention to underline the simultaneous blurring of three analytical distinctions: between centre and periphery (political mobilisation), between state and society (policy-making), and between domestic and international (polity restructuring). Focusing, as neo-functionalism, on the mobilisation of non-state agents, early governance studies depict how they have become engaged in overarching policy network that directly link the supranational, national, and sub-national (both functional and territorial) levels, in the process of policy-making. In contrast, later governance approaches point to how European integration has been “redefining the state”⁵⁹, going back to an ontological agenda concerned with “polity restructuring”.⁶⁰ Multi-level governance thus came to theorise the

⁵⁸ Pierson, Paul. “The Path to European Integration: A Historical Institutionalist Analysis.” *Comparative Political Studies* 29 (2), 1996, p. 123–163.

⁵⁹ Piattoni, Simona. “Multi-level Governance: A Historical and Conceptual Analysis.” *Journal of European Integration* 31 (2), 2009, p. 163–180, p. 169.

⁶⁰ Ibid.

“unravelling of the state”⁶¹ due to pressures from above, from below, and from within, and the creation of non-hierarchical relations between different overlapping territorial and functional jurisdictions (“polycentric governance”)⁶², which may produce efficient outcomes thanks to their deliberative features, able to cope with the recursive redefinition of goals and means⁶³ but might also suffer from a weak “democratic anchorage”,⁶⁴ allowing for accountability, in the absence of higher authority, only in terms of discretion without arbitrariness.⁶⁵

The insights of multi-level governance about polity restructuring were brought even further by the neo-medievalist strand of literature, which purported to resurrect the notion of empire as an empirical counterpart for the EU in order to abandon the methodological nationalism of earlier studies.⁶⁶ Scholars such as Zielonka identified a neo-imperial Union in the making, spurred by the increased diversity and asymmetry brought about by enlargement, which would definitively impede the EU to achieve the centre formation and boundary-building processes analysed by Bartolini as conducive to state-building.⁶⁷ According to Zielonka, “enlargement has dramatically and irreversibly transformed the nature of the Union”, and “will prevent the Union from overcoming the already existing discrepancy

⁶¹ Hooghe, Liesbet, and Marks, Gary. “Unraveling the Central State, but How? Types of Multi-Level Governance.” *American Political Science Review* 97 (2), 2003, p. 233–243.

⁶² Skelcher, Chris. “Jurisdictional Integrity, Polycentrism, and the Design of Democratic Governance.” *Governance* 18 (1), 2005, p. 89–11.

Schmitter, Philippe. “Neo-Functionalism.” In *European Integration Theory*, by Antje Wiener and Thomas Diez, Oxford: Oxford University Press 2004, p. 45–74.

⁶³ Sabel, Charles F., and Zeitlin, Jonathan. “Learning from Difference: The New Architecture of Experimentalist Governance in the EU.” *European Law Journal* 14 (3), 2008, p. 271–327.

⁶⁴ Skelcher, Jurisdictional Integrity, Polycentrism, and the Design of Democratic Governance, p. 96.

⁶⁵ Sabel and Zeitlin, Learning from Difference, p. 305.

⁶⁶ As a pun on Puchala’s famous metaphor, it could be said that it is not even an elephant! “Even now, we are trying to apply Westphalian solutions to a largely neo-medieval Europe, and are surprised that these solutions do not work”. Zielonka, *Europe as Empire*, 2006 p. 19.

⁶⁷ Bartolini, *Restructuring Europe*, 2005.

between its functional and territorial boundaries”.⁶⁸ The Westphalian form of the international system in Europe, according to these accounts, is being gradually overcome and is either turning into a post-modern, neo-medieval arrangement in which states lose their characteristic features into “overlapping authorities, divided sovereignty, diversified institutional arrangements, and multiple identities”,⁶⁹ while different peripheries are variously subordinated to the centre, or is being reshaped into a neo-modern form, featuring asymmetry and differentiation of integration, by an imperial Union whose members remain, nevertheless, states⁷⁰.

2.3 The Union and its member states as mutually constitutive: a social constructivist ontology

Neo-functionalist and liberal-intergovernmentalist approaches both tend to reduce the EU to only one of its parts, either the national or the supranational one.⁷¹ As an alternative, and following the line of interdependence between levels set by the neo-institutionalist, governance, and neo-medievalist approaches, this study adopts an understanding of the ontology of the European Union based on the social constructivist tradition inaugurated by Checkel,⁷² which posits the mutual constitutiveness between the Union and its member states.

Social constructivism is a relatively recent approach in European studies.⁷³ Its two core assumptions assert that the structure in which agents act is both material and social, and that it

⁶⁸ Zielonka, *Europe as Empire*, 2006, p. 2-3.

⁶⁹ Ibid, p. 15.

⁷⁰ Cooper, Robert. *The Breaking of Nations: Order and Chaos in the Twenty-First Century*. New York: Atlantic Monthly Press 2003. Also see Beck and Grande, *Empire Europe*, 2011

⁷¹ Ibid., p. i.

⁷² Checkel, Jeffrey T. “Social Construction and Integration.” *Journal of European Public Policy* 6 (4), 1999, p. 545–60.

⁷³ Ibid.

stands in a relation of mutual constitutiveness with the identities, interests, and preferences of the agents.⁷⁴ Social constructivism, therefore, leaves behind methodological individualism and agent-centred rational choice, to add an interpretative and structure-centred perspective based on a social ontology.

The proposed study adopts a constructivist perspective relying on conventional methodologies of knowledge, as opposed to the radical constructivist views alleging the impossibility of “intersubjectively valid knowledge claims”.⁷⁵ As such, it remains compatible in its meta-theoretical underpinnings with those approaches belonging to the “soft rationalist family tree”,⁷⁶ which takes into account the role of ideational factors in shaping political action.

The added value of social constructivism for European integration theory lies in complementing agency-centred theories by recalling that actors’ interests and preferences are not exogenous, given, and constant; rather, they spring from “the social construction of reality”, as in the definition of Berger and Luckmann.⁷⁷ Ideas define the universe of options and legitimise action, and are codified in institutions, defined as “a relatively stable structure of identities and interests”⁷⁸ which the individuals face as social facts with a power of coercion derived from the collectively shared knowledge of the social group. Norms, as

⁷⁴ Tanil, Gamze. *Europeanization, Integration and Identity: A Social Constructivist Fusion Perspective on Norway*. London: Routledge 2012, p. 14.

⁷⁵ Risse, Thomas. “Social Constructivism and European Integration.” In *European Integration Theories*, by Antje Wiener and Thomas Diez, Oxford: Oxford University Press 2009, p. 144–160, p. 145.

⁷⁶ Rosamond, Ben. “The Uniting of Europe and the Foundation of EU Studies: Revisiting the Neofunctionalism of Ernst B. Haas.” *Journal of European Public Policy* 12 (2), 2005, p. 237–54, p. 243.

⁷⁷ Berger, Peter L., and Luckmann, Thomas. *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. New York: Anchor Books 1966.

⁷⁸ Wendt, Alexander. “Anarchy Is What States Make of It: The Social Construction of Power Politics.” *International Organization* 46 (2), 1992, p. 391–425, p. 399.

“shared intersubjective understandings that make behavioural claims”,⁷⁹ provide guidance to actors trying to “do the right thing” according to a logic of appropriateness⁸⁰. Identities, rather stable and born from reciprocal typification, give rise to the actors’ interests. “Identity is part of a historical process of interaction which consolidates practices and beliefs creating norms, which in turn determine action”.⁸¹

Preferences are endogenous to the process of interaction: “actors, through interaction with broader institutional contexts (norms or discursive structures), acquire new interests and preferences – in the absence of obvious material incentives”.⁸² Immersed in a social environment, actors first adopt and then internalise social prescriptions. The social structure starts to provide actors with new interests and preferences, thus constitutively affecting their most basic properties, including preferences and identity, which are increasingly defined by their membership of a social community.

Social constructivism differs from previous rationalist perspectives in its ontological assumptions and epistemological methods, though its conventional strand remains compatible with them. The claim of social constructivism is smaller than that of the grand theories of integration, as it does not put forward any substantive claim concerning European integration. Rather, it purports to go further in the structure/agency debate, saying not only that structure and agents are codetermined, but that they are mutually constituted. It thus stands in between individualism and structuralism, “claiming that there are properties of structures and of agents that cannot be collapsed into each other”.⁸³

⁷⁹ Checkel, Jeffrey T. “Social Construction and European Integration.” In *The Social Construction of Europe*, by Thomas Christiansen, Knud Erik Jørgensen, and Antje Wiener (eds.). London: Sage 2001, p. 50–64, p. 57.

⁸⁰ Risse, *Social Constructivism and European Integration*, 2009, p. 147–148.

⁸¹ Tanil, *Europeanization, Integration and Identity*, 2012, p. 16.

⁸² Checkel, “Social Construction and Integration”, 1999, p. 548.

⁸³ Risse, “Social Constructivism and European Integration”, 2009, p. 146.

An ontologically social approach such as constructivism has the potential to complement theories that assume the primacy of either structure or agency. While the Union is more than the mere sum of its members, it also remains dependent on them in several respects and neither element can be said to have primacy over the other; consequently, the distinction between principals and agents is blurred.

According to social constructivists, “the EU has achieved identity hegemony in Europe” by working as an “active identity builder” and “fill[ing] the meaning space of Europe with a specific context”, so that now Europe and the EU have become synonymous.⁸⁴ This opens up the question of the feedback effect of membership of the Union on the features and identity of its member states (Europeanisation research agenda). On the one hand, starting from the common features of its members, the EU has come to define itself as a community of democracies.⁸⁵ On the other hand, EU membership increasingly defines how states see themselves and are seen by others, finally affecting the very meaning of statehood and sovereignty. Rather than nation-states, they are increasingly becoming defined as member states,⁸⁶ to the extent that their democratic legitimacy “cannot be established independently of the EU” anymore.⁸⁷ The EU appears thus as “a cooperative venture of conflict resolution and problem-solving coordination within an obligatory frame of reference” having a transformative (but not homogenising) effect on its members:

We thus witness in Europe the development of a supranational political order that recognizes the difference of its constituent parties. The EU is not based on a culturally homogenized people, nor is it brought about by

⁸⁴ Ibid., p. 154.

⁸⁵ Thomas, *Constitutionalization through Enlargement*, 2006.

⁸⁶ Sbragia, *From ‘Nation-State’ to ‘Member-State’*, 1994; Bickerton, *European Integration*, 2012.

⁸⁷ Eriksen, Erik O. “What Democracy for Europe.” In *What Democracy for Europe? Proceedings from the RECON Midterm Conference*, by John E. Fossum and Erik O. Eriksen. Oslo: ARENA 2010, p. 17–30, p. 18.

coercion and brute force. The EU's 'contract' aims at changing the identity of the contracting partners – from nation-states to member states.⁸⁸

Therefore, social constructivism crucially refocuses on two aspects overlooked in previous theoretical perspectives: the “mutual constitutiveness of agency and structure” and the impact of integration on the “social identities and interests of actors”.⁸⁹

3. The transformation of sovereignty: sovereignty as control, as responsibility, as participation

The transformations of the state and of its relations with societies and with the international level, discussed above, go along with a reconceptualisation of the notion of sovereignty. The classical notion of sovereignty as control, grounded in a Westphalian/Vettelian concept of stateness, of non-interference, and of sovereign equality, has come to be theoretically countered by a notion of sovereignty as an internationally shared responsibility, underpinning international intervention and post-conflict state building by international administration. A middle way between the two, I argue, is offered by the concept of sovereignty as participation. Sovereignty as participation includes the involvement in international social life as constitutive of a state's identity, but does not allow for the suspension of the state's sovereignty in order to restore it. As such, it seems particularly well suited to analyse the efforts of state building led by the European Union, aimed at building member states and in need to take care of local legitimacy, without the option to suspend sovereignty in its target countries.

⁸⁸ Ibid., p. 21.

⁸⁹ Risse, *Social Constructivism and European Integration*, 2009, p. 151.

3.1 Sovereignty as control

Sovereignty, although criticised as “organised hypocrisy”,⁹⁰ has been the ultimate source of order for the international system in the last five hundred years. The traditional reading of the history of international relations posits its birth with the end of the wars of religion in Europe and the Peace of Westphalia of 1648. These instruments had as a fundamental tenet the autonomy from external powers of each territory and government, in particular the non-interference of the Catholic Church in the religious affairs of the German princes. Notwithstanding the ongoing debate on the issue,⁹¹ the episode has remained an icon in the literature on international relations. In particular, “Westphalia” came to embody the two sides of sovereignty: internal supremacy of the ruler over a territory, and external non-interference in other rulers’ affairs. As such, “the sovereign power cannot be challenged from the inside and it can respond to outside challenges by resorting to the use of force”:⁹² this is the content of the definition of sovereignty, synthetically put forward by Philpott as “supreme authority within a territory”.⁹³ Sovereignty thus entails a combination of authority, supremacy, and territoriality.

⁹⁰ Krasner, Stephen D. *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press 1999.

⁹¹ Krasner, Stephen D. “Westphalia and All That.” In *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change*, by Judith Goldstein and Robert O. Keohane. Ithaca: Cornell University Press 1993, p. 235–64.

Philpott, Daniel.. *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*. Princeton Studies in International History and Politics. Princeton N.J: Princeton University Press. 2001

Osiander, Andreas. “Sovereignty, International Relations, and the Westphalian Myth.” *International Organization* 55 (2), 2001, p. 251–87.

⁹² Venneri, Giulio. “From International to EU-Driven Statebuilding: The Reorganization of Sovereignty in Post-Dayton Bosnia and Herzegovina”. PhD thesis in International Studies, Trento 2010, p. 24.

⁹³ Philpott, *Revolutions in Sovereignty*, 2001

As a central tenet of international relations, the concept of sovereignty has gone through different reconceptualisations: as noted by Biersteker,⁹⁴ “state and sovereignty are mutually constitutive concepts”. Classical realism, starting with Morgenthau,⁹⁵ saw it as a fixed and exogenous attribute of states, providing moral and legal justification to the political facts at the base of the decentralised relations among nations. Nevertheless, classical realism was challenged by those scholars of the liberal school of international relations who put emphasis instead on the growing interdependence in world politics and the diminishing role of the state towards non-state actors, including business corporations.⁹⁶ Economic interdependence, new global technologies, and the spread of democracy, were seen as eroding the absolute sovereignty of the state. The reply to the liberal critique came in terms of Waltz’s approach of structural realism; while he recognised that states are not the only international actors, he also introduced a concept of hierarchy within international anarchy and remarked that “so long as the major states are the major actors, the structure of international politics is defined in terms of them”.⁹⁷ The positions of realists and liberals tended then to converge around a vision of international politics centred around the concept of anarchy, and the centrality of self-interested states within it, though remaining distinct on the reasons and factors of cooperation under anarchy.

In fact, both realists and liberals have been criticised for confining their debate within a narrow reading of sovereignty as control: in this way, the ones were too focused on the states’ continuing monopoly over legitimate violence, while the others put too much emphasis on the

⁹⁴ Biersteker, Thomas J. “State, Sovereignty, and Territory.” In *Handbook of International Relations*, edited by Walter Carlsnaes, Thomas Risse-Kappen, and Beth A. Simmons, 157–76. London: Sage 2002, p. 157.

⁹⁵ Morgenthau, Hans J. *Politics among Nations: The Struggle for Power and Peace*. Boston: McGraw-Hill 2006, p. 4.

⁹⁶ Keohane, Robert O., and Nye, Joseph S. *Transnational Relations and World Politics*. Cambridge: Harvard University Press 1972.

⁹⁷ Waltz, Kenneth N. *Theory of International Politics*. Reading: Addison-Wesley 1979, p. 74.

last wave of globalisation, whose erosion of state sovereignty has not been stronger than the previous ones'. As underlined by Krasner, issues of control are distinct from issues of authority, and "interdependence sovereignty, or the lack thereof, is not practically or logically related to international legal or Westphalian sovereignty".⁹⁸

Krasner underlines the inner tension, within the international realm, between the logic of consequences, fostering actors to rationally balance presumed costs and benefits of action, and the logic of appropriateness, pushing them to behave as prescribed by rules, norms, and identities. The supremacy of the first over the second constitutes sovereignty as an "organised hypocrisy", since in the words of Krasner "states say one thing but do another; they rhetorically endorse the normative principles or rules associated with sovereignty but their policies and actions violate these rules".⁹⁹

A second, more radical critique to the concept of sovereignty as control came from the perspective of neo-marxist and world-system theory. According to the vision of Immanuel Wallerstein, sovereignty is but a fiction, a manipulation of the capitalist class. Sovereignty, the state, and international relations are deeply embedded, in his vision, in the relations between public authorities and the capitalist world as the "political system of sovereign states... suits perfectly the needs of capitalist entrepreneurs",¹⁰⁰ as it allows them to protect their private property from both theft, through public authority, confiscation, through the extension of the rule of law and property rights, and uncontrolled market forces, through legal regulation, in exchange for a fair amount of taxation.

3.2 Sovereignty as responsibility

⁹⁸ Krasner, *Sovereignty: Organized Hypocrisy*, 1999, p. 13.

⁹⁹ Kreisler, Harry. "Sovereignty*. Conversation with Stephen Krasner." University of California-Berkeley, 31 March 2003.

¹⁰⁰ Wallerstein, Immanuel. "States? Sovereignty?" In *States and Sovereignty in the Global Economy*, by D.A. Smith, D.J. Solinger, and S.C. Topik. Abingdon: Taylor and Francis 1999, p. 20–33, p. 23.

In contrast to the traditional meaning of sovereignty, couched in terms of absolute independence and autonomy, sovereignty as responsibility underlines its role in the socialisation of states, and provides the justification for an international state building agenda based on a liberal peace theory view of international relations.

Biersteker and Weber recognise the hypocrisy of sovereignty as control, as denounced by Krasner, but go forward by presenting sovereignty as an inherently social concept: “State’s claim to sovereignty construct a social environment in which they can interact as an international society of states, while at the same time the mutual recognition of claims to sovereignty is an important element in the construction of states themselves”.¹⁰¹ Focusing on the social construction of sovereignty, these authors conclude that, rather than on a “timeless principle of sovereignty”, the international system is based on the normative production of the state as a peculiar way of linking government, territory, population and recognition.¹⁰²

The constructivist approach to sovereignty is taken a step forward by Philpott,¹⁰³ who focuses on how ideas can generate authority. Reflecting on the role of the Peace of Westphalia in producing the normative foundation for a new international society, and of the process of decolonisation in expanding it on a global scale, Philpott refutes Krasner’s emphasis on power and material interests as constitutive of international reality, and on concepts such as sovereignty as a rationalisation and manipulation by dominant actors of political realities into legal justifications. Rather, Philpott sees ideas as powerful tools to subvert one or more of the three faces of authority in the international society (the legitimacy of polities, the rules of membership, the prerogatives of members): “ideas convert hearers; these converts amass their ranks; they then demands new international orders; they protest

¹⁰¹ Biersteker, Thomas J., and Weber, Cynthia (eds.). *State Sovereignty as Social Construct*. Cambridge: Cambridge University Press 1996, p. 1-2.

¹⁰² Ibid., p. 3.

¹⁰³ Philpott, *Revolutions in Sovereignty*, 2001.

and lobby and rebel to bring about these orders; there emerges a social dissonance between the iconoclasm and the existing order; a new order results”.¹⁰⁴

From these understandings of sovereignty as a social construction, the debate on sovereignty took a new direction towards an understanding of sovereignty as responsibility from a policy-oriented debate, as the one taking place at the United Nations in the 1990s. In fact, the UN as a collective security system was set up as a way to supersede the Westphalian system of individual absolute sovereignty, deemed responsible for the two world conflicts of the early 20th century.¹⁰⁵ Nevertheless, its realisation was impeded by the emergence of the bipolar conflict and by the lack of implementation of the security-related provisions of the UN Charter (art. 43, 45). What came into being was thus “another multilateral experiment that was not properly equipped to fully replace the pillars, practices, and dynamics typical of the Westphalian order”.¹⁰⁶ After 40 years of freezing, from the Korean War to the first Gulf War, the debate on the role of the UN and state sovereignty re-emerged at the end of the bipolar conflict in the 1990s. The reserved jurisdiction in internal affairs (*domaine réservé*), corollary of Westphalian-type sovereignty and of the UN principle of sovereign equality, came increasingly under scrutiny and was challenged by the emerging concept of humanitarian intervention,¹⁰⁷ which found one of its first formulations in the pan-European context in the final document of third conference on the Human Dimension of the CSCE (Moscow, 1991), stating that “the commitments undertaken in the field of the human dimension of the CSCE

¹⁰⁴ Philpott, *Revolutions in Sovereignty*, 2001, p. 4.

¹⁰⁵ Colombo, Alessandro. *La Guerra Ineguale. Pace E Violenza Nel Tramonto Della Società Internazionale*. Bologna: Il Mulino 2006.

¹⁰⁶ Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 39.

¹⁰⁷ “The threat or the use of force by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.” Holzgrefe, J.L., and Robert O. Keohane. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*. Cambridge: Cambridge University Press, 2003, p. 18.

are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned”.¹⁰⁸

The concept of sovereignty as shared responsibility was first put forward by Deng in his work on conflict management in Africa:

The locus of responsibility for promoting citizens’ welfare and liberty, for organizing cooperation and managing conflict, when not exercised by the society itself, remains within the state. Until a replacement is found, the notion of sovereignty must be put to work and reaffirmed to meet challenges of the times in accordance with accepted standards of human dignity.¹⁰⁹

Sovereignty as responsibility remained a topic of discussion among scholars interested in finding a way to reconcile an international system based on sovereign equality and non-interference with a growing concern for the respect of human rights worldwide. The debate of the 1990s was not only academic, but had to confront real-world issues such as the international interventions in Somalia, Bosnia, and Kosovo. The results of this debate coalesced in the report on the responsibility to protect by the International Commission on Intervention and State Sovereignty (ICISS), an international conference convened at the initiative of the Government of Canada. According to the ICISS,

Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests

¹⁰⁸ Conference on Security and Cooperation in Europe (CSCE). *Document of the Third Meeting of the Conference on the Human Dimension of the CSCE*. Moscow, 1991, p. 2.

¹⁰⁹ Deng, Francis M. (ed). *Sovereignty as Responsibility: Conflict Management in Africa*. Washington, DC: Brookings Institution 1996, p. xi.

that the *national political authorities are responsible to the citizens internally and to the international community through the UN*. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.¹¹⁰

As can be noted, the ICISS included in its concept of sovereignty as responsibility a double accountability of governments, both downwards towards their citizens, and upwards towards the international society embodied by the UN, which I argue is a central tenet of any notion of sovereignty beyond the mere concept of control. Nevertheless, the notion put forward by the ICISS of a responsibility to protect (R2P), accompanied by a commitment to prevent and a duty to rebuild, proved nonetheless of difficult and contentious operationalisation, in particular in the post-9/11 world.

In political terms, a debate ensued between a libertarian and neoconservative strand,¹¹¹ emphasising that sovereignty as capacity and responsibility would justify cases of foreign intervention by a duty to prevent spill-overs of international insecurity, and a communitarian and idealistic strand, limiting the possibility of external intervention in failing states only to extreme cases of humanitarian emergencies: “when a state acts irresponsibly, some international body will rule that the state has defaulted on its responsibilities and thus call for corrective international intervention by an international or regional body”.¹¹² In legal terms, the concept was discussed by several UN sessions, and in the 2009 UNSG Report it was reiterated that the responsibility to protect could not constitute a way to circumvent the

¹¹⁰ International Commission on Intervention and State Sovereignty (ICISS), and International Development Research Centre (Canada). *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. Edited by Gareth J. Evans and Mohamed Sahnoun. Ottawa: International Development Research Centre 2001, p. 3, emphasis added.

¹¹¹ Feinstein, Lee and Slaughter, Anne-Marie. “A Duty to Prevent”. *Foreign Affairs*. 83(1), 2004.

¹¹² Etzioni, Amitai. “Sovereignty as Responsibility.” *Orbis* 2006, p. 71–85, p. 82.

primacy of the UN system and the traditional Westphalian characteristics of the international society. Somehow, the responsibility to protect was tamed and normalised by asking for the UN Security Council to authorise any action in its pursuit.

Sovereignty “no longer appears to be an on-or-off condition”;¹¹³ rather than a natural right of states, sovereignty is constructed as a concession, a privilege dependent on the fulfilment of certain responsibilities.¹¹⁴ It is not anymore a screen behind which governments can hide from the scrutiny of their peers about whether they behave appropriately and fulfil their domestic responsibilities towards the population under their jurisdiction. In this way, sovereign governments are subject to both domestic and international accountability; they are less “free agents” and more “members of one community”.¹¹⁵ If they do not act appropriately or fulfil their fundamental tasks, they lose the privilege of sovereignty and justify external intervention.

Taking a Foucauldian perspective, Aalberts and Werner remark how “state sovereignty is used as a governmental technology that aims to create proactive, responsible subjects”.¹¹⁶ Starting with the *Islands of Palmas* arbitration, and up to the 2001 ICISS report, sovereignty is being increasingly understood as an obligation to respect the rights of other states, shaping and fostering autonomous and responsible members of the international society, “constituting states as capable actors that bear responsibility for their policy choices”.¹¹⁷

It may be seen from the debate quoted above how the practice of “liberal peace” international state building derives from an understanding of sovereignty as responsibility.

¹¹³ Fukuyama, Francis. “‘Stateness’ First.” *Journal of Democracy* 16 (1), 2005, p. 84–88, p. 88.

¹¹⁴ Venneri, “From International to EU-Driven Statebuilding”, 2010, p. 13-22.

¹¹⁵ Deng, “Sovereignty as Responsibility”, 1996, p. 83.

¹¹⁶ Aalberts, Tanja E., and Werner, Wouter G. “Mobilising Uncertainty and the Making of Responsible Sovereigns.” *Review of International Studies* 37 (5), 2011, p. 2183–2200, p. 2183.

¹¹⁷ *Ibid.*, p. 2198.

Under the assumption that state weakness or failure is at the root of conflict, and premised on the incapacity of domestic state consolidation, international state building aims at reconstructing state structures through external intervention:

the international community compromises one important norm associated with sovereignty – self-governance – to create the conditions for full empirical statehood and sovereign authority in the country it intervenes in, by establishing the capacity of the state to fulfil its international and domestic obligations.¹¹⁸

Practices of state building such as international administrations and governance assistance have not yet found an appropriate formalisation in terms of sovereignty. Krasner thus proposed the formalisation of such practices into new relations of trusteeships and partnerships, according to which the core institutions of fragile or failed states are reorganised under formulas of shared sovereignty.¹¹⁹

The notion of sovereignty as responsibility has not been without critiques. In particular, critics have noted that it seem to blur even further the accountability of international actors and to neglect the role of agency. Cunliffe has noted that “subordinating the supremacy of state sovereignty to the higher authority of the international community undermines the project of making power more accountable, and restrains the exercise of political agency in international politics”.¹²⁰ Chandler has remarked how state building perfectly fits the

¹¹⁸ Zaum, Dominik. *The Sovereignty Paradox: The Norms and Politics of International Statebuilding*. Oxford: Oxford University Press 2007, p. 41.

¹¹⁹ Krasner, Stephen D. “Sharing Sovereignty: New Institutions for Collapsed and Failing States.” *International Security* 29 (2), 2004, p. 85–120, p. 105-117.

¹²⁰ Cunliffe, Philip. “Sovereignty and the Politics of Responsibility.” In *Politics without Sovereignty. A Critique of Contemporary International Relations*, edited by Christopher J. Bickerton, Philip Cunliffe, and Alexander Gourevitch, New York: UCL Press 2007, p. 39–57, p. 40.

governmentality of an “Empire in denial”, willing to escape responsibility for its actions abroad, and how sovereignty as responsibility aptly justifies intervention in non-Western countries.¹²¹ Moreover, state building results in the creation of states “as administrative centres, directed from Brussels or Washington”, thus deprived of the vital relation between state and society.¹²² International state building is thus in line with those processes, such as regional integration, that produce a relativisation of the links between the state as an administrative machine and the society as a community. “The result is a proliferation of ‘phantom states’ composed of technical administrative shells, sustained mainly through external policy-making and resources, and dangerously detached from their constituent population, over which they are expected to exercise their political power”.¹²³

Analysts of the Western involvement in the Balkans have drafted different conclusions about it: while Zaum concluded that this concept was already providing a blueprint for action and a justification for post-conflict international administrations,¹²⁴ Venneri remarked rather a risk-averse, hands-off attitude of European institutions when faced with issues of sovereignty and intervention in the countries of the EU enlargement agenda, in particular Bosnia and Herzegovina.¹²⁵

3.3 Sovereignty as capacity and participation

As seen above, the concept of sovereignty as control is most apt to describe the Westphalian notion of state, self-contained and taking part only in the most limited international institutions (diplomacy, treaties, intergovernmental organisations). To the

¹²¹ Chandler, David. *Empire in Denial. The Politics of State Building*. London: Pluto 2006.

¹²² Chandler, David. “How ‘State-Building’ Weakens States”, *Spiked Essays*. 24 October 2005.

¹²³ Venneri, From International to EU-Driven Statebuilding. 2010 p. 147.

¹²⁴ Zaum, Dominik. “The Paradox of Sovereignty: International Involvement in Civil Service Reform in Bosnia and Herzegovina.” *International Peacekeeping* 10 (3), 2003, p. 102–20.

¹²⁵ Venneri, From International to EU-Driven Statebuilding, 2010.

opposite, the concept of sovereignty as responsibility see states' sovereignty as conditional upon the fulfilment of certain tasks, and granted by a superior order, providing a justification for cases of external intervention and international state building in post-conflict societies. Neither of the two concepts, though, seems apt to describe the sovereignty of the member states of the EU, nor the way that the EU interacts with sovereign candidate countries. Starting from a thick notion of EU member state, this study argues that being a member state goes beyond the Copenhagen criteria of liberal democracy and functioning market economy, and that through the criterion related to the capacity to implement the *acquis* it extends to the way state functions are organised. Such an understanding of sovereignty as capacity and participation spans in the middle way between sovereignty as control and sovereignty as responsibility. As seen in the critiques to the concept of sovereignty as control, sovereignty rather “represents a construction simultaneously encompassing authority, control, and legitimacy”.¹²⁶

Sovereignty as capacity and participation is not seen as in contrast with the delegation of powers to supranational authorities and multilateral institutions. States willingly allow for interdependence, in the belief that it reflects their own interests. Delegation of power can be interpreted more as “an expression of the value of sovereignty than a threat to its continuing importance”, as its objective is to “enhance the capacity of states (and the international system) to cope with complex problems requiring transnational or private-sector management or expertise”.¹²⁷ As reported by Krasner, rulers that are “free to choose the institutions and policies regarded as optimal” can decide to violate legal sovereignty, by inviting external intervention or by taking part in regional integration processes, without violating Westphalian

¹²⁶ Ibid., p. 31.

¹²⁷ Heller, T.C., and Sofaer, A.D. “Sovereignty. The Practitioners’ Perspective.” In *Problematic Sovereignty: Contested Rules and Political Possibilities*, edited by Stephen D. Krasner, New York: Columbia University Press 2001, p. 24–52, p. 31–32.

sovereignty, which happens instead “when external actors influence or determine domestic authority structures”.¹²⁸

Sovereignty may be deconstructed along different dimensions, as in Thomson’s view.¹²⁹ Along with the metapolitics of sovereignty as constitutive of the state system, there appears then a functional dimension, variable over time and issue. For instance, the retreat of the state from the field of the economy has gone along with the expansion of its intrusiveness in the private lives of the citizens. Starting from the work of Wolfgang Reineke, Anne-Marie Slaughter has argued that in today’s globalised world “national governments have already lost their sovereignty, but they should compensate for that loss by delegating their responsibilities to a host of non-state actors – international organizations, corporations and NGOs”.¹³⁰ States are not disappearing, and remain the most important international actor, but they are transforming from unitary into “disaggregated” states in which “different government institutions ... engage in activities beyond their borders”.¹³¹ The disaggregation of the state functions is accompanied by the disaggregation of sovereignty, whose meaning shifts “from autonomy from external interference to the capacity to participate in transgovernmental networks”, i.e. “sovereignty as participation”.¹³²

The reflection of Slaughter starts from the recognition that the notion of the unitary state is a fiction that is not even useful nowadays, turning itself into an analytical blinder. Instead, recognising the shift from the unitary state to the disaggregated state allows recognising the necessity and ability of governmental bodies to reach across the state border, cooperating with

¹²⁸ Krasner, *Sovereignty: Organized Hypocrisy*, 1999, p. 20.

¹²⁹ Thomson, Janice. “State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research.” *International Studies Quarterly* 39 (2), 1995, p. 213–33, p. 224.

¹³⁰ Slaughter, Anne-Marie. *A New World Order*. Princeton, N.J.; Woodstock: Princeton University Press, 2005, p. 262.

¹³¹ *Ibid.*, p. 12.

¹³² *Ibid.*, p. 34.

their foreign counterparts in order to fulfil their domestic tasks. In fact, as pointed out by Abram Chayes and Antonia Handler Chayes, “the only way most states can realize and express their sovereignty is through participation in the regimes that make up the substance of international life”.¹³³

It is regulators pursuing the subjects of their regulations across borders; judges negotiating minitreaties with their foreign brethren to resolve complex transnational cases; and legislators consulting on the best ways to frame and pass legislation affecting human rights or the environment.¹³⁴

Thus, the standard form of cooperation is not any longer limited to the multilateral treaty and the international organisation, as in an international system premised on unitary states and on sovereignty as control. Rather, as “a pattern of regular and purposive relations among like government units working cross the borders”,¹³⁵ government networks become the most relevant aspect of the international landscape, involving and engaging with civil society organisations both horizontally (among national officials of different countries) and vertically (among national and supranational officials). In this, government networks take part in what Keohane and Nye define as “transgovernmental” activity, i.e., “direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets”.¹³⁶

Governmental networks, constituting a new world order, allow a way out of the trilemma of global governance: “we need global rules without centralised power but with government

¹³³ Chayes, A., and A.H. Chayes. *The New Sovereignty. Compliance with International Regulatory Agreements*. Cambridge: Harvard University Press, 1998, p.27.

¹³⁴ Slaughter, *A New World Order*, 2005, p. 12.

¹³⁵ Ibid., p. 14.

¹³⁶ Ibid., p. 10.

actors who can be held to account”.¹³⁷ Government networks thus appear as the only feasible alternative to a global government, if states are to retain their formal sovereignty and if accountable actors are to be included within governance bodies. In particular, government networks

have become the signature form of governance for the European Union, which is itself pioneering a new form of regional collective governance that is likely to prove far more relevant to global governance than the experience of traditional federal states.¹³⁸

Understanding global governance through government networks, according to Slaughter, requires an updated concept of sovereignty, away from the autonomy from external interference typical of the notion of unitary state, and focused instead on the “new sovereignty”, identified by Abram and Antonia Chayes as the capacity to participate and interact with transgovernmental networks and international institutions, “connection to the rest of the world and the political ability to be an actor within it”.¹³⁹

Instead of a unitary state endowed with a single sovereignty as autonomy (insularity), as capacity of keeping other actors outside its own sphere of jurisdiction (right to resist), the notion of disaggregated state focuses on the relational capacity to engage and on the single governmental institution, each one endowed with a share of sovereignty according to its own functions and capabilities, interacting and participating transnationally. Moreover, rather than weakening the state, it ends up reinforcing it by strengthening the capacity of its institutions to interact with their foreign counterparts.¹⁴⁰ This notion of sovereignty comes close to the

¹³⁷ Ibid., p. 10.

¹³⁸ Ibid., p. 11.

¹³⁹ Chayes and Chayes. *The New Sovereignty*, 1998, p. 27.

¹⁴⁰ Slaughter, *A New World Order*, 2005, p. 269-270.

sovereignty as responsibility, as it “would accord status and recognition to states in the international system to the extent that they are willing and able to engage with other states, and thus necessarily accept mutual obligations”.¹⁴¹ Nevertheless, it does not arrive to justify external intervention and substitution in case its requirements and obligations are not fulfilled. The sanctions, it seems, is rather in the lack of ability to participate in global governance and to affect the world order.

4. Europeanisation: the domestic impact of Europe

Adopting an understanding of sovereignty as capacity and participation, as described above, allows opening up the research agenda on the effects of European integration on its member states and on its candidate countries, and the feedback effects of this interaction on integration itself. This would not be possible under the competing notion of sovereignty as control, which sees states as unitary actors and rules out any transgovernmental interaction, nor under a notion of sovereignty as responsibility, that subjugate states to a higher authority able to suspend their sovereign prerogatives. The inquiry in the domestic impact of European integration and its feedback effect has been undertaken in the framework of the concept of Europeanisation. This section introduces its definitions, theoretical linkages, mechanisms, scope conditions and outcome patterns, arriving at sketching a conceptual framework of Europeanisation.

4.1 Defining Europeanisation: exploring the domestic effects of Europe

The concept of Europeanisation has given birth to a large amount of literature in European studies, signalling the shift from an ontological to a post-ontological research agenda.

¹⁴¹ Ibid., p. 267.

Europeanisation research is interested in explaining not what the EU *is*, but what the EU *does*, as in its effects on the member states, and their responses to adjustment pressures.¹⁴² The definition of Europeanisation has been gradually broadened from an outcome to a process, up to including the recursive relation between the national and the supranational level.

The first result-oriented understanding of Europeanisation as an outcome sees it as an end-state corresponding to “a situation where distinct modes of European governance have transformed aspects of domestic politics”.¹⁴³ This definition is static rather than dynamic, answering the question of “how much” a specific issue or country is “Europeanised”, with reference to a specific and predetermined end result—the transformation and convergence of domestic structures (policies, institutions, or even identities) to a predetermined “European” norm. Nevertheless, it is problematic in referring to an end point which is often difficult to pinpoint (the average level of integration? an ideal or personal understanding of the *finalité* of the Union?), and it loses sight of other possible national responses other than convergence.¹⁴⁴

Second, rather than an outcome, Europeanisation has been defined as a process integrating the supranational and national political levels by “reorienting the direction and shape of politics”.¹⁴⁵ In this way, “domestic policy areas become increasingly subject to European policy-making”,¹⁴⁶ while the EU level exerts an influence “impacting member

¹⁴² Radaelli, Claudio M. “Whither Europeanization?: Concept Stretching and Substantive Change.” *European Integration Online Papers (EIoP)*, 4 (8), 2000, p. 6.

¹⁴³ Buller, J., and Gamble, A. “Conceptualising Europeanisation.” *Public Policy and Administration* 17 (2), 2002, p. 4–24, p. 17.

¹⁴⁴ The distinction between process-oriented and result-oriented definitions was first put forward by Maniokas. Maniokas, Klaudijus. “Concept of Europeanisation and Its Place in the Theories of the European Integration.” In *Lithuanian Political Science Yearbook*. Vilnius: Vilnius University, 2001.

¹⁴⁵ Ladrech, Robert. “Europeanization of Domestic Politics and Institutions: The Case of France.” *Journal of Common Market Studies* 32 (1), 1994, p. 69–88, p. 17.

¹⁴⁶ Börzel, “Towards Convergence in Europe?”, 1999, p. 574.

states' policies and political and administrative structures".¹⁴⁷ All these first generation definitions stress a one-way, top-down relationship; following an organisational logic, domestic institutions adapt to the altered context of EU membership, resulting in patterns of expected transformation and convergence.¹⁴⁸ When defining Europeanisation as "the 'domestic impact of Europe' – the various ways in which institutions, processes and policies emanating from the European level influence policies, politics and polities at the domestic level" Börzel and Risse treat European-level developments as the explanatory factor (independent variable) of changes at the domestic level (dependent variable).¹⁴⁹ Nevertheless, risks lie in reifying Europeanisation as something which is out there, able to explain what we see,¹⁵⁰ or in giving it uncontested primacy as an independent rather than an intervenient variable in already ongoing processes of modernisation or globalisation.¹⁵¹

Finally, a two-ways, process-oriented definition of Europeanisation sees it as a relation of influence between the national and the supranational level which is both top-down and bottom-up, circular rather than unidirectional, and cyclical rather than one-off. One of the most accurate definitions put forward, which avoids denotativeness and the orchestration of

¹⁴⁷ Héritier, Adrienne (ed). *Differential Europe: The European Union Impact on National Policymaking*. Lanham: Rowman and Littlefield 2001., p. 3.

¹⁴⁸ Chatzigiagkou, Georgios. "Enlargement Goes Western Balkans-Croatian Institutions in Time: Sluggish Institutional Evolution, Resilience, and Shallow Europeanisation". PhD thesis, University of York 2010, p. 39.

¹⁴⁹ Börzel, Tanja A., and Risse, Thomas. "Europeanization: The Domestic Impact of European Union Politics." In *Handbook of European Union Politics*, edited by Knud E. Jørgensen, Mark A. Pollack, and Ben Rosamond. London: Sage 2007, p. 483–504, p. 485.

¹⁵⁰ Bulmer, Simon, and Burch, M. "Coming to Terms with Europe: Europeanisation, Whitehall and the Challenge of Devolution". *Queen's Papers on Europeanisation* 2000, p. 9.

¹⁵¹ Goetz, Klaus H. "Making Sense of Post-Communist Central Administration: Modernization, Europeanization or Latinization?" *Journal of European Public Policy* 8 (6), 2001, p. 1032–51, p. 1040-1041.

lists of established concepts, is the one by Dyson and Goetz,¹⁵² defining Europeanisation as “a complex interactive ‘top-down’ and ‘bottom-up’ process in which domestic politics, politics, and public policies are shaped by European integration and in which domestic actors use European integration to shape the domestic arena. It may produce either continuity or change and potentially variable and contingent outcomes”. The pressure from above (structure) interacts with the “creative use” (agency) of European integration by domestic actors,¹⁵³ including their attempts at “uploading”¹⁵⁴ and “projecting”¹⁵⁵ their own national standards at EU level, and with phenomena of horizontal socialisation and learning. Convergence is not prioritised as the expected outcome, but uneven results stem from differences among countries and issue areas, refracting, mitigating and filtering the impact of integration. Europeanisation appears both as a cause and an effect of change, blurring the boundaries between independent and dependent variables.¹⁵⁶ Though useful to remind of the inter-relatedness of Europeanisation and European integration, this type of definition risks to directly encroach upon the field of the latter and to end up into conceptual overstretch. The three understandings of Europeanisation, captured by the three definitions above, are summarised in the table 1.1 below.

¹⁵² Dyson, Kenneth, and Goetz, Klaus H. “Living with Europe: Power, Constraint, and Contestation.” In *Germany, Europe, and the Politics of Constraint*. Proceeding of the British Academy 119. Oxford: Oxford University Press 2003, p. 20.

¹⁵³ Chatzigiagkou, “Enlargement Goes Western Balkans”, 2010, p. 47.

¹⁵⁴ Börzel, Tanja A. “Europeanization: How the European Union Interacts with Its Member States.” In *The Member States of the European Union*, edited by Simon Bulmer and Christian Lequesne. Oxford: Oxford University Press 2005.

¹⁵⁵ Bulmer, Simon, and Burch, M. “Central Government.” In *The Europeanization of British Politics*, edited by Ian Bache and Andrew Jordan. Basingstoke: Palgrave Macmillan 2006.

¹⁵⁶ Börzel, Europeanization, 2007.

Table 1.1 – Definitions of Europeanisation

		<i>Dimensions of Europeanisation</i>	
		<i>Static: outcome</i>	<i>Dynamic: process</i>
<i>Direction of change</i>	<i>One-way, linear, one-off (top-down)</i>	Europeanisation as transition towards a ‘Europeanised’ endstate	Europeanisation as domestic change coming from ‘Europe’
	<i>Two-way, circular, cyclical (bottom-up-down)</i>		Europeanisation as a circular/cyclical relation between national and supranational

4.2 The three strands of neoinstitutionalism and the mechanisms of Europeanisation

Europeanisation has been mainly understood in the framework of neo-institutionalist theories of European integration, based on the assumption that “institutions are the foundation of all political behaviour, without which there could be no organised politics”.¹⁵⁷ Neo-institutionalism argues that institutions structure politics by determining who is able to act and by shaping their strategies and (eventually) their interests, identities, and horizons of action; it remains thus compatible with social constructivist approaches. Neo-institutionalism, nevertheless, has also been criticised for its top-down bias and its reliance on the “shadow of hierarchy” or “of conditionality”,¹⁵⁸ resulting in a geographic gradient, with Europeanisation declining in power the farther one gets from the EU. Three variants of neo-institutionalism have helped theoretically framing Europeanisation: on the one hand rational choice

¹⁵⁷ Steinmo, S. “The New Institutionalism.” In *The Encyclopedia of Democratic Thought*, edited by Barry Clark and Joe Foweraker. London: Routledge 2001, p. 1.

¹⁵⁸ Schimmelfennig, Frank, and Sedelmeier, Ulrich. *The Europeanization of Central and Eastern Europe*. Ithaca: Cornell University Press 2005.

institutionalism and historical institutionalism, both linked to a rationalist approach, and on the other hand sociological institutionalism, referring instead to social constructivism.¹⁵⁹

First, rational choice institutionalism is an agency-centred approach based on methodological individualism; it takes the individual person as the basic unit of social life. Its ontology relies on a hard version of rational choice, depicting the actors as dedicated to maximise their utility function according to a logic of consequentiality. Preferences are fixed and exogenous to interaction. Institutions work as a constraint, as opportunity structures, limiting states' strategic behaviour and solving collective action problems.¹⁶⁰ A rational choice reading of Europeanisation sees the EU as yet another resource for domestic actors, leading to their differential empowerment and to a strategy of reinforcement by reward: "a state adopts EU rules if the benefits of EU rewards exceed the domestic adoption costs".¹⁶¹ Moreover, functional emulation can also indirectly lead to policy competition and lesson drawing: "a state adopts EU rules, if it expects these rules to solve domestic policy problem effectively".¹⁶² The EU *acquis* and accession negotiations make up the context where "reinforcement by reward" works best; technicality allows depoliticisation, while sectoral veto players are kept at bay by the aggregate benefit of membership.¹⁶³

A more interpretive understanding has been offered by sociological institutionalism, from the vantage point of post-positivist social science (*Verstehen*), interested more in

¹⁵⁹ Hall, P. and Taylor, C.R. "Political Science and the Three New Institutionalism." *Politica* 44, 1996, p. 936–957.

¹⁶⁰ Moravcsik, Andrew, and Schimmelfennig, Frank. "Liberal Intergovernmentalism." In *European Integration Theory*, edited by Antje Wiener and Thomas Diez. Oxford: Oxford University Press, 2009., p. 72.

Chatzigiagkou, *Enlargement Goes Western Balkans*, 2010, p. 58-60.

¹⁶¹ Schimmelfennig, Frank, and Sedelmeier, Ulrich. "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe." *Journal of European Public Policy* 11 (4), 2004, p. 661–679, p. 664.

¹⁶² *Ibid.*, p. 668.

¹⁶³ *Ibid.*, p. 671-673.

understanding the meaning of the actors' behaviour rather than in explaining or predicting it through the mechanistic reasoning based on if-then causality chains typical of positivist natural science (*Erklären*). It is in fact doubtful whether agency and subjectivity can be externally objectivised and analysed as if they were natural forces acting in causally linear ways, while both the agents and the researcher are involved in a complex web of human interactions. This competing approach thus draws from the constructivist tradition which posits a social ontology where agents and structure are mutually constituted, "claiming that there are properties of structures and of agents that cannot be collapsed into each other".¹⁶⁴ Immersed in a normative environment, actors first adopt and then internalise social prescriptions in the form of norms, i.e., "set[s] of shared intersubjective understandings that make behavioural claims" upon them.¹⁶⁵ Preferences and identities are thus endogenous to the process of interaction. Individuals behave trying to "do the right thing" through a logic of appropriateness, i.e., "rule-guided behaviour".¹⁶⁶ The EU is considered by sociological institutionalists as "the formal organization of a European international community defined by a specific collective identity and a specific set of common values and norms".¹⁶⁷ Indirectly, even in absence of EU impulse, normative emulation may result in the mimicry of models with higher perceived legitimacy.¹⁶⁸ Even Schimmelfennig and Sedelmeier acknowledge the relevance of sociological mechanisms of Europeanisation, though they limit them to the phase

¹⁶⁴ Risse, Thomas. "Social Constructivism and European Integration." In *European Integration Theories*, by Antje Wiener and Thomas Diez, 144–60. Oxford: Oxford University Press 2009, p. 146.

¹⁶⁵ Checkel, Jeffrey T. "The Europeanization of Citizenship?." In *Transforming Europe: Europeanization and Domestic Change*, edited by Caporaso, James, Maria Green Cowles, and Thomas Risse. Ithaca: Cornell University Press 2001, p. 182.

¹⁶⁶ Risse, Social Constructivism and European Integration, 2009, p. 147-148.

¹⁶⁷ Schimmelfennig and Sedelmeier, *Governance by Conditionality*, 2004, p. 667.

¹⁶⁸ Börzel and Risse, *Europeanization: The domestic impact of European Union politics*, 2007, p. 10.

of association negotiations and to democratic conditionality beyond the *acquis*, concerning the basic principles of liberal democracy, human rights and fundamental freedoms.¹⁶⁹

Finally, historical institutionalism is an eclectic approach relying on the sequencing of the previous two.¹⁷⁰ In the short-term, institutions are only behavioural constraints for actors' strategies of utility maximisation, but "in the long-run, actors' very identities may be powerfully shaped by institutional arrangements".¹⁷¹ Stemming from economic conceptualisation of increasing returns and path dependency, historical institutionalism sees institutions as sticky structures that lock in actors into persistent patterns. Change is explained by institutional misfit and external shocks, punctuating the equilibrium and resettling it on a new course. Policy inertia and path dependency limit EU influence, and only marginal change can be expected by layering or patching up EU policies into national repertoires.¹⁷² Though combining the previous two approaches, historical institutionalism remains somehow biased towards structure, leaving to agency a very limited role. The three strands of neo-institutionalism are summarised in the table 1 below.

¹⁶⁹ Schimmelfennig and Sedelmeier, *Governance by Conditionality*, 2004, p. 669-671.

¹⁷⁰ Pierson, Paul. *Politics in Time: History, Institutions, and Social Analysis*. Princeton: Princeton University Press 2004, p. 54-78.

¹⁷¹ Risse, *Social Constructivism and European Integration*, 2009, p. 152.

¹⁷² H  ritier, *Differential Europe*, 2001, p. 202.

Table 1.2: Europeanisation according to the three strands of neo-institutionalism

	<i>Rational choice institutionalism</i>	<i>Sociological institutionalism</i>	<i>Historical institutionalism</i>
<i>Logic of action</i>	Consequentiality (cost-benefit analysis)	Appropriateness (rule-guided behaviour)	Path dependency (stickiness of institutions)
<i>Interests of the actors</i>	Exogenous to interaction (new means for old goals)	Endogenous to interaction (new means for new goals)	Evolving over time (malleable in the long-term)
<i>Main element of change</i>	Thin learning (strategic bargaining)	Thick learning (socialisation)	Timing and practices (punctuated equilibrium)
<i>Strategy of Europeanisation</i>	Conditionality (reinforcement by reward)	Persuasion and legitimacy	Incremental change and critical junctures
<i>- Direct influence</i>	Cost/benefit manipulation (incentives/disincentives, capacity-building)	Normative pressure (authoritative models)	
<i>- Indirect influence</i>	Functional emulation: - regulatory competition - lesson-drawing	Normative emulation (mimicry)	
<i>Scope conditions</i>	1. Credibility 2. Determinacy 3. Adjustment costs 4. Size/speed of reward 5. Number of veto players	1. Norms legitimacy 2. Identification with EU 3. Norm resonance	1. Policy dissatisfaction 2. EU-centred epistemic communities 3. Rule transferability 4. Number of veto players
<i>Contexts of main relevance</i>	<i>Acquis</i> conditionality - Accession negotiations	Democratic conditionality - Association negotiations	

4.3 Scope conditions and outcome patterns of Europeanisation

Domestic actors are not simply passive recipients of Europeanisation. Instead, it is their active engaging, interpreting, incorporating or resisting to external influence that shapes the outcomes of Europeanisation, resulting in convergence or divergence.

Börzel and Risse define four scope conditions for institutional change. First, a domestic demand for change is needed, which leads to the differential empowerment of domestic actors. Second, statehood and the institutional and administrative capacities of the country are crucial for its ability to adopt, implement, and enforce decisions and reforms. Third, the regime type of the target country matters, since market democracies resonate with EU institutions and policies, while autocracies face higher costs of compliance and lower domestic pressure. Finally, power asymmetries, both in terms of material and ideational resources, constrain or foster norms diffusion; the EU's leverage is higher, the stronger its power asymmetry with the receiving actors.¹⁷³

The relation between pressure for adaptation and change in domestic structures is curvilinear, as sketched by Radaelli in his “misfit” model. A moderate pressure induces change at national level, whether by adaptation (thin learning) or transformation (thick learning). Instead, a good fit makes change unnecessary, while a bad fit raises the adjustments costs, discouraging change. The outcome of Europeanisation is thus not necessarily convergence, in terms of superficial adaptation (“absorption”) or behavioural change (“transformation”), but it could also be inertia or defensive responses (“retrenchment”). This

¹⁷³ Börzel, Tanja A., and Thomas Risse. “From Europeanisation to Diffusion: Introduction.” *West European Politics* 35 (1), December 9, 2011, p. 1–19, p. 11–14.

could be an issue of timing, as EU pressure could face a stable, post-reform domestic context, which already paid the sunk costs of adjustments.¹⁷⁴

The final resulting framework of Europeanisation can be depicted as in table 2.

Table 1.3: Europeanisation framework: logics of action, scope conditions, outcomes

European Union / ‘Europe’	<i>Influence modes</i>	<i>Logics of action</i>	<i>Scope conditions</i>	<i>Outcomes</i>
	Direct	Coercion, authority	Domestic demand	Inertia
		Consequentiality	Statehood	Absorption
	Indirect	Appropriateness	Regime type	Transformation
		Path dependency	Power asymmetries	Retrenchment

5. Turning nation states into member states: the internal transformative power of Europe

The rise of international cooperation and multilateral institutions has been a striking feature of the post-war period. But global and regional institutions do not signal only a thicker international society than in the inter-war period or in the *Belle Epoque*. Rather, it points to a profound transformation and redefinition of the state form itself, and of its internal features. Different interpretations have been put forwards concerning the domestic consequences of such a transformation, which can still be referred back to the Europeanisation paradigm.

¹⁷⁴ Radaelli, Claudio M. “The Europeanization of Public Policy.” In *The Politics of Europeanization*, edited by Kevin Featherstone and Claudio M. Radaelli, Oxford: Oxford University Press 2003, p. 27–56.

On the one hand, for scholars in the liberal tradition of international relations such as Majone, as well as Keohane, Macedo, and Moravcsik, delegation to international bodies is yet another way to secure domestic non-majoritarian democracy, as constitutionalism and federalism. International accountability is deemed to reinforce and preserve domestic democratic procedures¹⁷⁵ On the other hands, scholars such as Bickerton see this additional layer of accountability as alternative to the state/society linkages which were fundamental for the previous forms of nation states and national corporatist (welfare / developmental) states. International cooperation thus connects and reinforces national executives, insulating them from the societies they are deemed to democratically govern.¹⁷⁶

5.1 The anchoring power of international institutions on democracy

One way in which the form of the state is changed in the process of European integration is by the relativisation of the linkage between state and society, which is supplemented by a stronger linkage among different executives at European level. To the domestic accountability of Constitutional forms of checks and balances, a new layer of international accountability is juxtaposed. European institutions can thus be seen as yet another non-majoritarian institution typical of a “regulatory state”¹⁷⁷ and their introduction can be “democracy-enhancing” rather than a factor of democratic deficit.¹⁷⁸

In fact, majoritarianism is a fallacious notion of democracy. The idea of control by the majority of all politics – legislative, executive, and eventually also judiciary – derives from a

¹⁷⁵ Majone, Giandomenico. “Europe’s ‘Democratic Deficit’: The Question of Standards.” *European Law Journal* 4 (1), 1998, p. 5–28.

Keohane, Robert O., Stephen Macedo, and Andrew Moravcsik. “Democracy-Enhancing Multilateralism.” *International Organization* 63 (1), 2009, p. 1.

¹⁷⁶ Bickerton, *From Nation-States to Member States*, 2012

¹⁷⁷ Majone, Europe’s ‘Democratic Deficit’, 1998.

¹⁷⁸ Keohane, Macedo, and Moravcsik, *Democracy-Enhancing Multilateralism.*, 2009

radical view of the parliamentary assembly as “the only democratic representative institution”¹⁷⁹ and finds very few practical applications today. Westminster-type Parliamentary supremacy is tempered, in the continental tradition, by both constitutionalism and federalism.

On the one hand, “contemporary democracies are *constitutional democracies*”¹⁸⁰ several policy fields and decisions are insulated from the political game, in order to avoid the tyranny of the majority. Written constitutional rules, bicameralism, independent courts, and specialised agencies, all are tasked with holding in check the power of the democratically-legitimated MPs. “Well-designed constitutional constraints enhance democracy, understood as the ability of the people as a whole to govern itself, on due reflection, over the long run”,¹⁸¹ as it allows to combat special interests, protect individual and minority rights, and foster collective deliberation and participation to policy choices.

The core claim of the constitutional conception of democracy is that rule by the people can be enhanced, on balance, by complex procedural requirements such as checks and balances, and by institutions that are relatively remote and only indirectly accountable.¹⁸²

On the other hand, federalism as an organising principle of the state also trumps majoritarian democracy. “True federalism is fundamentally a non-majoritarian, or even anti-majoritarian, form of government”.¹⁸³ Besides a written and rigid Constitution, federalism prescribes a vertical and horizontal separation of powers and the over-representation of small

¹⁷⁹ Majone, Europe’s ‘Democratic Deficit’, 1998, p. 10.

¹⁸⁰ Keohane, Macedo, and Moravcsik. *Democracy-Enhancing Multilateralism*, 2009, p. 5, emphasis in the original.

¹⁸¹ *Ibid.*, p. 6.

¹⁸² *Ibid.*, p. 9.

¹⁸³ Majone, Europe’s ‘Democratic Deficit’, 1998, p. 11

jurisdictions in some settings (as in the European Council). Federalism has been interpreted as a tool of cleavage management in plural and divides settings, where different sub-societies coexist, in order to avoid deadlock or disintegration of the system.¹⁸⁴ As such, federalism allows for the non-domination of one group over the other.

Both federalism and constitutionalism are domestic system of checks and balances, aimed at tying the hands of majoritary-based legislatures and executives and ensure that their action does not trump upon individual or minority rights. The same logic of delegation to non-majoritarian institutions at home helps explaining delegation to international institutions. Delegation is usually justified by either cognitive factors (efficiency and effectiveness of specialised agencies), the reduction of transaction costs (saving time and efforts to reach agreements), or the politicians' wish to escape responsibilities and shift blame over other actors. To these, Majone adds the need to achieve credibility of commitments in technical decisions, in order to explain the spread of delegation to non-majoritarian institutions in today's Europe. Time-constrained legislators, subject to periodical renewal through elections, are faced with perverse incentives and a short-term bias, when looking for long-term solutions for policy problems. To achieve credible political commitments, not subject to the vagaries of democratic elections' results, policy-makers may thus restrain themselves and delegate authority to experts and agencies that are less directly accountable, and thus freer to take decisions with a long-term perspective. In cases such as these, "reliance upon qualities like independence and credibility has more importance than reliance upon majority rule," thus calling for a rethinking of a purely majoritarian concept of democracy.¹⁸⁵

¹⁸⁴ Lijphart, Arend. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty One Countries*. Political Science. Yale University Press 1984..

¹⁸⁵ Majone, Europe's 'Democratic Deficit', 1998, p. 18.

According to Majone, the European institutions may be thought of as “the regulatory branch– the ‘fourth branch of government’ to use the American phrase – of the Member States”.¹⁸⁶ The delegation to them of specific (“precisely and narrowly defined”) tasks would thus be sufficiently justified under the same non-majoritarian legitimacy sources: “expertise, procedural rationality, transparency, accountability by results”.¹⁸⁷

Delegation to multilateral international institutions can be justified in the same way as domestic delegation to non-majoritarian institutions: “multilateral institutions can, and often do, bolster democracy by enhancing such domestic constitutional mechanisms”.¹⁸⁸ This is so since international institutions help empower diffuse interests against special interests (as in the case of trade policy and liberalisation), protect vulnerable minorities’ and individual rights (as in the ECtHR¹⁸⁹ and the Kadi saga¹⁹⁰), and foster collective informed deliberation (as in climate policy and in the EU’s regulatory and network governance). Surely, international organisations as well “may attenuate direct electoral control and may themselves be captured by special interests, or operate in a nontransparent and unaccountable fashion”.¹⁹¹ At the same time multilateral institutions, the authors find, will more likely be democracy-enhancing where their member states are democratic, and where they foster the participation of civil society networks and organisations. The costs of participating in international institutions, for domestic democracies, will be higher for small and homogeneous societies, in terms of loss of citizens’ participation, than for large and heterogeneous ones, though the first may be more

¹⁸⁶ Ibid., p. 27-28.

¹⁸⁷ Ibid.

¹⁸⁸ Keohane, Macedo, and Moravcsik, *Democracy-Enhancing Multilateralism*, 2009, p. 9.

¹⁸⁹ The European Court of Human Rights, to which individuals of all 47 signatory states of the European Convention on Human Rights may individually appeal.

¹⁹⁰ Mr. Yasin Kadi, a Saudi citizen, appealed several times to the EU Court of Justice against UN-mandated sanctions (asset freeze) implemented through EU measures, which infringed upon his rights to fair trial. The first ECJ decision in *Kadi I* (2008) led the UN to rethink its system of justification of individual sanctions.

¹⁹¹ Keohane, Macedo, and Moravcsik, *Democracy-Enhancing Multilateralism*, 2009, p. 22-23.

able to monitor, influence and make accountable both their government and the organisation.¹⁹² Participation to international organisations thus, according to the liberal theoretical strand, adds a layer of international accountability to the domestic accountability between state and society, strengthening and “anchoring” domestic democracy.

5.2 The relativisation of the state/society linkage

A second interpretation of the domestic change fostered by multilateral cooperation, put forward especially by scholars such as Bickerton, see this additional layer of accountability as alternative to the state/society linkages which were fundamental for the previous forms of nation states and national corporatist (welfare / developmental) states. International cooperation thus connects and reinforces national executives, insulating them from the societies they are deemed to govern.

Bickerton argued that “European integration corresponds to the shift from one form of state – the *nation* state – to another, the *member* state”.¹⁹³ This passage goes along with the relativisation of the linkage between state and society which had been foundational for the nation state form: “the state-society relationship has been relativised, becoming only one relationship amongst others constitutive of statehood”.¹⁹⁴

European integration is best understood as a process of cooperation undertaken not by nation states jealous of their sovereignty and their national prerogatives, but by member states, entities whose self-understanding is inseparable from pan-European-level cooperation and policymaking. These member states are characterized by national executives

¹⁹² Ibid. p. 25-26.

¹⁹³ Bickerton, *From Nation-States to Member States*, 2012, p. 12, emphasis in the original.

¹⁹⁴ Ibid..

and administrations whose main orientation is towards the cooperative decision-making process itself.¹⁹⁵

This shift from nation- to member-states explains, according to Bickerton, the paradox of behaviour of EU countries, compromising rather than bargaining even when sheltered from the public eye within different EU bodies (e.g. the Political and Security Committee, PSC, and the Committee for Civilian Aspects of Crisis Management, Civcom, in CFSP; and the Economic and Financial Committee, EFC, in the eurozone management, all of which Bickerton dubs as “consensus-generating mechanisms”).¹⁹⁶

A second paradox identified by Bickerton is the one of the European Union appearing as external to its member states, in the popular imagination, while it is in fact much more based on the centrality of national executives and composed mainly of national representatives and officials more than of a European civil service.¹⁹⁷ This is due, according to Bickerton, to the “internal shift in the nature of statehood”¹⁹⁸ within the process of European integration, turning nation states into member states by introducing as an external constraint upon national sovereignty what was before (as Constitutional constraints) only an internal expression of sovereignty. This is in line with a reconceptualisation of the state from a Weberian coercive actor holding the legitimate monopoly of violence into a distinctive “community of association” binding citizens together and limiting state powers by an act of internal sovereignty¹⁹⁹, thus making up a peculiar combination of coercion and consent.

¹⁹⁵ Ibid., p. 49.

¹⁹⁶ Ibid., p. 35.

¹⁹⁷ Ibid., p. 46.

¹⁹⁸ Ibid., p. 52.

¹⁹⁹ Ibid., p. 52.

The focus is thus, following Milward,²⁰⁰ on regional integration as a process of state transformation. In contrast with earlier polities, displaying only tenuous links between rules and subjects (“society existed independently of rulers... [it] survived not because of its lords but despite them”),²⁰¹ the point of departure is the modern nation state, whose main feature was the use of nationhood and nationalism in order to mobilise the masses and fuse coercion and community. This created strong and firm vertical social bonds between state and society, and fostered an anarchical international society whose role was to express the independence of its members, rather than being a check on their sovereignty.²⁰²

The change from state to member states, according to Bickerton,²⁰³ comes with the idea that “membership is constitutive of statehood and is not just a post hoc recognition of the status quo”. Besides the traditional elements of statehood (territory, government, population, monopoly on legitimate violence), this new form of state witnesses a relativisation of the relationship between state and society, being supplemented by the state’s participation into external activities working as an internal constraint. In contrast with modern constitutional democracy since Montesquieu, Tocqueville, and Madison, which depoliticises certain regulatory elements as a way of avoiding majoritarian despotism and as an internal expression of popular sovereignty, member states find constraints on their powers from without, from their participation to external activities and bodies. “Limiting power through the imposition of external constraints upon national governments is the guiding idea of member statehood”; “instead of the people expressing themselves qua constituent power through this constitutional architecture, national governments seek to limit popular power by binding

²⁰⁰ Milward, *The European Rescue of the Nation-State*, 1992.

²⁰¹ Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 2001, p. 144.

²⁰² Bickerton, *From Nation-States to Member States*, 2012, p. 50-60.

²⁰³ *Ibid.*, p. 60.

themselves through an external set of rules, procedures, and norms”.²⁰⁴ This results in an exercise of self-limitation which is not conceptually different from the one of constitutional democracy – so much that it may be referred back to Weiler’s concept of “constitutional tolerance”²⁰⁵ – but which situates the sources of constraints beyond the borders of the state. “The member state realizes itself qua member state in the creation of multiple limits to and constraints upon the exercise of national power”.²⁰⁶

Externalising the constraints also detaches and separates the popular will from the policy-making process. First, society is assumed as separate from the state, as opposed to integrated. Second, constraints over power are based on institutional and bureaucratic mechanisms rather than on legal-political principles; the state is thus seen as “an administrative machine rather than a political community”.²⁰⁷ As expressed by Della Sala, the member state form is hard but hollow.²⁰⁸ On the one hand (hardness), government is more effectively insulated from societal pressures and executives are reinforced; whole policy areas, previously object of political contestation (e.g. monetary policy), are now depoliticised and dealt with technocratically as technical exercises. On the other hand (hollowness), the state is emptied of authority in favour of international (IOs), transnational (corporations) and subnational (local authorities) actors, and representation gives way to efficiency as a criteria to assess the quality of democracy. This results overall, in Bickerton’s analysis, in an inherently unstable state form, resting upon the presumption of division and diverging interests between

²⁰⁴ Ibid., p. 61.

²⁰⁵ Weiler, Joseph. *The Constitution of Europe: “Do the New Clothes Have an Emperor?” And Other Essays on European Integration*. Cambridge: Cambridge University Press 1999.

Weiler, Joseph, and Wind, Marlene (ed.). *European Constitutionalism beyond the State*. Cambridge: Cambridge University Press 2003.

²⁰⁶ Bickerton, *From Nation-States to Member States*, 2012 p. 61.

²⁰⁷ Ibid., p. 69.

²⁰⁸ Della Sala, Vincent. “Hollowing out and Hardening the State: European Integration and the Italian Economy.” *West European Politics* 20 (1), 1997, p. 14–33.

national governments and societies. Rather than seeing a vertical division between nation states, or an horizontal separation between nation states and the supranational Union, Bickerton identifies a “horizontal separation of national executives – in close cooperation with EU institutional settings – from domestic populations”.²⁰⁹ As remarked by Cooper, sovereignty is thus reconceptualised from expressing independence and separation, to expressing participation. Sovereignty as participation is not anymore a right inherent to the nature of any sovereign, but rather a privilege belonging to those “with a seat at the table”.²¹⁰

How did the transformation process of European states from nation states into member states develop? Bickerton identifies a critical juncture in the crisis of national Keynesianism in the 1970s and 1980s. The national corporatist state, which had isolated policymaking but within a strong national context, allowing for the rise of the welfare state, gave way to a “weak form of state”, “less bound by domestic constituents and more dependent upon international rules and norms for their own identity and sense of purpose”.²¹¹ In fact, the response to the post-war devastation of Europe was couched in national Keynesian terms: liberal democracies managed to deradicalise organised labour via generous national welfare systems, as well as the judicialisation and individualisation of political conflict. National corporatism as a “transitional state form”²¹² featured an emphasis on consensus and compromise, made possible by political pragmatism²¹³ and the primacy of administrative actors over political representatives, along with the technicalisation and technocratisation of politics. This resulted in broader depoliticisation of public life, and according to Bickerton can be seen as the uncoupling of representation from democracy, with the emergence of a

²⁰⁹ Bickerton, *From Nation-States to Member States*, 2012 p. 71.

²¹⁰ Cooper, *The Breaking of Nations*, 2005, p. 44.

²¹¹ Bickerton, *From Nation-States to Member States*, 2012, p. 75.

²¹² *Ibid.*, p. 109.

²¹³ See Daniel Bell. *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties*. Free Press, 1960.

functional notion of societal representation. Yet, political life remained bound within the state; the social contract remained “national in form and content”.²¹⁴

The economic crisis of the 1970s questioned the national socialdemocratic corporatist consensus. Resolution came through a radical transformation of the role of the state in social and economic life, including public expectations about it. The “new *laissez faire*”²¹⁵ implied a shift away of responsibilities from the state towards individuals and the market, thus “reneging on the basic premise of the post-war nation state: that governments could act as forces for social improvement and could guarantee individual access to goods such as employment, healthcare, education, and housing”.²¹⁶ Such an unpopular claim could only be supported via both public fatalism (Thatcher’s famous TINA formula) and external constraints. “Convinced of the impossibility of national solutions, governments embarked on various strategies to change public expectations and to demobilize those societal actors for whom national Keynesianism had become the natural policy choice”.²¹⁷ At the same time, the time inconsistency thesis led to a new consensus on the independence of central banks and the preference for policy rules rather than political discretion, while the inflationary bias perceived as inherent in national democratic procedures was corrected by reducing the state’s role in the economy. Overall, the notion of national social contract was criticised and put aside, weakening the link between states and societies and replacing them with stronger links between different national executives in need to find non-political, non-partisan sets of rules to bind their action. “The liberation of national governments from their corporatist commitments thus coincided with a weakening in many of the institutions that had mediated

²¹⁴ Ibid., p. 90.

²¹⁵ Goldthorpe, John.. *Consensus and Controversy*. Abingdon: Taylor and Francis 1978

²¹⁶ Bickerton, *From Nation-States to Member States*, 2012 p. 95.

²¹⁷ Ibid., p. 102.

state-society relations in the post-war period”²¹⁸. National corporatist frameworks were formally preserved but their *raison d’être* changed: “from being a way of guaranteeing rising incomes for the working class... these arrangements became the means by which businesses were able to keep down labour costs”.²¹⁹

The rise of the “regulatory state”, in Majone’s terms, with the shift of authority towards non-majoritarian bodies and the transformation of state structure from economic actors to market regulators, coincided with the relinquishment by the state of “many other goals, including economic development, technical innovation, employment, regional income redistribution, and national security”.²²⁰ This shift in the nature of the administrative power of the state, together with the dismantling of the post-war Keynesian institutional mechanisms, signals for Bickerton the rise of the “member state” as a new state model: “political power needs to be circumscribed in order that special interests do not dominate its decision-making”.²²¹ National executives are thus endowed with greater autonomy, but they lack an overarching set of political values and, unable to achieve substantial legitimacy via a social contract, they end up identifying with the procedural rules and norms.

6. Europeanisation beyond the member states and its pitfalls

Europeanisation within the borders of the European Union may refer to the transformation of the nation states into member states, by the introduction of an additional layer of international accountability, with different evaluations of its consequences, as highlighted in the previous section. On the one hand, domestic democracy may be reinforced

²¹⁸ Ibid., p. 105.

²¹⁹ Ibid., p. 105.

²²⁰ Majone, Europe’s ‘Democratic Deficit’, 1998, p. 79.

²²¹ Bickerton, *From Nation-States to Member States*, 2012, p. 108.

by a new non-majoritarian, albeit external, constraint; on the other hand, the linkages between state and society may get under strain and lead instead to collusion among member states' executives, insulated from their own societies.

In any case, the research agenda of Europeanisation did not stop at the borders of the European Union. During the 1990s, the growing influence of the EU on Central and Eastern European countries (CEE) in the frame of its enlargement policy led scholars to widen their field of research²²². This section zooms in on Europeanisation beyond the member states, resuming the main features of "Europeanisation East", as well as its main open issues resulting from the literature on the Europeanisation of candidate countries: unclear conceptual boundaries, a return to first generation top-down definitions, the risks of degreeism and adjectivised Europeanisation, and the seemingly intractable issue of stateness for contested candidate states.

6.1 Europeanisation vs. EU-isation: lack of clear conceptual boundaries

The concept of Europeanisation, first, is subject to a terminological ambiguity. The term, referring to 'Europe' in general, does not include a clear specification of the source of change expected at domestic level. We need to know "which Europe we are talking about".²²³

In a minimalist sense, Europeanisation is understood as "the process of downloading EU directives, regulations and institutional structures" to the national level.²²⁴ "Minimally, 'Europeanization' involves a response to the policies of the European Union".²²⁵ This narrow,

²²² Sedelmeier, Ulrich.. "Europeanisation in New Member and Candidate States." *Living Reviews in European Governance* 6 (1), 2011, p. 5.

²²³ Jano, Dorian. *The Europeanization of Western Balkans: A Fuzzy Set Qualitative Comparative Analysis of the New Potential EU Member States*. Saarbrücken: VDM Verlag Dr. Müller 2010, p. 30.

²²⁴ Ibid.

²²⁵ Featherstone, Kevin. "Introduction: In the Name of 'Europe.'" In *The Politics of Europeanization*, edited by Kevin Featherstone and Claudio M. Radaelli. Oxford: Oxford University Press 2003, p. 3.

EU-centric sense, which could be better termed “EU-isation”,²²⁶ is the one that scholars, especially those employing rationalist approaches, usually refer to. It is a meaning that is easier to operationalise and put to test in empirical studies.

In a maximalist sense, on the other hand, one can “speak of Europeanisation when something in the domestic political system is affected by something European”,²²⁷ i.e., it is “a phenomenon exhibiting similar attributes to those that predominate in, or are closely identified with, ‘Europe’”.²²⁸ Such an approach, on the one hand, opens up to the possibility of voluntary, indirect mechanisms resulting in institutional isomorphism or mimicry, such as social learning, adaptation and lesson-drawing. On the other hand, it includes the possibility of a broader understanding of “Europe” to be considered as the origin of the impulse affecting the domestic level. By sidelining an EU-centric approach, it takes into consideration the role of other European international organisations (Council of Europe, OSCE, NATO, but also OECD and global institutions such as WB, IMF, WTO) in fostering rule transfer and norm diffusion, going even beyond formal institutions (political Europe) to consider the role of cultural Europe, in the broad circulation of norms, practices and behaviours in the continent, as in the framing of the Eastern Enlargement as a part of the historical process of “return to Europe” of countries which felt having been violently separated from it.²²⁹

In fact, while the second, maximalist meaning seems the most linguistically appropriate for the concept of Europeanisation, for the sake of familiarity and operationalisation most scholars use the first, minimalist sense. This is an even more contentious issue when

²²⁶ Flockhart, Trine. “Europeanization or EU-ization? The Transfer of European Norms across Time and Space.” *Journal of Common Market Studies* (4), 2010, p. 787-810.

²²⁷ Vink, Maarten P. “What Is Europeanization? And Other Questions on a New Research Agenda”. Second YEN Research Meeting on Europeanisation, Bocconi University, Milan, 22-23 November 2002. p. 1.

²²⁸ Featherstone, Introduction: In the Name of ‘Europe’, 2003, p. 3.

²²⁹ Lippert, B., Umbach, G., and Wessels, W. “Europeanization of CEE Executives: EU Membership Negotiations as a Shaping Power.” *Journal of European Public Policy* 8 (6), 2001, p. 980–1012.

Europeanisation of candidate states is at stake, since the EU may not be only one source of change, in a process which sees parallel and often reinforcing pressures from several international instances and organisations (EU, Council of Europe, NATO, in addition to the broader globalisation and modernisation trends).

6.2 Europeanisation East in the shadow of hierarchy: back to a top-down definition?

The research agenda on the Europeanisation of candidate and applicant countries developed from the studies on conditionality in the shadow of the EU's eastern enlargement of 2004/07, mainly in the frame of rationalist and constructivist institutionalist theories. It was possible to speak of Europeanisation of candidate countries, thus striking a parallel with internal EU dynamics, due to the broad scope of the process, covering the whole of the *acquis*, and to the extent with which EU institutions steered it. At the same time, differences included the tools at EU disposal towards non-member countries (positive incentives, normative pressure, and persuasion), softer than treaty-based obligations and sanctions, coupled with deeper and more comprehensive monitoring, as well as the power asymmetry of the EU towards candidate countries, deprived of any "voice" or "upload" possibility and simply object of top-down rule transfer.²³⁰

According to Héritier,²³¹ the main differences between "Europeanisation West" (Europeanisation within the EU) and "Europeanisation East" (Europeanisation of candidate countries) lay in the starting situation of CEE countries, featuring both a triple simultaneous transition (to democracy, market economy, and sometimes also statehood) and a strong

²³⁰ Sedelmeier, *Europeanisation in New Member and Candidate States*, 2011, p. 6.

²³¹ Héritier, Adrienne. "Europeanization Research East and West: A Comparative Assessment." In *The Europeanization of Central and Eastern Europe*, edited by Frank Schimmelfennig and Ulrich Sedelmeier. Ithaca: Cornell University Press, 2005, p. 199–209, p. 203.

linkage with EU accession negotiations. In such a setting, the “overpowering external incentives associated with EU membership conditionality” exert an “enormous pressure” on candidate states.²³² When coupled with the wide scope of accession negotiations, including all the issues areas covered by the *acquis* and even beyond in cases of democratic conditionality, the frequent demands for wholesale institutional reform, and the extensive monitoring role of the European Commission on implementation, membership conditionality leads Europeanisation East to conform more with first-generation definitions of Europeanisation as a one-way, top-down process. Candidate countries are denied agency in the process, as they have no outlet to express their voice or to shape the policies of which they are at the receiving end.

The Europeanisation of candidate countries shares with the Europeanisation of member states the key empirical finding of a differential impact of “Europe” across countries and issue areas. Nevertheless, given the peculiarities introduced above, it is understandable how it has highlighted a more clear-cut explanatory value of rationalist institutionalist hypotheses for the domestic impact of the EU, when compared with sociological and historical institutionalist alternatives. Clear and credible incentives underpinning conditionality, in terms of both rewards and punishments, and the political costs incurred by domestic elites, seem able to explain the variance in the outcome levels of Europeanisation.²³³ As such, the Europeanisation of candidate countries looks very much alike a hierarchical process of conditional compliance.

6.3 Adjectivised Europeanisation: the dangers of degreeism

²³² Ibid., p. 205.

²³³ Sedelmeier, *Europeanisation in New Member and Candidate States*, 2011, p. 7.

As underlined by Sartori,²³⁴ a concept is defined in its field of application by two properties in a trade-off relation, intention and extension. The properties covered by the concept define its intention, while the range of items to which the concept applies defines its extension. The more the properties a concept includes, the less the empirical realities to which it will apply. Radaelli noticed earlier on that Europeanisation studies seemed to privilege extension and cover a broad range of phenomena, also when with few common features, and considered that to be due to the early stage in which the research field found itself.²³⁵ Similarly, the definition that he put forward back then was also highly denotative, intending to seize the research object by putting forward a collection, a catalogue of elements that may fall within its field of application, even if they do not appear at first sight to have too many properties in common.²³⁶ In Sartori's language,²³⁷ Radaelli's definition could be classified as a "precising denotative" definition.²³⁸

The assumption was that, after a first exploratory approach to the field, more intension-focused definitions and approaches would result in a more in-depth understanding of the object of Europeanisation research²³⁹. In fact, more than one decade later, Europeanisation studies keep using the same, denotative and extensive definitions. The end result is conceptual stretching in terms of degreeism, i.e. differences in kind replaced by differences in degree: by not being able to define what Europeanisation is and what is not, students tend to see it

²³⁴ Sartori, Giovanni. "Concept Misformation in Comparative Politics." *American Political Science Review* 64 (4), 1970, p.1033–1053

²³⁵ Radaelli, Whither Europeanization?, 2000, p. 5.

²³⁶ "Processes of (a) construction (b) diffusion and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies." Radaelli, *The Europeanization of Public Policy*, 2003, p. 30

²³⁷ Sartori, Giovanni. *Social Science Concepts: A Systematic Analysis*. London: Sage, 1984.

²³⁸ Chatzigiagkou, *Enlargement Goes Western Balkans*, 2010, p. 45.

²³⁹ Radaelli, *Whither Europeanization?*, 2000.

everywhere, but only partially.²⁴⁰ As Radaelli contended, “if everything is Europeanized to a certain degree, what is *not* Europeanized?”²⁴¹ The result can be seen in the plethora of studies arguing that Europeanisation is there, but only to a certain extent. The ‘adjectivised Europeanisation’ trend seems to be on the rise in the field. We hear about “limited”,²⁴² “slow”,²⁴³ “shallow”,²⁴⁴ “sluggish”,²⁴⁵ “negotiated”,²⁴⁶ Europeanisation, up to “Potemkin” Europeanisation.²⁴⁷ While they are often used in a descriptive way, sometimes these labels are held up as new concepts. In fact, they risk mistaking a difference in the outcome (differential, limited convergence and compliance) with a difference in the process. Instead of defining the scope conditions of the process of Europeanisation in the context of candidate countries, in order to explain its differential outcome, they tweak the process itself.

6.4 The issue of stateness: a cul-de-sac for weak states in the enlargement process?

Concerning the Europeanisation of candidate countries, one scope condition appears to be particularly well-suited to explain variance in outcomes: statehood (or stateness). As

²⁴⁰ Sartori, Concept Misformation in Comparative Politics, 1970.

Sartori, Giovanni, “Comparing and Miscomparing.” *Journal of Theoretical Politics* 3 (3), 1991, p. 243–257.

²⁴¹ Radaelli, Whither Europeanization?, 2000, p. 6.

²⁴² Vink, What Is Europeanization?, 2003.

Barbulescu, I. G., and Troncota, M. “The Ambivalent Role of the EU in the Western Balkans-Limited Europeanisation between Formal Promises and Practical Constraints-The Case of Bosnia-Herzegovina” *Romanian Journal of European Affairs* 12 (1), 2012, p. 5–26.

²⁴³ Tzifakis, Nikolaos. “Bosnia’s Slow Europeanisation.” *Perspectives on European Politics and Society* 13 (2), 2012, p. 131–48.

²⁴⁴ Goetz, Klaus H. “The New Member States and the EU: Responding to Europe.” In *The Member States of the European Union*, edited by Simon Bulmer and Christian Lequesne. Oxford: Oxford University Press 2005.

²⁴⁵ Chatzigiagkou, Enlargement Goes Western Balkans, 2010.

²⁴⁶ Lecher, W. *European Works Councils, Negotiated Europeanisation: Between Statutory Framework and Social Dynamics*. Farnham: Ashgate 2002.

²⁴⁷ Jacoby, W. “Priest and Penitent: The European Union as a Force in the Domestic Politics of Eastern Europe.” *East European Constitutional Review* 8 (1/2), 1999, 62–67.

underlined by Fukuyama,²⁴⁸ “before you can have a democracy or economic development, you have to have a state”. Differently than in previous EU enlargement rounds, in the Western Balkans different types of states coexists, ranging from international semi-protectorates and contested polities (Bosnia-Herzegovina, Kosovo) to more or less consolidated states (Croatia, Albania). The contestation of the polity, together with the weakness of state structures, vulnerable to capture by predatory elites, which Linz and Stepan had already put at the centre of the explanatory model of post-communist transition,²⁴⁹ have also been singled out by Elbasani as a relevant intervenient variable in Europeanisation processes: “deficient patterns of compliance tend to correlate well with the problem of stateness”.²⁵⁰

The same argument is endorsed by Börzel, when she states that “limited statehood is the main impediment for the Western Balkans on their road to Brussels”, since it “affects both the capacity and the willingness of countries to conform to the EU’s expectations for domestic change”.²⁵¹ In fact, limitations in both sovereignty (the domestically and internationally uncontested claim to the legitimate monopoly of force) and capacities (organisational, financial and cognitive resources to make and enforce collectively-binding rules) “have seriously curbed the transformative power of the EU in the Western Balkans – despite their membership perspective”.²⁵² In contexts of contested statehood, conditionality is not able to produce social learning and modify behaviours, and these very states’ weaknesses lead the EU to behave inconsistently, reducing its own leverage and the effectiveness of conditionality.

²⁴⁸ Fukuyama, ‘Stateness’ First, 2005, p. 84.

²⁴⁹ Linz, J.J., and Stepan, A. *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*. Baltimore: Johns Hopkins University Press 1996.

²⁵⁰ Elbasani, *European Integration and Transformation in the Western Balkans*, 2013, p. 18.

²⁵¹ Börzel, *When Europeanization Hits Limited Statehood*, 2013, p. 174.

²⁵² *Ibid.*, p. 173.

Consolidated statehood is crucial to make Europeanisation work. Uncontested sovereignty and sufficient state capacity are indispensable to comply with EU expectations for domestic change. For countries that lack one or both, membership is too remote to provide sizeable and credible incentives to engage in costly reforms.²⁵³

This finding leads to a dilemma in the EU enlargement policy: the EU has offered future membership as a contribution to soften and solve statehood issues, but those very issues are undermining the Western Balkans' compliance with EU norms and rules. According to Börzel, "the EU is unlikely to deploy much transformative power in its neighbourhood as long as it does not adjust its 'accession tool box' to countries whose statehood is seriously limited".²⁵⁴ The EU seems ill-equipped to deal with weak statehood cases, as it has no previous experience as a state-builder, and the case of Kosovo demonstrates that it has not developed the policies to become one. Its conditionality, capacity-building and selective coercive powers seem insufficient to produce anything more than formal, superficial change. Moreover, the EU's post-modern emphasis on power-sharing, minority rights, and capacity-building has sometimes clashed with state-building attempts to create strong central institutions and national identities. "Somewhat paradoxically, the EU can neither empower liberal reform coalitions where they do not exist, nor can it build states where there is no consensus on the national unit".²⁵⁵

Börzel's ultimate finding is that the EU "lacks a clear strategy for state-building",²⁵⁶ but she does not suggest the EU to equip itself with one, as "it is no use trying to develop one",²⁵⁷

²⁵³ Ibid., p. 183.

²⁵⁴ Ibid., p. 174.

²⁵⁵ Ibid., p. 183.

²⁵⁶ Ibid.

²⁵⁷ Ibid., p. 184.

advocating instead that the EU acknowledges that it can only promote stability in its neighbourhood, and not substantial change. While this seems reasonable in the framework of the European Neighbourhood Policy, it should be not necessarily so for the countries included in the enlargement agenda. The next section puts forward a new approach to the dilemma, by reframing it in terms of member state building, in order to look for new solutions.

7. Member state building: building functional member states while integrating them

An alternative—or better a complementary approach—to the concept of Europeanisation in the context of EU candidate countries is the concept of “member state building”. Initially employed quite denotatively, the use of this concept is growing in the literature and its features are becoming clearer. This section introduces the theoretical referents of member state building in the literature on state building and the notion of sovereignty as responsibility. It then defines it and trace the early discussions on the topic, concluding with the insight that member state building can contribute to solving the dilemma of simultaneous state building and European integration.

7.1 From state building to member state building

The issue of statehood, essential for Europeanisation but not addressed by it, has been usually tackled by the literature on state building, focused on “expanding over time the autonomy, authority, legitimacy and capacity of the state”.²⁵⁸ The practice of “liberal peace” state building derives from an understanding of sovereignty as responsibility. Under the

²⁵⁸ Chandler, David, and Sisk, Timothy D. *Routledge Handbook of International Statebuilding*. Abingdon : Routledge 2013, p. xxii.

assumption that state weakness or failure is at the root of conflict, state building has developed since the 1990s as a strategic approach to sustainable peace.²⁵⁹ Premised on the incapacity of domestic state consolidation, external intervention is therefore needed to rebuild the state structure: either direct, or through coercion and monitoring, or by conditionality, in a long-distance state-building approach. The shift towards the latter is due to the incompatibility of long-term direct intervention with democracy and the rule of law, and to its legitimacy and commitment crisis.²⁶⁰

Two different approaches to state building can be discerned in the literature: a structure-centred approach focusing on institutions and an agency-centred approach focusing on legitimacy. The mainstream approach to state building, based on a Weberian conception of the state, keeps this latter conceptually distinct from society and equates weak statehood with lack of institutional capacity.²⁶¹ State building is thus defined as the creation and strengthening of new governmental institutions, consistently with a liberal peace-building approach arguing that liberal democracy, economic interdependence, and international organisation are conducive to peace.²⁶² It nevertheless fails in devising an adequate notion of legitimacy without falling in a circular definition of legitimacy as belief in legitimacy—a by-product of successful institutions.²⁶³

The state that tends to emerge from international state building, anyway, has some typical features: according to Zaum it is an executive-dominated state, still unable to provide most

²⁵⁹ Helman, Gerald B., and Ratner, Steven R. "Saving Failed States." *Foreign Policy*, 89 (Dec), 1992, p. 3–20.

²⁶⁰ Bieber, Florian. "Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans." *Europe-Asia Studies* 63 (10), 2011, p. 1783–1802, p. 1791.

²⁶¹ Fukuyama, 'Stateness' First, 2005.

Rotberg, Robert I. *When States Fail: Causes and Consequences*. Princeton: Princeton University Press 2004.

²⁶² Roberts, David W. *Liberal Peacebuilding and Global Governance: Building Positive Peace?* London: Routledge 2011, p. 10.

²⁶³ Lemay-Hébert, Nicolas. "Rethinking Weberian Approaches to Statebuilding." In *Routledge Handbook of International Statebuilding*, London: Routledge 2013, p. 3–14, p. 5.

public services, and often reproducing pre-war patterns of political economy.²⁶⁴ Bieber coins for it the term of minimalist state, i.e., “an effort to address the sources of conflict and state weakness by fostering state structures which fall short of the set of functions most states are widely expected to carry out, but by doing so might be able to endure”.²⁶⁵ The minimalist state is a sub-type of the weak state, but it holds minimal functions and has only minimal ambitions. Its legitimacy is still contested, both domestically and often internationally; its capacity to enforce decisions is weakened by power-sharing agreements and veto points; and its scope (the fields with which its structures engage) may be limited to few central functions: defence, foreign affairs, monetary policy. Nevertheless, its very limitation may allow it to sustain itself.²⁶⁶

To the contrary, the critical literature on state building has pointed to the lack of legitimacy of models of state building designed and imposed from abroad.²⁶⁷ Institutional state building has been criticised as a discourse that produces states that are “failed by design”,²⁶⁸ by underplaying the role of local agency and reinforcing political dependency from abroad.²⁶⁹ An alternative approach to state building and legitimacy, reinstating an element of agency, has thus been developed by these scholars by taking into account the relation of mutual constitutiveness between state and society and the possibility to analyse it using constructivist theoretical tools. State failure and collapse is also deemed to derive from

²⁶⁴ Zaum, Dominik. “Beyond the ‘Liberal Peace.’” *Global Governance* 18 (1), 2012, p. 121–32.

²⁶⁵ Bieber, Building Impossible States?, 2013, p. 1784.

²⁶⁶ Ibid., p. 1786-90.

²⁶⁷ Paris, Roland. “Peacebuilding and the Limits of Liberal Internationalism.” *International Security* 22 (2), 1997, p. 54–89.

Chandler, *Empire in Denial*, 2006.

Mac Ginty, Roger, and Richmond, Oliver P. *The Liberal Peace and Post-War Reconstruction: Myth or Reality?* London: Routledge 2009.

²⁶⁸ Richmond, Oliver P. “Failed Statebuilding versus Peace Formation.” In *Routledge Handbook of International Statebuilding*, Abingdon: Routledge 2013, p. 130–140.

²⁶⁹ Chandler, David. *International Statebuilding*. Abingdon: Routledge 2010.

the collapse of the central authority's legitimacy and of its capacity to command loyalty, adding "a layer of complexity by looking at the nation-state as a constitutive whole"²⁷⁰ and drawing attention to the role of the "local" element and the agency of the beneficiaries of state building in hybridising the outcome.²⁷¹ This can be seen also as a shift back in the understanding of sovereignty, from the concept of sovereignty as responsibility towards the concept of sovereignty as capacity and participation.

7.2 The birth of member state building: building functional states while integrating them

Member state building was first referred to as a strategy in the 2005 report by the International Commission on the Balkans (ICB), *"The Balkans in Europe's future"*. Member state building was supposed to face the "integration challenge" and respond to the ghettoisation of the remainder of the Balkans, once Romania, Bulgaria and Croatia would have joined the Union. The ICB recognised that Western Europe and the post-Yugoslav states were "talking at cross-purposes" in the 1990s.²⁷² The EU was set on the course of a post-modern project of supranational integration, while the newly independent states were in a state- and nation-building moment which led only to the creation of weak states and protectorates. "Building functional member states while integrating them into the EU is Brussels' unique challenge in the Balkans".²⁷³ Member state building was seen as a distinct strategy from both international state building and the EU enlargement process. "The objective is not simply to build stable, legitimate states whose own citizens will seek to

²⁷⁰ Lemay-Hébert, *Rethinking Weberian Approaches to Statebuilding*, 2013, p. 11.

²⁷¹ Jarstad, Anna K., and Roberto Belloni. "Introducing Hybrid Peace Governance: Impact and Prospects of Liberal Peacebuilding." *Global Governance* 18 (1), 2012, p. 1–6.

²⁷² ICB, *The Balkans in Europe's Future*, 2005, p. 29.

²⁷³ Ibid.

strengthen and not destroy them - rather it is the establishment of a state that the EU can accept as a full member with absolute confidence”.²⁷⁴

As seen by the ICB, such a strategy should have rested on three pillars. First, the Union should have fostered the development of functioning state administrations exploiting the leverage of the accession process. This includes a shift in focus from formal adoption of *acquis* norms to the development of implementation capacities, the inclusion of benchmarking, and the priority given to justice and home affairs issues as the most challenging ones. Capacity building should thus become the “principal and explicit objective” of both the association (SAP) and negotiating framework.²⁷⁵ Although the lack of a single model of EU member state makes the Union a reluctant state builder, unwilling to endorse one or the other of the many administrative and constitutional arrangement in force in its member states, the Commission should have “assume[d] the responsibility for some of the institutional choices that the applicants are forced to make”.²⁷⁶ Secondly, the Union should have fostered the economic integration of the Western Balkan region, with a free trade area leading to a customs union with the EU, coupled with infrastructural investments and labour market and travel policies. Thirdly, “Member-state building as a Constituency Building”²⁷⁷ should have focused on the gap between state and society, enhancing the quality of democracy, protection of minority rights, and the reconciliation between decentralisation, local self-governance, and multiethnicity. Finally, a “smart visa policy” should have allowed

²⁷⁴ Ibid.

²⁷⁵ Ibid., p. 30.

²⁷⁶ Ibid.

²⁷⁷ Ibid., p. 32.

the youth of the region to travel to the rest of the EU, consolidating liberal and pro-European attitudes in new generations which found it the most difficult to travel abroad.²⁷⁸

The same year as the ICB's report, the European Stability Initiative (ESI) distinguished in the Western Balkans three models of state building, as defined by Fukuyama as "the creation of new institutions and the strengthening of old ones".²⁷⁹ First, traditional capacity-building focuses on standard non-coercive developmental tools to foster democracy and institution-building. Second, authoritarian state-building entrusts wide-ranging competences to unaccountable international structures, tasked to respond to threats to peace and ensure minority protection; these performed "reasonably successful" in the post-war reconstruction of the countries at stake,²⁸⁰ but failed in supporting the consolidation of self-sustaining states. Finally, the ESI identified an EU-specific approach, named member state building, which had "accomplished revolutionary transformations over the past decade" in Central and Eastern Europe as well as Turkey.²⁸¹ Member-state building, according to the ESI, consists of three processes: "an administrative revolution", brought about by alignment to the EU *acquis*, in terms of institutions and legislation; "a process of social and economic convergence", fostered by cohesion policies; and finally "a shift in the substance and processes of democratic governance", opening up the decision-making process to consultation with civil society.²⁸²

²⁷⁸ Many of the ICB's recommendations have later been enacted by the European Commission in its enlargement strategy - from the shift of emphasis towards implementation and rule of law issues, to the visa liberalisation programme.

²⁷⁹ Fukuyama, 'Stateness' First., 2005

²⁸⁰ European Stability Initiative. *The Helsinki Moment. European Member State Building in the Balkans*. Berlin, 1 February 2005, p. 8.

²⁸¹ Ibid, p. 3.

²⁸² Ibid, p. 6-8.

7.3 The paradoxes of member state building and the role of the EU

Later studies defined EU member states building as “a specific path to EU membership creating, in parallel, the preconditions for being a sustainable State as well as a future Member State”.²⁸³ The EU enacts a dual strategy, of state building and of European integration, towards the states in its enlargement agenda, through the tool of conditionality:

The intricate process of EU integration with all its norms, procedures and criteria is the best crash-course in rational state management, good governance and administrative capacity building ever. The added value is in the form rather than the content of the EU integration process.²⁸⁴

The challenge for the region is no longer about peacebuilding but about a process of preparation for membership in European structures... Democratization and state building are fundamental elements of this Europeanization. The EU, in other words, is building states which can eventually join the Union.²⁸⁵

Nevertheless, as much as Europeanisation is weakened by the lack of statehood, member state building shows all the contradictions of the EU's effort to build states while integrating them. As Juncos argues, the time has come for a third generation of critical Europeanisation studies, able to acknowledge the contradictions and limitations of the EU approach in order to understand it better. In fact, for Juncos, it would be wrong to assume a coherent EU strategy,

²⁸³ Woelk, Jens.. “EU Member State-Building in the Western Balkans: (Prolonged) EU-Protectorates or New Model of Sustainable Enlargement? Conclusion.” *Nationalities Papers* 41 (3), 2013, p. 469–82, p. 470.

²⁸⁴ Van Meurs, Wim.. “The Europeanisation of the Balkans: A Concrete Strategy or Just a Placebo?” In *International Peace Plans for the Balkans - A Success?*, edited by Predrag Jureković and Frederic Labarre. Vienna: National Defence Academy and Bureau for Security Policy 2006, p. 131.

²⁸⁵ Keil, Søren. “Europeanization, State-Building and Democratization in the Western Balkans.” *Nationalities Papers* 41 (3), 2013, p. 343–53, p. 344, 346.

only to be tweaked by fine-tuning its issues with high domestic costs and normative inconsistencies. Rather, the inner contradictions of Europeanisation and the member state building effort should be exposed in order to better understand what factors weaken the transformative power of Europe and how they can be alleviated if they cannot be eliminated.²⁸⁶

The EU has been unable to transfer conditionality to state-building; stateness has remained the biggest obstacle to EU integration. Europeanisation-Southeast, to paraphrase Héritier, has been mostly externally-driven, coercive and increasingly demanding.²⁸⁷ The main contradiction arises from the tensions between building minimal states (the post-conflict state building agenda) and building future EU member states (the member state building agenda). In fact, there exists a complex and non-linear relation between European integration and stateness. On the one hand, integration requires from states to renounce to absolute competence and pool some sectoral sovereignty in order to achieve common solutions. On the other hand, the EU requires from them high capacity requirements, in order to transpose EU law into domestic legislation, and to take part in common decision making. This is at odds with the conditions of most post-conflict states, which feel a need for strong, symbolic external sovereignty, while facing challenges of limited domestic capacity.²⁸⁸

Member state building, in the context of the Western Balkans, has gone way further than what was the experience with institution-building during the EU eastern enlargement, enlarging its scope up to encroaching open issues of sovereignty. Conditionality, moreover, has sometimes undermined state building itself, even when geared towards a minimalist state.

²⁸⁶ Juncos, Ana E. "Member State-Building versus Peacebuilding: The Contradictions of EU State-Building in Bosnia and Herzegovina." *East European Politics* 28 (1), 2012, p. 58–75, p. 59.

²⁸⁷ Anastasakis, Othon. "The Europeanization of the Balkans." *Brown Journal of World Affairs* 12, 2005, p. 77–88, p. 82.

²⁸⁸ Bieber, Building Impossible States?, 2013, p. 1785.

First, pre-accession conditionality, being “sliced-out”, has offered little reward and therefore little leverage. Second, the EU has had to deal with cross-conditionality with other international organisations (Council of Europe, NATO). Third, the absence of clear rules and criteria, due to the lack of a single model of EU member state, has weakened democratic conditionality; the EU *acquis* is “weak on the nature of the state... The EU gives little guidance as to what kind of states can join the EU”.²⁸⁹

In this context, “success” in member state building, according to Bieber, corresponds to exiting the minimalist state category, by acquiring legitimacy, strength and scope, “to be able to function as a future EU member state, and to provide services to citizens that allow them to secure popular legitimacy”.²⁹⁰ To achieve this, a three-pronged effort is needed. First, there should be commitment to one single state-building project over other alternatives. Second, a normative case for the state (a political, input criterion) is necessary, in order to persuade political elites to commit to it. Third, institutional capacities (an administrative, output criterion) are needed to meet the dual challenge of the high expectations of society from the state, and of EU membership requirements. All in all, given the two sources of high expectations, “the bar for state success in the Western Balkans is considerably higher than in other regions”.²⁹¹

Juncos highlights four contradictions of EU state building in the Balkans. First, the depoliticised and technocratic process of enlargement clashes with the highly salient domestic politics of state building. Second, the state-strengthening (capacity- and institution-building through pre-accession funds) and state-weakening (empowerment of civil society, resistance by sub-state political actors, downsizing and internationalisation of the public sector)

²⁸⁹ Ibid., p. 1793-1794.

²⁹⁰ Ibid., p. 1798.

²⁹¹ Ibid., p. 1799.

dynamics of enlargement are at odds. Third, EU compliance goals, implying the lack of alternatives, undermine local ownership; the EU promotion of the latter remains unable to foster effective civil society consultation. Finally, the executive-reinforcing, élite-driven and top-down features of member state building clash with the need to secure peace-building first by building consensus within society on the new institutions.²⁹²

Woelk identifies five paradoxes of member state building. The first is the “paradox of sovereignty”: Western Balkans states, while they see the mirage of absolute sovereignty, are subject to international pressures to limit their sovereignty even before full integration. The second is the “no blueprint paradox”: the region, as well as the EU, shows remarkable diversity in the forms and functions of state structures, not providing any clear constitutional model. The third is the “good will paradox”: the EU lacks effective means of enforcement, especially in case of violation of political and constitutional duties, as a reflex of the voluntary nature of integration. The fourth is the “no damage paradox”: sanctions, as a way of enforcing decisions, might often even worsen the situation, thus suggesting a more strategic use of positive incentives instead. Finally, the “mirror paradox” tells us that “the EU’s capacity of acting as a catalyst for reforms depends very much on its own attractiveness”²⁹³.

So, given the drawbacks above, which option is left for the EU’s role towards the Western Balkans? The main question concerns “how to find solutions for sustainable change and create incentives for overcoming these paradoxes”.²⁹⁴ According to Woelk, the main point of reference is that diversity is worth being preserved, as it is recognised by the EU as a value in itself (Art. 4.2 TEU). Therefore, the sovereignty paradox and the no-blueprint paradox seem to dispel the idea of a grand road map, a “detailed construction plan” for

²⁹² Juncos, *Member State-Building versus Peacebuilding*, 2012, p. 62-70.

²⁹³ Woelk, *EU Member State-Building in the Western Balkans*, 2013 p. 473-474..

²⁹⁴ *Ibid.*

member state building. Rather, the EU should shift its discourse and practice from “European standards” to “European adaptations”, in order to take into consideration the diversity among candidates and among member states. By taking as a reference point the shared values and principles of democracy, human rights, and rule of law, operationalised in particular by other organisation than the EU (Council of Europe, OSCE), the Union could spell out a set of different compatible options, from which the candidates could legitimately decide which to adopt according to local needs and features. This would help overcome the sovereignty paradox, as well as fostering “local ownership” by citizens and political elites.

The EU, in the context of member state building, would thus assume the role of an “interested moderator”²⁹⁵, suggesting different perspectives and aiming to improve the political debate and decision making processes. The concept is similar to the idea of Europe as a “vanishing mediator”²⁹⁶ the EU would employ a relational power in its conflict management strategy, highlighting “the constitution of a community sharing a similar fate (and thus not necessarily a similar identity as such)”.²⁹⁷ By recognising conflict as a constitutive of the political, Balibar too points to the ability of the EU to preserve diversity, thus working as “neither a model, nor a hegemon”.²⁹⁸ This may also help lowering the politicisation and contestation of EU integration in candidate countries, as “the creation of a general consensus on EU integration is of fundamental importance in the process of EU Member-state building”.²⁹⁹

²⁹⁵ Ibid., p. 477.

²⁹⁶ Balibar, Étienne. *L'Europe, l'Amérique, la guerre réflexions sur la médiation européenne*. Paris: La Découverte / Poche 2005.

²⁹⁷ Ramel, Sylvie. “The Role of the European Union in Bosnia-Herzegovina: Neither a Model, nor a Hegemon?” *Transitions* 51 (1-2), 2011, p. 269–87, p. 281-282.

²⁹⁸ Ibid.

²⁹⁹ Keil, “Europeanization, State-Building and Democratization in the Western Balkans”, 2013, p. 350.

What are thus the necessary features for a working member state building approach? Woelk underlines the need for an incentive-based perspective of positive conditionality, consultation and assistance in constitutional matters, and citizens' involvement to achieve reconciliation.³⁰⁰ The suggestions of Juncos are overlapping, focusing on the need to secure legitimate institutions, to acknowledge the political nature of state building, and to prioritise peace building as its foundation.³⁰¹

The ability of the EU member state building approach to soften the contradiction of “liberal peace” state building may be illustrated with an example from the enlargement process, the police reform in Bosnia and Herzegovina. In a case of “mismanaged conditionality”,³⁰² in 2004 the OHR/EUSR Paddy Ashdown identified police reform as a key prerequisite for progress in the European integration path of the country. However, early apparent inter-ethnic agreement on the issue soon disappeared, leading Bosnia to the deepest political crisis since post-war democracy. Ashdown's centralisation effort, cast in technocratic terms of judicial reforms, was undermined by the lack of common standards, either in the EU or by the Council of Europe, on police matters. The apparent lack of legitimacy of the EU conditions raised opposition by local politicians. The impasse remained until the OHR/EUSR backpedalled, accepting cosmetic changes as satisfactory.³⁰³ In this case, it is apparent how the lack of respect for the value of diversity, intrinsic in the “liberal peace” top-down agenda allowed domestic actors to oppose a veto and conquer the agenda of reform. A different approach, based on member state building, could have presented Bosnian politicians with several possible solutions for compatibility between Bosnian institutions and broad European

³⁰⁰ Woelk, *EU Member State-Building in the Western Balkans*, 2013, p. 477-479.

³⁰¹ Juncos, *Member State-Building versus Peacebuilding*, 2012.

³⁰² Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 29.

³⁰³ Tolksdorf, Dominik, Flessenkemper, Tobias, and Helly, Damien. 2013. “Police Reform and Conditionality.” In *Ten Years After: Lessons from the EUPM in Bosnia and Herzegovina 2002-2012*, Paris: EUISS, p. 20–26.

standards, drawing options from the various experiences of EU member states. In this way, open domestic discussion on the model to adopt would have also added legitimacy to the process, avoiding the democratic contradictions of imposed models.

A change in this direction is evident in recent practice from the EU's previous vertical and hierarchical positioning at the helm of international protectorates (Bosnia-Herzegovina, Kosovo) towards a more horizontal and deliberative approach based on new political partnership instruments (High Level Accession Dialogues, HLAD) aimed at fostering ownership and legitimacy in low-statehood candidate countries. The EU is thus trying to be less of an "Empire in denial"³⁰⁴ or a "substitute for Empire",³⁰⁵ and work together with local elites in fostering state building in a way that is compatible with both the European member-state model and the domestic democratic procedures. More could still be done; Farrell (among others) has gone as far as to call upon the EU to facilitate a locally-driven agreement to reform the Dayton Constitution of Bosnia-Herzegovina to make it compatible with EU accession and put an end to the international presence in the country.³⁰⁶ This could be the final challenge for EU member state building; after the several failed attempts at reforming Dayton, the EU would have to be extremely careful, though, in fostering a local solution from within, without imposing it from outside, for both legitimacy and effectiveness concerns.

³⁰⁴ Chandler, *Empire in Denial*, 2006.

³⁰⁵ Rupnik, Jacques. "L'Europe Centrale et Les Balkans À La Recherche D'un Substitut d'Empire." In *Entre Kant et Kosovo: Études Offertes À Pierre Hassner*, by Anne-Marie Le Gloannec and Aleksander Smolar. Paris: Presses de Sciences Po 2003, p. 339–60.

³⁰⁶ Farrell, Darragh. "Failed Ideas for Failed States? Liberal International State-Building in Bosnia and Herzegovina". *Center for Southeast Europe Working Paper Series 1*. Graz, 2009. p. 21.

II. Learning to interact: Bosnia and Herzegovina and the European Union

Introduction

This chapter introduces the country object of the case study of the thesis, Bosnia and Herzegovina. After a short introduction to the Dayton political order, the chapter discusses the multiple transitions (to democracy, market economy, statehood, and peace) that make it the country in the region with the most layers of complexity in governance. It then analyses Bosnia and Herzegovina as a contested state. Bosnia is different from most other such cases, since the roots of state contestation are internal: they stem from the simultaneous presence of a complex federal and consociational structure, and of sub-state centrifugal tendencies coupled with direct intervention by international actors with executive powers. The chapter also takes a look at the Dayton institutional framework under the lenses of the two main theories of power-sharing, the consociational and integrative models. Bosnia and Herzegovina appears as a hybrid case in which elements from both models are present, though in an often contradictory way. The second part of the chapter looks at the interactions between the European Union and Bosnia and Herzegovina over time, highlighting in particular how the EU struggled to adapt its approach to the specific Bosnian post-conflict context and to get to the helm of the international presence in the country. The EU remained twice stuck in cycles

of mismanaged conditionality, in the case of the police reform process (2005-2008) and of the *Sejdić-Finci* constitutional reform process (2008-2014). The shift towards a streamlined EU presence and the rescheduling of conditionality with the “new approach” to Bosnia and Herzegovina in late 2014 led to a rebalanced conditionality and a different standing of the EU in the country, which enabled the re-opening of the EU path and the achievement of relative successes in the 2014-2016 period, also highlighting the consolidation of a strategy of member state building as stateness-aware enlargement or enlargement-specific state-building.

1. Bosnia and Herzegovina as a contested state

1.1 The Dayton order in Bosnia and Herzegovina

The Dayton peace accords (officially the General Framework Agreement for Peace), initialled on 21 November 1995 in Ohio and signed on 14 December in Paris, put an end to 43 months of war in Bosnia and Herzegovina.³⁰⁷ The conflict had caused over 100,000 deaths,

³⁰⁷ The peace agreement includes 11 articles and 12 Annexes. Article I commits the parties to respect the UN Charter, the Helsinki Final Act and other OSCE documents, including the respect of the sovereignty of the parties, the peaceful resolution of controversies and the renunciation to any action against the territorial integrity and political independence of Bosnia and Herzegovina or any other state. Article II concerns the military aspects, defined in detail in the Annexes 1A and 1B (“Agreement on Military Aspects of the Peace Settlement” and “Agreement on Regional Stabilization”). Article III concerns the Inter-Entity Boundary Line (IEBL), with details in Annex 2. Article IV deals with elections, further detailed in Annex 3. Article V relies on Annex 4 to introduce the new Constitution of Bosnia and Herzegovina. Article VI concerns the establishment of various institutions, each further detailed in the annexes: the Arbitration Tribunal (Annex 5), the Human Rights Commission (Annex 6), the Commission on Refugees and Displaced persons (Annex 7), the Commission on Preservation of National Monuments (Annex 8) as well as the issues concerning public corporations (Annex 9). Article VII commits the parties to respect all human rights mentioned in the Annexes (Annex 6 chapter One and Annex 7 chapter One) as a means to achieve a lasting peace. Article VIII concerns the commitments on the civilian aspects of implementation of the peace accords, linked to Annex 10 (Civilian Implementation, OHR) and 11 (International Police Task Force, IPTF). Article IX foresees an obligation of cooperation of the parties with all other actors for the implantation of the agreement, as well as

the displacement of half the population of the country (of which 1 million refugees abroad) and the destruction of one third of the housing. The use of ethnic cleaning, concentration camps, mass rapes and massacres of civilians had made it the most brutal conflict in Europe since fifty years. The contracting parties of the Dayton peace accords are the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. The latter two took part in the peace negotiations as representatives of their secessionist Bosnian proxies (the Croatian Defence Council (HVO) which had established the Croatian Republic of Herzeg-Bosna, and the Army of Republika Srpska (VRS) which aimed to defend the self-proclaimed Republika Srpska) which were fighting against the army of the internationally-recognised government seated in Sarajevo (*Armija BiH*).

The peace compromise had been reached after the decisive action by NATO through air bombing of Serb positions, leading to a convergence between the situation in the field and on paper. The different sides of the agreement all had to renounce to a part of their war objectives: to carve out Bosnia among themselves for Serbia and Croatia; and to keep it together as a single polity for the Sarajevo government and the international community. The Republic of Bosnia and Herzegovina (RBiH) was thus internationally recognised in its pre-war borders, but as a new polity – the state of “Bosnia and Herzegovina” (BiH), soon also with a new blue and yellow flag – composed of two “entities”, each afforded with the widest margin of autonomy: the Federation of Bosnia and Herzegovina (FBiH), covering 51% of its territory and inhabited mostly by Bosniaks and Bosnian Croats; and Republika Srpska (RS), governing the remaining 49% and mostly inhabited by Bosnian Serbs. The Federation entity was to be further decentralised in 10 autonomous cantons, mostly ethnically homogenous, while RS was to remain as a unitary polity. The thin layer of state-level institutions meant to

for the prosecution of war crimes and other violations of international humanitarian law. Article X foresees the mutual recognition between Bosnia and Herzegovina and the Federal Republic of Yugoslavia, each within its borders and as sovereign and independent states. Article XI includes the final dispositions.

keep them together was limited to a three-person rotating Presidency and three common Ministries – as detailed in Dayton’s Annex 4, which includes the English-language text of the new Constitution of Bosnia and Herzegovina. Moreover, this territorial power-sharing structure was complemented by ethnic power-sharing provisions among the three “Constitutive Peoples”, including the rotating Presidency and the use of Entity veto and Vital National Interest veto (VNI) in the legislative process.

The first novelty of the Dayton order was thus the use of state building as a peace building strategy, and of “imposed federalism” as a state building strategy. Dayton went beyond the usual purpose of a peace treaty, and through an exercise in “political engineering”,³⁰⁸ aimed rather at building a federal state from the ruins of war.³⁰⁹ A federal form of state was introduced as part of the toolkit of international conflict resolution, peace building, and external state building, and without an endogenous ideology of federalism supporting it,³¹⁰ Bosnia’s imposed federalism, however, limited itself to recognising the politico-territorial reality of 1995, and the same meaning of federalism remained domestically contested. Moreover, Dayton’s territorial set-up only partially overlaps with the communitarian system of constitutional protection of the three Constitutive Peoples.³¹¹ Rather, the superposition in the RS between one territorial entity and the vast majority of one constitutive people risks creating a ‘segment state’, indicated in the literature as one element

³⁰⁸ Solioz, Christophe, *Prospects for Balkan Stability: Ownership, Transitional Process and Regional Integration in Bosnia and Herzegovina*, Geneva: PSIO Occasional Paper, 2000

³⁰⁹ Chandler, David, *Bosnia: Faking democracy after Dayton*, Londra: Pluto Press, 2000.

³¹⁰ Keil, Soeren, *Multinational Federalism in Bosnia and Herzegovina*, Farnham: Ashgate 2013.

³¹¹ Perry, Valery, “Not-so-great expectations. The EU and the constitutional politics of Bosnia and Herzegovina”, in: Keil, Soeren and Zeynep Arkan (eds.), *The EU and Member State Building. European Foreign Policy in the Western Balkans*. London: Routledge 2014, 163-187.

Woelk, Jens, “Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes” (Chapter 4), in: Burgess, Michael and Alan Tarr (eds.), *Constitutional Dynamics in Federal Systems: SubNational Perspectives*, McGill-Queen’s University Press 2011.

conducive to further radicalisation of autonomy claims– as demonstrated by the secessionist rhetoric adopted by the RS leader Milorad Dodik since 2006.³¹²

The second novelty of the Dayton order was the strengthening of state building via the embeddedness of international organisations in the domestic legal order. The involvement of the international community in Bosnia and Hergovina's post-war environment was massive, with a division of labour among international organisations to ensure the implementation of the peace accords (see table 1 below). On the military side, 60,000 troops under NATO command were included in the Implementation Force (IFOR), sine 1996 Stabilization Force (SFOR). On the civilian side, oversight over the implementation was entrusted to the Office of the High Representative (OHR), tasked to report to the international community as embodied by the Peace Implementation Council (PIC). From the list of contents of the peace accords and from their order it is possible to see how the primary focus of its drafters was on the military aspects of peace-building. Then came issues linked with short-term stabilisation and state-building (elections, Constitution, institutions), which were deemed to allow for a quick exit-strategy of the international presence in the country. Only afterwards are issues of human rights and war crimes included, as well as more detailed provisions about civilian implementation (OHR).

³¹² Roeder, Philip G., *Where Nation-States Come From: Institutional Change in the Age of Nationalism*, Princeton 2007. Perry, Valery, A 'segment state' vision of the future of Bosnia and Herzegovina?, *Transconflict*, 10 February 2014.

Table 3.1: Dayton Peace Accords annexes and tasked international institutions³¹³

<i>DPA Annex/Article</i>	<i>Issue area</i>	<i>Tasked institution</i>
Annex 1A	Military aspects	NATO (IFOR, SFOR)
Annex 2	Inter-Entity Boundary Line	
Annex 1B	Regional stabilisation	OSCE
Annex 3	Elections	
Annex 6B	Human Rights Ombudsman	
Annex 4	Constitution	High Representative (OHR)
Annex 10	Civilian implementation	
Article IV	Constitutional Court	European Court of Human Rights
Article V	Central Bank	International Monetary Fund (IMF)
Annex 6C	Human Rights Chamber	Council of Europe
Annex 7	Refugees and Displaced Persons	UNHCR
Annex 8	Commission on Public Companies	European Bank for Reconstruction and Development (EBRD)
Annex 11	International Police Task Force (IPTF)	United Nations: UNMiBH

The third novelty of the Dayton order was the presence of a muscled civilian implementation via the executive powers of international actors. The strategy of short-term disengagement, in fact, proved an illusion: after rushed elections in 1996 had confirmed the war-time nationalist elites in power, the PIC had to rethink its strategy and in 1997 settled for entrusting the OHR with direct executive powers to take actions against persons found in violation of the legal obligations stemming from the peace accords or their implementation. The OHR was instrumental in the coming years in order to overcome mutual vetoes and consolidate the implementation of the provisions of the peace agreement. When consensus

³¹³ Stoessel, Marcel, *The role of the OSCE in Bosnia and Hercegovina*, Geneva: Graduate Institute of International Studies 2001, p.3.

could not be found, the OHR imposed laws (including on media, industry, refugee returns) and symbols (including the flag, anthem, passport, currency and car number plates), as well as removed obstructionist politicians and civil servants, up to RS President Nikola Poplasen in 1999. Its main phase of activism was in 2000-2006, during the mandate of Paddy Ashdown; subsequent setbacks and a changed domestic and international environment led the institution to take a more reserved role. After twenty years the OHR is still present, due to a lack of consensus on its closure, and entrusted with the same “Bonn powers”, although their use is deemed today only a last resort by the majority of PIC members.³¹⁴

Bosnia and Herzegovina has not stagnated in the last two decades, though. Rather, its institutions have developed from a weak confederation into the current Dayton-based federal form, thanks to the impulse towards centralisation of international and mixed political actors (the Office of the High Representative and Bosnia’s Constitutional Court). At the same time, the consolidation of an ethnic-based party system, with intra-group party competition only, helps explain how a federal system that is constitutionally centred upon territorial elements works in reality as an ethnic federation. The unsuccessful combination of strict power-sharing mechanisms with the Western tradition of civil liberties and human rights emerged in cases such as the Sejdić-Finci ruling of the European Court of Human Rights, which for long time blocked Bosnia’s progress in EU integration. According to Keil, Bosnia should be understood as an internationally administered federation rather than as a protectorate, as domestic politicians have always been offered space to find an agreement before international actors

³¹⁴ On the issue see: Peter, Mateja “No Exit: The Decline of International Administration in Bosnia and Herzegovina”, in: Keil, Soeren and Valery Perry, *State-Buidling and Democratization in Bosnia and Herzegovina*, Farnham: Ashgate 2015, 131-150

stepped in to impose a solution.³¹⁵ Yet, the embeddedness of the international community in the Bosnian political scene has also led to its domestication.³¹⁶

1.2 Bosnia and Herzegovina's multiple transitions

Bosnia and Herzegovina features some unique characteristics, which derive from its own history³¹⁷ and have been lately entrenched in the BiH Constitution as drafted at Dayton. The result is a structure of asymmetric federalism, with a patchwork of overlapping decentralised competences, which burdens decision making and hinders implementation. Moreover, the territorial set-up does not overlap with the communitarian system of constitutional protection of the three recognised constitutive peoples (Bosniaks, Serbs, and Croats).

Bosnia and Herzegovina– the country with the most layers of complexity in governance, among those of the Western Balkans – is the product of multiple overlapping transitions: to democracy and market economy, but also to statehood, to peace, and to power-sharing and international supervision. The way these various transitions have played out and interacted has deeply affected the current state of the institutions in the country. This feature sets Bosnia and Herzegovina apart from the rest of the countries of the region, and from most post-socialist countries too. It adds further layers of complexity to its development, and presents the European Union with additional challenges than it was used to face.

³¹⁵ Keil, *Multinational Federalism in Bosnia and Herzegovina*.

³¹⁶ As expressed by a diplomatic representative of an EU member state in Sarajevo, “since twenty years the international community here is a political actor like any other, so that their pavlovian reflex is to wait for us to provide them with a solution. It is also politically less costly to accept unpopular solutions if they are seen to be imposed from outside rather than reached freely in a compromise.” Personal interview, November 2014.

³¹⁷ Several features of the Dayton system – starting with the collegial Presidency – are actually inherited from the Yugoslav, Austro-Hungarian and even Ottoman experience. Keil makes a compelling case to consider the *longue durée* when approaching Bosnia and Herzegovina in his *Multinational Federalism*. This need was also confirmed in interviews with officers of the EU Delegation to Bosnia and Herzegovina, November 2014.

Bosnia shares with the whole Central-Eastern Europe the heritage of socialism, with its two related transitions to liberal democracy and to market economy (two of the three Copenhagen criteria for EU membership). In the case of Bosnia, the two have been destabilised by the failure of the third and preliminary transition – to sovereignty and statehood – that Bosnia shares with the other post-Yugoslav and post-Soviet states of recent independence. The ensuing war and its resolution through external intervention and compromise have added further dimensions. Bosnia shares with other post-Yugoslav states the heritage of conflict, with its transition to peace. Due to the way peace was achieved in Bosnia, though, through external intervention and imposed compromise, it also faces additional transitions to shared rule and to international supervision.

Table 2: Layers of transition in Bosnia-Herzegovina and elsewhere, compared

Transition from	Transition to	<i>Lat.Am, Mediterr.</i>	<i>Cent.East Europe</i>	<i>Post-Soviet</i>	<i>Post-Yugoslav</i>	<i>Bosnia-Herz.</i>
Socialism	Democracy	X	X	X	X	X
Socialism	Market economy		X	X	X	X
Yugoslav federation	Sovereignty & statehood			X	X	X
Conflict	Peace				X	X
Ethnic autonomy	Shared rule					X
Supervision	Self-rule					X

Studies of transition have widened their scope, from their early outset in the 1970s and 1980s. The process of political transition, centred upon the institutionalisation of democratic ‘rules of the game’, was already the subject of 1970s and 1980s studies on the “second wave” of democratisation in Southern Europe (Portugal, Spain, Greece) and Latin America, after the

“first wave” of imposed post-war democracies (Germany, Japan, Italy).³¹⁸ The first level of transition identified in ‘transitology’ studies has been the one of democratisation, i.e. “the whole process of regime change from authoritarian rule to the rooting of a new liberal democracy”.³¹⁹

The transition of post-socialist countries of Central and Eastern Europe in the 1990s and the following debate on the “third wave of democratisation”³²⁰ spurred the growth of a new strand of literature that focused its attention on the new challenge these states faced: the contemporary development of liberal democracy and market economy in countries coming from a long period of single party rule and planned economic systems. The simultaneity of the ‘double transition’ to political and economic liberalisation in CEE added a layer of complexity, with potential “mutual effects of obstruction”.³²¹

Furthermore, in the case of post-Soviet and post-Yugoslav countries, political liberalisation went together with newly-acquired independence through the dissolution (whether peaceful or not) of socialist federations, adding a vital interplay with the transition to statehood. The entanglement was captured by early definitions of the “triple transformation”. According to Claus Offe, this process involved three hierarchical levels of decision making: first, identity, i.e. “who ‘we’ are” (polity-building, state- and nation-building: “nationhood”); second, institutions, i.e. “the institutional framework of the ‘regime’” (institution-building and “constitution making”); and third, distribution, i.e. “who gets what”, i.e. “the ‘normal politics’

³¹⁸ O'Donnell, Guillermo, Philippe C. Schmitter and Lawrence Whitehead, *Transitions from Authoritarian Rule: Comparative Perspectives*. A Johns Hopkins Paperback. Johns Hopkins University Press, 1986

Linz, Juan J., and Alfred Stepan. *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*. Baltimore: Johns Hopkins University Press, 1996.

³¹⁹ Pridham, Geoffrey, *The Dynamics of Democratization*, Continuum: London and New York 2000, p. 16.

³²⁰ Huntington, Samuel P., *The Third Wave: Democratization in the late Twentieth Century*, Norman: University of Oklahoma Press, 1991

³²¹ Offe, Claus, “Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe”. *Social Research*, 71 (3), Fall 2004, p. 501-528, p. 508.

of allocation”.³²² Many works on the transformation of Central and Eastern Europe soon adopted the ‘triple transition’ label,³²³ to indicate democracy, market, and the state,³²⁴ or even lumped together the different dimensions in two broad areas, democratisation/marketisation and state/nation-building.³²⁵ Some authors, like Kuzio, set out to keep separate “stateness and the national question”,³²⁶ defining post-communist transformations as a quadruple transition (“democratisation, marketisation, state-institution and civic nation-building”), and founding civil society on civic nationalism and a shared national identity as means to ensure the cohesion of the polity. Offe remarked that the simultaneity of the three processes set aside Central and Eastern European countries from previous rounds of democratisation, making it “unsuitable and misleading” to analyse them as simply another wave. In his view, contrary to previous cases in which “the territorial integrity and organization of each country were largely preserved”, in Central and Eastern Europe “the scene is dominated by territorial disputes, migration, minority or nationality conflicts, and corresponding secessionist longings”.³²⁷ This pessimistic view likely originated from the same *zeitgeist* that had led Mearsheimer to spell disaster from ethno-national and border conflicts for the whole post-socialist half of the old continent.³²⁸ Yet, the call to integrate stateness and the challenges of state- and nation-building in the transitology literature was long overdue. Skocpol had argued already in 1985

³²² Ibid., p. 507

³²³ Przeworski, Adam, *Sustainable Democracy*. Cambridge University Press, 1995.

³²⁴ Kubicek, Paul, *Unbroken Ties: The State, Interest Associations, and Corporatism in Post-Soviet Ukraine*. University of Michigan Press, 2000.

³²⁵ Hall, John R., “In search of civil society”, In; *Civil Society: Theory, History, Comparison*. Cambridge:Polity, 1996, p. 1–31, p. 22.

³²⁶ Kuzio, Taras. “Transition in Post-Communist States: Triple or Quadruple?” *Politics* 21 (3), September 1, 2001, p. 168–77, p. 169.

³²⁷ Offe, *Capitalism by Democratic Design?*, p. 504.

³²⁸ Mearsheimer, John J., “Why We Will Soon Miss the Cold War”, *The Atlantic*, August 1990.

in favour of “Bringing the state back in”,³²⁹ and Linz and Stepan called attention in the 1990s to the fact that “stateness problems must increasingly be a central concern of political activists and theorists alike”.³³⁰

The orderly unfolding of transitions in Central and Eastern Europe in the 1990s dispelled most of Mearsheimer’s forecasts, demonstrating that fifty years of socialist regimentation had managed to consolidate states and societies within their new borders. Yet, this third dimension of transition – to statehood and independence – remained relevant for one particular type of state, the socialist federations. None of these managed to survive the early phases of transition, yet they disappeared with very different modalities and consequences. While Czech Republic and Slovakia headed for a ‘velvet divorce’ (though Slovakia then underwent a period of authoritarian consolidation), and although the dissolution of the Soviet Union happened remarkably peacefully (with specific exceptions in the Caucasus), Yugoslavia proved to be the deviant case. In Bosnia and Herzegovina, in particular, political liberalisation preceded economic transition. The 1990 election, the first one organised after the end of the political monopoly of the League of Communists of Yugoslavia, was held at the level of the republics (Bosnia) rather and before than of the federation (Yugoslavia). Moreover, political liberalisation also preceded the consolidation of clear boundaries of the polity (transition to statehood), i.e., whether a democratised Bosnia would have remained part of a rump Yugoslavia, and on which terms.³³¹ Scholars of democratic theory have stressed how the decision on the definition of the borders of the polity is pre-democratic and cannot be

³²⁹ Evans, Peter B., Dietrich Rueschemeyer, and Theda Skocpol (eds.). *Bringing the State Back In*. Social Science Research Council. Cambridge University Press, 1985.

³³⁰ Linz and Stepan, *Problems of Democratic Transition and Consolidation*, 1996, p. 366.

³³¹ See Linz, Juan J., and Alfred Stepan. “Political Identities and Electoral Sequences: Spain, the Soviet Union, and Yugoslavia.” *Daedalus* 121 (2) 1992, p. 123–39.

settled by conventional democratic methods.³³² Likewise, Dahl stresses that “we cannot solve the problem of the proper scope and domain of democratic units from within democratic theory”,³³³ warning that the lack of agreement on the boundaries of the political unit would not allow for consolidation of democracy. Frontloading political liberalisation in a situation of uncertain polity boundaries created a ‘prisoner’s dilemma’ that fostered the victory of nationalist parties in each republic and within each ethno-national community of Bosnia, and led to the defeat of any non-ethnic, non-national alternative.³³⁴

The wars that ravaged former Yugoslavia in the decade between 1991 and 2001 left it successor states with the additional challenge of coping with a fourth transition, from conflict to peace - the one with the widest range of consequences. Bosnia is today first and foremost a post-conflict country. The armed confrontation that devastated the country for three and a half years, causing more than 100,000 deaths and the displacement of half its population, has left deep scars, both visible, as in the destruction of buildings and productive infrastructures, and invisible ones, in the memories, identities, and preferences of the population. These war legacies still influence all transitions and cleavages in today’s Bosnia and Herzegovina.³³⁵

³³² Whelan noted that “democratic theory cannot itself provide any solution to disputes that may – and historically do – arise concerning boundaries... The boundary problem does, however, reveal one of the limits of the applicability of democracy, and acknowledgement of this may have the beneficial effect of moderating the sometimes excessive claims that are made in its name”. Whelan, Frederick G., “Prologue: Democratic Theory and the Boundary Problem.” *Nomos XXV: Liberal Democracy* 25, 1983, 13–47, p. 16, 43.

³³³ Dahl, Robert A., *Democracy and Its Critics*. New Haven: Yale University Press, 1989, p. 207.

³³⁴ Sasso, Alfredo, The ‘Bosnian Silence’? Regime Decline and Civic Alternatives in Bosnia-Herzegovina (1989-1990). *West Croatian History Journal*, 9(9), 2014, 31-53. Alfredo Sasso, “The defeat of the democratic Yugoslavism in Bosnia-Herzegovina: the Alliance of Reformist Forces of Yugoslavia (SRSJ)”, in Antonello Biagini, Giovanna Motta (eds.), *Empires and Nations from the Eighteenth to the Twentieth Century*. Vol. 2, Cambridge: Cambridge Scholars, 2014, p. 563–575.

³³⁵ See Levy, Naomi. “International Peacebuilding and the Politics of Identity: Lessons from Social Psychology Using the Bosnian Case.” *Journal of Intervention and Statebuilding* 8 (1), January 2, 2014, p. 68–90.

Two corollaries descend from this fourth transition, to peace, for the forms it assumes in Bosnia and Herzegovina: the transition to shared rule, and the transition to self rule. Even the transition to peace, in fact, did not develop in the same way in all the post-Yugoslav states. Slovenia and Montenegro remained relatively shielded from the fighting, Croatia managed to regain control over all its territory through military action, and Serbia was forced to accept the loss of control over Kosovo through the same forceful means. In the other cases – Bosnia-Herzegovina and the former Yugoslav republic of Macedonia³³⁶ – the conflict came to an end through external intervention and a forced compromise among the warring parties. In Macedonia, the low-level conflict that opposed the Skopje government to local Albanian guerrilla in 2001 did not last long and a full-blown war was prevented by early international intervention and mediation. The ensuing Ohrid Agreement guaranteed the integration of Albanians within the Macedonian decision-making structures through integrative and consociational measures. In Bosnia and Herzegovina, on the other hand, the conflict had lasted for more than three years and had known the siege of Sarajevo and the genocide of Srebrenica, before the fallout from Croatia's military advances and resolute NATO air support managed to push Bosnia, Croatia and Serbia (the latter ones in the name of their warring proxies) to sign up to the Dayton Agreement. The war in Bosnia was not solved through the clear military victory of one side, allowing a new political system to establish itself through a 'victor's peace', as it had been the case in 1940s Germany, Japan, Italy or Austria (but also in 1930s Spain). Rather, the Bosnian conflict is a paradigmatic example of 'new war', a category blurring the border between civil and international-conventional wars.³³⁷ The end of the conflict through externally-imposed power sharing – based on federalism and consociationalism, and replacing ethnic autonomy – engendered a fifth transition, to shared rule.

³³⁶ Hereinafter Macedonia.

³³⁷ Kaldor, Mary. *New and Old Wars: Organized Violence in a Global Era*. Oxford: Polity Press, 1999.

The deal struck at Dayton preserved Bosnia and Herzegovina as a single state, by reconstituting it as a consociational power-sharing system between the warring parties, which were to become its two decentralised entities, capped by a thin layer of state-level institutions. The newly established state of Bosnia and Herzegovina was described as an imposed federation without a federal ideology to support it.³³⁸ The political system of Bosnia, which combines strong territorial decentralisation with a state-wide system of power-sharing among national groups, has often been deemed responsible for the economic stagnation and lack of political reforms of the two post-war decades, since it effectively multiplies the veto points and, while ensuring non-domineering, it also guarantees the near-impossibility of actual governing.³³⁹ In fact, what has been most often seen as problematic in the Bosnian case – and what has given rise to strategic judicial litigation cases such as Sejdic-Finci, Pilav, Zornic and others – is the uncanny mix of territorial (federal) and non-territorial (ethnic/communitarian) power-sharing, which impacts differently on different categories of citizens in different parts of the country.

To ensure the necessary trust for such a system of imposed federalism to work, the implementation of the Dayton Peace Agreement was delegated to a host of international organisations, and the *ad hoc* Office of the High Representative was entrusted with executive civilian powers, as of 1997, to effectively ensure that domestic actors do not obstruct or revert the implementation of the peace agreement. This element of embeddedness of international organisation and of direct international civilian administration engendered the last, sixth transition from international supervision to self-rule, and the ongoing paradox of having to

³³⁸ Keil, *Multinational federalism in Bosnia and Herzegovina*. 2013.

³³⁹ According to Toal and Dahlman, Bosnia can be defined as a country in which an ethnoterritorial spatial order has been connected, thanks to the results of the war, to an ethnocratic political order. Toal, Gerald and Carl Dahlman, *Bosnia Remade. Ethnic Cleansing and Its Reversal*. Oxford/New York: Oxford University Press 2011, p. 5.

move a country “from Dayton to Brussels”, i.e. from international supervision to shared sovereignty, without passing through the usual form of full Westphalian sovereignty.

1.3 Bosnia and Herzegovina as a contested state

The legacies of the different layers of transition at play, detailed above, all contribute to the contestation of statehood in Bosnia. This is apparent in both dimensions of statehood, related to state legitimacy (i.e. the relation between state and society through the political sphere) and to state capacities (i.e. the ability to take and enforce political decisions). Yet, Bosnia and Herzegovina is not always included among contested states. This is because the sources of its state contestation are of an internal nature, and hence less visible.

Bosnia and Herzegovina differs from most other contested states that only enjoy partial external recognition. Bosnia and Herzegovina has in fact been universally recognised since 1992 as an independent and sovereign state, and it enjoys membership in the main international organisations;³⁴⁰ Bosnia thus arguably displays high levels of external sovereignty. The Bosnian state is also formally fully in control of its territory, as no parts of it have declared secession or remain de facto outside the authority of state institutions. Yet, Bosnia and Herzegovina remains severely constrained in its domestic ability to take and implement policy decisions. An asymmetric federal system (with most competences held by sub-state entities) a complex consociational structure, the executive powers of international organisations, and the challenges of sub-state centrifugal tendencies (secessionism in RS and

³⁴⁰ Bosnia and Herzegovina was even elected as a non-permanent member of the UN Security Council in 2010-2011.

calls for a separate third Croat entity) all testimony to Bosnia and Herzegovina's "problematic sovereignty"³⁴¹ and to a level of internal sovereignty that may be considered medium at best.

According to the definition of sovereignty put forward by Krasner,³⁴² Bosnia enjoys a high degree of external/'international-legal' sovereignty (recognition), but falls short when it comes to internal/'domestic' sovereignty (effective control by state structures) and of Westphalian/Vattelien sovereignty (independence and non-interference from outside). In the following table, Bosnia is placed within the context of contested states, along the two dimensions of sovereignty, internal (territorial control and non-interference) and external (international recognition).

State contestation in Bosnia and Herzegovina may be less visible, due to its internal character, but not less salient. First, the domestic sovereignty of Bosnia and Herzegovina is limited by the consociational nature of its Constitution, which was adopted as the Annex Four to the 1995 Dayton Peace Agreement. Bosnia's state-level institutions were agreed as a thin layer to cap the two then-warring entities, the Federation of Bosnia and Herzegovina (FBiH), further decentralised into cantons, and the unitary *Republika Srpska* (RS). The result is a structure of asymmetric federalism, with a patchwork of overlapping and decentralised competences, which burdens decision making and hinders policy implementation. Moreover, the territorial set-up does not coincide with the communitarian system of country-wide protection of group rights providing legislative veto rights to the three constitutive peoples (Bosniaks, Serbs, and Croats).

³⁴¹ Krasner, Stephen. *Problematic Sovereignty: contested rules and political possibilities*, New York: Columbia University Press 2001, p.2

³⁴² Krasner, Stephen. "Abiding Sovereignty." *International Political Science Review*, 22 (3) 2001, p. 229-251.

Table 1: Selected contested states and degrees of internal/external sovereignty³⁴³

		External Sovereignty		
		Low	Medium	High
Internal Sovereignty	Low	Donetsk/Luhansk ^{a p}	Western Sahara ⁽⁴⁶⁾ ^{a p}	South Sudan ^c Iraq ^{a d} , Libya ^{a c} Somalia ^{a c d} , Syria ^{a c}
	Medium	Transnistria ^p Abkhazia ^{(4) p} South Ossetia ^{(4) p} Nagorno Karabakh ^p North Cyprus ^{(1) p}	Palestine ^{(136) a s}	Bosnia Herzegovina ^{d s} Cyprus ^{(-1) a} , Georgia ^a Moldova ^a , Ukraine ^a
	High	Somaliland Iraqi Kurdistan ^a	Taiwan ⁽¹⁹⁾ Kosovo ^{(111) a s}	Timor Leste

This complex institutional structure is compounded by a lack of a consensus on a long-term vision of the state among the majorities of the Constitutive Peoples. In fact Serbs, Croats, and Bosniaks have been remarked as having an “asymmetric commitment” to the

³⁴³ Source: author’s elaboration based on Krasner, Abiding Sovereignty; Papadimitriou, Dimitris and Petar Petrov, ‘Whose rule, whose law? Contested statehood, external leverage and the European Union’s rule of law mission in Kosovo’, *Journal of Common Market Studies*, 50 (5) 2012, pp.746-763. External sovereignty grows with international recognition (UN membership – in *italic* non-UN members; numbers of recognisers or non-recognisers in parenthesis). Internal sovereignty grows with autonomy from external influence – dependence on patron states (^p) or international supervision (^s) – and effective control of state authorities over all territory – secessionist or occupied areas outside control of state authorities (^a), far-reaching decentralisation (^d), or opposing claims to government, up to civil wars (^c).

state.³⁴⁴ This is due mainly to two factors, which are hard to disentangle. First, Serbs and Croats have constituted themselves politically as such (rather than simply as Orthodox Bosnians and Catholic Bosnians) due to the nationalist influence of Bosnia's bigger neighbours, working as kin-state for these populations of their same confession. To the contrary, Bosnian Muslims (later politically mobilised as Bosniaks) have remained without a kin-state. At the same time, the numerical prevalence of the latter has made it easier for them to claim interest in an ethnically-blind and centralised state, in which they would constitute a relative but substantial plurality of the population. The two main reasons have made it so that the three group display a different attitude and identification towards the state – with the first ones rather more interested in “home rule” in the sub-state territories where they are majorities, and displaying the national symbols of the neighbouring countries (or derivatives), and the latter rather more able to identify with the country as a whole and its own symbols. As a multinational state by design, with clauses of special protection for its three constitutive peoples, , the current Bosnian institutions were crafted at the end of the conflict with the first task to ensure non-domineering by one group over the other in the post-conflict period.³⁴⁵ Bosnia and Herzegovina thus suffers from a the lack of consensus on a long-term vision of the state among its three constitutive peoples, which bear three different political projects (a centralised and ethnic-blind state for the Bosniaks, secession via dissolution of the state for the Serbs, and a three-entity confederal polity for the Croats) – mirroring what in the studies of the EU “democratic deficit” has been referred to as the “*no demos paradox*”.³⁴⁶

³⁴⁴ Bieber, Florian. “After Dayton, Dayton? The Evolution of an Unpopular Peace”, *Ethnopolitics*, 5 (1), March 2006, 15-31, 21.

³⁴⁵ Bosnia and Herzegovina had anyway a long tradition of political accommodation of multiple identities and power-sharing, going back to the Ottoman, Austrian and Yugoslav periods. On this see the chapter on “Bosnia and Herzegovina's Federal Tradition” in Keil, 2013.

³⁴⁶ Weiler, Joseph H.H. “Does Europe need a Constitution? Reflections on Demos, Telos, and the German Maastricht Decision.” *European Law Journal* 1 (3), 1995, p. 219-58.

Finally, and despite the international recognition and UN membership of Bosnia, its stateness remains contested from above too. In fact, even when the territorial and communitarian systems of division of powers are considered, the internal sovereignty of Bosnia and Herzegovina is further limited by the presence of international institutions with executive powers, embedded within the domestic legal order since 1995, though *de facto* less and less able to deploy their final powers. As agreed at Dayton, the final civilian authority in the country is vested in the Office of the High Representative (OHR) with his “Bonn powers” that since 1997 entitle him to remove elected officials and repel or impose laws, in order to guarantee the respect of the peace accords. While international supervision or even direct civilian administration has also occurred in other contexts, the Bosnian set-up is particular for its endurance,³⁴⁷ especially in a moment of retreat of international organisations from civilian administration tasks.³⁴⁸ In fact, an exit strategy for the OHR has been under discussion since 2008,³⁴⁹ and the use of its executive power has been quietly scaled down after the controversy over police reform in 2008-09. Nevertheless, its closure has been repeatedly delayed, also following pressures for its continuation by Bosnian actors themselves. Likewise, although

Weiler, Joseph H.H., Haltern, Ulrich R. and Mayer, Franz C. “European Democracy and its Critique.” *West European Politics* 18 (3), 1995, p. 4-39.

Scharpf, Fritz. *Governing in Europe. Effective and Democratic?*. Oxford: Oxford University Press 1999.

Streeck, Wolfgang. “Neo-voluntarism: A New European Social Policy Regime?”. *European Law Journal* 1, 1995, p. 31-59.

Offe, Claus. “The Democratic Welfare State in an Integrating Europe.” In M. Greven and L. Pauly (eds.), *Democracy Beyond the State? The European Dilemma and the Emerging Global Order*. Lanham: Rowman and Littlefield 2000.

³⁴⁷ The International Civilian Office (ICO) supervising post-independence Kosovo was closed in 2012; UN supervision over East Timor lasted between 1999 and 2012.

³⁴⁸ No UN civilian administration was established in South Sudan after the 2011 independence (only a mission with a limited mandate, UNMISS); the country relapsed into civil war merely two years after.

³⁴⁹ The Peace Implementation Council drew a list of 5 objectives and 2 conditions (the “5+2 agenda”) to be fulfilled before the OHR could be closed down. Office of the High Representative (OHR), *The 5+2 Agenda*, 1 January 2012. Also see Peter, No Exit, 2015.

limited in its forces in theatre (600 troops), EUFOR Althea maintains a last-resort role in ensuring stability and order in the country.

1.4 Consociational and integrative elements in the Bosnian power-sharing system

The Dayton political order is characterised by a complex power-sharing system featuring a mix of ethnic and territorial federalism. In fact, as remarked by Keil, “in reality Bosnia works as an ethnic federation”, but this is “not due to Constitutional prerogatives, but because of the continued dominance of nationally exclusive parties which interpret politics in Bosnia as a zero-sum game between its different peoples”.³⁵⁰ It is the interplay of formal and informal elements of politics (institutions and parties) that creates challenges. As Toal and Dahlman argue, during and after the Bosnian conflict an ethno-territorial order of space was superimposed to an ethnocratic political order.³⁵¹ This has been openly criticised by international bodies such as the Venice Commission,³⁵² as well as it has led to widespread criticism of EU actions in Bosnia too. The EU in fact is deemed in turn to be either focusing only on formal institutions and overseeing the actual political dynamics, or conversely as empowering domestic informal political actors in reaching shady and opaque backroom deals, rather than engaging with formal institutional fora.³⁵³

³⁵⁰ Keil, *Multinational federalism in Bosnia and Herzegovina*. 2013, p. 96.

³⁵¹ Gerard Toal and Carl Dahlman, *Bosnia Remade. Ethnic Cleansing and its Reversal*. Oxford / New York: Oxford University Press, 2011, 5.

³⁵² European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, Strasbourg: Council of Europe / Venice Commission, 11-12 March 2005.

³⁵³ See for instance the latest controversies surrounding the role of the EU delegation in fostering a deal on the “Coordination Mechanism” in EU matters among Bosnian political leaders in 2015/2016, or the previous controversies on the closed-doors negotiation sessions with the 6 or 7 main Bosnian political leaders during

The institutional system devised at Dayton combines elements of territorial federalism and ethno-communitarian power-sharing, coupled with integrative provisions too. It thus appears as a hybrid of often-cited blueprints such as Lijphardt's consociationalism³⁵⁴ and Horowitz's integrative model.³⁵⁵ Different analyses of the Bosnian system against these two theoretical ideal-types may be found, including a 2004 article by Nina Caspersen,³⁵⁶ who also highlights how the balance between the two poles has changed over time in Bosnia, as well as in the latest book by Soeren Keil.³⁵⁷

According to Lijphardt, the composition of differences in divided societies (and particularly in post-conflict ones) is only possible through elite cooperation in institutions that explicitly recognise such cleavages and base policy-making upon them. This is meant to guarantee the protection of groups' rights and to recognise the legitimacy of the demands for internal self-determination. Lijphardt's model of consociational democracy is thus characterised by two main features, grand coalitions (i.e. "the participation of representatives of all significant communal groups in political decision-making")³⁵⁸ and group autonomy (i.e. their "authority to run their own internal affairs, especially in the areas of education and culture"),³⁵⁹ with the two corollary of veto powers (on issues of minority interest) and proportional representation (in the electoral system and in public administration alike). The explicit recognition of societal cleavages in this model would accommodate and soften latent

the 2013/2014 talks on Constitutional amendments to solve the Sejdic-Finci issue. On the latter see: International Crisis Group, *Bosnia's Future*, 2014.

³⁵⁴ Arend Lijphardt, *Democracy in Plural Societies*, 1977.

³⁵⁵ Donald Horowitz, *Ethnic Groups in Conflict*, 1985.

³⁵⁶ Nina Caspersen, "Good Fences Make Good Neighbours? A Comparison of Post-Conflict Regulation Strategies in Postwar Bosnia", in *Journal of Peace Research*, 41 (5), September 2004, p.569-588

³⁵⁷ Soeren Keil, *Multinational Federalism in Bosnia and Herzegovina*, 2013.

³⁵⁸ Arend Lijphardt, "Constitutional Design for Divided Societies", *Journal of Democracy*, 15 (2), April 2004, p. 96-109, p. 97.

³⁵⁹ Ibid.

grievances of communal groups through their participation in decision-making, autonomy in own matters, and guarantees of non-domineering by majority groups. Elite cooperation, following Lijphardt, would be fostered by the “self-negating prophecy” created by the mutual harm that ethnic leaders would be able to inflict to each other.

In the case of Bosnia and Herzegovina, the most visible elements of the Dayton accords (and the strongest back in 1995) can be associated with the consociational model. These include the rotating Presidency and the required presence of members of the three Constitutive Peoples in the government; the presence of veto powers (entity veto, VNI veto); ethnic proportionality in the Parliament and generally in public administration (based upon the results of the 1991 census); and group autonomy, guaranteed by the strong decentralisation at entity and canton level, so that de facto most of the powers are exercised by majoritarian and homogeneous institutions.³⁶⁰ Yet, it should also be noted that Bosnia does not require the strongest forms of consociationalism. For instance, the Presidency members are elected on a territorial rather than ethnic basis, thus leading to controversies, such as the one surrounding in 2016-2014 Zeljko Komšić.³⁶¹ Similarly, the formation of grand coalition governments does not require the winning parties in each entity or community to gather together in an “obligatory coalition” (as would have been the case e.g. in Macedonia); rather, competitive elections at entity and state-level can produce different results, giving light to forms of “cohabitation”. For instance, in 2014 the incumbent coalition maintained power in RS, but the opposition Serb parties managed to gather a majority in their community at state level, thus entering the state-level coalition. Finally, veto powers are entrusted to both ethnic communities (caucuses of constitutive peoples in each level’s House of Peoples) and to territorial representatives (entity veto). In addition to this, the Dayton order does specify a

³⁶⁰ Caspersen, *Good Fences Make Good Neighbours?*, 2004, p. 573.

³⁶¹ SDP politician elected as Croat member of the Presidency but rejected by Croat voters on the ground of having been voted by mainly Bosniak SDP voters.

closed list of protected groups, but nowhere does it define their features or makes group membership compulsory or unchangeable, differently from similar systems in e.g. Belgium, Cyprus, and South Tyrol.³⁶²

Donald Horowitz's integrative model is the second and opposite ideal-type of power-sharing. On the one hand, Horowitz highlights how ethnic elites are not naturally prone to cooperation, since they are influenced by intra-group political competition that fosters maximalist rather than compromise positions. On the other hand, he remarks that ethnic identity is fluid and should not be crystallised but allowed to evolve over time, so that other non-ethnic cleavages may also be made salient in politics. Explicit recognition of group distinction and group rights might fuel polarisation and reinforce ethnic identities and loyalties, thus providing incentives for maximalist positions and consolidating a situation of political paralysis due to mutual vetoes.³⁶³ Horowitz's integrative model instead aims to create incentive mechanisms for moderation and multi-ethnicity. First, through electoral systems based on pre-electoral multiethnic coalitions, so that the need for candidates to attract votes from outside his own community may push them towards moderation and compromise. Second, through a federal system based on ethnically heterogeneous political entities, in order to foster integrative dynamics, moderate attitudes and fluid identities. Finally, by promoting public policies that are "ethnically blind" to reduce the salience of cleavages rather than reinforcing them. Horowitz's model follows a minimalist approach focused on interaction dynamics and aimed at promoting compromise. Group protection is not guaranteed ex ante, since the final aim is to hollow out the differences and integrate the communities.³⁶⁴

³⁶² See on this the report by the European Stability Initiative on the Sejdic-Finci issue, *Houdini in Bosnia*, 2013. Also see Stojanovic, Nenad. *Dialogue sur les Quotas: Penser la Représentation dans une Démocratie Multiculturelle*. Paris: Presses de Sciences Po 2014.

³⁶³ Keil, Multinational federalism in Bosnia and Herzegovina, 2013, p. 97.

³⁶⁴ Caspersen, Good Fences Make Good Neighbours?, 2004, p. 571.

The Dayton order also include several integrative elements, albeit less visible. First, group autonomy is based on the congruence of ethnicity and territory (at entity, canton, or municipal level), rather than on ethnicity in itself; provisions on refugee return and on the right to vote in pre-war residence areas work to strengthen electoral and territorial heterogeneity, undermining group autonomy. Likewise, there is no explicit provision requiring obligatory coalitions among the main ethno-national parties, thus leaving flexibility and allowing for electoral change. Secondly, several Dayton-mandated bodies worked as ethnic-blind, majoritarian institutions, without ethnic veto powers (the Constitutional Court, the Central Bank, the Joint Interim Commission, the Human Rights Chamber, the Commission for Refugees and Displaced Persons, the Commission for the Preservation of National Monuments and the Commission on Public Enterprises). Although not primarily legislative institutions, these integrative bodies still retain a substantial share of power. Moreover, integrative elements have been increasing in weight during the peace implementation process, particularly following the strengthening of the OHR powers in 1997. This has been the case, for instance, through the Constitution Court judgment “on the Constitutive Peoples” of 2000 (case U5/98), which has established the equality of rights of Bosniaks, Croats and Serbs throughout the country and in both entities, thus further diminishing the initial provisions on group autonomy and reinforcing the shift away from ethno-territorial rule. The same goes for the primacy of international treaties and human rights law in the Constitution, which has gained even more preeminence after Bosnia and Herzegovina’s accession to the Council of Europe in 2004. The ensuing jurisprudence (Sejdić–Finci case law) has shown the limitations of the Dayton order and the direction to take in order to overcome it.

The case of Bosnia and Herzegovina allows adding few variables to the debate on consociative and integrative elements of power-sharing. First, the international dimension: the

guarantee over the agreements given by external powers influences the incentives of the parties and favours the acceptance of integrative elements, while straining the consociative ones (cf. the judgements of the Constitutional Court), although the long-term sustainability of the whole system remains uncertain. Secondly, the temporal dimension: identities are more likely to become more fluid in the mid to long period, again favouring the shift towards a more integrative approach. Finally, the intensity of conflict matters: local experiences of war-time violence influence post-conflict everyday life.³⁶⁵

Scholars recognise already since the 1990s that the two ideal-types described above are not meant to be applied in their pure form, but rather to be customised and mixed in accordance with local conditions and specific features, including the historical context, the type of conflict, and the features of the parties involved.³⁶⁶ Stefan Wolff comes to define “complex power-sharing” as “a practice of conflict settlement that has a form of self-governance regime at its heart, but whose overall institutional design includes a range of further mechanisms for the accommodation of ethnic diversity in divided societies”, including among others those recommended by the literature on consociationalism and integration.³⁶⁷

According to Caspersen, the very same mix of consociative and integrative elements foreseen at Dayton creates a complex system in which each model’s extreme effects are moderated. Consociational elements are influenced by the fluidity provided by the integrative ones, while integrative elements are included in a system of consociational and international guarantees that make their acceptance by minorities more plausible. According to Caspersen, in the Bosnian case the consociational elements retain the primacy in guaranteeing stability

³⁶⁵ Caspersen, . Good Fences Make Good Neighbours?, 2004, p. 585

³⁶⁶ See for instance Sisk, Timothy. *Power-Sharing and International Mediation in Ethnic Conflict*, Washington DC: US Institute of Peace, 2002 [1996], 34-35.

³⁶⁷ Wolff, Stefan. “Autonomy”. *The Princeton Encyclopedia of Self-Determination*, online (undated) at <https://pesd.princeton.edu/?q=node/1>.

Bosnia, notwithstanding the international presence. This is due to the deep cleavages left by the conflict in society, to the primacy of self-determination demands, and to the absence of a majority group. Integrative institutions have worked smoothly, but this might be due to the last-instance guarantee role of the international community. The two approaches can be deemed compatible, Caspersen argues, and a mix of the two has been able to promote moderation in Bosnia.

The evaluations on the success or failure of the specific mix of elements included in Bosnia's complex power-sharing system are mixed. While assessments in the first decade of implementation tended to be more positive, the following decade of stagnation, retrenchment and paralysis has cast a shadow of pessimism on contemporary commentators. Influenced by the experience of ten years of stagnation in Bosnia starting from 2006, more recent literature highlights how Dayton's uncanny mix of ethnic and territorial elements impedes Bosnia from progressing further and from reforming itself. In fact, there remains a contradiction between Dayton's consociational and integrative measures, deriving respectively from the tradition of Ottoman, Austro-Hungarian and Yugoslav power-sharing systems, reinforced and crystallised at Dayton, and from the Western liberal tradition of human rights and fundamental freedoms³⁶⁸ - as highlighted by the multiple ECHR judgements against Bosnia and Herzegovina since 2008. Moreover, the balance between the two principles have shifted over time and diverged further locally, without yet finding a stable equilibrium which may in compliance with EU standards of human rights protection. Changes to the Entity Constitutions in 2002 (fostered by the Constitutional Court 2000 decision on the Constitutive Peoples) have extended to the sub-state level the same guarantees of group rights. Yet, this

³⁶⁸ Keil, *Multinational federalism in Bosnia and Herzegovina*, 2013, p. 123.

has been *de facto* gutted out in Republika Srpska,³⁶⁹ while furthering the disfunctionality of the Federation. Likewise, the case of Mostar, where municipal elections cannot be held since 2008 due to lack of consensus on the electoral system and constituencies, show that Bosnian political elites remain impervious to a culture of compromise and more ready to sacrifice basic rights of their citizens (including the right to free elections) for the sake of defensive-positionalism. A positive case, instead, is the one of the District of Brčko. Since its Final Arbitration Settlement in 1999, Brčko is directly administered by the state institutions, while its residents may freely choose to which entity citizenship to apply for the enjoyment of their social and political rights. In Brčko, group rights have been de-territorialised, and entities have become something more similar to Belgium's overlap of "linguistic communities" in Brussels. Seen under the lenses of experimentalist governance,³⁷⁰ Brčko provides a successful example of how to make Bosnia work, despite increased complexities in understanding the applicable legislation in the area.³⁷¹ Yet, the Brčko model is a case that is most likely to remain an exception than to become the new norm, since its universalisation would require a deep rethinking of Bosnia's current institutional structure. In general terms, the few examples cited allow to understand how in the last decade, rather than moving towards convergence and functionality, Bosnia has witnessed further internal divergence and diversification of local experiences.

³⁶⁹ The rules of procedures of the RS Constitutional Court, openly contradicting the same RS Constitution, hollow up the possibility for any minority Vital Interest Veto in the Entity to pass. See Stefan Graziadei, *Verfassungsblog*, 2016

³⁷⁰ Sabel, Charles F., and Jonathan Zeitlin. 2008. "Learning from Difference: The New Architecture of Experimentalist Governance in the EU." *European Law Journal* 14 (3):271–327.

Tulmets, Elsa. 2010. "Experimentalist Governance in EU External Relations: Enlargement and the European Neighbourhood Policy." In *Experimentalist Governance in the European Union: Towards a New Architecture*, by Charles F. Sabel and Jonathan Zeitlin, 297–324. Oxford: Oxford University Press.

³⁷¹ Matthew Parish, *A Free City in the Balkans: Reconstructing a Divided Society in Bosnia*, London: IB Tauris, 2009.

Overall, the Dayton order is most often assessed as a success in peace-building, having been able to prevent the relapse of Bosnia into conflict, while a failure in state-building and democratisation, having been unable to create or foster the conditions to overcome the very same grievances that had led to conflict, and having rather reinforced and perennialised the very ethnopolitical system created by the conflict – in the words of Florian Bieber, a “failed success”.³⁷² At the same time, Dayton has put in motion a cycle of policy learning among international state-builders in the late 1990s, whose consequences may be noted already in the different policy mixes applied in the cases of Macedonia and Kosovo.³⁷³ As noted also by Stojanovic, measures of recognition of group rights and group autonomy remain pivotal in accommodating diversity in divided societies; yet, unlike what had been the case in Bosnia, these should be informal, flexible and temporary, to allow the political system to evolve and reform.³⁷⁴

2. The European Union in Bosnia Herzegovina: an uneasy transition

The previous section introduced Bosnia and Herzegovina as a case study; this section looks at the early interactions between the European Union and Bosnia and Herzegovina since the 1990s, highlighting in particular how the EU struggled to adapt its approach to the specific Bosnian post-conflict context and to get to the helm of the international presence in the country in the late 2000s. The standard tools of EU foreign policy, based on capacity-building, conditionality and socialisation, led the EU twice to an impasse due to cycles of

³⁷² Florian Bieber, “Conclusions”, in Keil and Perry, 2015.

³⁷³ See on this Soeren Keil in Keil and Perry, 2015.

³⁷⁴ See Nenad Stojanovic, *Dialogue sur les quotas*, 2014.

mismanaged conditionality; first in the case of the police reform process (2005-2008), as a result of the lack of internal legitimacy of EU conditions, and second in the case of the *Sejdic-Finci* constitutional reform process (2008-2014), due to the lack of credibility and proportionality of EU rewards. The shift towards a streamlined EU presence (with the fusion between the EU Special Representative and Head of Delegation in 2011) and the rescheduling of conditionality with the “new approach” to Bosnia and Herzegovina following the British-German initiative of late 2014 led to a rebalanced conditionality and a different standing of the EU in the country, which enabled the re-opening of the EU path and the achievement of relative successes in the 2014-2016 period. This renewed approach also highlights the different aim of the EU in Bosnia and Herzegovina and the rise of a strategy of member state building as stateness-aware enlargement or “limited state-building”: aimed at building the functions for a future member state, not the state per se; limited in scope by the EU *acquis*; limited in method by the need to act through domestic democratic procedures; and limited in level by the need to engage with sub-state authorities too.

2.1 Venus in the land of Mars? In the shadow of the High Representative

As noted in the previous section, the EU did not take up specific roles in post-war Bosnia and Herzegovina, as opposed to the roster of other international organisations, from the OSCE to NATO, IMF, EBRD, UNHCR and the Council of Europe, which were tasked with overseeing the implementation of specific military and civilian aspects of the Dayton Peace Agreements (see Table 3.1 Above).

Smaller scale engagement by the EU in the conflict and post-conflict period included, first, the European Community Monitoring Mission (ECMM, since 2005 EUMM), which from 1991 to 2007 deployed 75 observers throughout former Yugoslavia. Second, it included

the Arbitration Commission of the Conference on Yugoslavia (commonly known as the Badinter Committee), set up by the EEC Council of Ministers on 27 August 1991 to provide legal advice to the International Conference on former Yugoslavia (ICFY), which between 1991 and 1993 issued fifteen opinions on international legal issues stemming from the process of the break-up of Yugoslavia, including on advising EU member states regarding the conditions under which to recognise post-Yugoslav independent countries. And, third, it included the European Union Administration of Mostar (EUAM), which from July 1994 to January 1997 strived to ensure the post-war reconstruction and reunification of the Herzegovinian capital, through which ran one of the major frontlines during the Croat-Bosniak conflict. Headed by the former mayor of Hamburg Hans Koschnick, EUAM focused on rebuilding physical infrastructure and setting the basis for the future joint administration of the city. In early 1996 Koschnick proposed a large central administrative zone, as a step towards a reunified multi-ethnic Mostar; his car was then attacked by a mob, and Koschnick resigned after the EU Council decided to appease the Croat leadership which opposed reunification and instigated the attack, instead of backing his plans.³⁷⁵ Mostar remains up to today a divided city without a unified administration, and thus has been unable to hold local elections since 2008. Otherwise, the EU took a backseat in the post-war reconstruction of Bosnia and Herzegovina. Diplomatically the EU remained involved in the Peace Implementation Council (PIC) and a non-written rule stated that the international High Representative had to be a European; operationally, the European Commission managed a growing amount of funds in reconstruction aid for Bosnia and Herzegovina and all of former Yugoslavia.³⁷⁶

³⁷⁵ In 30 months, EUAM spent around 150 million EUR in reconstruction aid, i.e. 2,500 EUR per each Mostar resident. See Christopher Bennett, *Bosnia's Paralysed Peace*, London: Hurst and co, 2016, p. 94-95

³⁷⁶ See the chapter on Financial Assistance. Under PHARE, OBNOVA, ECHO and other programmes, a total of 4.856 M EUR were disbursed in former Yugoslavia between 1990 and 2000.

Despite the lack of large-scale operational engagement on the ground, the EU already had clear ideas about the future framework of relations with Bosnia and Herzegovina. Already in December 1995, when the Dayton Peace Agreement had just been signed, the European Commission had set as an objective the creation of “a direct and dynamic contractual relationship between Bosnia and the European Union within the framework of a regional approach”.³⁷⁷ The latter came to light between 1997 and 2000 with the adoption of Council conclusions on conditionality,³⁷⁸ and the establishment of the Stabilisation and Association Process (SAP).³⁷⁹ A tailored “EU Road Map” for Bosnia and Herzegovina was annexed to the May 2000 Brussels PIC conclusions,³⁸⁰ including the 18 essential conditions, covering political, economic and democratic issues, for the Commission to start working on a Feasibility Study for the opening of negotiations on a Stabilisation and Association Agreement (SAA), a contractual agreement with the EU on the road towards membership, equivalent to Central and Eastern Europe’s Europe Agreements. Fifteen out of the 18 conditions were complied with by September 2002, though mainly by OHR imposition, including the adoption of an electoral law.³⁸¹

³⁷⁷ Peace Implementation Council, *Conclusions of the Peace Implementation Conference held at Lancaster House*, London, 12 August 1995.

³⁷⁸ Council of the European Union, *Council Conclusions on the Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region (Annex II)*, Luxembourg, 29/30 April 1997, 7738/97. This followed the Commission’s strategy paper on “The application of conditionality to the development of relations between the EU and the countries concerned by the regional approach”, which was welcomed by the General Affairs Council on 24 February 1997. See also European Commission, *Regional Approach*, MEMO/98/76, Brussels, 28 October 1998.

³⁷⁹ European Commission, *Communication from the Commission to the Council and the European Parliament on the Stabilisation and Association process for countries of South-Eastern Europe*, Brussels, 26 May 1999, COM(1999)235 final.

³⁸⁰ European Commission, *EU Road Map - Steps to be taken by Bosnia and Herzegovina to Prepare for a Launch of a Feasibility Study*, 9 March 2000.

³⁸¹ Bennett, *Bosnia’s Paralysed Peace*, p. 155.

A reinforced engagement and the start of the road “from Dayton to Brussels” started in 2003, when the Thessaloniki Declaration made clear that all Western Balkan countries were to be considered as potential candidates for EU accession.³⁸² In November of the same year the European Commission presented its Feasibility Study on opening negotiations on an SAA, including sixteen areas of priority reform. Among the conditions necessary for Bosnia and Herzegovina to negotiate an SAA and formally join the SAP, the Commission listed “further reform and enhance state-level enforcement capacity” to fight organised crime, as well as “quickly making SIPA [the state intelligence agency] fully operational”.³⁸³ Based on the Thessaloniki Agenda, the EU also adopted a European Partnership document for Bosnia and Herzegovina, identifying benchmarks for progress and providing a framework for financial assistance.³⁸⁴

The transformative incentive provided by the “pull of Brussels” seemed to provide some early results, as laws were approved in early 2004 on state-level law-enforcement capabilities, as well as on defence, education and tax administration, without the usual obstruction shown by Bosnian Serb political representatives. Likewise, the High Representative Petritsch started to present Bosnia and Herzegovina’s path – and his own actions – as an “entry strategy” into the European Union rather than an “exit strategy” for the international community. His successor, Paddy Ashdown, was also formally double-hatted as international High Representative as well as EU Special Representative to Bosnia and Herzegovina (EUSR). He

³⁸² See paragraph 40 of the Thessaloniki European Council Presidency Conclusions, 19-20 June 2003, and the Declaration of the Thessaloniki EU-Western Balkans Summit, 21 June 2003, C/03/163.

³⁸³ European Commission, *Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union*, Brussels, 18 November 2003, COM(2003)692 final.

European Commission, *Bosnia and Herzegovina: Commission approves Feasibility Study*, press release IP/03/1563, Brussels, 18 November 2003.

³⁸⁴ Council of the European Union, *Council Decision on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina*, 14 June 2004, 2004/515/EC.

also oversaw a renewed commitment of the European Union to take over responsibilities in Bosnia and Herzegovina, with the deployment in January 2003 of the EU Police Mission (EUPM), which succeeded the UN IPTF, and in December 2004 of the EUFOR Althea military mission, which took over from NATO's SFOR the executive mandate under Chapter VII of the UN Charter to enable a "safe and secure environment" (SASE) in Bosnia and Herzegovina.³⁸⁵

Paddy Ashdown made liberal use of the OHR Bonn Powers to impose legislation, in order to "build Bosnia's central government and undermine the country's sub-sovereign political units: only in this way ... Bosnia could become *a normal European state* and put its violent war behind it".³⁸⁶ To achieve this centralisation agenda, Ashdown "became a one-man legislative machine, repeatedly using the Bonn Powers to enact legislation, creating new institutions, and implicit threats to remove officials to push the Entities to agree to transfer new powers to central government".³⁸⁷ Ashdown soon topped the statistics on the use of the Bonn Powers in his "centralisation-no-matter-what policy",³⁸⁸ with 447 decisions in the June 2002 – January 2006 period. His main objectives were the reorganisation of the judicial system, the creation of a single army, and the reform of the tax system with the introduction of a state-wide VAT, and the clean-up of the public administration and government from corrupt and war-related officials and politicians.³⁸⁹

³⁸⁵ United National Security Council Resolution on the situation in Bosnia and Herzegovina, S/RES/1575, 22 Novemebr 2004. Quoted in Bennett, p. 153-154.

³⁸⁶ Parish, M. T. 2007. "The Demise of the Dayton Protectorate". *Journal of Intervention and Statebuilding*, 1(Special Supplement), p. 11-23, p. 16.

³⁸⁷ Ibid., p. 16-17.

³⁸⁸ Venneri, Giulio. "'Conquered' vs 'Octroyée' Ownership: Police Reform, Conditionality and the EU's Member-Statebuilding in Bosnia-Herzegovina," *Review of European Studies*, 5 (3), 2013, p. 32.

³⁸⁹ As noted by a diplomatic representative of an EU member state in Bosnia and Herzegovina, "Ashdown's idea was 'I've put together a country, now just make use of it'. That proved unfeasible and unsustainable. He was very interventionist, and ended up being very divisive." Personal interview, Sarajevo, December 2014.

Yet, Ashdown felt that the legislation necessary to move the country towards European integration (as well as towards NATO partnership) could not be imposed but had to be autonomously adopted by the BiH institutions to demonstrate the credibility of the country's EU accession bid. The OHR stood behind, by supporting the legislative drafting process and conducting intensive lobbying efforts to ensure their adoption.³⁹⁰ Ashdown's leadership proved crucial in achieving between 2003 and 2005 the reform of the defence and intelligence sectors, which entailed transfers of competences from the entities to the state, and saw the three ethnic-based militias be joined into a single, multiethnic army under the control of a Ministry of Defence, coupled with a reformed and professional state-level intelligence service. This allowed Bosnia and Herzegovina to be invited to join NATO's Partnership for Peace programme in 2006 together with Serbia. At the same time, a countrywide VAT was introduced in January 2006, fulfilling long-standing recommendations from the European Commission and the IMF.³⁹¹

2.2 The police reform saga: a lack of legitimacy of EU conditionality

What proved a nut too hard to crack, instead, was the reform of the police, which remained embroiled in a cycle of mismanaged conditionality.³⁹² Its relative failure showed that early enthusiasm for the new "era of Brussels" was premature. As noted by Bennett, "police reform did not need to become the obstacle that it did, nor the focus of so much time and effort. That it did was the consequence of a decision by Lord Ashdown to push a specific model of police restructuring".³⁹³

³⁹⁰ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 156.

³⁹¹ Ibid., p. 156-160.

³⁹² Venneri, "'Conquered' vs 'Octroyée' Ownership", p. 29.

³⁹³ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 161.

Between 2003 and 2008 the EU adopted an OHR-mandated target – the centralisation of the police system – as part of EU accession (SAP) conditionality, despite the lack of European standards and the extreme political sensitivity of the issue. When this proved impossible to achieve, the new HR/EUSR tried to refocus on a different topic (constitutional reform) but was not supported by the EU Council, thus having to resign. His successor pushed ahead on the issue to retain credibility, but had to content himself with some cosmetic reform in 2008, following which Bosnia and Herzegovina was allowed by the EU to sign the Stabilisation and Association Agreement, which had remained on hold. The conditionality applied by the EU in the case of police reform defied Schimmelfennig’s and Sedelmeier’s criteria (it was not seen as legitimate and it did not resonate with local norms)³⁹⁴ and had to be brought forward just to defend overall EU credibility – but in the end the EU had to accept cosmetic changes as a face-saving exit strategy from the impasse.

The need for police reform was first noted in November 2003, in the feasibility study on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the EU, in which the Commission noted among other issues that Bosnia and Herzegovina also needed “a structural police reform with a view to rationalising police service” and included this in the preconditions for Bosnia and Herzegovina to be able to negotiate an SAA under the priority heading on “Tackling crime, especially organised crime”.³⁹⁵ As for other reform areas, the Commission approached the matter from a purely technical point of view, focusing on costs and performance ratios, while criticising the

³⁹⁴ Frank Schimmelfennig, “Europeanization beyond Europe”, *Living Reviews in European Governance*, 4(3) 2009.

Ulrich Sedelmeier, “Europeanisation in new member and candidate states”, *Living Reviews in European Governance*, 6 (1) 2011.

³⁹⁵ European Commission, *Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union* (“Feasibility Study”), COM(2003)692 final, Brussels, 18 November 2003, p. 41.

fragmentation and conflicts of competence among police forces. The feasibility study noted that “police reform is ongoing” yet “to fight crime, further reform and enhanced State-level enforcement capacity are needed” and highlighted that “BiH must now consider further restructuring and rationalising police services in order to enhance efficiency and improve crime fighting capabilities”.³⁹⁶ An expert study requested by the Commission in June 2004 noted also that the police was over-staffed, under-equipped, and politicised.³⁹⁷ Yet, no prescriptive model was put forward, and the study remarked that the presence of multiple police authorities did not present a problem *per se* – rather, their coordination needed to be improved.³⁹⁸

In the first half of 2004, the Commission and the OHR pushed for the adoption of six new laws on security matters, including the Law on SIPA, the state intelligence agency. Despite their adoption, at its June 2004 Istanbul Summit, NATO rejected Bosnia and Herzegovina’s application for the Partnership for Peace programme due to insufficient cooperation with the ICTY (not a single indictee had been delivered by Republika Srpska). The Summit communiqué noted that “systemic changes [are] necessary to develop effective security and law enforcement structures”.³⁹⁹

It was then that HR/EUSR Ashdown decided that police reform was the missing piece of the puzzle. Following the example of the successful Defence Reform Commission, Ashdown set up a Police Restructuring Commission (PRC), chaired by former Belgian prime minister

³⁹⁶ “The complexity of the existing multiple police forces increases costs and complicates coordination and effectiveness... Costs are high because of duplication in areas such as training and equipment. Financial and technical constraints limit crime fighting abilities.” Ibid., p. 26.

³⁹⁷ Bennett, *Bosnia’s Paralysed Peace*, 2016, p. 161.

³⁹⁸ Dominik Tolksdorf, “Police reform and conditionality”, in Tobias Flessenkeper and Daniel Helly (eds.), *Ten years after: Lessons from the EUPM in Bosnia and Herzegovina, 2002-2012*, Joint Report 2013, Paris: EUISS.

³⁹⁹ NATO, *Istanbul Summit Communiqué*, Press Release (2004)096, 28 June 2004, §34,.

Wilfred Martens, with the task to design “a single structure of policing for Bosnia and Herzegovina under the overall political oversight of a ministry or ministries in the Council of Ministers”.⁴⁰⁰ Ashdown also penned the three “European” principles which should have underpinned police reform: (a) state-level authority on all legislative and budgetary competences on police matters; (b) functional local police areas based on technical criteria and with local-level-only operational command; and (c) no political interference in police operations.⁴⁰¹

Ashdown went for a top-down approach, providing a prescriptive outcome of the police reform process that entailed constitutional-level changes. To enact his three principles, in fact, entities should have agreed to a transfer of competences to the state level on police matters. This raised the immediate objections of the Bosnian Serb politicians, who saw the move as an attempt at pushing for centralisation of the state – something that Ashdown did not hide, as he regarded police reform as important for the state-building process in Bosnia and Herzegovina.

Since Ashdown could not use the Bonn Powers to impose his police reform model against the letter of Dayton, to maximise his leverage upon domestic actors he made use of his “second hat” and persuaded the European Commission to include his police reform principles within EU conditionality.⁴⁰² His three principles were explicitly endorsed by the Commission, in a letter from Commissioner Patten to the prime ministers of the state and entity governments in BiH, effectively including them within EU conditionality towards

⁴⁰⁰ Office of the High Representative (OHR), *Decision Establishing the Police Restructuring Commission*, No. 287/04, 07 May 2004.

⁴⁰¹ Tolksdorf, *Police Reform and Conditionality*, 2013, p. 21.

⁴⁰² The four conditions included: adoption of the Public Broadcasting Law; police reform; arrest of war criminals; and cooperation with the ICTY. In his memoirs (*Swords and ploughshares: Bringing peace to the 21st century*, London: Orion, 2007), Paddy Ashdown remembers how he asked outgoing European Commissioner Chris Patten to “weigh in” on the matter, and how the Commissioner obliged. RS President Dodik reportedly keeps Ashdown’s book on his desk in Banja Luka, open at that page, as vindication of international interference in Bosnian affairs and non-respect of Dayton by the OHR.

Bosnia and Herzegovina. Ashdown's principles were not questioned by the new commissioner Olli Rehn, and they remained formally part of EU policy until late 2007, despite not being based upon the EU *acquis* (which includes no prescriptions on policing models)⁴⁰³ nor having ever been discussed or endorsed by the EU Council.⁴⁰⁴ Ashdown thus created a political conditionality out of thin air and managed to channel it via the EU to exert pressure upon domestic authorities.

The level of ambition of such a reform was very high. The HR/EUSR expected entities and cantons to renounce their law-enforcement competences and transfer them to state-level institutions for joint management. Moreover, the pre-designed principles raised high – possibly unnecessarily high – the bar for Bosnia and Herzegovina to sign the EU Stabilisation and Association Agreement, despite there not being any such specific request in the Commission's Feasibility Study.⁴⁰⁵

Despite early optimism that a deal on police reconfiguration would be achievable within a few months (Bosnian Serb representatives seemed to have even accepted the plan to draw new “police regions” that crossed the inter-entity boundary line),⁴⁰⁶ negotiations in the Police Restructuring Commission did not advance much, as the Bosnian Serb side soon understood the high-politics agenda of centralisation which lay beneath Ashdown's presumed technical efforts at ushering in police reform. The High Representative had in fact underestimated the sensitivity of the issue for domestic politicians. After the defence reform, the police was the only public force still under direct control of RS politicians, who were determined not to lose

⁴⁰³ Some PIC ambassadors had called into question Ashdown's centralised police model already in 2004, given that other EU member states (Germany, Austria, Spain) have functional and effective decentralised police structures.

⁴⁰⁴ Tolksdorf, *Police Reform and Conditionality*, 2013, p. 21-22.

⁴⁰⁵ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 162.

⁴⁰⁶ Moore, P. 2005. “Bosnia-Herzegovina: Finally On The Path To The EU?”, *RFE/RL*, October 6.

it. Moreover, Ashdown's centralisation agenda was easy to present under an ethno-political light as a measure favouring the Bosniaks against the Bosnian Serbs.

The Police Reform Commission report (the "Martens Proposal"), as submitted to the OHR and the BiH Council of Ministers,⁴⁰⁷ included two draft laws that foresaw a general oversight by the state-level Ministry of Security over three bodies of police: intelligence (SIPA), border control (SBS) and local police bodies. Of the latter, 10 police regions would have crossed the inter-entity boundary line. The proposal was rejected by the representatives of Republika Srpska, and, despite public campaigns, pressure, and political negotiations, no agreement that respected Ashdown's three principles could be brokered before the 10th anniversary of Dayton.⁴⁰⁸

The Commission kept its emphasis on efficiency and operational performance of police in Bosnia and Herzegovina, even after the publication of the Martens report. In a letter to the BiH Prime Minister Adnan Terzić, the EU Commissioner for External Relations Chris Patten justified the EU's involvement on police reform issues in BiH with the fact that "if BiH is not able to tackle crime effectively, this has a bearing on crime elsewhere in Europe, including within the EU".⁴⁰⁹ As noted by Venneri, police restructuring was also kept separate from the ongoing judicial reform, which would later be presented as a major success story of the HR/EUSR. Any link between the two was absent in the 2004 mandate of the Police Restructuring Commission, and in the 283-page final report of the same body the issue of effective cooperation between police bodies and prosecutors is only briefly mentioned

⁴⁰⁷ Office of the High Representative (OHR), *Final Report on the Work of the Police Restructuring Commission of Bosnia and Herzegovina*, Sarajevo, 31 December 2004.

⁴⁰⁸ Bennett, *Bosnia's Paralysed Peace*, p. 163.

⁴⁰⁹ Letter from EU Commissioner for External Relations Chris Patten to BiH Prime Minister Adnan Terzić, 2004, quoted in Venneri, 'Conquered' vs. 'Octroyée' Ownership, 2013, p. 34.

once.⁴¹⁰ This was in contradiction with the earlier Commission feasibility study, which had clearly emphasised a technical focus on law enforcement capacities in the country, including the fact that “police forces in one Entity have no right of ‘hot pursuit’ into another; there is no central data base; different Entity forces use different information systems”.⁴¹¹ In fact, as summarised by Venneri, “in spite of the rhetoric on efficiency, institutional centralization was the primary objective” pursued by Ashdown’s HR/EUSR and supported by some EU member states, although in itself police centralisation without judicial restructuring in parallel could have created even more complicated and less efficient police structures.⁴¹²

Despite stark public messages (“choosing Belarus over Brussels”⁴¹³), the failure of the police reform talks did not bring any concrete consequence. The upcoming end of Ashdown’s mandate, and of the 10th anniversary of Dayton, was putting some pressure on the EU to present some deliverables from its protracted efforts in Bosnia and Herzegovina. Upon the initiative of the Bosnian Serb representatives (both RS President Dragan Čavić and opposition leader Milorad Dodik), in October 2005 the state- and entity-level Parliaments in Bosnia and Herzegovina adopted a resolution envisaging a state-level Directorate for Implementation of Police Restructuring (DIPR) which “shall be assigned to make a proposal of a plan for implementation of police structures reform in BiH per phases, *including proposals of police*

⁴¹⁰ Under the section on “Legal provisions for the single structure of policing”. According to the proposed Law on the Police Service of Bosnia and Herzegovina (Art. 63, on “Duties and responsibilities of the local police commissioner”), local police commissioner must, *inter alia*, “ensure proper implementation of the guidelines and directives of the Prosecutor concerning the activities of police officials in relation to criminal proceedings within his/her police area”. OHR, *Final Report of the Police Restructuring Commission*, 2004, p. 139.

⁴¹¹ European Commission, *Feasibility Study*, COM(2003)692 final, p. 35

⁴¹² This was recognised also by other Sarajevo-based international organisations, such as the OSCE, as quoted by Venneri, ‘Conquered’ vs. ‘Octroyée’ Ownership, 2013, p. 36

⁴¹³ Bennett, *Bosnia’s Paralysed Peace*, 2016 p. 163.

regions”.⁴¹⁴ The resolution included an operational agreement with a detailed working schedule, but also mentioned that this had to be conducted in compliance with both EU principles *and* the Dayton Constitution (despite the two references being contradictory).⁴¹⁵ Despite no actual reforms having been adopted and no detailed accord, the Commission decided this was sufficient to open the negotiations for a Stabilisation and Association Agreement with Bosnia and Herzegovina, which started on 21 November, on the 10th anniversary of the Dayton agreements.

Things changed from January 2006, with the new HR/EUSR, Christian Schwarz-Schilling, being requested to support the transition towards local ownership of the reforms, and with a new mandate for the EU Police Mission (EUPM), including assistance to the police reform process. Negotiations continued in the framework of the Directorate, but once elected RS entity Prime Minister, in February 2006, Milorad Dodik reneged on the October 2005 agreement. The EUPM tried to depoliticise the issue by working on the harmonisation of police procedure among entities, and on the professionalization of the police staff. Yet, the pre-electoral climate ahead of the October general elections (with Bosniak politician Haris Silajdžić trying to exploit the reform process to question the existence of Republika Srpska) and regional developments (Montenegro’s independence, the discussions on the future status of Kosovo, and the expectations for the ICJ’s February 2007 ruling on the Srebrenica genocide case) did not present conditions conducive to the fostering of a compromise. RS representatives also boycotted the works of the Directorate, after asking without success for a reform of its decision-making procedures to secure an ethnic veto for themselves.⁴¹⁶ Despite explanations that the Directorate was to be a technical body and not a political one, and that

⁴¹⁴ OHR. *The EU Accession Process*. 2005. http://www.ohr.int/dwnld/?content_id=34264, emphasis added

⁴¹⁵ Bennett, *Bosnia’s Paralysed Peace*, 2016 p. 163.

⁴¹⁶ The Steering Board of the Directorate was supposed to decide by consensus, but could resort to majority voting if this was to prove not possible.

hence no ethnic veto nor risk of “out-voting” could be foreseen, they decided to attend the works only as observers.⁴¹⁷

The Directorate concluded its work in December 2006 by adopting a final report that did not include the restructuring of the police districts. Yet, RS representatives did not endorse it and opposed any move that would question the status or authority of entity police forces.⁴¹⁸ EU ambassadors in Sarajevo also expressed reserves about the good judgement behind Ashdown’s police reform principles, which were still being upheld by the U.S. (and formally by the EU).⁴¹⁹

Confronted with the risk of a collapse of the police reform, the German HR/EUSR Christian Schwartz-Schilling tried to shift the focus towards renewed talks on constitutional reforms, following the March 2005 “Opinion on the Constitutional Situation in Bosnia and Herzegovina and the power of the High Representative” by the Council of Europe’s Venice Commission. Schwartz-Schilling was more preoccupied with establishing the conditions for the upcoming closure of the OHR, and ensuring the local ownership of reforms, also by quietly scaling down the use of the Bonn Powers. Yet, he did not find support from the EU headquarters, which deemed the police reform to have to remain among the EU priorities, and he submitted his resignation in July 2007.

The new HR/EUSR, the Slovak diplomat Miroslav Lajčák, tried to push for an agreement in the summer of 2007, but the risk of backlash due to regional (Kosovo and Serbia) as well as domestic development shaped diplomats’ attempts at finding a way out of the police reform conundrum.⁴²⁰ In fact, in order to both strengthen Bosnia’s state institutions and

⁴¹⁷ Bennett, *Bosnia’s Paralysed Peace*, 2016, p. 164.

⁴¹⁸ Ibid.

⁴¹⁹ Tolksdorf, *Police Reform and Conditionality*, 2013, p. 24.

⁴²⁰ Ibid.

reassert the powers of the OHR, Lajčák had decided to address the issue of decision-making rules in the BiH Council of Ministers, imposing amendments that changed the quorum so that decisions could be taken by a majority of present and voting ministers – thus preventing any party from blocking state-institutions by simple absence – and reduced the necessary ethnic quota from two to one representative from each constituent people. Reaction from the Bosnian Serb side was unexpectedly strong, going as far as the resignation of the Chairman of the BiH Council of Ministers, Nikola Špirić. The crisis upended the political climate in the country for a month.⁴²¹ Regional stability considerations, related to Kosovo/Serbia relations in the wake of the presentation of the Ahtisaari plan, also cautioned against a forceful response from the OHR. Lajčák, who later remarked how he felt let down,⁴²² had to steer a narrow path between not backing down and not overreacting.

At the end, an unexpected breakthrough on police reform was able to relax the tensions: upon the initiative of Milorad Dodik and Haris Silajdžić on 28 September 2007 all governing parties drafted a joint declaration in Mostar, reiterating their commitment to the three principles, while leaving again the details for future negotiations in the framework of eventual constitutional reforms – hence once more kicking the can down the road.⁴²³ The exasperation of the HR/EUSR on the linkage between police reform and the SAA is also the reason why the “Mostar declaration” was received sceptically by the HR/EUSR as well as by some PIC Steering Board member countries. Despite having an initially positive impact on the drafting of a protocol on police reform, such outcome remained below the originally high expectations

⁴²¹ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 188. Also see Philippe Leroux-Martin, *Diplomatic Counterinsurgency: Lessons from Bosnia and Herzegovina*, New York: Cambridge University Press, 2014.

⁴²² Lajčák remarked the issue in his last speech before resigning to take up the post of Slovak Foreign Minister.

⁴²³ According to Koneska, this effectively “tied any further progress on police reform to the success of constitutional reform without setting any timeframe for it.” Koneska, Cvete. *After Ethnic Conflict: Policy-making in Post-conflict Bosnia and Herzegovina and Macedonia*. Abingdon: Routledge, 2016, p. 132.

on centralisation. The new HR/EUSR Miroslav Lajčák extended a relatively positive welcome to the protocol,⁴²⁴ only to be supplemented a few hours later by a much less explicit press release, highlighting the Commission's monopoly of interpretation over the technical aspects of police reform, while hiding its high politics features.⁴²⁵ The importance of this document was anyway scaled down only two days after, when it became clear that the BiH Parliament could not provide a quick follow-up to it.

An "Action plan to implement the Mostar agreement" was drafted and endorsed in Sarajevo on 22 November, identifying six new state-level institutions to be set up,⁴²⁶ despite EUPM noting that it could have led to "a useless superstructure to the existing police structures" and advising instead "to create a state structure able to influence the status quo and move the police restructuring forward".⁴²⁷ At the same time, the OHR accepted a compromise on the state parliament's rule of procedure, upon Dodik's initiative, thus stepping back from its previous threats of direct imposition.⁴²⁸

EU Commissioners Rehn and Solana also endorsed the compromise solution on police reform, which did not dent entities' competences on policing, and decided to postpone the implementation of Ashdown's principles. On 4 December 2007, Commissioner Rehn landed in Sarajevo to initial the text of the negotiated SAA, leaving the signature for the moment in which the laws on the six new institutions would be adopted.

⁴²⁴ OHR. *Lajčák and Rehn: "No Progress Towards EU Without Police Reform"*, 10 August 2007.

⁴²⁵ "OHR and EUSR have received the Dodik/Silajdžić Protocol which is now under review by the relevant EU institutions. We urge everyone to refrain from interpreting the document as only the European Commission can give an opinion on whether this agreement is in line with the three principles for police reform." Office of the High Representative (OHR) / EU Special Representative in Bosnia and Herzegovina (EUSR), *Statement: OHR/EUSR comment on Silajdzic-Dodik Protocol*, 28 September 2007.

⁴²⁶ Agency for Forensic Examinations; Institute for Education and Professional Upgrading; Agency for Police Support; Independent Board; Citizens' Complaint Board; Police Officials Complaint Board.

⁴²⁷ Quoted in Bennett, *Bosnia's Paralysed Peace*, 2016, p. 190.

⁴²⁸ *Ibid.*, p. 189.

The BiH Parliament adopted two police laws on 16 April 2008, and on 16 June 2008 the BiH government could thus sign the Stabilization and Association Agreement with the EU, which had been on hold for one year. The implementation of police reform trailed on for a few more years, with political actors obstructing the development of the state-level coordination bodies.⁴²⁹

2.3. The end of police reform: Unworkable conditions and mismanaged conditionality

Exactly four years after HR/EUSR Ashdown had started the police reform process, the EU signed its SAA with Bosnia and Herzegovina. In the meantime, ambitious conditions, well beyond the EU acquis, had been set and reneged on. Ashdown's three principles were set aside for a phase of constitutional reforms that never came to be in the form it was envisaged. Moreover, the other preconditions for signing the SAA (full ICTY cooperation, PBS reform and public administration reform) were watered down in the process. Moreover, the final result of the police reform process was deemed by many as a step back in terms of effective policing, emphasising administrative tasks rather than active policing and not providing avenues for effecting cooperation between law enforcement agencies responsible for different layers of governance.⁴³⁰

The most widespread interpretation of the police reform saga in the literature is that it showed the limits of EU political conditionality and that it weakened the EU's leverage by

⁴²⁹ Tolksdorf, *Police Reform and Conditionality*, 2013, p. 24.

⁴³⁰ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 190.

showing that Brussels was ready to accept fake compliance for the sake of moving on.⁴³¹ Several factors contributed to this first cycle of mismanaged conditionality.

The first and foremost can be identified in the lack of legitimacy of the EU conditions. Ashdown's three principles for police reform, despite being possibly an example of best practices on the issue, were not based on the EU *acquis*.⁴³² They were thus devoid of the intrinsic power of EU norms in terms of rules that Bosnia and Herzegovina would have to align with, sooner or later, in its effort to accede to the European Union. Instead, they appeared to Bosnian political actors as the whim of some international administrators, willing to play power games with recalcitrant local elites.⁴³³ The lightly taken decision to resort to purely political conditionality to push for constitutional-level changes diminished the EU's leverage as a technocratic actor and exposed it to criticism by domestic elites based on the perception of a politicised approach masking a hidden agenda.

The second factor was the lack of clarity from the EU side. The international community overall, in Bosnia and Herzegovina, did not manage to speak with a single voice on the issue,⁴³⁴ and external factors linked to regional stability concerns interfered more than once in the process, leaving the HR/EUSR without the international backing he expected. Moreover, it also strongly highlighted the paradoxes and conflicts of interests created by double-hatting,⁴³⁵ with one single person tasked with two mandates and responsible both for upholding the civilian implementation of Dayton via a logic of external imposition (OHR)

⁴³¹ See also Daniel Lindvall, "The Limits of the European Vision in Bosnia and Herzegovina. An Analysis of the Police Reform Negotiations", Södertörn Doctoral Dissertations, *Stockholm Studies in Sociology* 40, 2009.

⁴³² This was recognised also by members of the Bosnian public administration. Interview with Osman Topcagic, former head of the Directorate for European Integration, Sarajevo, December 2014.

⁴³³ According to a Commission official, police reform was an ideological issue, premised on the will of the OHR to dismantle the sovereignty of the entities on the police forces by referring to supposed European standards. Interview, Brussels, February 2015.

⁴³⁴ Troncota, *Bosnia and Herzegovina: A critical case of Europeanization*, 2014, p. 238.

⁴³⁵ *Ibid.*, p. 239.

and for fostering the EU integration of the country via a logic of local ownership (EUSR). Double-hatting had allowed the OHR to instrumentalise EU processes for its own aims: institutional aims, in terms of upholding Dayton, forward-looking aims, in terms of Ashdown's not-so-hidden centralisation agenda, and organisational aims, in terms of ensuring the prestige and survival of the office. This was compounded by the distracted supervision from the EU side (busy in that period with adapting to the eastern enlargement and its consequences) of the Bosnian developments and the actions of its own EUSR office, in a typical principal-agent dilemma. This later led to the restructuring of the EU presence in Bosnia and Herzegovina, with the decoupling of the OHR from the EUSR and the new double-hatting of the latter with the Head of the EU Delegation as of 2011 to create a single voice for the European Union in Bosnia and Herzegovina.

One more factor was the domestication of international actors by the local elites after ten years of executive mandate and direct intervention in domestic politics. As noted by Bennett, "by becoming the driver of reforms, the international community became an actor rather than an observer".⁴³⁶ The international factor became, over time, just one more variable in the cost/benefit calculations of local actors, which could reasonably predict the international actors' reactions, and knew their weak spots. In particular, the episode taught domestic actors that they could "conquer" ownership by resisting conditionality until international actors would be worn out of it,⁴³⁷ domesticating it in a trench warfare strategy in which domestic actors would have a home advantage. Thanks to their longer time horizon (being entrenched enough in the political system not to fear repeated electoral cycles), local actors were able to exploit the temporal inconsistencies of international ones (who would typically remain in the country for four or five years), by obstructing processes long enough for them to get tired and

⁴³⁶ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 168.

⁴³⁷ Venneri, 'Conquered' vs 'Octoyée' Ownership, 2013, p. 29.

become hard-pressed to show some progress to their principals.⁴³⁸ In this way, local actors became able to effectively negotiate conditionality or even coercive imposition, in line with what is highlighted by the literature on “hybrid peace”.⁴³⁹ Moreover, the episode also highlights the organisational logic of European and international institutions to defend a “no mistake” policy and shirk accountability for policy failures⁴⁴⁰ by shifting it on local actors via discourse of local ownership and lack of political will.

Finally, it could be added that the European perspective was still too far away – the reward was not concrete enough – for the “pull of Brussels” to have any substantial effect. The negotiation and signature of the SAA did not have any tangible impact on the daily life of the Bosnian citizens – differently from processes such as the later Schengen visa liberalisation – and could thus be comfortably sat out by politicians whose legitimacy was rather in the cycle of patronage politics, providing voters with the access to the labour market and the social services via party loyalty and the grey economy.

For these reasons, the bar of conditionality in the police reform process was set too high and outside the perimeter of the EU *acquis*, establishing an objective that had probably always been out of reach since the beginning, and the EU had to backtrack while saving face within a few years.

⁴³⁸ As noted by Juncos, the restructuring of police districts was seen as the prelude to the EU’s entry in the field of debate on constitutional reform in BiH, which would soon gain prominence with the Sejdić-Finci saga. Ana E. Juncos, “Europeanization by Decree? The Case of Police Reform in Bosnia”, *Journal of Common Market Studies*, 49 (2), March 2011, p. 367–389.

⁴³⁹ On the concept of hybrid peace see Roberto Belloni, “Hybrid Peace Governance: Its Emergence and Significance”, *Global Governance: A Review of Multilateralism and International Organizations*, 18 (1), January-March 2012, pp. 21-38.

⁴⁴⁰ Venneri, ‘Conquered’ vs ‘Octoyée’ Ownership, 2013, p. 30.

3. Sysyphus in Sarajevo: the EU and the challenge of constitutional reforms

The second cycle of mismanaged conditionality in Bosnia and Herzegovina is related to the wider issue of constitutional reforms, and in particular the EU's involvement in it following the ruling by the Council of Europe's European Court of Human Rights (ECtHR) in the case of *Sejdić and Finci* in 2008.⁴⁴¹ From 2009 onwards, the EU included constitutional reform as a precondition for the entry into force of the Stabilisation and Association Agreement. Yet, agreement on a *Sejdić–Finci*-compliant reform proved elusive, and the degradation of socio-economic conditions and growing protest movements finally led the EU to postpone such a condition to a later stage in late 2014.

3.1 The Venice Commission Opinion and the genesis of the constitutional reform debate

Constitutional reforms started to be discussed following the accession of Bosnia and Herzegovina to the Council of Europe on 24 April 2002. Bosnia and Herzegovina thus committed to honour the obligations of membership stemming from Art. 3 of the Statute of the Council of Europe,⁴⁴² as well as specific commitments listed in the PACE Opinion 234 (2002) on Bosnia and Herzegovina's application for membership, including the need to

⁴⁴¹ European Court of Human Rights, Grand Chamber, *Case of Sejdić and Finci v. Bosnia and Herzegovina* (applications 27996/06 and 34836/06), *Judgment*, Strasbourg, 22 December 2009.

⁴⁴² “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”

strengthen state institutions in relation to the entities, and to align the text of the Constitution to the Constitutional Court's decision on the "constituent peoples" case (U-5/98).⁴⁴³

Upon a request of the same Parliamentary Assembly of the Council of Europe, in March 2005 the Venice Commission issued its advisory "Opinion on the Constitutional Situation in Bosnia and Herzegovina and the power of the High Representative". The assembly had tasked the expert body to assess whether the use of the High Representative's Bonn Powers respected the basic principles of the Council of Europe, as well as whether the Constitution of Bosnia and Herzegovina was in compliance with the European Convention on Human Rights and the European Charter on Local Self-Government. It had also asked it to generally review the rationality and functionality of the constitutional setup of the country. The report was not positive, in particular for what concerns the Bonn Powers, which, although beneficial in the wake of the war, do "not correspond to democratic principles when exercised without due process and the possibility of judicial control".⁴⁴⁴ In terms of institutional arrangements, the Venice Commission criticised the extraordinarily weak state level as incapable to "effectively ensure compliance with the commitments of the country with respect to the Council of Europe and the international community in general", as well as the overlap of competences between the Presidency and the Council of Ministers, the lack of specific limitations for the use of the national interest veto, the entity veto, and the House of Peoples as a legislature. Finally, the

⁴⁴³ Parliamentary Assembly of the Council of Europe (PACE), *Opinion 234 (2002) on Bosnia and Herzegovina's application for membership of the Council of Europe*, Strasbourg, 22 January 2002:

"4. The Assembly stresses, however, that the state institutions should be strengthened at the expense of the institutions at Entity level, if need be by a revision of the constitution.

15 ... a. to adopt and to implement, within one year after its accession, constitutional and legislative amendments necessary to comply with the decision of the Constitutional Court on the "constituent peoples of Bosnia and Herzegovina" of June-July 2000"

⁴⁴⁴ The Venice Commission noted that the continued existence of the Bonn Powers "becomes more questionable over time", calling for a "progressive phasing out of these powers and for the establishment of an advisory panel of independent lawyers for the decisions directly affecting the rights of individuals pending the end of the practice". Venice Commission, CDL-AD (2005) 004, §100, p.24.

Venice Commission noted that the Constitution was unusually “drafted and adopted without involving the citizens of BiH and without applying procedures which could have provided democratic legitimacy”.⁴⁴⁵ The Venice Commission concluded that it was “unthinkable that Bosnia and Herzegovina can make real progress with the present constitutional arrangements”. It thus made a connection between the phasing out of international supervision and a constitutional reform process to strengthen the domestic institutions.

3.2 The April Package and its failure

The Venice Commission opinion set the debate for the coming months, which also coincided with the 10th anniversary of the Dayton agreement. On this occasion, the United States Institute of Peace (USIP) organised an event in Washington, aptly entitled “Beyond Dayton: The Balkans and Euro-Atlantic Integration”, during which the U.S. Under Secretary of State for Political Affairs, R. Nicholas Burns (who had worked on Bosnia and Herzegovina between 1995 and 1997) made a clear appeal for the opening of a process of constitutional reform, with a view to modernising the Dayton arrangements and creating new unified, functional institutions for the country.⁴⁴⁶ In the press conference, Burns clarified that this process would entail moving towards a single-member presidency, a stronger prime minister, and a stronger parliament with a stronger speaker, and that U.S. diplomacy would work with BiH leaders to hammer out the details before the 2006 elections.⁴⁴⁷ Likewise, in her meeting with BiH Presidency Chairman Ivo Miro Jovic, U.S. Secretary of State Condoleezza Rice

⁴⁴⁵ Venice Commission, CDL-AD (2005) 004, §3, p.3.

⁴⁴⁶ Burns pleaded the Bosnian authorities “to consider the future of Bosnia, the modernization of the Dayton Accords themselves, and to agree on a new, *more unified* Bosnia-Herzegovina for the generations ahead... the Dayton Accords need to be modernized. Bosnia needs to create *new national institutions* that can chart a new future for the country”. U.S. Department of State. 2005. *Bosnia Ten Years Later: Successes and Challenges*. Speech by R. Nicholas Burns, Under Secretary for Political Affairs, Washington DC, November 21. Emphasis added.

⁴⁴⁷ Ibid.

remarked that “we must now move beyond the framework constructed one decade ago... the country needs a *stronger energetic state* capable of advancing the public good and securing the national interest”.⁴⁴⁸ Bosnian leaders also agreed in a joint statement to commit to a process that “will enhance the authorities of the state government and streamline parliament and the office of the presidency”.⁴⁴⁹

Under the leadership of Amb. Douglas L. McElhaney in Sarajevo and of Amb. Donald Hays in Washington (a former Deputy HR in BiH in 2001-2005, then chair of the USIP Center for Post-Conflict Peace and Stability Operations), the U.S. diplomacy embarked in the following months on a process of closed-doors negotiations with the main Bosnian party leaders, while drafting in Washington the details of a compromise proposal to be concluded by early Spring, before the start of the campaign for the October general elections. The choice of the approach, focusing on the main parties’ leaders, stemmed from the general approach of U.S. diplomacy to negotiations in post-conflict situations, and from the overall ideas that in such segmented societies the main opinion-makers need to be taken on board first, and that the rest of society will later follow too. Throughout the negotiation process, EU member states’ diplomacies took part or were briefed only sporadically; the process was completely U.S.-owned.⁴⁵⁰

The final compromise proposal, dubbed “April Package” (*aprilski paket*), was less ambitious than originally hoped, but still included a number of changes designed to streamline policy-making and strengthen the state-level institutions. The revised Bosnian Constitution would have foreseen, first, a single-member presidency (with two deputies, one for each

⁴⁴⁸ U.S. Department of State. 2005. *Remarks in Honor of the Tenth Anniversary of the Dayton Peace Accords*. Speech by Secretary Condoleezza Rice, Washington DC, November 22. Emphasis added.

⁴⁴⁹ McMahon, P. C., Jon Western, 2009. “The Death of Dayton: How to Stop Bosnia from Falling Apart”. *Foreign Affairs*, 88(5), 69-77.

⁴⁵⁰ Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 167, 172.

constituent people, to rotate every 16 months instead of 8), indirectly elected by the Parliament and with a more ceremonial role, and a reduction of matters subject to consensus among presidency members to only a few, including defence; at the same time, the Chairman of the Council of Ministers was to be reinforced and two new ministries (for agriculture and for technology and the environment) were to be established. Second, the amendments foresaw the codification of the competences *de facto* acquired by the state level in the previous period (defence, security, intelligence, as well as joint institutions such as the state-level BiH Court, BiH Prosecutor's Office, High Judicial and Prosecutorial Council, and Indirect Tax Authority), together with a new category of shared competences (in taxation, justice and electoral affairs), and especially a specific provision for European integration that would have allowed the state level to assume the necessary competences from the entities. Third, the Parliament would have also been reconfigured, with a higher number of MPs (87 instead of 42 in the House of Representatives, including at least 3 "Others", and 21 instead of 15 in the House of Peoples, indirectly elected from the former rather than from the entities' parliaments) and with permanent, non-rotation speakers and deputies. Moreover, the House of Peoples's competences would be limited to the procedure for the Vital National Interest veto – thus in practice becoming an arbitration committee of the same House of Representatives. A form of "entity voting" would persist, with legislation approved if at least one third of MPs elected from each entity would support it.⁴⁵¹

To sum up, the proposal aimed at better defining and in part expanding the state-level competences as well as at streamlining the institutional structure, limiting (but only up to a point) the powers of the entities and the veto rights of the ethnic groups. In so doing, the package managed to gather a wide consensus by offering something to each group: safeguarding the autonomy of Republika Srpska for the Bosnian Serb parties; persistence of

⁴⁵¹ *April Package of Amendments*, Amendment I, 2006.

political equality of the constituent peoples for the Bosnian Croats; and the strengthening of state institutions for the Bosniak and civic parties.

Yet, when push came to shove, the package failed to meet the two-third majority required by only two votes – mainly because of squabbles within the Bosnian Croat and Bosniak camps. Among the former, the HDZ party split between the HDZ BiH (in favour) and the smaller HDZ 1990, which opposed the package on the grounds that entity voting did not protect the Croat group, as well as that the authority of the House of Peoples would be weakened; among the latter, the SBiH party of Haris Silajdžić voted against the package, objecting in particular to the confirmation of entity voting, probably in the hope of achieving an even better deal in terms of centralisation, in view of their final aim of abolishing Republika Srpska.⁴⁵²

Both parties were rewarded by voters at the following elections – an indication that their intransigence had struck a chord with voters, and that electoral calculations had trumped earlier opportunistic reasons to support the reform agreement. This also showed how, despite helping to broker the deal, the U.S. diplomatic strategy of closed-door negotiations under external pressure without a public debate had finally backfired,⁴⁵³ as a pre-electoral climate had easily pushed political leaders to renege on their commitments. At the same time, Milorad Dodik ratcheted up his rhetoric to unprecedented levels, hinting at a possible independence referendum for Republika Srpska following the recent example of Montenegro; he also won with a landslide.

⁴⁵² Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 169.

⁴⁵³ Despite some limited efforts of broader consultations, there had been very little attempt at building a broader civic constituency and creating the social conditions to support the adoption of the package. See Hays, Don and Jason Crosby, “From Dayton to Brussels: Constitutional Preparations for Bosnia’s EU Accession, *Special Report 175*, Washington: United States Institute for Peace, 2006.

As a final surprise, the SDP candidate Željko Komšić was elected to the BiH Presidency, together with the Bosniak Silajdžić (SBiH) and the Bosnian Serb Radmanović (SNSD). Komšić, a Croat running for the civic SDP party, was elected also thanks to Bosniak, Serb and other votes in the Federation constituency. He was thus not seen as a legitimate representative of the Croat group by the main Bosnian Croat parties, the HDZ BiH and HDZ 1990. The trauma of the Komšić case would have long-term consequences for future reform efforts.

The failure of the April Package, albeit only by a small margin, had very heavy consequences on the reform process. On the one hand, a precious occasion had been lost, whose favourable domestic conditions would not come back after the October 2006 elections. On the other hand, it had exposed the differences in approach between the United States and the European Union (and its member states), with the first showing no reluctance in replacing local actors to foster a compromise, in a hands-on, top-down approach. Finally, as remarked by Bennett, the failure also “exposed the depth of feeling and the scale of the task involved in amending the Dayton Peace Agreement using the mechanisms for change contained within it”.⁴⁵⁴

3.3 The botched EU initiatives under Schwartz-Schilling

A timid attempt at a new constitutional reform process was launched by the new HR/EUSR, Christian Schwartz-Schilling, after his appointment in 2006. Schwartz-Schilling saw his role as promoting the local ownership agenda and fostering the closure of the OHR office and the establishment of a reinforced EU presence. To this end, he considered that “Bosnia and Herzegovina must be fully sovereign. That means that I must step back”.⁴⁵⁵ His

⁴⁵⁴ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 176

⁴⁵⁵ Schwarz-Schilling, Christian. *High Representative's TV Address to Citizens of BiH*. 31 January 2006.

approach to fostering reforms was very different from the closed-door U.S. approach under the April package talks: following the example of the European Convention leading to the Nice Treaty, Schwartz-Schilling envisaged a “constitutional convention” approach, open to civil society and the cultural establishment of Bosnia and Herzegovina, to foster a parallel debate in society and to break the monopoly of the ethno-nationalist party in the topic. However, this soon appeared unrealistic given the tense political climate. As a subordinate, Schwartz-Schilling proposed a law-based constitutional commission, to be nominated by the BiH Parliament, with three co-chairs (a Bosnian intellectual and one each from the U.S. and the EU) and a technical secretariat composed equally of Bosnians and internationals. Despite the readiness of Germany to foot the bill of such an endeavour, the proposal found a cold welcome in Brussels. While the EU Council deemed it as not showing enough local ownership and remaining too internationally-driven, the Commission was rather worried that this initiative would take away the priority still afforded to the police reform issue and spoil technical efforts with broader high-politics debates. The feasibility of the initiative quickly faded away in the summer of 2007, as HDZ BiH withdrew its support. At the same time, the last attempt by the U.S. to rescue the April Package through further talks between Dodik and Silajdžić also arrived at a fruitless conclusion.⁴⁵⁶ Moreover, because of his disappointment about the lack of support from Brussels, Schwartz-Schilling would soon resign from his post as HR/EUSR.

3.4 Further attempts in 2008-2009: from Prud to Butmir

Talks were relaunched in late 2008, after the closure of the police reform saga and the local elections. Following a retreat in the village of Prud, on 8 November 2008 the leaders of the three main parties (Dodik for the SNSD, Tihić for the SDA and Čović for the HDZ)

⁴⁵⁶ Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 174-176.

signed a joint agreement to place constitutional reforms at the top of the agenda, with the aim of harmonising the Bosnian Constitution with the European Convention on Human Rights, as well as to clarify state competences and establish functional institutions, and to reorganise the middle layers of governance, as well as settling the legal status of Brčko.⁴⁵⁷ The Prud declaration also explicitly called for amendments to be drafted with the expert assistance of international institutions.

That same month, Solana and Rehn presented a joint report to the European Council, in order to establish “a comprehensive EU approach” to state-building in Bosnia and Herzegovina, based on the European Partnership document and the SAA implementation, leveraging the fact that “EU integration represents a policy area that all BiH leaders agree on”.⁴⁵⁸ Yet the report was rather cautious on constitutional reform issues, as it mentioned that:

Constitutional reform is neither a requirement for OHR closure nor for BiH’s further journey towards the EU. Nevertheless, the constitutional framework must evolve to ensure effective state structures capable of delivering on EU integration, including the requirement to speak with one voice. The EU can support constitutional reform with expertise and funds, but the process must be led by BiH itself.⁴⁵⁹

The “Prud process” led to monthly tripartite meetings of party leaders. Yet, a detailed agreement on the foreseen reforms remained elusive, particularly for what concerned territorial reorganisation: Tihić and Čović saw this as a way to abolish the RS and replace the

⁴⁵⁷ Office of the High Representative (OHR). 2008. *Joint Statement of the Presidents of HDZ Party Dragan Čović, SNSD Party Milorad Dodik and SDA Party Sulejman Tihić*, Prud, 8 November, p.1.

⁴⁵⁸ European Union, *Summary Note on the Joint Report by Javier Solana, EU High Representative for the CFSP, and Olli Rehn, EU Commissioner for Enlargement, on "EU's Policy in Bosnia and Herzegovina: the Way Ahead"*, Brussels, 10 November 2008, S367/08.

⁴⁵⁹ Ibid.

entities with four non-ethnic regions, while for Dodik the modification of the borders of Republika Srpska was a clear red line and for him any other change would be conditional to entrenching the right of the RS entity to secede from the new state configuration after a three-year probation period.⁴⁶⁰ The only concrete outcome of the “Prud process”, upon U.S. pressure, was the agreement that a formal amendment to the BiH Constitution would incorporate the Brčko District under the jurisdiction of the state institution and of the Constitutional Court, as had been settled by the Brčko arbitration process.⁴⁶¹

The EU and the U.S. worked together to avoid a premature failure of the process, by inviting the leaders to Brussels in March 2009 and by organising a joint visit of EU CFSP High Representative Javier Solana and U.S. Vice-President Joe Biden in May 2009. Biden and Solana issued a joint declaration noting that the Euro-Atlantic progress of Bosnia and Herzegovina “will require concerted efforts and compromise to achieve needed reforms, including a functional BiH Constitution. The United States and the EU will support this process of growth and reform”.⁴⁶²

Yet, the domestic political climate verged more and more on open confrontation, particularly due to the stormy relations between Dodik and the OHR. Emboldened by the stronger support from Russia - which had started to distance itself from the Western consensus in the PIC and to favour the immediate closure of the OHR and the end of the Bonn Powers – in May 2009 the SNSD-dominated RS parliament adopted a resolution challenging

⁴⁶⁰ International Crisis Group (ICG), *Bosnia's Incomplete Transition: Between Dayton and Europe*. Sarajevo, Brussels: ICG - Europe Report No. 198, p. 5.

⁴⁶¹ Parliamentary Assembly of the Council of Europe (PACE), *The functioning of the democratic institutions in Bosnia and Herzegovina*, Vol 3.1, Document 12112, 11 January 2010

⁴⁶² U.S. Government, *Joint Statement Issued by United States Vice President Joe Biden and European Union High Representative for Common Foreign and Security Policy Javier Solana*, 20 May 2009.

68 competences that had been transferred from the entities to the state-level in the course of the previous decade. As expressed by Dodik in an interview with *Večernje Novosti*,

We are now going to ask for the competencies taken away from us to be returned. This will be the basis of our concept in the process of constitutional changes. Nobody should have any doubt about us achieving that. Be assured – RS will not lose one single competency more.⁴⁶³

This would become the mantra and the standard position of the RS authorities in the following decade. Despite a strong rebuke by the PIC Steering Board, to which Russia did not align,⁴⁶⁴ Dodik later doubled down in his challenge to the OHR, with the RS government adopting a decision stating that all OHR decisions adopted based on the Bonn Powers would no longer apply on RS territory.⁴⁶⁵ Again, the stark reaction by the PIC Steering Board, describing the RS government as responsible for the “downward spiral in political relations and challenges to the GFAP”, was not supported by Russia.⁴⁶⁶

While the domestic political climate seemed not to be conducive to big reform attempts, the positions of the EU and the U.S. soon also started to diverge: in September, in the framework of the “Quint” meetings between the U.S., France, Germany, Italy, and the United

⁴⁶³ Quoted in Vujanović, D., Srpska is more important to us than the EU, *Večernje novosti*, 7 January 2009, quoted in Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 203.

⁴⁶⁴ “Statements and actions challenging the sovereignty and constitutional order of BiH, as well as attempts to roll back previously agreed reforms and to weaken existing state level institutions display open disrespect for the fundamental principles of the GFAP, are unacceptable and have to stop.” Peace Implementation Council (PIC), *Communiqué of the Steering Board, Political Directors*, 30 June 2009.

⁴⁶⁵ RS Government, Conclusions of the 124th session held in Banja Luka on 24 September 2009.

⁴⁶⁶ Peace Implementation Council (PIC), *Statement by the Ambassadors on the RS Government Conclusions*, 25 September 2009.

Kingdom, the EU member states proposed a brainstorming retreat for Bosnian leaders, while the U.S. presented a focused *argumentaire* on the need for constitutional reforms.⁴⁶⁷

The EU document for the Quint mentioned that the “imperfect Dayton constitution... has clearly reached its limits”, and that “to apply for membership of the EU and NATO, Bosnia and Herzegovina needs to recover its full sovereignty;” “only after a decision has been taken to close the Office of the High Representative and relinquish the Bonn Powers can BiH sensibly hand in its application for EU and NATO membership”.⁴⁶⁸ Once again, the EU emphasised the formal aspects of sovereignty over actual capacities, and the preference for a gradualistic and technocratic approach to change, with the overall idea that restoration of full Bosnian sovereignty would be followed by its taming via assimilation in the Euro-Atlantic supranational structures.⁴⁶⁹ Overall, the EU foresaw as feasible only a couple of constitutional-level reforms: harmonisation with the ECHR, and a few institutional tweaks in line with the April package (indirect election of the BiH Presidency, increase in the number of MPs, reform of the cantonal structure of the Federation entity) to present the BiH political leaders with a package deal.

The U.S. had a more radical position, in line with the 2005 Venice Commission Opinion, which considered constitutional reform as indispensable and centralisation as the main aim. The U.S. also objected to the EU position on three grounds: first, noting that EU enlargement negotiations would not be possible without constitutional reform and transfer of competences to the state level; second, deeming it unclear whether and how the EU enlargement process would identify the required changes and foster their adoption; and, finally, considering unrealistic the assumption that the closure of the OHR would lead to stronger local ownership

⁴⁶⁷ Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 181.

⁴⁶⁸ European Union, 2009. *First Ideas for a “Package” Solution to the Transition in Bosnia and Herzegovina by the End of 2009*, Brussels, 16 September 2009 [Restricted - Unpublished], quoted in Venneri 2010, p. 185.

⁴⁶⁹ Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 186.

rather than mere institutional paralysis. The U.S. also sought to foster NATO-compliant reforms as a priority and a potential tool to break the deadlock and build “the institutional basis for EU enlargement negotiations”.⁴⁷⁰

The sense of urgency for a constitutional reform was also spurred by conjunctural factors. First, the already-looming 2010 general elections; second, the upcoming ruling of the European Court of Human Rights in the *Sejdić–Finci* case, anticipated by the *amicus curiae* brief by the Venice Commission, which clearly stated how “different treatment on the basis of ethnicity can hardly ever be justified”.⁴⁷¹

A retreat was organised in the Butmir military base outside Sarajevo on 9 October 2009, in which the U.S. (represented by the Deputy Secretary of State Jim Steinberg) maintained the lead role over the EU representatives (the EU Commissioner for enlargement Olli Rehn and the Swedish Foreign Minister and former HR for BiH, Carl Bildt, for the EU Council Presidency). The U.S. approach took prominence in the configuration of the talks, which gathered Bosnian leaders in the military base to discuss the reconfiguration of sovereignty in the country. At the same time, two aspects from the EU approach were also included: a degree of public diplomacy was sought, to complement closed-door talks, and the process remained “capitals-driven”, with only a marginal role for the OHR.⁴⁷² In the final draft proposal, a specific paragraph (§6a) also clarifies that only the state of Bosnia and Herzegovina could

⁴⁷⁰ U.S. Department of State, *Non-Paper on Constitutional Reform in Bosnia and Herzegovina*, Washington D.C., 16 September, 2009 [Restricted - Unpublished], quoted in Venneri 2010, p. 190.

⁴⁷¹ Venice Commission, *Amicus Curiae Brief in the cases of Sejdić and Finci v. Bosnia and Herzegovina*, Opinion no. 483/2008, CDL-AD(2008)027, Strasbourg, 22 October 2008, §22.

⁴⁷² Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 193.

apply for membership in international organisations, and that it was empowered to assume competences from the entities for such an aim.⁴⁷³

The Butmir draft, which was taking over the main points from the April Package of three years before, found even less consensus among domestic parties than its predecessor, as each side kept raising its stakes. The SDP and SBiH opposed it because it would not have sufficiently reinforced the state-level institution and would have left ambiguities in the definition of competences; the SNSD opposed it as too centralistic, as the well-entrenched Dodik did not see any need to renegotiate the prerogatives that Dayton had granted his entity; and the HDZ, in its quest for a third entity after the Komšić trauma, also opposed the draft because it did not protect the Croat group enough. Only the SDA was explicitly in favour of the compromise proposal. After two fruitless negotiating sessions, the talks were wrapped up in November 2009, right before the ECtHR issued its Sejdić–Finci ruling.

A criticism of the Butmir initiative from the U.S. side came from James C. O'Brian, who was among the drafters of the Dayton constitution. O'Brian criticised the tendency to go for “big initiatives” to strike a package deal on reform, proposing instead a bottom-up, gradualistic approach to “pick many, many little fights” with the local elite. He also noted that “constitutional reform is not necessary”, and that it would anyhow mean very little if negotiated by and for the same ethno-nationalist elites. According to O'Brian, the EU policy-makers should rather “be themselves” and bring Bosnian elites to task in the implementation

⁴⁷³ “Bosnia and Herzegovina shall have the responsibility for applying to membership in International Organisations and to conclude Treaties... To that end, it may transfer sovereign powers to such organisations”; “Bosnia and Herzegovina shall have the responsibility to conclude agreements with the European Union and to undertake legal and political commitments required for the process of accession to the European Union, including on matters that in accordance with other provisions of this Constitution are the responsibility of the Entities”. *Constitutional Amendments*, Butmir, 29 October 2009, quoted in Venneri, *From International to EU-Driven Statebuilding*, 2010, p. 190.

of their contractual obligations stemming from the SAA.⁴⁷⁴ At the same time, a criticism of a different nature came from Europe too, in the form of an open letter signed by the three former HR/EUSR, Paddy Ashdown, Wolfgang Petritsch and Christian Schwarz-Schilling, who complained about the lack of involvement of the HR/EUSR, the lack of a wider public debate on the topic, and the need to maintain the Bonn Powers in some form even after the foreseen closure of the OHR, to provide a long-term international guarantee on peace and stability in the country.⁴⁷⁵

Overall, the reasons for the failure of all constitutional reform attempts between 2005 and 2010 have been identified, first, through the short and fixed Bosnian electoral cycles, with administrative or political elections every two years, which reinforce the short-termism of political actors in search of gains at the ballot box.⁴⁷⁶ Moreover, the zero-sum character of Bosnian politics, with three sides having incompatible long-term goals, has been indicated as the other main reason for the impossibility to reach a compromise.⁴⁷⁷

3.5 The ECtHR Sejdić–Finci ruling and its impact

In 2002 Bosnia and Herzegovina joined the Council of Europe and signed the European Convention of Human Rights (which was referred to as directly applicable by the same Dayton Constitution), and in April 2005 the Protocol 12 to the Convention – which

⁴⁷⁴ O'Brian, Jim, *A New Agenda for Bosnia and Herzegovina*, Washington, DC: United States Institute for Peace, August 2009.

⁴⁷⁵ Ashdown, Paddy, Wolfgang Petritsch and Christian Schwarz-Schilling, *Assuring Peace and a European Future in Bosnia and Herzegovina*, Statement, Berlin/London/Paris, 18 October 2009.

⁴⁷⁶ International Crisis Group (ICG), "Bosnia's Dual Crisis". *Europe briefing* 57, 12 November 2009, p. 7-8. Sebastian, Sofia, "Leaving Dayton Behind: Constitutional Reform in Bosnia and Herzegovina". *FRIDE Working Paper* 46, November 2007.

⁴⁷⁷ Azinović, Vlado, Kurt Bassuener and Bodo Weber, *Assessing the potential for renewed ethnic violence in Bosnia and Herzegovina: A security risk analysis*, Sarajevo: Atlantic Initiative – Democratization Police Council, 2011

establishes a general prohibition of discrimination – came into force after having been ratified by Bosnia and Herzegovina in the group of twelve frontrunner Council of Europe member states.

Soon, two prominent citizens of Bosnia and Herzegovina who do not identify with any of the three constituent peoples – Dervo Sejdić, a Bosnian Roma representative, in June 2006, and Ambassador Jakub Finci, a Bosnian Jew, in January 2007 – filed a complaint of discrimination in Strasbourg, arguing that the Constitution and the electoral law restricted them from running as candidates for the country Presidency and for the House of Peoples. In December 2009 the Court, in its Grand Chamber, ruled in their favour.⁴⁷⁸

The ECtHR ruling meant one further narrowing down of the constitutional reform agenda after the failures of the 2006 April package and of the 2009 Prud-Butmir process,⁴⁷⁹ thought the EU Council kept speaking broadly about the “effective functioning of the institutions”. In the assessment of Valery Perry, the exercise over time even “changed from a chance to broadly remove discriminatory provisions in the constitution to a narrow exercise driven by leading party interests in maintaining the status quo”.⁴⁸⁰

⁴⁷⁸ The ECtHR case-law on the issue later also included the cases of Mr Ilijaz Pilav (application 41939/07, judgment 09 June 2016), a Bosniak resident in Republika Srpska, related to discrimination against members of one constituent people in the constituency when only a member of another people may be elected to the BiH Presidency; of Ms Azra Zornić (application 3681/06, judgment 15 July 2014), a citizen of Bosnia and Herzegovina who does not identify with any constituent people or national minority; and of Mr Samir Šlaku (application 56666/12, judgment 458, 26 May 2016), a member of the Albanian minority. The Court has consistently ruled in favour of the complainants, claiming that such discrimination is not justified in a democratic society.

⁴⁷⁹ Interview with an officer at the EU Delegation to Bosnia and Herzegovina, 21 December 2014.

⁴⁸⁰ Perry, Valery. “Constitutional Reform Processes in Bosnia and Herzegovina: Top-down Failure, Bottom-up Potential, Continued Stalemate”, in: Soeren Keil and Valery Perry (eds.), *State-Building and Democratization in Bosnia and Herzegovina*, Farnham: Ashgate, 2015, p. 15.

At that point, the SAA had not yet been ratified by all EU member states and, while an Interim Agreement was already in force for what concerns trade-related matters, it was deemed important to amend the constitution in line with the Sejdić–Finci ruling in time for the upcoming elections of October 2010, to improve their legitimacy. Yet, finding a way to implement the ECtHR ruling without unsettling the delicate Dayton balance proved elusive one more time, particularly after four years of fruitless negotiations on constitutional reform and deterioration of the political climate.⁴⁸¹ The aim of the political talks of the following year was to find a way to make the Bosnian Constitution ECtHR-compliant, and this in turn meant finding a way to satisfy the requests of the Bosnian Croat parties for a safe electoral constituency to avoid future Komšić cases. A Parliamentary committee was tasked to discuss the issue in 2010, at the start of the electoral campaign, but did not achieve any results, against the backdrop of procedural issues and the lack of a quorum.⁴⁸²

Elections were held in October 2010 without any ECtHR-compliant changes, and with no consequences. Electoral results rewarded Dodik, who was elected to the RS Presidency, and punished Silajdžić, who lost the seat of Bosniak BiH Presidency member to Bakir Izetbegović, son of Alija. Komšić was re-elected. With Dodik well entrenched in power, in February 2010 the RS parliament adopted a Law on Referendum and Civic Initiative enabling entity-level referendums, which would prove very important in future relations with the OHR and with the EU.⁴⁸³ The election also led to a prolonged stalling, with a fifteen-month period needed to gather a coalition and establish a government in January 2012, also because of the HDZ parties' obstruction to a government being formed without their presence, as they considered themselves the only legitimate representatives of the Bosnian Croats, and the rightful owners of all governmental posts earmarked for Croats. During the same period,

⁴⁸¹ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 213.

⁴⁸² Perry, *Constitutional Reform Processes in Bosnia and Herzegovina*, 2015, p. 19.

⁴⁸³ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 214.

international actors devoted most of their energy to Dodik's referendum challenge to the state-level Court and judiciary, which led to the establishment of the Structured Dialogue on Justice.

Implementation of the Sejdić–Finci ruling was thus included as part of EU conditionality for the entry into force of the SAA in the political conclusions of the EU Council of 21 March 2011, which speak more broadly of the “compliance of the Constitution with the European Convention on Human Rights”,⁴⁸⁴ also with reference to other open issues, including pensions and immovable properties.⁴⁸⁵

At the same time, 2011 was also the year in which the long-discussed “reinforced presence” of the EU in Bosnia and Herzegovina was put in place. With the end of the OHR mandate of Miroslav Lajčák and the appointment of the Austrian diplomat Valentin Inzko to the same position, the double-hatting as EUSR was suspended.⁴⁸⁶ The decoupling between the OHR and EUSR was seen as the start of a new era and of a new dynamic, with the passage from the hard power of the High Representative to the soft power of the EU. At the same time, it also meant that the EU stopped supporting by default the state-building agenda of the international community, to think by itself about the European future of the country.⁴⁸⁷

Meanwhile, following the implementation of the Lisbon Treaty that upgraded Commission delegations abroad to EU Delegations, the legal, political and press offices of the EUSR also passed under the hierarchy of the EU Delegation, which until then had dealt mainly with development and economic issues related to the Interim Agreement, now headed by a Danish diplomat, Peter Sørensen, also double-hatted as EUSR, whose new mandate also

⁴⁸⁴ Council of the European Union, *Council conclusions on Bosnia and Herzegovina*, 3076th Foreign Affairs Council meeting, Brussels, 21 March 2011.

⁴⁸⁵ Interview with an officer at the EU Delegation to Bosnia and Herzegovina, December 2014.

⁴⁸⁶ Interview with a diplomatic representative of an EU member state, Sarajevo, November 2014.

⁴⁸⁷ Interviews with officers at the EU Delegation to Bosnia and Herzegovina, December 2014.

explicitly included the monitoring of and giving advice on the process of Constitutional reform.⁴⁸⁸ With its Delegation “starting to acquire some political muscles”,⁴⁸⁹ the EU in Bosnia and Herzegovina could thus since rely on a single, reinforced office, with an unequivocal mandate to support the European integration of the country, well separate and distinguished from the OHR, whose mandate to uphold the civilian implementation of the Dayton constitution remained in force since no progress could be reported on the 5+2 agenda for its closure.

Despite the political stalemate, between October 2011 and March 2012 talks towards a compromise to implement the ECtHR *Sejdić–Finci* ruling were held in the framework of a Parliamentary Joint Committee.⁴⁹⁰ The process was led by the BiH Parliament as the competent institution (technical assistance offered by the EU was turned down for full ownership) and open to civil society⁴⁹¹ and EU representatives as observers.⁴⁹² In the course

⁴⁸⁸ Council of the European Union, Council Decision 2011/426/CFSP of 18 July 2011 appointing the European Union Special Representative in Bosnia and Herzegovina, OJ L 188, 19 July 2011, p. 30–33, Art.3(l): “in line with the Union integration process, advise, assist, facilitate and monitor political dialogue on the necessary constitutional changes”.

⁴⁸⁹ Interview with an officer at the EU Delegation to Bosnia and Herzegovina, 21 December 2014.

⁴⁹⁰ The “Joint Ad Hoc Committee for the Implementation of the judgment of the European Court of Human Rights in the case of *Sejdić and Finci vs. Bosnia and Herzegovina*” was composed by 11 MPs from the BiH House of Representatives and 2 MPs from the House of Peoples and headed by Šefik Džaferović, an experienced SDA politician deemed of competence and integrity.

⁴⁹¹ The openness of the Joint Committee to civil society contribution has been disputed. Perry contends that MPs were initially hostile to the idea, seeing themselves as the legitimate representatives of the people; NGOs were nevertheless allowed to present their proposals in the second committee session (18 October 2011). Four NGOs did so, yet the session was not interactive, and NGO proposals were followed by remarks by other societal representatives that spoiled the atmosphere. There is no evidence, according to Perry, that the NGO proposals were seriously considered by the MPs, nor that their ideas had any impact on the Committee’s work. Valery Perry, “Constitutional Reform Processes in Bosnia and Herzegovina”, p. 33. Further references by the European Parliament to the work of the Joint Committee, praising it for the involvement of civil society, are seen as evidence that NGO participation ends up providing legitimacy

⁴⁹² Interview with an officer at the EU Delegation to Bosnia and Herzegovina, who had assisted as observer to the works of the Joint Committee. 21 December 2014.

of the six months, the committee held meetings twice a month; it was decided that the committee would focus strictly on finding an ECtHR-compliant solution, rather than on broader changes to the institutions. While a simple solution was within reach for the House of Peoples (adding two representatives of the “Others” elected from the Federation, and one from Republika Srpska),⁴⁹³ the bone of contention remained the Presidency, for which the Serbs wanted to continue with direct election of the Serb member, while the Croats asked for either indirect elections or a separate constituency to avoid future Komšić cases.⁴⁹⁴ A solution could thus not be found, as MPs lacked the political clout to diverge from established, and mutually incompatible, party lines. The Committee then remained dormant, pending institutional instructions from party leaders.⁴⁹⁵

3.6 The High Level Accession Dialogue and the Sejdić–Finci talks

The stalemate following the 2010 elections, with a fifteen-month period needed to gather a coalition and establish a government in January 2012, also meant that no reforms could be seriously discussed. Out of the three conditions posited by the EU for the entry into force of the SAA, a state aid law and a census law were soon adopted; “credible efforts” towards the implementation of the Sejdić–Finci ruling remained outstanding. By the end of spring the EU saw it necessary to step in, and in June 2012 the Enlargement Commissioner Štefan Füle launched a High Level Accession Dialogue (HLAD) on the Accession Process with Bosnia and Herzegovina as a policy dialogue with the main Bosnian political leaders to understand

⁴⁹³ In 2013 the European Stability Initiative suggested that the EU accept a reform of the House of People as a feasible and first step forward in implementing the Sejdić–Finci ruling, leaving the reform of the Presidency for a later moment. European Stability Initiative, “Houdini in Bosnia. How to unlock the EU accession process”. ESI Discussion Paper, 17 October 2013, p. 7

⁴⁹⁴ Perry, *Constitutional Reform Processes in Bosnia and Herzegovina*, 2015, p. 19.

⁴⁹⁵ Interview with an officer at the EU Delegation to Bosnia and Herzegovina. 21 December 2014.

the various positions and assess whether any ground for compromise could be found.⁴⁹⁶ The dialogue started with a focus on the Sejdić–Finci issue, to then broaden to other issues concerning the EU integration of Bosnia and Herzegovina – such as the need for a coordination mechanism for the country to speak with a single voice in the accession process⁴⁹⁷ – in order to include constitutional reforms in the broader framework of EU accession. Yet there was no breakthrough.⁴⁹⁸

In the summer of 2012, the HDZ and SDP leaders, Dragan Čović and Zlatko Lagumdžija, reached an agreement on the broad lines of a reform, based on the indirect election of the BiH Presidency members by the BiH Parliament. Bosnian Croat parties continued to demand that any Sejdić–Finci-compliant solutions also include a reform of the election methods, to prevent future Komšić cases. The Čović–Lagumdžija agreement remained at the stage of a draft, and it did not produce detailed amendments. Yet, it managed to receive criticisms from Bosnian civil society representatives, who dubbed it as “medieval” since it would foster ethnic segregation on the local level too, by creating three electoral constituencies based on ethno-national majorities.⁴⁹⁹ Moreover, the SDA opposed it because it deemed unacceptable that the three members of the BiH Presidency would be elected under different methods; in fact, for the Bosnian Serbs it is a red line that the Serb member should remain directly elected from the territory of Republika Srpska. The same Komšić left the SDP party, in dissent with the agreement with the HDZ, which would have excluded him from acceding to power again

⁴⁹⁶ European Union Delegation to Bosnia and Herzegovina, *Joint Conclusions from the High Level Dialogue on the Accession Process of 27 June 2012*, 28 June 2012.

⁴⁹⁷ As remarked by Goran Svilanović, Director of the Regional Cooperation Council, in the negotiations between the EU and Bosnia and Herzegovina there will be only two sides, and the most complex task will be to coordinate a single position on the Bosnian side. Personal interview, Sarajevo, 20 October 2014.

⁴⁹⁸ The dialogue was described as “a kind of aborted idea” that “did not really work”. Interview with officers at the EU Delegation to Bosnia and Herzegovina, November / December 2014.

⁴⁹⁹ *Zašto ne?*, *Civilno društvo oštro osuđuje sporazum o ustavnim promjenama koji produbljuje diskriminaciju*, 13 July 2012, ZastoNe.ba

in the future. Further talks within the High Level Accession Dialogue were held in November and December 2012, but with no results,⁵⁰⁰ in particular because of the main aim of the Bosnian Croat party, i.e. the revision of the electoral rules for the BiH Presidency to prevent new Komšić cases.⁵⁰¹

A third phase of Sejdić–Finci talks started in February/March 2013, when the EU decided to step up its engagement into a direct facilitation of the negotiations under the auspices of Commissioner Füle. In a joint statement, Commissioner Füle and Council of Europe Secretary-General Thornbjörn Jagland expressed “regret that narrow party and ethnic interests continue to prevail over genuine engagement to end the constitutional discrimination of many citizens of Bosnia and Herzegovina and bring the legislation in line with the European Convention on Human Rights.” They also noted that “the regrettable lack of commitment from some of the party leaders to the EU agenda will clearly undermine Bosnia and Herzegovina's European integration process.”⁵⁰² Between March and April 2013, the EU Delegation in Sarajevo, with the support of the Director-General of DG NEAR, Stefano Sannino, facilitated a series of talks between the party leaders and their advisers; formal BiH authorities held by second-tier politicians, such as prime minister Bevanđa, were not included in the process. The EU role as a facilitator, looking for a synthesis between the different positions of the political parties, was well appreciated by the political leaders, and the local

⁵⁰⁰ European Commission, *Opening remarks by Commissioner Štefan Füle at the High-level Dialogue on the Accession Process between the EU and Bosnia and Herzegovina*, 27 November 2012.

European Union Delegation to Bosnia and Herzegovina, *Statement to BiH media by Commissioner Štefan Füle after the Second meeting of the High-level Dialogue on the Accession Process (HLDAP) with Bosnia and Herzegovina (BiH) in Sarajevo*, 27 November 2012.

⁵⁰¹ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 222. A diplomatic representative of an EU member state in Sarajevo noted that the EU's softer approach – fostering the emergence of an endogenous compromise – was not understood by political leaders used to the interventionist approach of the OHR. It was only then that the EU accepted to step-up its engagement. Personal interview, Sarajevo, November 2014.

⁵⁰² European Union Delegation to Bosnia and Herzegovina, *Commissioner Füle and Secretary General Jagland regret the lack of progress in implementing the Sejdić-Finci judgement*, 8 March 2013.

press reported it as such each time a solution had been found, but no fully-fledged agreement could be reached. On 11 April 2013, Commissioner Füle acknowledged that no final agreement could be found, and closed the dialogue process.⁵⁰³

During the summer of 2013, a political initiative of the two main Bosniak and Croat parties, the SDA and HDZ BiH, led to a political agreement between Čović and Izetbegović on several files, from Mostar (where local elections could not be held since 2008) to Sejdić–Finci and beyond. Launched and negotiated in full ownership by the two parties, the Čović–Izetbegović understanding brought some optimism that an autonomous domestic political dynamic could take foot.⁵⁰⁴ This happened in parallel to a public campaign and political initiative, spearheaded by the U.S. Embassy, for a reform of the Federation entity institutions, which led to 181 recommendations by an expert group and a draft new constitution for the entity, whose adoption was nevertheless never taken into serious consideration.⁵⁰⁵ On 1st October 2013 Commissioner Füle called for a meeting of the Bosnian political leaders in Brussels, at which they signed an agreement on principles on how to solve the Sejdić–Finci issue.⁵⁰⁶ Yet, the agreement dissolved even before their airplane landed back in Sarajevo. The

⁵⁰³ European Union Delegation to Bosnia and Herzegovina, *Statement by the Commissioner for Enlargement and European Neighbourhood Policy, Mr Štefan Füle, after consultations with political parties in Bosnia and Herzegovina*, Sarajevo, 11 April 2013.

⁵⁰⁴ Interview with an officer at the EU Delegation to Bosnia and Herzegovina, December 2014.

⁵⁰⁵ Valery Perry, “Constitutional Reform Processes in Bosnia and Herzegovina, p. 20. Documents available at <http://ustavnareformafbih.blogspot.com>.

⁵⁰⁶ European Commission, “BiH: Agreement on how to come to solution on pressing issue”, 1 October 2013. , quoted in ESI, Houdini in Bosnia, 2013.

European Union Delegation to Bosnia and Herzegovina, *EU-Bosnia and Herzegovina: 3rd round of High Level Dialogue on Accession Process*, 30 September 2013,

Commissioner then asked them to discuss further locally and come back on 10 October with the agreed details,⁵⁰⁷ but no final compromise was reached.⁵⁰⁸

The final phase of the Sejdić–Finci talks was again led from the ground, by the EU Delegation in Sarajevo. Three long negotiation sessions⁵⁰⁹ among political leaders were held – the first, upon invitation by Commissioner Füle, in a castle near Prague in November, and the second and third in Sarajevo. The Venice Commission and the U.S. also sent their envoys as observers and technical assistants. Differently from earlier talks in the Parliamentary Committee, when only dogmatic positions were exchanged, now a final synthesis seemed possible.⁵¹⁰ Yet, the stakes were so high that a final agreement proved impossible, as HDZ BiH required the absolute arithmetical certainty of being able to occupy the third seat of the BiH Presidency – which, given that the Sejdić–Finci ruling was actually about removing ethnic discrimination in the access to the same Presidency, could not be provided by any possible model. The process was finally declared over on 17 February 2014, during the riots in Sarajevo.⁵¹¹ New elections were held in Bosnia and Herzegovina in October 2014, for the second time without implementation of the Sejdić–Finci ruling.

⁵⁰⁷ European Union Delegation to Bosnia and Herzegovina, *Remarks by Ambassador Peter Sørensen on his return from the third meeting of the High Level Dialogue on the Accession Process*, Sarajevo, 3 October 2013.

⁵⁰⁸ European Union Delegation to Bosnia and Herzegovina, *EU-BiH: After the 3rd round of High Level Dialogue on Accession Process*, Brussels, 10 October 2013.

⁵⁰⁹ According to one of the participants to the three meetings, these were “16-hours meetings in which we entered at 3PM and got out at 6AM... even physically very demanding”. Interview with an officer at the EU Delegation to Bosnia and Herzegovina, December 2014.

⁵¹⁰ “I remember Dodik with the copy of the [new] Constitution, in cyrillic, in his hands”. Ibid.

⁵¹¹ “There was even a discussion on whether to bring all the political leaders within the EU Delegation building, which could have been well defended in case it was surrounded by the protesters.”. Ibid.

Overall, the Sejdić–Finci saga showed a second cycle of mismanaged EU conditionality. In the words of one EU official, the Sejdić–Finci ruling was “a failed Trojan horse; it did not open on time, and the EU remained stuck inside”.⁵¹²

The main reason for such mismanagement was the lack of proportionality between what was required from the country (constitutional reform) and what was on offer (entry into force of the SAA). The political leaders who took part in the talks had very little incentive to reach a final agreement, as their primary electoral objectives could best be achieved by resisting pressure and reinforcing their public position as defenders of the rights of their own community/constituency. Attaching conditionality to each procedural step in the EU accession process had made the reward invisible.⁵¹³ Differently from other reforms with more evident benefits for everyday citizens – such as the process of visa liberalisation – the entry into force of the SAA was not concrete enough a reward for the general public to mobilise in support. Moreover, despite its undoubted value in terms of fundamental rights, the Sejdić–Finci issue remained a very abstract issue for the majority of the Bosnian electorate, whose living conditions would not have immediately benefited from its resolution.

As a second issue, as was the case in the previous police reform cycle, Sejdić–Finci conditionality also lacked legitimacy. The ECtHR ruling – at least in its part concerning the BiH Presidency – was based on a Protocol to the Convention, Protocol 12, that only very few EU member states had ratified.⁵¹⁴ And, in terms of general compliance with Council of

⁵¹² Interview with a Commission official, Brussels, February 2015.

⁵¹³ As Milorad Dodik said on RTRS “Pecat” on 10 October 2013: “Macedonia has candidate status since 2005. Macedonia still does not have a date for the opening of negotiations, which is the next stage, and neither does Serbia. So if we implement Sejdić–Finci, we would have candidate status. Let us not repeat this abstract story of Europe moving and us lagging behind. Where is Europe moving? Where did Serbia go?”.

⁵¹⁴ Cyprus, Finland, Luxembourg, the Netherlands, Romania, and Spain – later joined also by Croatia, Malta, Portugal and Slovenia. See Council of Europe, *Chart of signatures and ratifications of Treaty 177, Protocol*

Europe obligations, Bosnian authorities used to refer to the way worse track record of EU member states such as Italy or candidates such as Turkey.⁵¹⁵ In fact, it is unclear how and why the Commission decided to adopt as its own a conditionality that stemmed from the Council of Europe legal framework and that did not have direct bearing on the EU *acquis*, even before Bosnia and Herzegovina applied formally for EU membership and started its European integration process.⁵¹⁶ Reports have pointed to the close personal relations between Commissioner Füle and Council of Europe secretary-general Jagland, and this personal/conjunctural factor cannot be discarded. Moreover, a question of relation between human rights principles and peace-building is worth a note. As highlighted in the dissenting opinion of the Maltese judge Giovanni Bonello to the ruling ‘does it fall within this Court's remit to behave as the uninvited guest in peace-keeping multilateral exercises and treaties that have already been signed, ratified and executed?’⁵¹⁷ Finally, as it was remarked by EU officials themselves, despite being based on a ECtHR ruling, the process did not see any concrete involvement of the Council of Europe or of the Venice Commission, that left the whole process in the hands of the EU.⁵¹⁸

Finally, in terms of process, the Sejdić–Finci talks replicated previous attempts at constitutional reforms in focusing on closed-door meetings between political party leaders,⁵¹⁹ while leaving on the sidelines the formal political institutions (Parliament and Council of

No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Status as of 31/12/2017, online.

⁵¹⁵ Interview with an officer at the EU Delegation to Bosnia and Herzegovina, December 2014.

⁵¹⁶ The European Stability Initiative neatly summarised that “what is being asked of Bosnian leaders has not been asked of other EU candidates”. ESI, “Houdini in Bosnia”, 2013, p. 3.

⁵¹⁷ ECtHR, Sejdić–Finci decision, p. 34.

⁵¹⁸ Interview with an officer at the EU Delegation to Bosnia and Herzegovina, November 2014.

⁵¹⁹ As remarked by one Bosnian public servant, such meetings are “totally extra-institutional” and “their legitimacy is democratically contestable”; there are also no minutes to retrieve the topics of discussion. Interview with a civil servant at the Directorate for European Integration, November 2014.

Ministers).⁵²⁰ Public debate was also missing overall. The process thus failed to encourage a domestic constituency to push for a compromise and to support the eventual final agreement from the talks. It also did not take into due consideration the several bottom-up attempts at proposing different models and solutions for constitutional reform.⁵²¹ Rather, coming at the end of several years of botched attempts at constitutional reforms, it started with very few chances of success.⁵²²

3.7 Towards a rebalanced approach to EU conditionality in BiH

Together with containing Bosnian Serb grievances via the Structural Dialogue on Justice, most of the resources of the EU and the other international actors in Bosnia and Herzegovina during the 2010-2014 legislature were used to find a solution to the Sejdić–Finci issue. At the same time, the global financial crisis and the crisis of the eurozone also started to take their toll on the country. Severe economic downturn was headed off only via IMF standby arrangements in 2009 and 2012, later extended in 2014. Yet, the same institution had to repeatedly suspend its loans due to non-compliance of Bosnian institutions with its agenda of reforms, which threatened to dent the patronage network connecting political parties to voters seeking job security and access to public services. Early protests by war veterans against reforms that would reduce their status-based social entitlements had already turned violent in

⁵²⁰ On political leaders' meetings as an informal institution in the Western Balkans see Jovan Bliznakovski, Borjan Gjuzelov, and Misha Popovikj, *The Informal Life of Political Parties in the Western Balkan Societies*, Institute for Democracy 'Societas Civilis' Skopje (IDSCS), September 2017, [INFORM project deliverable D2.1](#).

⁵²¹ For an overview of civil society proposals for constitutional reform see Valery Perry, "Constitutional Reform Processes in Bosnia and Herzegovina", p. 24-28.

⁵²² As noted by an officer at the EU Delegation to Bosnia and Herzegovina, the politicisation of the issue throughout the previous attempts in 2006 and 2008-2009, and their failure, meant that a new attempt was unlikely to succeed. Personal interview, Sarajevo, November 2014.

April 2010.⁵²³ Political agreements in 2012 between SDP and SNSD to dilute the definition of and sanctions for conflict of interest and to repatriate powers from independent institutions (only the first point was enacted) increased social perceptions of the corruption of the ruling political class. In the summer of 2013, a spontaneous civil rights movement organised mass-scale demonstrations in central Sarajevo asking the political institutions to solve the dispute of identity numbers and documents for newborns, which were impeding them from expatriating and had caused the death of a child.

This peaceful “JMBG” or “bebolucija” protest was only the prelude of the street riots of February 2014, which started from the strike of a bankrupt firm in Tuzla and soon extended to most cities in the Federation entity. Within few days, rioters had set alight the buildings of the cantonal governments – identified with the waste of money of the plethoric Bosnian public administration – and also attacked the BiH Presidency. In the following weeks, while several cantonal governments resigned, citizens established local assemblies, called *plenums*, to discuss political issues and come up with demands and programmes, which kept a certain level of organisation, with differences among different towns, up to summer 2014.⁵²⁴ In the same period, Bosnia and Herzegovina also had to endure the catastrophic floods that hit the country in May, killing 25 persons, displacing 40,000, and affecting 1,5 million people overall, with an economic damage estimated at 2 million euros. Civil society once again proved quick to react, providing solidarity across ethnic lines, and international donors soon

⁵²³ Bennett, *Bosnia's Paralysed Peace*, 2016, p. 224.

⁵²⁴ On the 2014 riots and plenums in Bosnia and Herzegovina see:

Milan, Chiara. “Bosnia and Herzegovina: from Workers’ Strike to Social Uprising.” In *The Class Strikes Back. Self-Organized Workers’ Struggles in the 21st Century*, Azzellini, Dario and Michael G. Kraft (eds.), Amsterdam: Brill 2017;

Milan, Chiara. “‘Sow hunger, reap anger’: From neoliberal privatization to new collective identities in Bosnia Herzegovina.” In *Global diffusion of protest. Riding the protest wave in the neoliberal crisis*, Donatella della Porta (ed.), Amsterdam: Amsterdam University Press 2017;

Mujanović, Jasmin. *Hunger and Fury: The Crisis of Democracy in the Balkans*, London: Hurst, 2018.

pledged to support the reconstruction, while the government seemed unable to respond effectively.⁵²⁵

The EU was struck by the February 2014 riots in the middle of the latest round of negotiations with political leaders on the Sejdić–Finci issue, as “a rude wake up call”.⁵²⁶ The disconnect between closed-door negotiations among political leaders on electoral formulas and street protests for socio-economic rights could not have been more apparent.⁵²⁷ At the same times, the protests demonstrated to EU officials the existence of a constituency looking for change.⁵²⁸ The EU soon shifted its focus towards social and economic reforms by quickly putting together a six-point Compact for Growth and Jobs,⁵²⁹ as a blueprint of policy priorities that Bosnian politicians were supposed to focus on after the elections. A public campaign to bring more Bosnian citizens to the ballot was also launched, but the results of the election (the third since the Sejdić–Finci ruling) did not lead to particular changes. The main community parties (SDA, HDZ, SDS) came out reinforced, and could form a state-level coalition, while Dodik’s SNSD remained in power in the Republika Srpska entity.

Four years of fruitless discussions with Bosnian politicians on electoral metaphysics, and the outburst of rage by Bosnian laymen at the lack of employment and degrading living conditions in the country had the effect of convincing the EU and its member states that a change of policy was necessary. This was first proposed by the German and British foreign ministers, Frank-Walter Steinmeier and Philip Hammond, in a joint letter on 4 November

⁵²⁵ Bennett, *Bosnia’s Paralysed Peace*, 2016, p. 228.

⁵²⁶ Ibid., p. 233.

⁵²⁷ Mujanović argues that “contemporary BiH elites are a bandit class (that is, *baje*), a parasitic class, they have no potential to be democratic agents”. See Mujanović, Jasmin “The *Baja* Class and the Politics of Participation.” In Damir Arsenijević (ed.), *Unbriable Bosnia and Herzegovina: The Fight for the Commons*, Baden-Baden: Nomos 2015.

⁵²⁸ Interview with an officer at the EU Delegation to Bosnia and Herzegovina, December 2014.

⁵²⁹ The six points of the Compact concerned taxes on jobs, barriers to jobs, business climate, enterprises, corruption, and social protection. See EUD/EUSR, *Compact for Growth and Jobs*, 2014.

2014,⁵³⁰ which was then translated (with minor changes) into EU Council Conclusions, adopted in December 2014.⁵³¹ To ensure consistency, the “renewed EU approach” towards Bosnia and Herzegovina stemming from the British-German initiative did not remove Sejdić–Finci conditionality, but rather rescheduled it, delaying its expected implementation to a later moment in the accession process. The BiH Presidency and Bosnian political leaders were expected to commit to a broad programme of reforms – the Reform Agenda – and in exchange the EU would put the SAA into force. Upon progress in the implantation of the reform agenda, Bosnia and Herzegovina could then present its EU membership application to the EU Council, and the Commission would then prepare its opinion (*Avis*) on the preparedness of the country in fulfilling the political criteria to obtain candidate status and open accession negotiations, including the implementation of the Sejdić–Finci ruling. As noted by Bennett, “in essence, the issue of constitutional change was shelved” and emphasis was shifted on socio-economic reforms.⁵³²

The timing of the initiative was favourable – right after both EU and Bosnian elections – and its content was long overdue. The EU could thus hope to restart its relations with Bosnia and Herzegovina, placing emphasis on a wider range of reforms, rather than only on electoral formulas to overcome discrimination of minorities, which albeit necessary remained seen as exoteric by the wider population. At the same time, the initiative could avoid being seen as an *ad hoc* approach, but rather as treating Bosnia and Herzegovina as any other enlargement country.

⁵³⁰ Steinmeier, Frank Walter and Philip Hammond, *Letter to HR/VP Mogherini and Commissioner Hahn*, Berlin/London, 4 November 2014.

⁵³¹ Council of the European Union, *Council conclusions on Bosnia and Herzegovina*, Foreign Affairs Council meeting, Brussels, 15 December 2014.

⁵³² Bennett, *Bosnia’s Paralysed Peace*, 2016, p. 233.

In January 2015 the Bosnian political leaders signed a Written Commitment to Reforms, which was then endorsed by the BiH Parliamentary Assembly,⁵³³ and on 16 March 2015 the EU Council decided to bring into force as of 1 June 2015 the EU-BiH Stabilisation and Association Agreement (SAA),⁵³⁴ which had been signed in 2008 but had remained frozen since.⁵³⁵

On 15 February 2016 Dragan Čović, as Chairman of the BiH Presidency, presented the formal application of Bosnia and Herzegovina for EU membership to the EU institutions in Brussels. By the summer, the country's institutions managed to fulfil the one condition and two "consensus-enablers" set by the EU Council for the application to be taken into consideration: demonstrating significant progress in the implementation of the Reform Agenda, as well as finding a final agreement on the coordination mechanism among all institutions concerned with EU affairs in BiH, and finally proceeding with the adaptation of the trade measures included in the SAA to take into account the EU accession of Croatia – something that Bosnia and Herzegovina had delayed for over three years, and that was finally resolved in the first half of 2016. Despite protests from Republika Srpska, the full results of the 2013 census were also published by the legal deadline of 1st July, after certification by Eurostat. Given the (almost unexpected) progress on all fronts, on 20 September 2016 the EU Council decided to take into consideration Bosnia and Herzegovina's EU membership application, and to task the EU Commission to prepare its opinion (*Avis*) on whether the

⁵³³ *Written Commitment of Bosnia and Herzegovina* - Agreed by the BiH Presidency on 29 January 2015, Signed by the leaders of the 14 parties represented in Parliament, and Endorsed by the Parliamentary Assembly of Bosnia and Herzegovina on 23 February 2015.

⁵³⁴ Council of the European Union, *Outcome of the Council Meeting*, 3379th Foreign Affairs Council meeting, 7265/15, Brussels, 16 March 2015.

⁵³⁵ Council of the European Union, *Bosnia and Herzegovina: Conclusion of Stabilisation and Association Agreement*, Press Release 199/15, 21 April 2015.

European Commission, *Stabilisation and Association Agreement with Bosnia and Herzegovina enters into force today*, Press release IP/15/5086, 1 June 2015.

country sufficiently fulfils the political criteria for membership in order to open accession negotiations.⁵³⁶ The illegal referendum held in Republika Srpska on 26 September 2016⁵³⁷ did not manage to spoil the atmosphere of optimism, and led to targeted U.S. sanctions being imposed on Milorad Dodik in January 2017.⁵³⁸ On 9 December 2016, Commissioner Hahn in Sarajevo presented to the Chairman of the BiH Council of Ministers, Denis Zvizdić, the 3242-question Questionnaire – a first challenge for the newly set-up coordination mechanism to crunch. After a laborious consensus-building process, replies are expected in early 2018.⁵³⁹

4. Conclusions

This chapter reviewed the genesis and developments of the interactions between the EU and Bosnia and Herzegovina. The basic social and political characteristics of today's Bosnia and Herzegovina were presented and explored in relation to the country's Constitution as an Annex to the Dayton Peace Accords, with its mix of territorial federalism and ethnic power-sharing provisions. State building was used as a strategy of peace building in Bosnia and Herzegovina, reinforced by the embedding of international organisations in the post-conflict order, in particular through the executive powers afforded to the Office of the High Representative for the implementation of the civilian aspects of the Dayton accords, which allowed the post-war development from a loose confederation into a federal form, albeit dysfunctional. The chapter also discussed the multiple and ongoing transitions (to democracy,

⁵³⁶ Council of the European Union, *Council conclusions on the application of Bosnia and Herzegovina for membership of the EU*, Press release 525/16, 20 September 2016.

⁵³⁷ Office of the High Representative (OHR), *Special Report on a Referendum in Republika Srpska against Bosnia and Herzegovina State Constitutional Court Decisions*, New York, 21 October 2016.

⁵³⁸ Reuters, *U.S. imposes sanctions on Bosnian Serb nationalist leader Dodik*, 17 January 2017.

⁵³⁹ The questionnaire has been published by the BiH government and is available online in English language on the DEI website at http://dei.gov.ba/dei/media_servis/vijesti/default.aspx?id=17741&langTag=bs-BA.

market economy, statehood, peace, shared rule and finally self rule) that make Bosnia and Herzegovina the country in the region with the most layers of complexity in governance. It then analysed Bosnia and Herzegovina through the prism of the notion of state contestation, which is central to the dissertation. Bosnia and Herzegovina is different from most other such cases, since contested statehood has internal roots: it stems from the simultaneous presence of a complex federal and consociational structure, and of sub-state centrifugal tendencies coupled with direct intervention by international actors with executive powers. The chapter also looked at the Dayton institutional framework under the lenses of the two main theories of power-sharing, the consociational and integrative models. Bosnia and Herzegovina appears as a hybrid case in which elements from both models are present, though in an unresolved and often contradictory way.

The second part of the chapter then investigated the interactions between the EU and Bosnia and Herzegovina over time, highlighting in particular how the EU struggled to adapt its approach to the specific Bosnian post-conflict context and to reach the helm of the international presence in the country. Due to the interference of standard notions of state building, and remaining in the shadow of the international High Representative, the EU got twice stuck in cycles of mismanaged conditionality, in the case of the police reform process (2005-2008) and of the *Sejdić-Finci* constitutional reform process (2008-2014). The shift towards a streamlined EU presence and the rescheduling of conditionality with the “new approach” to Bosnia and Herzegovina in late 2014 led to a rebalanced conditionality and a different standing of the EU in the country, which enabled the re-opening of the EU path in the 2014-2016 period, also highlighting the consolidation of a strategy of member state building as stateness-aware enlargement, or enlargement-specific state-building.

As such, member state building is interested in strengthening the administrative functions required for a future EU member state to take part in the EU processes of decision-making

and policy-implementation, rather than at strengthening state structures *per se*. Secondly, member state building is limited in scope by the perimeter of the requirements of the EU *acquis*, in order to preserve the legitimacy of its prescriptions, and open to locally-negotiated solutions that may be compatible with the *acquis*, rather than prescribing top-down solutions and “best practices”. Finally, member state building is encompassing in levels, as it does not only address the state level, in a centralisation effort, but beign agnostic on the domestic distribution of competences among levels of governance it recognises and works together with sub-state authorities to ensure that the functions required from a future EU member state may be adequately performed in compliance with the local conditions.

III. The Structured Dialogue on Justice: Building Consensus to Restore Legitimacy

Introduction

This chapter delves into the first case study of the dissertation, by looking at the proceedings of the EU/BiH Structured Dialogue on Justice, an exercise of political dialogue aimed at legitimacy-building. The Structured Dialogue on Justice is a bilateral exercise between the EU and Bosnian authorities that has taken place since 2011. It involves routine meetings between national and European civil servants, and includes two plenaries and a dozen thematic meetings per year. The latter are open to representatives of lawyers' and magistrates' professional organisations, and in two cases also to civil society and NGOs. It is a forum with both transgovernmental and deliberative characteristics,⁵⁴⁰ as it brings together representatives

⁵⁴⁰ Transgovernmental cooperation implies "direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of cabinets or chief executives of those governments." Keohane, Robert O. and Joseph Nye, *Transnational Relations and World Politics*, Cambridge 1974, p. 43.

Deliberation refers to "an approach to decision-making in which citizens consider relevant facts from multiple points of view, converse with one another to think critically about options before them and enlarge their perspectives, opinions, and understandings". FAQ of the *Deliberative Democracy Consortium*, online.

with different legitimacy, and it seeks to foster consensus at domestic level to get Bosnia to “speak with one single voice” to the EU.⁵⁴¹

The Structured Dialogue is an example of the EU’s member state building approach, aimed at legitimacy-building, i.e. restoring state legitimacy from without. This is being done through a strategy of “governance by dialogues”, introducing in the context of EU enlargement some instruments mixing the tradition of political dialogues with third countries with the deliberative settings typical of e.g. comitology and governance networks. The Dialogue provided an avenue for actors from different levels of authorities in Bosnia to discuss sectoral policies in the presence of societal stakeholders as well as of international actors, the EU, as an agenda-setter. It thus reproduced some deliberative and consensus-seeking features of intra-EU tools, all the more since it was later expanded in terms of subjects (e.g. the fight against corruption) and of stakeholders included (civil society organisations also invited).

The chapter traces the development of the Structured Dialogue on Justice in chronological order, starting with its launch in the context of the 2011 RS referendum threat, its development between 2012 and 2014, the broadening of the dialogue agenda after the 2014 protests, and finally the impact of the entry into force of the Stabilisation and Association Agreement in 2015. The conclusions of the chapter resume some of the elements of interest of the Structured Dialogue on Justice as an example of governance by dialogue and deliberation in EU external policies, and even more as an example of consensus-building mechanisms aimed at restoring legitimacy of domestic institutions, within a member state building approach.

⁵⁴¹ Interviews with officers at the EU Delegation to Bosnia and Herzegovina, and with members of NGOs involved in the Structured Dialogue. Sarajevo, November/December 2014.

1. The 2011 RS referendum threat and the launch of the Structured Dialogue on Justice

The instrument of political dialogue is a typical tool of EU external relations, usually included in association or cooperation agreements.⁵⁴² Political dialogue, as an exercise to foster domestic consensus on EU-related reforms without direct intervention in domestic politics, is another instance of member state building in the EU enlargement policy.⁵⁴³

A political dialogue on issues of Justice and Home Affairs (JHA) had already been proposed by the European commission to Bosnia's authorities after the signature of the Stabilization and Association Agreement (SAA) in 2008. Since the agreement could not enter into force, and the Interim Agreement on Trade and Trade-related matters did not cover justice issues, the EU and Bosnia and Herzegovina did not have a formal venue of discussion on the issue. An informal political dialogue on justice was thus proposed in order to start talks earlier and advance on the topic.⁵⁴⁴ The format of the meeting, that follows the technical subcommittees of the interim agreement, was chosen in the words of one of the EU officials involved as a way to "impose ownership" and move away from the custom of no accountability of Bosnian political actors for reforms imposed by the High Representative.

⁵⁴² The European Council of Essen in 1994 introduced the form of the "structured dialogue" in EU enlargement policy as a way to oversee the preparation of Central and Eastern European countries to implement the Copenhagen criteria, particularly concerning issues of foreign policy and of justice and home affairs. European Council, *Presidency Conclusions*, Essen, 9-10 December 1994.

Galičić, Drino. "EU conditionality and governance complexities in the Western Balkans: Towards mutual accommodation or maintaining the status quo?" PhD thesis, University of Graz, 2014, 180-181.

⁵⁴³ See for instance the High Level Accession Dialogues in Macedonia, as well as the mediation efforts that have led to the April 2013 agreement on the normalisation of relations between Serbia and Kosovo.

⁵⁴⁴ Interview with Osman Topcagic, Director of the EU unit at the BiH Ministry of Foreign Affairs. Sarajevo, 11 December 2014.

Technicalisation was chosen as a purposeful way to depoliticise what were deemed hot issues and foster consensus.⁵⁴⁵

The idea of a forum of political dialogue between the EU and Bosnia's authorities became topical in 2011, when it was re-launched as an exit strategy from the political crisis looming over the country. On 13 April 2011, the National Assembly of Republika Srpska (RS) decided to hold a referendum to ask voters whether they supported the legitimacy of the state courts and the powers of the High Representative. The aim was to curtail the authority of the state's Constitutional Court as an interpreter of the Constitution derived from the Dayton agreements, as well as those of state-level judicial institutions (including the Court of BiH, established in 2003) within the borders of RS, as they were perceived as biased against Bosnian Serbs and the RS entity.

The poll immediately appeared extremely risky,⁵⁴⁶ so much that the international High Representative, Valentin Inzko, defined it as the "most serious challenge" to the stability of Bosnia as envisioned by the 1995 Dayton Accords. In fact, the likely "no" outcome would have laid bare the illegitimacy of the OHR's "Bonn powers" and of the highest state-level Court in the eyes of the population of one of the two entities. Moreover, it would have seemed paradoxical if the OHR had reacted simply by barring the referendum from being held through his Bonn powers. Such a course of action would have confirmed exactly what the organisers of the poll wanted to show: the democratic deficit of the international supervisory institutions in Bosnia. The OHR was also probably no longer able to take such a decision,

⁵⁴⁵ Interview with an officer at the EU Delegation to Bosnia and Herzegovina, December 2014.

⁵⁴⁶ See European Union Delegation to the United Nations – New York, *Statement by EU HR Ashton on the situation in Bosnia and Herzegovina*, 14 April 2011, EU11-144EN;

European Union Delegation to the United Nations – New York, *EU Statement - United Nations Security Council: Situation in Bosnia and Herzegovina*, 9 May 2011, EUUN11-051EN.

after its gradual weakening as a result of the long tug-of-war on the police reform from 2005 to 2008 that had left it drained of political legitimacy.⁵⁴⁷

The EU condemned the referendum declaration as “a step in the wrong direction”, and expressed to the RS leadership “our strong concerns and our expectations that the referendum will not be held”.⁵⁴⁸ Yet it also accepted to inquire the substantial reasons of RS dissatisfaction, provided that they were expressed in a procedurally correct way: “while concerns related to the functioning of state institutions may be legitimate, they must be expressed through appropriate mechanisms; it is clear that only mutually agreed reforms would be acceptable”.⁵⁴⁹ It thus “called on BiH political leaders to engage in a constructive, structured political dialogue on legal issues and the judiciary”, while reiterating its support for the OHR and for the territorial integrity and sovereignty of BiH.⁵⁵⁰ The head of the European External Action Service, Catherine Ashton, flew to Banja Luka on 13 May 2011 and met with RS President Milorad Dodik, allowing for a lifting of the referendum threat in exchange for a consultation process on justice and home affairs which would have involved the EU and the national and local authorities of Bosnia.⁵⁵¹ “We consider that this dialog will establish solutions to these concrete problems and will re-establish this country on the EU path”,

⁵⁴⁷ On the issue of the police reform see: Venneri, *From International to EU-Driven Statebuilding*, 2010; Tolksdorf, Dominik, Tobias Flessenkemper, and Damien Helly, “Police Reform and Conditionality”, in *Ten Years After: Lessons from the EUPM in Bosnia and Herzegovina 2002-2012*, EUISS Joint Report, Paris 2013, p. 20–26;

Keil, Søren. “Europeanization, State-Building and Democratization in the Western Balkans”, *Nationalities Papers* 41 (3), 2013, p. 343–53.

⁵⁴⁸ European Union Delegation to the United Nations – New York, *EU Statement - United Nations Security Council: Situation in Bosnia and Herzegovina*, 9 May 2011, EUUN11-051EN.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid.

⁵⁵¹ European Union Delegation to the United Nations – New York, *Statement by EU HR Ashton at press point with the President Dodik of Republika Srpska*, 13 May 2011, EU11-171EN.

Ashton declared.⁵⁵² The ad interim head of the EU Delegation in Sarajevo, Renzo Daviddi, commented that “we’ll talk about issues surroundings appellate proceedings, war crimes and retroactive application of certain laws. That does not mean that we agree with all remarks [of Dodik]”.⁵⁵³

The diplomatic solution was and remains highly controversial among Bosnian and international observers alike. While it effectively defused the political crisis by calling off the referendum,⁵⁵⁴ and thus reinforced the opposition parties in the RS that attacked Dodik for his U-turn,⁵⁵⁵ it also seemed to have provided Dodik with the international legitimacy he was looking for in his long-term secessionist project. Still in October 2014, the former HR Paddy Ashdown at a debate on Bosnia and Herzegovina at the House of Lords decried how:

The noble Baroness, Lady Ashton, was even persuaded by her advisers to go to visit Milorad Dodik as though he was the head of a state, not the head of an entity, and sit down with him when, on his table, there was a map and flag of Republika Srpska and the flag of the European Union, but no flag for Bosnia-Herzegovina. You could not give a clearer example that the European Union was not interested in the state.⁵⁵⁶

Ashdown’s interventionist approach as an HR, though, had been pointed out as one of the factors having earlier led the EU to the showdown on the police reform in 2005-2008 and

⁵⁵² Darren Mara, “Bosnian Serbs retract threat of divisive referendum under EU pressure”, *Deutsche Welle*, 13 May 2011.

⁵⁵³ Eldin Hadzovic, “Brussels Takes On Bosnia Judicial Reform”, *Balkan Insight*, 23 May 2011.

⁵⁵⁴ “I think that the referendum for the time being is not necessary”, declared Milorad Dodik after the talks. “I believe we have a credible partner who has not only acknowledged our concerns with regards to the ... functioning of the judiciary at Bosnia-Herzegovina level, but is also ready to invest its credibility into that process”. Mara, *Deutsche Welle*, 2011.

⁵⁵⁵ Hadzovic, *Balkan Insight*, 2011

⁵⁵⁶ Lords Hansard text for 21 Oct 2014, Column 607.

having irreversibly alienated RS authorities.⁵⁵⁷ As expressed by a communication website funded by the RS,

The main reason the Structured Dialogue is necessary is that BiH's judicial system, which was imposed on BiH by a succession of High Representatives, entrenches OHR's political authority over the judiciary, contravenes the rule of law, and otherwise fails to meet EU and other international standards for judicial institutions. The High Representative has dominated the judiciary by, among other methods, directly and indirectly dictating the outcome of court proceedings and displacing the lawful authority of courts. A High Representative's decree even forbids any judicial proceeding that "takes issue in any way whatsoever" with his decisions.⁵⁵⁸

On a more positive note, the engagement of Catherine Ashton with RS authorities also meant that for the first time, and after a long delay, the EU had to pay due consideration to the multi-level nature of the Bosnian polity, laying the ground for the subsequent debate on the need for a coordination mechanism among different Bosnian administrative levels charged with EU-related competences.⁵⁵⁹

Overall, the use of a tool of political dialogue to defuse a referendum crisis may be seen as yet another instance of depoliticisation through technicalisation, and a transfer in the EU external action of what are daily strategies of domestic governance. The methodology of the

⁵⁵⁷ See Venneri, *From International to EU-Driven Statebuilding*, 2010; Tolksdorf, *Police Reform and Conditionality*, 2013; Keil, *Europeanization, state-building and democratization*, 2013.

⁵⁵⁸ BiH Dayton Project, *Fulfilling the Promise of the Structured Dialogue*, 8 March 2012.

⁵⁵⁹ As Bosnia and Herzegovina is structured as an asymmetric federation, the same competence (e.g., education) may be shared between one entity, several cantons, and the municipalities of other cantons where it has been devolved to the lowest levels of administration. See Keil, *Multinational Federalism*, 2013, p. 115-116.

dialogue included a relevant role for EU actors in a domestic process of consensus building on the reform of the justice sector. Besides issuing recommendations at the end of each meeting, the EU would set the agenda of the meetings, which domestic participants would have to accept at least two weeks earlier and provide an agreed list of participants as well as a position paper on the progress made on the implementation of recommendations.⁵⁶⁰ Thus, the EU would “support the identification of necessary institutional and legislative reforms”,⁵⁶¹ while leaving to domestic authorities the ownership over the process. At the same time, the dialogue remained based on the consensus on the need to proceed to coordination with EU and domestic consultation before any amendment to key judicial legislation is put into procedure at any level, to ensure consistency in the overall judicial architecture.

2. The first meeting of the Structured Dialogue: demining the Bosnian judiciary

The first session of the Structured Dialogue on Justice was held in Banja Luka, the *de facto* capital of RS, on 6-7 June 2011, formally opened by Štefan Füle, EU Commissioner for Enlargement, who defined it as “an important platform” that “the EU is offering to the authorities of Bosnia and Herzegovina”, and “an opportunity that cannot be missed”.⁵⁶² The Dialogue was included in the framework of the EU/BiH Stabilisation and Association Process (SAP), in parallel to the sectoral cooperation in place under the SAA’s Interim Agreement,

⁵⁶⁰ European Union Delegation to Bosnia and Herzegovina, *Recommendations from the European Commission*, Second meeting of the “SAA Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina, Sarajevo, 10-11 November 2011

⁵⁶¹ Füle, Štefan, *Opening Speech, 1st meeting of the EU/BaH Structured Dialogue on Justice*, Banja Luka (Bosnia and Herzegovina), 6 June 2011

⁵⁶² European Union Delegation to Bosnia and Herzegovina, *Commissioner Štefan Füle to open EU-BiH SAA Structured Dialogue on Justice on 6 June*, 6 June 2011.

and it was presented as an anticipation of future accession negotiations: a “challenging process, which all candidate countries had to face during their European integration process in the light of the political Copenhagen criteria for accession”, with the objective of “the consolidation of the rule of law and the establishment of an independent, effective, impartial and accountable judicial system across the whole country to the benefit of every citizen”, and “with a view to making the whole system of Bosnia and Herzegovina compatible with European standards and rules”.⁵⁶³ In his opening speech, Füle defined the consolidation of the rule of law and of the judicial system as “one of the most challenging fields in the future negotiations for EU memberships”, linking it to the EU’s ‘renewed consensus on enlargement’ with its frontloading of the accession negotiation chapters 23 and 24. In Füle’s words, “the very good news is that the main principles and basic requirements are unambiguous and they do not leave grounds for conflicting interpretations or opting out”. The dialogue was thus presented as *acquis*-anchored, linked to “necessary and fundamental” principles and “non-derogable rights” that EU member states cannot afford to question and whose “instability or uncertainty” is not acceptable. Specifically, although stressing the domestic need for ownership of the reforms and that “the ultimate responsibility ... lies in the hands of those who have been democratically elected”, Füle did not refrain from setting clear limits to the extent of the subject matters, by expressing that “the EU strongly supports” the domestic judicial institutions (the Court of BiH, the state-level Prosecutor’s Office, and the High Judicial and Prosecutorial Council, HJPC) and that it is “crucial that their existence is no longer questioned and any debate on their functioning is mindful of their role”. At the same time, demonstrating to have learned from the failure of the one-size-fits-all approach to the police reform, Füle acknowledged that “there is no single EU model” and that “the optimal

⁵⁶³ Ibid.

arrangement is the responsibility of competent authorities” in BiH.⁵⁶⁴ Rather, those technical solutions “shall attract the necessary political consensus and be promptly translated into adequate reforms”.⁵⁶⁵

The approach of the Structured Dialogue was embraced by the RS leadership, which considered to have found in the EU a different approach from the perceived unitarist/centralist vision of the OHR.⁵⁶⁶ The Structured Dialogue was deemed “a vitally important opportunity to align [BiH’s] judicial institutions with EU standards”, which “will not be quick or easy, but it has the potential to help dramatically reform the badly broken judicial system imposed by the High Representative”.⁵⁶⁷

The first set of preliminary recommendations set by the European Commission at the end of the first dialogue session touched upon the Justice Sector Reform Strategy (JSRS), the National War Crimes Strategy (NWCS), the coordination of domestic competences, equal access of citizens to justice, and the justice sector budget. It envisaged further discussions on an appellate system for the state-level Court of BiH, the resolution of the backlog of cases, and the harmonisation of domestic legislation across different levels, mindful of the respective competences of the territorial units. The Commission also handed in to the BiH Minister of Justice a request for technical information,⁵⁶⁸ which the Bosnian authorities submitted in the early autumn.

⁵⁶⁴ Füle, *Opening Speech, 1st meeting of the EU/BaH Structured Dialogue on Justice*, Banja Luka, 2011

⁵⁶⁵ European Commission (EC) and Directorate for European Integration (DEI), *Draft Joint Press Release*, 7 June 2011

⁵⁶⁶ “Those supporting continued OHR intervention into the BiH justice system will continue their current effort to undermine the Structured Dialogue”. BiH Dayton Project, *Fulfilling the Promise*, 2012.

⁵⁶⁷ Ibid.

⁵⁶⁸ European Union Delegation to Bosnia and Herzegovina, *First set of preliminary recommendations from the European Commission*, Inaugural meeting of the “SAA Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina, Banja Luka, 6-7 June 2011

3. The Structured Dialogue on Justice from 2012 to 2014

The Structured Dialogue held most of its meetings in the 2012-2014 periods, with five plenary sessions whose agenda touched upon the technical issues at stake in the justice sector in Bosnia and Herzegovina, focusing in particular on two issues: the draft law on the Courts, and the draft law on the High Judicial and Prosecutorial Council (HJPC). Its work was complemented by the input of the Council of Europe's Venice Commission that in the same period issued three different opinions on legal matters concerning Bosnia and Herzegovina. The interaction and frequent reference to Council of Europe documents speaks of a growing architecture of inter-institutional cooperation in JHA matters, differently from the parallel exercise of the Sejdić–Finci talks.

The second session of the Structured Dialogue took place in Sarajevo on 10-11 November 2011. The range of substantial topics under discussion, as evident from the Commission's recommendations, had mushroomed from five to twenty-two, touching upon issues as different as the backlog of unpaid utility bills, the introduction of free legal aid, and the infrastructures and administration of the prison system.⁵⁶⁹ The Commission found it particularly troubling that the National War Crimes strategy was stalling,⁵⁷⁰ and was concerned by the lack of progress on the reform of the appellate system at the Court of BiH, expecting that the 2008 proposal be put into Parliamentary procedure. It also supported the phasing out of international staff with executive powers from the Court of BiH and the

⁵⁶⁹ European Union Delegation to Bosnia and Herzegovina, *Recommendations from the European Commission*, Second meeting of the "SAA Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina, Sarajevo, 10-11 November 2011

⁵⁷⁰ "Effective processing of war crimes cases is fundamental for the truth and national reconciliation. Delays and inefficiencies cannot be accepted the lack of effective developments in this field seriously undermines the overall credibility of the judiciary; therefore, all deadlocks shall be overcome as a matter of priority". Ibid.

Prosecutor's Office in line with the principle of ownership – something that was welcomed by RS authorities.⁵⁷¹

In June 2012 the Council of Europe's European Commission for Democracy through Law (Venice Commission) delivered its Opinion No. 648/2011 on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, which it had been requested by the European Commission in October 2011.⁵⁷² The Venice Commission recognised Bosnia's legal and judicial system as "the most complex and decentralised federal system among European countries today" (§29), due to the divergence among the four different and separate legal, judicial and prosecutorial systems which – although "a natural result of living in a federal system" (§34) – produces "discrepancies and inconsistencies in virtually all areas of the legal system" (§36), undermining legal certainty and the equal treatment of all citizens (§57). Countering "excessive decentralisation of the legal orders" (§45) was thus deemed "important for the country if it intends to be able to apply the *acquis communautaire*" (§46). To tackle the lack of consistency in BiH's legal order, the Venice Commission recommended to couple top-down strategies of harmonisation with bottom-up elements of informal cooperation, for instance through a "Joint co-ordination panel" gathering the heads of all four high judicial institutions and continuing the existing informal inter-court cooperation, while waiting for a constitutional reform necessary to establish a Supreme Court of BiH in the long run (§66-67). The Venice Commission also recommended clarifying the scope of competences and jurisdiction of the state-level courts (the Constitutional Court and the Court of BiH), which remained a point of controversy between the RS and the state institutions, to prevent any doubt of arbitrariness (§55-56), as well as to establish a separate Court of Appeal

⁵⁷¹ BiH Dayton Project, *Fulfilling the Promise*, 2012.

⁵⁷² European Commission for Democracy through Law (Venice Commission), Opinion No. 648/2011 on *Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, Strasbourg 18 June 2012, CDL-AD(2012)014

to increase the independence of the appeal procedure (§62). For what concerns the independence of the judiciary, the Venice Commission positively assesses the role and work of the HJPC, established in 2004 under a competence transfer agreement between the Entities, although it found it could be improved by creating two sub-councils, for judges and prosecutors respectively, and countering the fragmentation of sector financing (§82-98).

The third meeting of the Structured Dialogue on Justice was held in Mostar on 5-6 July 2012. The Commission's recommendations, touching upon 17 substantial topics, acknowledged some positive developments, e.g. on the agreed interpretation of the criteria for the referral of war crime investigations from the State to the Entities and Brčko jurisdictions, as well as on the resolution of the backlog of cases. It also expressed concerns at delays, as in the signature of the Protocol on exchange of information and evidence in war crime cases between the state Prosecutors of Bosnia and of Serbia, and in the alignment of the RS Law on Courts with HJPC Law.⁵⁷³

One issue highlighting the possible drawbacks of a transgovernmental and deliberative process such as the Structured Dialogue on Justice emerged in 2012 and concerned the new RS Law on Courts. In the recommendations following the second meeting of the Dialogue, the Commission stated that it “expects the RS Ministry of Justice to continue its close coordination with the HJPC in relation to the draft Law on Courts of Republika Srpska; expects that the Law shall be mindful of the independence of the judiciary and fully coherent with the prerogatives and recommendations of the HJPC”. The issue concerned the mechanism for the election of the judges from RS at the HJPC, that the RS draft Law on Courts intended to modify, but which in so doing would have created a conflict of

⁵⁷³ European Union Delegation to Bosnia and Herzegovina, *Recommendations from the European Commission*, Third meeting of the “SAA Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina, Mostar, 5-6 July 2012.

competences with the state-level Law on the HJPC already regulating the matter. According to the DPC think tank, “the [RS] law was clearly aimed at undermining the independence of the judiciary in the entity and undermining the authority of one of the most important central state level institutions and a cornerstone of EU-supported post-war judicial reform”, the HJPC. “The law was assessed by the HJPC as delivering a death-blow to judicial reform. In addition, the HJPC qualified some provisions of the RS law ‘illegal’. The law drew resistance from judges and prosecutors state-wide, including from within the RS, despite heavy political pressure there”.⁵⁷⁴ The compromise, found in the framework of the dialogue, foresaw to include a more detailed article in the state-level Law on the HJPC, which was undergoing revision at the same time. This was assessed very negatively by the same DPC observers, who dubbed it “a slap in the face of brave local officials who had stood up to defend judicial independence”.⁵⁷⁵ At the third meeting of the Structured Dialogue in July 2012, the Commission positively assessed the compromise reached, yet lamented the delay in its legislative implementation.⁵⁷⁶ Subsequently, at its fourth meeting in April 2013, it welcomed the adoption in first reading of the amendments and put it forward as one first example of consensual solutions reached in the framework of the Structured Dialogue.⁵⁷⁷ Yet, Dodik

⁵⁷⁴ Democratisation Policy Council (DPC), “EU Policies Boomerang: Bosnia and Herzegovina’s Social Unrest”, *Policy Brief* 2014, p. 3

⁵⁷⁵ Ibid.

⁵⁷⁶ (§10) “On the full alignment of the Law on Courts of Republika Srpska (RS) with relevant HJPC recommendations, the European Commission: acknowledges that high level agreement to align the Law on Courts of RS with HJPC Law was reached. Notes with concern that such agreement was not translated into adequate legislative amendments, and that communication between the RS Ministry of Justice and HJPC was not fruitful. Calls upon the HJPC and RS Ministry of Justice to jointly define, without further delays, the concrete legislative text that reflects their agreement on the principle and that will be drafted in the form of amendments to the RS Law on Courts by the RS Ministry of Justice.”

⁵⁷⁷ “12. On full alignment of the RS Law on Courts with relevant HJPC recommendations, the European Commission: Welcomes the adoption of the amendments to the RS Law on Courts by the RS Government and the subsequent adoption by the RS National Assembly in first reading. Expects the completion of the process as a matter of urgency. Congratulates all relevant institutions involved in this process for their

backtracked from the deal, asking the RS PM Zeljka Cvijanovic to oppose it. At the following fifth meeting in November 2013, the Commission found the impasse “extremely disappointing” and asked the RS authorities to reinstate the agreed amendments in the legislative procedure,⁵⁷⁸ but to no avail. According to an EU official, the RS leadership did not want to provide the EU with a first success in the dialogue with the RS to showcase.⁵⁷⁹ The issue then fell off the agenda of the following meetings of the Structured Dialogue and remained in stand-by. Although in itself quite trivial, the issue aptly highlights the risks of a depoliticised, deliberative and transgovernmental approach such as that of the Structured Dialogue. Such a setting, although useful to avoid the spillover of political issues over technical/juridical ones, remains obscure to the main part of the population and might give rise to feelings of “backroom deals” and lack of accountability. All the more in a context such as the Bosnian one, in which the European Union may be accused of caving in to RS pressures and not being able to keep the bar straight as the OHR used to.

The fourth meeting of the Structured Dialogue on Justice was held in Brčko on 8-9 April 2013. Among the 14 substantial points of its Recommendations, the Commission stressed the need to achieve concrete results by finalising the draft laws under discussion (the Laws on Courts and the Law on the HJPC) and putting them in parliamentary procedure, following an

constructive role, since they have once more confirmed that clear and open consultations the only possible was to resolve differences regarding any piece of legislation that deals with reform of the judiciary, as for all other sectors.”

578 (§3) “On the draft amendments to the RS Law on Courts, the European Commission: Considers the recent impasse regarding the adoption of previously agreed amendments to the RS Law on Courts extremely disappointing. Requests the RS authorities to reinstate the Proposal for amendments into the procedure in view of its final adoption, taking into account the full compliance with HJPC Law defining competences of the latter.”

⁵⁷⁹ Interview with an officer at the EU Special Representative in BiH, Sarajevo, August 2015.

opinion of the Venice Commission.⁵⁸⁰ The Commission also agreed to the BiH requests for budgetary support to the justice system through IPA funds 2012-2013, while underlining its exceptional and temporary nature, aimed at reducing the backlog of cases on war crimes processing, and conditioned upon the adoption of Action Plans for the implementation of the National War Crimes Strategy (NWCS). Finally, the meeting saw the launch of the works to prepare the next Justice Sector Reform Strategy (JSRS) 2014-2018 and its Action Plan, a condition for the disbursement of IPA funds under sector budget support.

In June 2013 the Venice Commission delivered its Opinion No. 723/2013 on the Draft Law on the Courts of Bosnia and Herzegovina, which it had been requested by the BiH Ministry of Justice in April 2013.⁵⁸¹ The opinion analysed the draft law dealing with amending the Law on the Court of BiH (2000) and setting up a separate High Court of BiH in order to increase the independence of the appeal mechanism. The Venice Commission was particularly worried by the compatibility of the draft law with the law on the HJPC, and highlighted several issues which seemed to encroach upon the independence of the judiciary, starting from the selection of the judges following a criteria of ethnic proportionality, deemed “highly problematic” since “the judiciary is not a representative institution” (§21) and “organising courts along ethnic lines would be wrong, counterproductive and damaging” (§22). Civil liability of judges and the centralisation of evaluation procedures in the hands of the Court President, and the wide involvement of the Ministry of Justice, including in financial issues, were also deemed as potentially threatening judicial independence. On the issue of the criminal jurisdiction of the Court of BiH, already controversial in the past and

⁵⁸⁰ European Union Delegation to Bosnia and Herzegovina, *Recommendations of the Fourth Plenary Meeting of the “Structured Dialogue on Justice between the European Union and Bosnia and Herzegovina”*. Brčko, 8-9 April 2013.

⁵⁸¹ European Commission for Democracy through Law (Venice Commission), Opinion No. 723/2013 on *The Draft Law on the Courts of Bosnia and Herzegovina*, Strasbourg 15 June 2013, CDL-AD(2013)015

subject to appeal to the Constitutional Court in 2009 (Zivkovic, U 16/08, 28 March 2009), the Venice Commission recalled the “consensus on the need to revise the wording” of art. 15, found at the third meeting of the Structured Dialogue, and recommended further clarifications of art.15(2) to avoid room for discretion at risk of breaching the principle of legal certainty (§38-43). It also recommended that the High Court act as a single last instance, without further appeal mechanisms (§52), and that it decides disputes, with binding legal consequences, rather than giving opinions (§53).

The following month, in July 2013, the EU and BiH held the fifth meeting of the Structured Dialogue on Justice in the form of a first thematic plenary dedicated to the reform of the state level judiciary. In its final Recommendations, the Commission positively assessed the redrafting of the Draft Law on the Courts following the recommendations of the Venice Commission’s opinion, though highlighting the persistence of some residual open issues. It took note of a consensus on the key principles of the reform, i.e., the clear determination of the circumstances for the extended criminal jurisdiction of the state level judiciary, to be maintained, as well as the configuration of a system with a first instance and a new appellate state court. Concerning the draft amendments to the HJPC Law, the Commission expressed preoccupation about the preservation of the prerogatives and competencies of the HJPC, especially concerning the access to judicial careers, the appointment of judges and prosecutors, and the prevention of conflicts of interest, and thus invited the Ministry of Justice to launch a wide consultation and ask for an opinion of the Venice Commission before going forward with the legislative revision.

On 18 June, the ECtHR dealt a blow to the practices of the Court of BiH, holding it in violation of the Convention that the appellants, Maktouf and Damjanovic, had been tried and sentenced for war crimes following the 2003 BiH Criminal Code rather than the Yugoslav one, in breach of the principle of irretroactivity of criminal law (*nulla poena sine lege*). The

EU Delegation highlighted that “war crimes processing needs to continue The issue should not be politicised Consistency in the application of criminal law is a crucial feature of this endeavour”.⁵⁸² The incident, which led also to the release of several convicted war criminals, bolstered the idea of strengthening the collaboration between BiH’s courts in order to harmonize their practices, in the absence of a state-level Supreme Court, towards the establishment of a joint panel of the presidents of the highest courts of the different legal systems of the country (state-level, entity-level, and Brčko District), as originally suggested at the June 2012 Mostar session of the Dialogue.⁵⁸³ The issue of equal treatment before the law had been on the table since the start of the Dialogue, and had been one of the original justifications for Dodik to call a referendum on state courts.

The sixth plenary meeting of the Structured Dialogue on Justice was held in Banja Luka on 11-12 November 2013. The Commission recommendations, in six substantial points, highlight the main point of debate, staying clear of minor issues. On the Maktouf-Damjanovic issue, the Commission recommended caution in the implementation of the ECtHR ruling, restating the need to proceed establishing “an effective Joint Panel of highest judiciary instances”, under HJPC lead, to advice for the harmonisation of court practices in the application of criminal law to the processing of war crimes. It recommended that the consolidated text of the Draft Law on the Courts of BiH is submitted in parliamentary procedure, in order to gather a wide consensus and achieve its adoption before October 2014 elections. The Commission was also disappointed at the withdrawal of the draft amendments

⁵⁸² European Union Delegation to Bosnia and Herzegovina, *Statement of the Delegation of the European Union/EUSR on the judgement in Maktouf and Damjanovic vs Bosnia and Herzegovina*, Sarajevo, 30 July 2013.

⁵⁸³ “Fully respect the principle of equality of citizens before the law and basic principles of criminal law, by maximising possibilities for the harmonised application of the criminal codes in war crime cases through periodic high-level judicial consultations.”

to the RS Law on Courts, and worried about the proposed amendments to the HJPC Law, for which it recommended an opinion of the Venice Commission.

The Opinion of the Venice Commission on the Draft Law on the HJPC (No. 712/2013) arrived in March 2014.⁵⁸⁴ The Venice Commission was particularly concerned with the risks of politicisation and of undue interference in the independence of the judiciary that might have stemmed from an excessive involvement of the legislative in the appointment of HJPC members, from providing the Parliamentary Assembly with the power to dismiss the HJPC's members and Presidents, and from the introduction of ethnic quotas, as well as from a downward transfer of competences to the Entities in the appointment of prosecutors (§126). The HJPC had been established as a single, state-level council for judges and prosecutors, with the task to ensure its independence, impartiality and professionalism. Although not explicitly foreseen in the Constitution, the HJPC was set-up in 2004 by a law based on a Transfer Agreement with which the entities delegate such task to the state-level institutions.⁵⁸⁵ Its compliance with the BiH Constitution was confirmed in 2009 (case No. U 11/08). Although its establishment was assessed positively by the EU, the Venice Commission, and the BiH judiciary, the HJPC in its first decade of work suffered from several weaknesses, from the vulnerability of the selection procedure for its members and for the judiciary (lacking a mandatory written exam and national pool of vacancies), to being shared between judges and prosecutors, and the limited scope of competences of the body, unable to push for more radical reforms, including of the financing of the justice system, or to fix the backlog of cases (§11). Few amendments had been proposed, some of which had already been assessed

⁵⁸⁴ European Commission for Democracy through Law (Venice Commission), Opinion No. 712/2013 on *The Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, Strasbourg 24 March 2014, CDL-AD(2014)008.

⁵⁸⁵ Agreement on the Transfer of Certain Entity Responsibilities through the Establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Sarajevo, 11 March 2004.

by the Venice Commission in its 2012 Opinion. The final set of amendments, though, was presented in December 2012 and “sought to strengthen the influence of the legislative and executive powers” over the HJPC (§13), thus being opposed by the associations of judicial professionals. To reconcile the proposals of the parties and of the judicial institutions, the BiH Ministry of Justice put forward a new Draft Law in 2014. The Venice Commission considered it as “a very complex and comprehensive instrument seeking to regulate all aspects of the functioning of the HJPC carefully drafted and seek[ing] to take into account international standards” (§19). The solution to the shortcomings highlighted by the Venice Commission in 2012, though, was often just a comeback to the 2004 text. The Venice Commission endorsed the principle of sub-division of the HJPC in two sub-council, one for the judges and one for the prosecutors, with the maximum amount of autonomy. Meanwhile, it acknowledged the need for the HJPC to remain a single and uniform body in accordance with the 2004 competence Transfer Agreement. It considered the compromise reached “a balanced solution” (§61), “appropriate” to BiH’s “particular context” (§64) to ensure that judges and prosecutors cannot outvote the other group in appointments and disciplinary proceedings. Besides pleading for an explicit mention of the HJPC within BiH’s Constitution in the longer term (§24), the Venice Commission highlighted several points of concerns. As regards the selection of the HJPC members, it recalled that “the judiciary should not be organised along ethnic lines” (§32), and that the provision calling for at least six representatives for each Constitutive People, as well as for gender equality, in a country the size of BiH, would make their selection “very difficult and inflexible” (§32), penalise their merits, and “undermine the effective functioning of the system” (§35). Moreover, the Venice Commission pointed out several avenues through which the proposed system would have risked encroaching on the separation of powers and put the judiciary at risk of politicisation. In fact, the Draft also foresaw the possibility for the Parliamentary Assembly to remove the HJPC Presidency or

one of its members in case of negative assessment over its annual report – a provision that the Venice Commission deemed “clearly problematic” and that “should be deleted” (§72). The same was true for the election and dismissal of the HJPC’s President and Vice-Presidents which, the Venice Commission reminded, should not be based on ethnic criteria and whose election “should not be left to the Parliamentary Assembly” (§47).

4. The broadening of the dialogue agenda after the 2014 protests

The early months of 2014 also saw the onset of popular mobilisation in Bosnia, particularly in the Federation entity, against the precarious socio-economic conditions of the main part of the population and especially high rates of youth unemployment. The civic protest, which in 2013 had been peacefully embodied by the JMBG/*bebolucija* movement, turned instead violent in February 2014, when several buildings of the cantonal administrations – taken as a symbol of the wastefulness, redundancy, and corruption of BiH’s political system – were torched in Sarajevo, Tuzla, Zenica and Mostar, and several cantonal administrations resigned as a consequence. The protestors then organised in city-based plenums, which took different trajectories and overall subsided by the summer. At the same time, the final rounds of the process of constitutional reform negotiations finally ended without an agreement. The EU thus found itself in a double crisis – let down by political elites unable to reach a compromise, and provoked by a mass popular movement that risked threatening the overall stability of the country. On 7 March, the EU delegation met with civil society organisations, that pleaded “to make the Structured Dialogue on Justice process more transparent and efficient”, by having it transform into a “Structured Dialogue on the Rule of Law”, dealing also with gender equality and the fight against corruption, organised, crime, discrimination, and hate speech. CSOs also pleaded for their own involvement, claiming that

the dialogue had shown only limited results since it “lack[s] the third critical party – BH civil society”, and positing themselves as an alternative way to reach out and represent the BiH citizens’, beyond those political elites whose lack of will to reach compromise solutions to outstanding issues had become more than apparent.⁵⁸⁶ The European Council, on the initiative of Commissioner Füle, responded by adopting its April 2014 Conclusions in which it declares to have “heard the public protests and calls by BiH citizens”, and “urges the BiH institutions and elected leaders to reach out to the people ... and provide responsible and immediate answers to their legitimate concerns” (§3). Then, among the other actions of repositioning the main EU priority in Bosnia on socio-economic issues, the Council also declared to “support broadening the Structured Dialogue on Justice to other rule of law issues, and in particular to anticorruption issues” (§5).⁵⁸⁷

Two weeks later, the Structured Dialogue reconvened in Brussels for a thematic plenary session, its seventh, of feedback on the main issues at stake on judicial reform.⁵⁸⁸ Yet, the EU decision to broaden the agenda of the dialogue to other rule of law issues was not welcomed by all Bosnian actors. The thematic session was not attended by the representatives from Republika Srpska at the Justice Ministry and at the Directorate for European Integration,⁵⁸⁹ who objected to the introduction of talks on anticorruption, and the cooperation between police and prosecutors, fearing that it would have meant a comeback to the debate on police

⁵⁸⁶ Initiative for the Monitoring of BiH’s European Integration, “The Structured Dialogue has to be more transparent and focused on a wider spectrum of BH citizens’ needs.” Open Letter of BH Civil Society Organisations to the BiH Council of Ministers, the BiH Directorate for European Integration, the European Union Delegation in BiH and the European Commission, Sarajevo, March 2014 (undated).

⁵⁸⁷ Council of the European Union, EU Foreign Affairs Council conclusions on Bosnia and Herzegovina, Luxembourg, 14 April 2014.

⁵⁸⁸ European Union Delegation to Bosnia and Herzegovina, *Thematic plenary of the EU-BiH Structured Dialogue on Justice – Recommendations by the European Commission Services*. Brussels, 29 April 2014.

⁵⁸⁹ Klix.ba, “EU razočarana što nije bilo predstavnika Ministarstva pravde i RS-a” [EU disappointed RS lacks representatives at Justice Ministry], 30 April 2014.

reform already closed in 2009. RS representatives complained of the delays in the reorganisation of the HJPC as well as in the debate on the removal of international judges from the Constitutional Court. They called for a comeback to the original mandate, focusing on faster resolution of the cases of alleged war crimes committed against Bosnian Serbs.⁵⁹⁰

The three points of the European Commission's Recommendations focus on the draft Law on the HJPC, the Justice Sector Reform Strategy (JSRS) 2014-2018, and the revised draft Law on Courts of BiH. The Commission recalled that the draft Law on the HJPC needed to undergo a thorough debate and to follow the conclusions of the December 2012 TAIEX expert seminar, to prevent overexposure of the judiciary to political pressures. It also reminded that even in the lack of a single model in Europe, cherry-picking and decontextualisations were to be avoided, since "when it comes to recently formed democratic states, the system of formal guarantees for the independence of the judiciary has to be possibly more rigorous" (§1). It thus advocated reviewing the draft law to include the recommendations of the Venice Commission, and to ensure the harmonisation of the RS Law on Courts with the BiH Law on the HJPC. The Commission also recalled the need to proceed with the adoption of the 2014-2018 JSRS as a condition for the disbursement of IPA funds, and recommended to start the legislative procedure for the draft Law on Courts, making sure to achieve "the widest and most consensual political support" (§3) while following the principle of maintaining the extended jurisdiction of state-level judiciary through clarifying in an objective way its criteria of application, as suggested by the Venice Commission in its Opinion No. 723/2013.

The structured Dialogue also held a plenary meeting, its eight, on 13-14 May 2014 in Sarajevo, following the broadened agenda called for by the April EU Council Conclusions,

⁵⁹⁰ RTRS TV, "Strukturalni dijalog u ćorsokaku" [Structured dialogue in limbo], 14 April 2014. See also Jahić, Dino, "Bosnia and Herzegovina." In *Nations in Transit* report 2015, New York: Freedom House, p. 156.

thus including also other rule of law issues such as “anti-corruption; anti-discrimination; prevention of conflict of interest; measures to strengthen integrity, accountability and efficiency of police forces” (§1.2), while maintaining the reform of the judiciary “as the main priority of the Structured Dialogue” (§1.5).⁵⁹¹ The Commission welcomed progresses in the entrenchment of the professionalism of the judiciary (a mandatory written entry exam, and systematic structured interviews for applications and promotions). It reiterated the need to amend the draft Law on the HJPC to ensure the independence of the judiciary from political pressures, taking into account the opinion of the Venice Commission, and invited to process the draft law through the Council of Ministers. It also asked the HJPC to provide detailed information on the application of extended criminal jurisdiction by the Court of BiH, in terms of numbers of cases, types of offenses, overview of the main reasoning, and statistical overview of the final outcome, in order to finalise the drafting of the Law on the Courts of BiH and to proceed to clarify the criteria for the application of art. 7(2) extended jurisdiction. The Commission also recalled the need to reduce the backlog of cases through systemic solutions, particular for unpaid utility bills cases, while ensuring a proper handling of war crime cases to achieve reconciliation. On the implementation of the National War Crimes Strategy (NCSW), it underlined the need to consolidate the process of referral.

The rule of law issues included under the broadened agenda started to be discussed with the need for an inclusive process of preparation of a 2015-2019 new anticorruption strategy. The Commission declared that it “shares the concerns expressed by representatives from civil society organisations” in the plenary session, as regards the need to start from “a comprehensive qualitative analysis of the implementation of the current strategy, a thorough

⁵⁹¹ European Union Delegation to Bosnia and Herzegovina, *Plenary meeting of the “Structured Dialogue on Justice and Additional Rule of Law Matters between the European Union and Bosnia Herzegovina”*. Recommendations by the European Commission. Sarajevo, 13-14 May 2014. Ref. Ares(2014)1639230 – 20/05/2014

corruption risk assessment, as well as available sector reform” (§6.3). It also welcomed the adoption of a new Public Procurement Law, and of the Regulation on Whistleblowers Protection. On conflict of interest issues, the Commission recalled the need to monitor compliance with international standards and regrets that “in many instances, legislative authorities appear to have reversed the efforts towards achieving higher anti-corruption standards” (§8.3), as in the area of political parties’ financing, and in the relocation of the competence on conflicts of interests from the Central Electoral Commission to the Parliamentary Assembly; it also commended the RS for the inclusion of CSOs in the implementation of the new anticorruption plan, asking for them to be involved further (§9). On anti-discrimination, the Commission welcomed the initiative of the Ministry of Human Rights and Refugees to work on a revision of the 2009 Law on Prevention of Discrimination (LPD), and suggested that procedural amendments (needed to improve legal certainty) are accompanied by substantial amendments to harmonise with the EU acquis on discrimination on grounds of disability, age, gender identity and sexual orientation, encouraging the systemic and inclusive consultation of CSOs all along the process (§10). The last points of the recommendations are devoted to the integrity, accountability, efficiency and coordination of the police forces, along with their cooperation with the prosecutors. The Commission particularly “stresses that a fully functional security sector, irrelevant of its fragmented nature, is a key element for the development and entrenchment of the rule of law, which in turn is fundamental for the process of integration into the EU” (§13.2)

The issue of the extended criminal jurisdiction of the state-level judiciary, as included in the last draft of the Law on Courts, was the subject of a TAIEX expert seminar held in July 2014.⁵⁹² The seminar started from the outcome of a first TAIEX seminar held in 2013,

⁵⁹² European Union Delegation to Bosnia and Herzegovina, *EU-BiH Structured Dialogue on Justice and Additional Rule of Law Matters. TAIEX legislation review seminar on the extended criminal jurisdiction of*

according to which “there is no requirement to limit or expand the current criminal jurisdiction of the Court of BiH but to clarify it”.⁵⁹³ The HJPC presented the analytical opinion, as requested by the European Commission, on the case law of the Court of BiH based on art.7(2), highlighting 22 cases since 2003, lacking a consistent and harmonised jurisprudence. The situation in BiH was compared with examples from Belgium, Germany, Italy and Switzerland; after bilateral talks with representatives of the Court of BiH, the Prosecutor’s Office, Republika Srpska and the OHR, the practitioners defined specific recommendations for amendment of art.7(2) in order to “complement the existing draft reform with more stringent parameters” to “allow a clear definition of the jurisdiction” and “reducing excessive margins of discretionary power”.⁵⁹⁴ These included the clarification of the notion of interrelation between offenses, the limitation of the scope of extended jurisdiction only to serious offenses, and a definition of the seriousness of the crime based on a threshold of penalty and/or a list of specific offenses (possibly based on the list of European Crimes),⁵⁹⁵ together with “specific and objectivised criteria” to justify state-level adjudication: serious and actual damage, interrelated criminal offences in various entities, serious criminal offences by organised criminal groups active state-wide. Overall, such set of parameters would have allowed to reduce discretion and visibly justify the added value in the state-level jurisdiction, avoiding any risk of potential misuse of the measure able to affect human rights in individual cases. The experts also recommended the requirement to formally provide motivations for art.7(2) investigations, the possibilities for entities to both challenge

the State level judiciary in relation to European standards on legal certainty and the principle of the natural judge. Conclusions by the European Commission Services. Sarajevo, 23-25 July 2014. Ares(2014)2636062, 8 August 2014.

⁵⁹³ Ibid, p.2.

⁵⁹⁴ Ibid, p.4.

⁵⁹⁵ Crimes excluded from double criminality requirements for the surrender of suspects among Member States, based on the European Framework Decision on the European Arrest Warrant No. 2002/584.

state-level jurisdiction decisions and to voluntarily give up jurisdiction on specific cases to the state level, as well as the set-up of a separate state-level appellate court.

Another TAIEX expert seminar was held in February 2015 on the issue of conflict of interest in the judiciary.⁵⁹⁶ The May 2014 Recommendations of the European Commission after the first Structured Dialogue session under the broadened agenda included the request to adopt a HJPC Book of Rules on conflict of interest, defining the situations of conflict of interests and the actions to be taken, which the HJPC did in the following months based on art. 10(2) and 16 of the Law on the HJPC. The HJPC Book of Rules was intended as a first step towards establishing a set of rules against conflict of interest valid for the whole state judiciary. Yet, soon after and at the 26-27 November session of the HJPC, its members started discussing possible amendments and even revocation of the Book of Rules, which “would in effect downgrade the Book of Rules and backslide into a vacuum of questionable practices of conflict between public and private interests of its members”, according to the Commission.⁵⁹⁷ The Commission thus organised the TAIEX seminar, to “assist for an effective enforcement of the new rules and to discuss the issue at the level of the entire judiciary”.⁵⁹⁸ The seminar discussed examples from Belgium, Croatia, Germany and Italy; the invited experts assessed positively the legal grounds of the Book of Rules as a by-law, and recommended it to be included in the text of the future revised Law on the HJPC. The experts highlighted that “there is no independent council in Europe that has as much power as the HJPC in BiH”, and that thus it “should be more careful to the conflict of interest issue than it is necessary in current EU member states. Maximum independence should lead to maximum

⁵⁹⁶ European Union Delegation to Bosnia and Herzegovina, *EU-BiH Structured Dialogue on Justice and Additional Rule of Law Matters. TAIEX seminar on “conflict of interest in the judiciary”. Summary conclusions by the European Commission services*. Sarajevo, 4-5 February 2015. Ares(2015)757837, 23 February 2015.

⁵⁹⁷ Ibid, p. 2

⁵⁹⁸ Ibid, p. 2

awareness”.⁵⁹⁹ Clear rules on integrity and accountability would make up the necessary balance to the full independence of the HJPC from the other powers of the state, and prevent any reform intended to introduce an overexposure of the judiciary to the legislative or the executive. Given the evidence on the existence of conflicts of interests in the BiH judiciary, it was recommended that the Book of Rules not be amended to soften it, lest the independence of judiciary be put in danger. Rather, such rules should be extended to the whole judiciary, and complemented with assets declarations and limits on extrajudicial earnings.

5. The entry into force of the SAA and its impact on the Structured Dialogue on Justice

Following the Anglo-German diplomatic initiative in Autumn 2014, the December 2014 EU Council Conclusions on BiH, the signature of the Written Commitment to Reforms and its adoption by the BiH Parliamentary Assembly, on 16 March 2015 the EU Council decided to bring into force as of 1 June 2015 the EU-BiH Stabilisation and Association Agreement (SAA),⁶⁰⁰ which had been signed in 2008 but had remained frozen since.⁶⁰¹ The entry into force of the SAA also meant the establishment of an EU-BiH SAA Sub-committee on Justice, Freedom and Security, meant to cover also the JHA issues dealt with by the Structured Dialogue up until that moment. Yet, differently from the Structured Dialogue, the SAA Sub-committee is a formal venue of bilateral dialogue between EU institutions and candidate

⁵⁹⁹ Ibid, p. 7

⁶⁰⁰ Council of the European Union, *Outcome of the Council Meeting*, 3379th Council meeting, Foreign Affairs, Brussels, 7265/15, 16 March 2015,

⁶⁰¹ Council of the European Union, *Bosnia and Herzegovina: Conclusion of Stabilisation and Association Agreement*, Press Release 199/15, 21 April 2015.

European Commission, *Stabilisation and Association Agreement with Bosnia and Herzegovina enters into force today*, Press release IP/15/5086, 1 June 2015.

country executive representatives, hence not foreseeing the presence of justice professionals and civil society organisations in the debate. Yet, since the December 2014 Council Conclusions expressly foresaw that “the Reform Agenda should be developed and implemented in consultation with civil society”, it was understood that somehow CSOs would remain involved in the process.⁶⁰²

One more session of the Structured Dialogue was organised after the entry into force of the SAA for 13-14 July 2015. More than one year had lapsed since the last meeting of May 2014, due to the campaign for the October 2014 political election, and the following period of renewal of institutions, with the new governments taking place only in April 2015. And yet, the Dialogue format had to be changed at the last moment for the renewed referendum threats coming from Republika Srpska, which brought the situation back to the status it had in 2011. The Commission services had performed a regular stock-taking mission on 6-7 July 2015, meeting with executive representatives as well as practitioners and civil society, and got the impression of a growing politicisation of the process from the BiH side.⁶⁰³ The following day, 8 July, with a week of delay on the agreed timetable, the BiH Council of Ministers endorsed the working documents and list of participants for the dialogue, but in what was understood by the EU as a political game it also decided to change the co-chair for BiH, from the Security Ministry Secretary to the Minister of Justice, and entrusting the Ministry of Justice with the conduct of the process instead of the Directorate for European Integration. These developments only reached the Commission on the afternoon of Friday 10 July; meanwhile, the Commission had decided to put on hold the plenary session of the dialogue, given the flaws and delays in its preparation process, and to invite instead the four Justice Ministers for a meeting on Monday 13 July. The same day, 10 July, the RS Justice Minister Anton

⁶⁰² E-mail communication with EUSR officer, February 2015

⁶⁰³ Interviews with EUSR and European Commission officers, August 2015.

Kasipovic announced he would not take part in the upcoming Structured Dialogue meeting, due to the lack of establishment of an agreed agenda within two weeks from the meeting, as in accordance with the Dialogue methodology. Kasipovic affirmed that the RS government remained committed to the Structured Dialogue, while reiterating the opposition of RS authorities to the participation of justice professionals and civil society organisations to the dialogue, stating that “the reason for the modest result of the dialogue” has to do with “the fact that it included a huge number of participants and topics that are not the subject of the main purpose of the dialogue”, and that the “enormous difficulties” experienced by the BiH judiciary would be better overcome by “hav[ing] the ones accountable for decisions make them”.⁶⁰⁴ On Sunday 12 July, the European Commission confirmed that the plenary session of the Structured Dialogue would be put on hold, and that a restricted meeting with the four Justice Ministers would instead take place. It also asked for “an urgent engagement with respective executive authorities in BiH” in order to “discuss all aspects related to the functioning of the Structured Dialogue” as well as “the future establishment of a formal Sub-Committee on Justice, Home Affairs and Security”.⁶⁰⁵

At the ministerial meeting, on Monday 13 July, the Commission reported of a consensus “on continuing and intensifying work within the Structured Dialogue on Justice and refocus it on the key items”, i.e., the processing of war crime cases and the reform of judiciary institutions, while leaving the broader agenda agreed upon in April 2014 (anticorruption, antidiscrimination, etc) to the works of the upcoming EU-BiH sub-committee on Justice, Home Affairs and Security.⁶⁰⁶ Interviews with EU officers confirmed that the enlarged

⁶⁰⁴ SRNA.rs, “Structured Dialogue on Justice Cannot Resume” Banja Luka 10 July 2015.

⁶⁰⁵ European Commission, *Statement of the European Commission on the EU-BiH Structured Dialogue on Justice*, Bruxelles, 12 July 2015.

⁶⁰⁶ European Commission, *Joint Statement of the Ministerial meeting in the framework of the EU-BiH Structured Dialogue on Justice*, Sarajevo, 13 July 2015.

agenda of the Structured Dialogue, away from the four original priorities agreed with Dodik, was increasingly seen as problematic and counter-productive.⁶⁰⁷ According to the Joint Statement, “the Structured Dialogue on Justice is place for debate and consensus building to develop key reforms needed for the country; however, final decision making lies obviously with relevant executive and legislative authorities from BiH”.⁶⁰⁸ EU officers had informed member state representatives in Sarajevo that the process was facing a crisis and a revision was needed to ensure its functionality. Two things in particular were noted: that the EU was working within the framework of the EU *acquis* and European standards, including the European Convention on Human Rights, and not just with political conditionality; and that therefore the EU could assist, facilitate and even mediate among domestic actors, but it would not “play a game” and negotiate with them on the substance of the EU *acquis*.⁶⁰⁹ The question of the relation between decision-makers and non-state actors was discussed but not clearly resolved, as the Joint Statement recalls that “ministers shall continue playing a pivotal role in the platform, but their work shall be continuously informed by practitioners, academia, and international experts”.⁶¹⁰ Likewise, participants confirmed the need for the continuous involvement of practitioners and civil society organisations to ensure inclusiveness and provide valuable input, although formally the engagement of the EU remained with the executive and legislative authorities, since they hold the responsibility for legislative initiative. A concern was expressed about too in-depth engagement with civil society representatives, as blurring the lines of democratic accountability of domestic institutions.⁶¹¹

⁶⁰⁷ Interviews with EUSR and European Commission officers, August 2015.

⁶⁰⁸ European Commission, *Joint Statement*, 13 July 2015.

⁶⁰⁹ Interviews with EUSR and European Commission officers, August 2015.

⁶¹⁰ European Commission, *Joint Statement*, 13 July 2015.

⁶¹¹ Interviews with EUSR and European Commission officers, August 2015. See on the topic: Klijn, Erik-Hans, and Chris Skelcher. “Democracy and Governance Networks: Compatible or not?” *Public Administration* 85 (3), 2007, p. 587–608.

The upcoming revision of the format of the dialogue, in the context of the establishment of the SAA Sub-Committee on Justice, Freedom and Security would therefore need to strike a balance between the two.

Although the RS Minister Kasipovic acted constructively at the Ministerial meeting, and supporting the Structured Dialogue process, as recognised by participants from the EU side, he was not able to guarantee results on the part of the RS government.⁶¹² In fact, that very day, Kasipovic was also supposed to debrief the RS Parliament on the issue. Yet, at the parliamentary debate, the RS President Milorad Dodik showed up and tabled a motion to call for mid September a referendum on confidence in the state justice system and in the authority of the OHR, which was approved by the majority of the deputies. The wording chosen for the poll question, on whether RS citizens support “the unconstitutional and unauthorised laws imposed by the High Representative of the international community, especially the laws imposed relating to the Court and the Prosecutor’s Office of Bosnia and Herzegovina”,⁶¹³ gives a hint on the side taken by the RS leadership on the issue. Justifying the decision to call for a referendum, Dodik claimed that the state judiciary was costing “millions” to the RS budget while working against its interests, since its war crimes prosecutions mainly targeted Bosnian Serbs, and under command responsibility charges rather than for individual actions.⁶¹⁴ Dodik said he was “ready for dialogue on the judiciary and the prosecution in BiH” but warned that, in the lack of an agreement, he would “stick to the decision on the referendum”. He explicitly mentioned that “the courts and the prosecution are under the direct influence of the SDA and Bakir Izetbegovic. We expect the courts to be independent and not influenced by Oric and Izetbegovic or British and American embassies”.⁶¹⁵ “There can be a

⁶¹² Interview with an officer at the EU Special Representative in BiH, Sarajevo, August 2015.

⁶¹³ Jukic, Elvira M., “Bosnian Serbs to Hold Referendum on State Courts”, *BIRN / Balkan Insight*, 16 July 2015.

⁶¹⁴ Ibid.

⁶¹⁵ *TANJUG*, “Oric was in Srebrenica in disguise, inciting crowds”, 17 July 2015

court and a prosecutor's office in the competences of BiH but it cannot be focused only on one nation – on Serbs – nor can it take over cases from the RS".⁶¹⁶ He also reiterated previous claims on the violation of international law and the Dayton Accords by the High Representatives between 2000 and 2005, including the abolition of fiscal competences of the entities and the broadening of BiH Council of Ministers from three to ten state-wide ministries, and guaranteed that the RS would hold the referendum even if this was to be annulled by the Constitutional Court, since such a decision would be "political rather than legal".⁶¹⁷

Several factors may help explaining Dodik's decision to come back to the referendum he had threatened in 2011. First, in electoral term, at the 2014 elections his SNSD party had lost the BiH Presidency post for the Bosnian Serbs, and he personally had retained the RS Presidency only for a small number of votes. His majority in the RS Parliament was deemed scarce, so much that several observers had warned he might lose it by July; moreover, the RS was deemed to be facing a severe liquidity crisis by mid September, the date for when the referendum was called. By going back to identity politics, Dodik could strengthen his claims as ultimate defender of Republika Srpska, divert public attention from socioeconomic issues, and embarrass the RS opposition (which in fact decided to abstain from the referendum vote), before it proved to be too late for him to muster parliamentary support. Second, in terms of relations with the state level, some disturbances in inter-institutional relations were expected since Dodik's party had been expelled from both the BiH Presidency and the BiH government coalition by the RS opposition, while remaining in power in both the Presidency and the government of Republika Srpska. Resorting to the argument of direct popular legitimacy could have been a way for him to restore himself as the unavoidable leader of the Bosnian

⁶¹⁶ Ibid.

⁶¹⁷ *Slobodna Bosna*, 16 July 2015

Serbs. Moreover, allegations had surfaced about financial mismanagement in the RS banking sector, linked to cases of corruption and graft. The crack of Banja Luka's Bobar Banka could potentially expose the RS political leadership to investigations by the BiH State Prosecutor – against whom, Dodik launched the referendum.⁶¹⁸

Finally, in terms of the justice system, things had started to unravel from the month of June, in relation of the Naser Oric issue and Srebrenica's twentieth anniversary. Oric during the war had been the commander in Srebrenica of the Armija BiH, the army of the internationally recognised Sarajevo-based government. He had later been indicted at the ICTY for war crimes allegedly committed against Serb civilians in 1992, and acquitted in 2008 as not in control of the military unit that had committed the crime, but Serbia and the Bosnian Serbs did not accept the verdict and kept considering Oric as a war criminal at large. In 2014 Serbia launched an Interpol mandate against Oric, but Bosnia appealed to have it suspended. Yet in June 2015 Oric was arrested in Switzerland on another Serbian Interpol mandate, just few weeks before the 20th anniversary of the genocide in Srebrenica, where he is considered as a hero and the ultimate defender by most Bosniaks.⁶¹⁹ In the following days, the BiH Prosecutor's Office launched an Interpol mandate against Oric too, to override the Serbian one.⁶²⁰ The Swiss authorities accepted the Bosnian mandate, Oric was extradited to Sarajevo and was released in the following days – though he remained under trial in the country.

The use by the Serbia of Interpol mandates for political reasons was not new (in the past, prosecutions had been launched against Ejup Ganic and Jovan Divjak). In the heated context

⁶¹⁸ Rodolfo Toé, "Bosnia and Herzegovina: The Bobar Banka case", *Osservatorio Balcani e Caucaso*, 20 August 2015.

⁶¹⁹ Davide Denti, "BOSNIA: Arrestato Naser Oric su richiesta di Belgrado. Polemiche in vista del ventennale di Srebrenica", *East Journal*, 16 July 2015.

⁶²⁰ Davide Denti, "BOSNIA: Il movimentato ventennale di Srebrenica", *East Journal*, 10 June 2015.

of Srebrenica's 20th anniversary, in which Serbia pushed Russia to issue a veto on a draft UN Security Council Resolution on the genocide,⁶²¹ though, the Oric case greatly contributed to increase the tensions within Bosnia and with Serbia, which came to surface with the launch of object against Serbia's PM Vucic at the Srebrenica remembrance ceremony in July.⁶²² In terms of regional cooperation in justice matters and war crimes prosecution, the malicious use of international prosecution instruments by Serbia cancelled all the trust between the state prosecutors of the two countries, that in the previous years had demonstrating to be able to cooperate efficiently.⁶²³ As acknowledged by an EU officer, "Serbia killed the [cooperation] Protocol and the mechanisms of international cooperation",⁶²⁴ and in so doing it cast a shadow over the whole process of cooperation among prosecutor's offices of BiH and Serbia, providing new arguments for the main opponents of the Structured Dialogue – including the President of the Court of BiH. At the same time, the counter-mandate launched by the BiH Prosecutor's Office to ensure the extradition of Oric to Bosnia and Herzegovina rather than to Serbia managed to irk the RS leadership, who saw it as the confirmation that the state institution, included the judicial ones, responded first and foremost to the main Bosniak political leadership, hence providing one more justification to resorting to the referendum threat.

So, while the RS used to be the main interested actor in the Structured Dialogue on Justice, and while its Justice Minister assured that the entity remained committed and willing to continue debating the issue, in July 2015 Milorad Dodik decided to enact its referendum

⁶²¹ Davide Denti, "SERBIA: L'ONU dichiarerà Srebrenica un genocidio. Belgrado insorge: 'motivazioni politiche'," *East Journal*, 7 July 2015.

⁶²² Davide Denti, "BOSNIA: Il movimentato ventennale di Srebrenica".

⁶²³ In March 2015, Belgrade arrested several Bosnian Serbs, allegedly directly responsible for the Srebrenica genocide, who had sought refuge in Serbia, and decided to put them under trial in the country.

Davide Denti, "SERBIA: Belgrado arresta i carnefici di Srebrenica", *East Journal*, 23 March 2015.

⁶²⁴ Interview with an officer at the EU Special Representative in BiH, Sarajevo, August 2015.

threat. The understanding in the EU community was that the referendum would be conducted, but that its legal effects would have been nihil.⁶²⁵ Yet, Dodik's move found a completely negative reception from international actors in BiH and from foreign diplomacies, included Serbia. On 13 July, the representatives of the EU, US, UK, France, Germany and Italy travelled to Banja Luka to express their concerns about the initiative. In a joint statements, the western diplomats affirmed that they "recognise and agree that there are significant problems with the court and prosecutorial system in BiH," but reaffirmed the importance to discuss such issues in the framework of the Structured Dialogue on Justice rather than with an instrument of direct democracy "with no legal value, on a question which challenges the principles of the BiH constitution", which would prove ineffective and "a waste of money". They reaffirmed that "State level judicial institutions are critical to the sovereignty and stability of Bosnia and Herzegovina" and that the referendum would be unconstitutional and "a direct threat to the sovereignty and security of the state as a whole," besides "seriously harm[ing] this country's EU accession path". It would prove an "unnecessary confrontation which would undermine rather than support our partnership and the reforms which we agree are needed", and that therefore "cannot be tolerated".⁶²⁶

Similarly, the day after, the Steering Board of the Peace Implementation Council (with the telling exception of Russia) denounced the announced referendum as a "fundamental violation" of the Dayton Accords. It reminded that the RS parliament is not competent on issues falling either within the constitutional responsibilities of the state, or under the GFAP and international law, and that "the International Community retains the necessary instruments to uphold the GFAP", in a subtle mention to the still in force Bonn Powers of the

⁶²⁵ Interview with an officer at the EU Special Representative in BiH, Sarajevo, August 2015.

⁶²⁶ EUSR *Joint Statement on the Planned RS Referendum*, Sarajevo, 14 July 2015

OHR.⁶²⁷ The OHR himself, Valentin Inzko, the day after, defined it as a “referendum against Dayton”. In his statement Inzko recalled that the laws at stake (the 2002 Law on the Court of BiH and the 2003 Law on the Prosecutor’s Office) had been passed by the BiH Parliament, SNSD included, and were twice deemed Constitution-compliant by the BiH Constitutional Court, as well as that the OHR executive powers had been repeatedly endorsed by the UN Security Council.⁶²⁸ The US Embassy defined the planned referendum a “threat ... to the security, stability, and prosperity of Bosnia and Herzegovina”, declaring to oppose it as a violation of Dayton.⁶²⁹ Also the European Parliament president, Martin Schulz, who was scheduled to visit Bosnia on 16 July, dismissed the announced referendum as “counterproductive” and “playing with the high risk”, since “referendums are meaningful and useful when it is about the fundamental questions. If they are used for tactical reasons – it is the wrong instrument”.⁶³⁰ Even Serbia did not support Dodik’s referendum move. In his visit to Belgrade on 17 July, the RS President was told by the Serbian PM Vucic “to reconsider the decision to hold a referendum”,⁶³¹ offering to speak in front of the RS Assembly if so needed,⁶³² and subtly threatening to withhold Serbia’s backing of the Bosnian Serb entity in the future.⁶³³

⁶²⁷ OHR, *Statement by the Ambassadors of the Steering Board of the Peace Implementation Council*, 14 July 2015

⁶²⁸ OHR, *Those supporting referendum against Dayton are pushing RS into isolation and crisis*, 15 July 2015

⁶²⁹ Embassy of the United States in BiH, *Statement on the RSNA Vote to hold a referendum on the state judiciary*, Press Release, 15 July 2015

⁶³⁰ EU Delegation to BiH, Press Conference of the European Parliament President Martin Schulz in Bosnia and Herzegovina, 16 July 2015

⁶³¹ *TANJUG*, “Oric was in Srebrenica in disguise, inciting crowds”, 17 July 2015

⁶³² “I am ready to... present additional arguments that could contribute to easier consider the overall situation... if needs be also in front of the RS deputies. *TANJUG*, “Vucic says he asked Dodik to ‘reconsider referendum’”, 17 July 2015

⁶³³ “Serbia would find it difficult to exist without the RS, while the RS would find it no less difficult without Serbia”. *Ibid.*

The only international player that openly backed Dodik's move was the Russian Federation. In dissent from to the PIC Steering Board statement, Russia deemed the referendum "a question of internal politics" and remarked that the failure of the "so-called 'Structured Dialogue'" had left the "concerns of the Serbian community in BiH unanswered".⁶³⁴ Russia also claimed that the abstention of the RS opposition meant the decision of the RS Assembly reflected a "consensus" among the Bosnian Serb community on the matter, and thus the dissatisfaction of "half of the state" could not be ignored nor called unconstitutional, since "Serb citizens feel that their Constitutionally- guaranteed rights and freedoms are limited".⁶³⁵ It later called for the end of the "international protectorate" in BiH and the OHR's attempts to the "forced unification" of Bosnia.⁶³⁶

Domestically, the RS referendum threat arose generalised opposition from the Federation-based parties. In a common statement on 16 July, the leaders of the three opposition parties (DF, SBB, SDP) condemned the referendum as a "fundamental violation" of Dayton, "a direct violation of the Constitution", and "an assault on the integrity and sovereignty of Bosnia and Herzegovina", pleading to "fight" against the SNSD efforts "to provoke violence in order to maintain power". Yet, they recognised that the underlining problem with the politicisation of the state judiciary did indeed exist: "we share the dissatisfaction with the

⁶³⁴ Embassy of the Russian Federation in Bosnia and Herzegovina, Komentar Ambasadora Ruske Federacije u BiH Petra Ivancova za agenciju „FENA“ [Comment of the Ambassador of the Russian Federation to BiH Petar Ivancov with the news agency "Fena"], 14 July 2015. http://www.sarajevo.mid.ru/pr_lj_148.html.

⁶³⁵ Embassy of the Russian Federation in Bosnia and Herzegovina, Не може се игнорисати воља половине БиХ! Интервју Амбасадора Русије у БиХ Петра Иванцова Новинској Агенцији „СРНА“ [“The will of half of Bosnia cannot be ignored!” Interview of Russian Ambassador to BiH Peter Ivancov with news agency "SRNA"], 16 July 2015.

⁶³⁶ Embassy of the Russian Federation in Bosnia and Herzegovina, Članak Ambasadora Rusije u BiH Petra Ivancova „Nezavisnim novinama“: *Bosna i Hercegovina: prošlo je vrijeme vanjskog protektorata* [Article of the Ambassador of Russia to BiH Peter Ivancov on "Nezavisne Novine": *Bosnia and Herzegovina: Gone is the time of the foreign protectorate*]. 7 August 2015

work on the part of the BiH judicial system that often behaves as an instrument in the hands of one political party”, i.e., the SDA, claiming to “remain open to dialogue”.⁶³⁷

After the summer recess, a follow-up ministerial meeting was organised in Brussels on September 10, at which the competent authorities of the state and of each territorial level (FBiH, RS, Brčko) met with Commissioner Hahn to “take stock of the results achieved so far” and “build consensus on reforms”.⁶³⁸ The Protocol signed by the four ministers effectively rescued the reforms agreed in the framework of the Structured Dialogue (the Law on Courts and the Law on the HJPC) and committed to finalize the draft texts and put them into parliamentary procedure, after an upcoming final TAIEX seminar. It also referred to the need to recalibrate the activities within the Structured Dialogue in order to strengthen its efficiency and functionality – a reference to the backtracking from the May 2014 “enlarged agenda”.⁶³⁹

The September 2015 meeting effectively fed into the process to reform the Structured Dialogue while trying to defuse the renewed RS referendum threat through a low-profile strategy. Yet, its set-up, as a ministerial reunion in Brussels at the presence of the highest EU responsible, raised some eyebrows. As Adis Merdzanovic remarked, the photo-op of the event reminded of the old-style internationalisation strategy, according to which “internal Bosnian matters are being discussed under international tutelage outside the country”.⁶⁴⁰ Indeed, while not a session of the Structured Dialogue per se, the restricted ministerial meetings of July and September 2015 demonstrated how the Structured Dialogue could possibly not survive as a

⁶³⁷ *Oslobodjenje*, “Niksic, Radoncic and Komsic: Referendum an assault on BiH's integrity, sovereignty”, 17 July 2015.

⁶³⁸ EU Delegation to BiH, Ministerial Meeting in the Framework of the EU-Bosnia and Herzegovina Structured Dialogue, 10 September 2015.

⁶³⁹ European Commission, *Protocol on the Outcome of the Ministerial Meeting in the framework of the EU-BiH Structured Dialogue on Justice*, Brussels, 10 September 2015.

⁶⁴⁰ Adis Merdzanovic, *Structured Dialogue in Brussels: The return of 1990s internationalisation strategy?*, 12 September 2015

sustainable domestic instrument of consensus-building without high-powered EU support in the crisis moments – thus questioning the purely domestic character of the process and the EU's capacity to restore legitimacy from without.

Table 3.1: Contents of Agenda points of the Structured Dialogue on Justice meetings

	1 st Banja Luka	2 nd Sarajevo	3 rd Mostar	4 th Brčko	5 th Sarajevo	6 th Banja Luka	7 th Brussels	8 th Sarajevo
	6-7/06/11	10-11/11/11	5-6/07/12	8-9/04/13	12/07/13 (thematic)	11-12/11/13	29/04/14 (thematic)	13-14/05/14
Justice Sector Reform Strategy (JSRS)	1			9 New JSRS			2 New JSRS	
National War Crimes Strategy (NCWS)	2	11 NWCS 12 Referral of cases 9 Regional cooperation	1 Referrals 3 NCWS & regional coop	1 Referrals 3 Regional cooperation		5 Referrals 6 Regional cooperation		5
Coordination of competences	3	16 Art.7(2)	6					
Equal access to justice, juvenile justice, prison system	4	5 State prison and forensic psychiatric hospital 8 Prison administration 13 Maktouf-Damjanovic	2 Maktouf-Damjanovic 16 Infrastructures 17 Vulnerable groups and juvenile justice	2 Maktouf-Damjanovic 7 Capital investments 10 Juvenile justice		1 Maktouf-Damjanovic		
Budget	5	10 Structural resources of judicial institutions 22 Financing of justice sector	14 Reduction of budget fragmentation 15 IPA funds for justice support	8 IPA funds as EU support for justice sector				
Case backlog		1	7					4 Efficiency of judiciary
FBiH Prosecutor Law		2	11					
FBiH Execution of Criminal Sanctions Law		3	12					
Free Legal Aid Law		4	9					
Police/prosecutor cooperation		6						11
Pre-trial detention		7						
Witness protection		14	4	13 BiH Law				
Appellate Court		15	5					
RS Draft Law		17	10	12 Full		3		

on Courts				alignment				
HJPC Consolidation		18	8	6 HJPC Law amendments	2 HJPC Law amendments	4 HJPC Law amendments	1 HJPC Draft Law	3 Independence & reform of judiciary
Constitutional Court		19						
Professionalism of judiciary		20	13					2
International staff in judicial institutions		21						
Extradition agreements				4				
BiH Draft Law on Courts				5	1	2	3	
FBiH Draft Law on Corruption and organised crime				11				
Care of court users, data protection, publication of rulings				14				
Anti-corruption								6
Public Procurement								7
Whistleblowers Protection								8
Conflict of interest, asset declaration, access to information, political party financing, money laundering								9
Anti-discrimination								10
Integrity and accountability of police forces								12
Efficiency and coordination of police forces								13
Follow-up	6	23	18	15		7		14

The table above shows the distribution of agenda items through the first eight sessions of the Structured Dialogue on Justice. Starting with a very concise agenda in its first meeting, the dialogue expanded both in depth and in width in the following sessions between 2012 and 2014. The final, eighth session in May 2014 saw an “expanded agenda” to include wider Rule of Law issues, and an enlarged participation to include also civil society representatives.

Conclusions

The vicissitudes of the EU-BiH Structured Dialogue on Justice, over a period of five years (2011 to 2016) aptly illustrate the potentials and the drawbacks of a member state building approach and of the EU's attempt to adapt some domestic solutions to the Bosnian environment. Instruments of domestic consensus-building, such as the Structured Dialogue on Justice, may be assimilated due to their features to instances of “governance networks”, whose impact on domestic democracy is still under debate.⁶⁴¹ The Structured Dialogue on Justice seems to have run into the usual criticisms for governance networks and, in particular in relation to the trade-off between democracy and efficiency. On the one hand, governance networks may provide the opportunity to open up the policy-making process and connect it with citizens and stakeholders. On the other hand, they risk further blurring accountability and allowing an opaque shield for government and private interests.⁶⁴²

Soerensen points to four elements of potential incompatibility between governance networks and representative democracy. They build a multi-level system of shared sovereignty, challenging the hegemony of the state and the construction of ‘the people’; they lead to the contestation of the notion of representation; they foster a new activism by the public administration; and they challenge the separation between the political system and the civil society.⁶⁴³ Yet, governance networks also have the potential to enhance accountability, exactly because they “draw more actors into a process of deliberative policy-making and implementation”.⁶⁴⁴ Governance networks may mediate the relations between political representatives and civil stakeholders, through the interaction of the public administration

⁶⁴¹ Klijn and Skelcher, *Democracy and Governance Networks?*, 2007

⁶⁴² *Ibid.*, p. 588.

⁶⁴³ Sørensen, E. “Democratic Theory and Network Governance”, *Administrative Theory and Praxis*, 24 (4) 2002, p. 693 – 720 .

⁶⁴⁴ Klijn and Skelcher, *Democracy and Governance Networks*, 2007, p. 594.

with the civil society and interest groups within functional quasi-governmental institutions.⁶⁴⁵ This may offer new opportunities for democratic anchorage: it reengages citizens by offering them direct participation and improving the information available to them; it fosters a communicative rationality and a deliberative decision-making process that leads to consensual outcomes, accommodating partial preferences beyond a simple zero-sum negotiation; it allows non-state actors to participate all along the policy process, from agenda setting to the implementation phases, thus building coalitions of actors interested in the success of the policy; and finally it increases the trust between citizens and institutions, by engaging them in semi-public and semi-formal arenas.⁶⁴⁶

The potentials of governance networks and of consensus-building mechanisms such as the Structured Dialogue on Justice seem particularly promising in situations such as Bosnia and Herzegovina's: where the contestation of the state and the embeddedness of international institutions in a post-conflict setting leads to uncertainty about the meaning and the attributes of "the people" as the final holder of sovereignty; and where electoral democracy is challenged by the sub-system dominance of ethno-cultural constituencies and the entrenchment of nationalist parties through vicious circles of graft and patronage. It promises to strengthen decision-making by adding an alternative legitimacy avenue to the discredited electoral-democratic one, ensuring the inclusion of all affected parties and interests in the process. Similarly, it foresees to go beyond mere BiH party politics (whose pettiness has led the word "politicisation" to acquire a negative character) by instating a deliberative and result-oriented procedure. Finally, it promises to increase trust and transparency and to re-engage the population while offering European coaching to domestic authorities.

⁶⁴⁵ Ibid., p. 595.

⁶⁴⁶ Ibid., p.595-596.

One of the most innovative elements of the Structured Dialogue has proven to be the formal involvement of civil society representatives in two areas of discussion, anticorruption and fundamental rights. In the words of one of the convenors of the dialogue, civil society members have found themselves “sitting at the same table with the authorities, discussing the priorities, laws, and strategies, that until now had only been discussed between EU and national authorities.... They are delighted to be part of that, [even] without yet knowing what would be their role, their task to play”.⁶⁴⁷ Civil society groups involved within the format confirmed this⁶⁴⁸ and highlighted “the opportunity to give public recommendations in front of domestic institutions” as the most relevant aspect of the dialogue,⁶⁴⁹ though they complained that other agenda points remained outside public discussion, and that speaking time for NGOs was limited. They pleaded for a stronger involvement of NGOs as a third party to a Dialogue among EU institutions, BiH institutions, and BiH civil society.⁶⁵⁰ Others complained that CSOs could only perform an “observers’ role” due to the impossibility to access or submit documents for consideration, and that their interventions were acknowledged but then didn’t make an impact on the final recommendations of the session.⁶⁵¹ Unfortunately, the participation of CSOs at the May 2014 session of the Structured Dialogue remained a unique case, due to the delays and qualms that marred the process in 2014/15.

According to observers and participants alike, the biggest achievement of the dialogue has been to ensure the agreement of all actors (national and local authorities, professional representatives, civil society groups) to discuss the perceived problems of Bosnia and

⁶⁴⁷ Interview with an officer at the EU Delegation in Sarajevo, November 2014

⁶⁴⁸ Interview with Sarajevo Open Centre. Sarajevo, 19 December 2014

⁶⁴⁹ Interview with Transparency International BiH, 13 August 2015

⁶⁵⁰ Ibid.

⁶⁵¹ Interview with Centre for Investigative Journalism, 6 August 2015

Herzegovina on an equal footing and without preconditions.⁶⁵² The Structured Dialogue has been hailed as an example of a non-bureaucratic, political approach to solve a politically complex situation.⁶⁵³ The EU created a domestic instrument for consensus-building while providing the services of a third-party interested mediator, as the EU Delegation assesses the progress in between sessions and coaches its participants.⁶⁵⁴ The EU set the boundaries of the issues under discussion (the organisation of domestic institutions, but not the role of state institutions in entrenching the rule of law) and through a “demining exercise” it actually “expanded the scope and strength of the very institutions that were contested”.⁶⁵⁵

The Structured Dialogue thus proved to be “a dynamic mechanism of multilevel cooperation”, “a useful and flexible administrative framework for political discussion”, in the words of Bosnia’s civil servants themselves,⁶⁵⁶ aimed at creating domestic consensus while respecting the legitimacy of domestic political institutions. The EU is present in the Structured Dialogue as an “interested moderator”,⁶⁵⁷ supervising a domestic compromise-making mechanism while not directly imposing solutions, in agreement with a model of member state building and a notion of sovereignty as participation. The dialogue was thus presented as *acquis*-anchored, linked to “necessary and fundamental” principles and “non-derogable rights” that EU member states cannot afford to question and whose “instability or

⁶⁵² The head of the Directorate for European Integration, Nevenka Savic, noted that Bosnian authorities sit together to discuss only when EU officials are in the same room. Interview, Sarajevo, 11 December 2014.

⁶⁵³ “The dialogue has gained such a level of leverage amongst the participants that no other alternative for reaching consensus on demanding issues of judicial reform now exists”. Galičić, EU conditionality and governance complexities in the Western Balkans, 2014, p. 184.

⁶⁵⁴ Interviews with an officer of a national embassy in Sarajevo, and with an officer of the EU Delegation in Sarajevo, November 2014.

⁶⁵⁵ Galičić, EU conditionality and governance complexities in the Western Balkans, 2014, p. 185.

⁶⁵⁶ Interview with an officer of the Directorate for European Integration. Sarajevo, December 2014.

⁶⁵⁷ Jens Woelk, “EU Member State-Building in the Western Balkans: (Prolonged) EU protectorates or New Model of Sustainable Enlargement? Conclusion.” *Nationalities Papers* 41 (3), 2013, p. 469-82, p. 477.

uncertainty” is not acceptable.⁶⁵⁸ The frequent reference and involvement in the process of other international institutions (the Council of Europe and its Venice Commission) speaks of a growing architecture of inter-institutional cooperation in JHA matters.

Some small-scale concrete achievements have been reached through the Structured Dialogue, from the transfer of cases from the State to the Entity courts on war crimes to an agreement on the use of IPA funds to strengthen the state prosecutor’s office capacity to address the backlog of war crimes and other serious cases.⁶⁵⁹ Despite these positives, many of the actors involved consider that the Dialogue is yet to deliver the change expected, since no draft laws discussed within the process have yet been tabled for parliamentary procedure – the September 2015 Ministerial Protocol agreed on the fast-tracking of the Draft Law on Courts and the Draft Law on the HJPC in order to finalize the texts and bring them into parliamentary procedure. According to Freedom House, “several changes are under discussion, including a new state appellate court, but the dialogue has yielded few concrete results, and politicians continue to propose changes outside the talks”.⁶⁶⁰ Calls for reform of the dialogue have been put forward, including by Bosnia’s civil society organisations.⁶⁶¹

Moreover, the vicissitudes of the Structured Dialogue in 2014 and 2015 speak of the growing incompatibility between its aims – to increase both democracy and efficiency. The need to include all stakeholders and interested parties, as attempted at the May 2014 session, highlighted the unwieldiness of managing a political process with around 50 participants. Democracy, in terms of inclusivity, thus run counter to efficiency. At the same time, the presence of participants with different sources of legitimacy – representative democracy,

⁶⁵⁸ EU Delegation to BiH, *First set of preliminary recommendations*, Banja Luka, 6-7 June 2011.

⁶⁵⁹ Interview with an officer of the Directorate for European Integration. Sarajevo, December 2014.

⁶⁶⁰ Jahić, “Bosnia-Herzegovina”, in *Nations in Transit 2014*, p. 139.

⁶⁶¹ Sarajevo Open Centre, *CSOs appeal to the BH institutions and EU to make Structured dialogue on justice more transparent and efficient*, 2014

expertise, self-styled civil society representatives – made it more difficult to establish a clear ownership and accountability within the process. While it could well be said that the Structured Dialogue remained under “domestic ownership”, it was unclear to the Bosnian layman citizen who took part in it, under which prerequisites, for which purposes, and accountable to whom. In this case, again, inclusivity trampled accountability and transparency. Finally, the resurgence of the RS referendum threat in June 2015 demonstrated how the process’ aims of consensus-building could not be achieved in the presence of competing political dynamics, and how its domestic sustainability remained in danger, in the absence of a resolute EU-level backing.

The Stabilization and Association Agreement between the EU and Bosnia entered into force on 1 June 2015 following the Anglo-German diplomatic initiative,⁶⁶² the EU Council conclusions on Bosnia,⁶⁶³ and the “written commitment” to reforms by Bosnia’s institutions.⁶⁶⁴ Thus, two new sectoral sub-committees were established, including one on Justice, Freedom and Security, which took over from the Structural Dialogue the main part of its agenda. The Structured Dialogue continued to be used as a tool to provide for more in-depth discussion on specific topics, in particular the draft laws on Courts and on the HJPC, which by end 2017 had not managed to gather the necessary consensus to proceed into parliamentary procedure. An evaluation of the final impact of the dialogue thus must remain on hold.

⁶⁶² Letter of Frank-Walter Steinmeier and Philip Hammond to the HRVP Federica Mogherini and the EU Commissioner for ENP and Enlargement Negotiations Johannes Hahn, Berlin/London, 4 November 2014.

⁶⁶³ Council of the European Union, *Conclusions on Bosnia and Herzegovina*, Brussels, 15 December 2014.

⁶⁶⁴ *Written Commitment of Bosnia and Herzegovina*, Agreed by the BiH Presidency on 29 January 2015, Signed by the leaders of the 14 parties represented in Parliament, and endorsed by the Parliamentary Assembly of Bosnia and Herzegovina on 23 February 2015.

Overall, the participation of CSOs in BiH's Structured Dialogue on Justice remained episodic and linked only to the May 2014 session. The main advantage of the Structured Dialogue has been to provide CSOs with a platform to directly address their recommendations to state authorities in the presence of the EU, thus reinforcing accountability and monitoring. The change with the establishment of the formal subcommittee could become problematic for the participation of those members of civil society that are usually excluded from the strictly intergovernmental setting. A solution will have to be found in order not to dissipate the social capital mobilised by the exercise thus far.

IV. The Instrument for Pre-Accession: Building Consensus to Restore Capacities

Introduction

In the previous chapter I focused on the legitimacy dimension of statehood to show how the EU gets involved in policy dialogues in order to foster consensus among political actors and restore institutional legitimacy. This chapter focuses on the other dimension of statehood, capacity, which is directly linked with the conditions for EU accession, as one of the Copenhagen criteria directly concerns the “administrative and institutional capacity to effectively implement the *acquis* and ability to take on the obligations of membership”.⁶⁶⁵ Capacity-building is also linked to the notion of international state-building as a way to prevent the collapse of weak states into war.

This chapter considers the financial instruments of EU pre-accession assistance and what their underlying structures and rationale may tell us about the EU’s approach to capacity-building in enlargement countries. The way in which the EU enacts capacity-building in its enlargement countries, and particularly in Bosnia and Herzegovina, is specific under two

⁶⁶⁵ European Commission, *Glossary – Accession criteria*, https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en

dimensions. On the one hand, EU-driven capacity building is not merely aimed at strengthening state structures, but it focuses in particular on those institutions and bodies that are directly responsible or necessary for the implementation of the EU *acquis*. On the other hand, EU-driven capacity building is also not merely following an outside-in approach based on the replication of standard blueprints, but rather asks target countries to develop their own institutional solutions to adapt their structures to the requirements of the EU *acquis*. This latter feature is also the product of a learning process within the EU, which can be noticed in the evolution from IPA to IPA-II, and the shift in focus from *structure* to *function*. Finally, EU-driven capacity building is not separate from wider societal and political needs. The shift to a sector approach under IPA-II also highlights how the EU requires enlargement countries to develop national plans and strategies, which in a highly decentralised country like Bosnia and Herzegovina necessitate a wide consensus among political actors at multiple levels of governance. The EU thus leverages on this commitment to foster domestic policy dialogue and overcome state contestation. The approval of the Coordination Mechanism and its use in the development of countrywide strategies in Bosnia and Herzegovina are cases in point.

The first sections of the chapter inquire IPA-I and the build-up of policy implementation structures via the roadmap towards decentralised management. The varied results in introducing decentralised management also help explaining the shift towards a sector approach under IPA-II. In the context of Bosnia and Herzegovina, this translated in a novel emphasis on the need for countrywide sector strategies. In order to foster the development of such strategies, the EU encouraged Bosnia and Herzegovina's authorities at all levels to develop and adopt a "coordination mechanism", which was first put to task in order to prepare the replies to the Commission Questionnaire following Bosnia and Herzegovina's EU membership application. In the chapter conclusions I take stock of the evolution of the ways in which the EU has intervened in Bosnia and Herzegovina to achieve capacity-building: from

fostering institution-building (IPA DIS) to facilitating consensus and leading to the establishment of consensus-building engines (coordination mechanism). This evolution also shows a learning process of the EU on how best to support capacity-building in context of state contestation within its enlargement region.

1. Training for membership: the Instrument for Pre-Accession Assistance

Since 2007 enlargement countries receive EU funds through a single Instrument for Pre-Accession Assistance (IPA). Alongside policy dialogue, financial assistance is part and parcel of a process aimed at fostering institutional and policy change, with the final aim of accelerating progress towards EU membership.⁶⁶⁶

Differently from previous generations of EU financial assistance to the Western Balkans, which was mainly focused on post-war reconstruction, development, and stabilisation, the focus of IPA funds is mainly on institution building and compliance with the *acquis*, in a fully accession-driven perspective. IPA funds aims at improving the governance structures and at strengthening administrative capacities, in order to prepare enlargement countries to perform the required tasks and engage productively within the EU once they have become member states, particularly in terms of policy implementation and management of funds.

⁶⁶⁶ This section includes materials previously published as: Davide Denti, 'Did EU candidacy differentiation impact on the performance of pre-accession funds? A quantitative analysis of Western Balkan cases', *Croatian International Relations Review*, XIX (68), 2013, p. 61-91.

The structure of IPA funds is “designed to mirror the Structural Funds” of the EU.⁶⁶⁷ IPA funds merge features only partially present in previous financial assistance for the Western Balkans, to introduce the three principles of decentralization, partnership and programming, simultaneously present only in the EU structural funds (see table 6.1 below). In doing so, IPA funds “deliberately mimic cohesion policy requirements to prepare candidate countries more effectively for managing cohesion policy post-accession”.⁶⁶⁸

IPA funds have been variously described as a training ground or a gym for domestic institutions to develop the necessary administrative capacities and gain experience in administering EU monies to become able to receive and absorb the much higher volumes of EU structural funds available upon EU accession.⁶⁶⁹ Their implementation is therefore the site of a learning process in which enlargement countries experiment and develop domestic solutions in order to achieve the prescribed result in the most appropriate way given their differing starting conditions and features. A comparison of the various financial assistance instruments for the Western Balkans over time is presented in the table 6.2 below. The geographical focus of the EU’s action appears widening; the focus moves from reconstruction to development to pre-accession, and regional programmes acquire more and more importance over time.

⁶⁶⁷ Allan F. Tatham, *Enlargement of the European Union*, Alphen aan de Rijn: Kluwer Law International 2009, p. 323.

⁶⁶⁸ Ian Bache, Europeanization and multi-level governance: EU cohesion policy and pre-accession aid in Southeast Europe, *Southeast European and Black Sea Studies* 10 (1), 2010, p. 7.

⁶⁶⁹ “A gym exercise, of technical preparation to manage EU funds in the future”, in the words of the Deputy Head of the EU Delegation to Bosnia and Herzegovina. Personal interview, Sarajevo, 28 November 2014.

Table 4.1 - Evolution of structural principles of pre-accession instruments over time

<i>period</i>	<i>Instruments</i>	<i>Decentralization</i>	<i>Partnership</i>	<i>Programming</i>
1985-1992	IMPs (Greece)	☒	☑	☑
1989-present	Structural funds	☑	☑	☑
1994-present	Cohesion funds	☒	☑	☒
1990-2006	Pre-accession instruments	☑	☒	☒
1996-2001	MEDA (Turkey)	☒	☑	☑
2007-present	IPA funds	☑	☑	☑
<i>Structural funds: ERDF, ESF, EAGGF</i>				
<i>Pre-accession instruments: PHARE, OBNOVA, SAPARD, ISPA, EDIS, CARDS + PAI Turkey</i>				

Source: Author's re-elaboration from Bache, Europeanization and multi-level governance, 2010, p. 8.

Table 4.2 –EU financial assistance instruments for the Western Balkans

	<i>1st generation instruments</i>			<i>2nd generation instruments</i>	<i>3rd generation instruments</i>	
<i>Instrument</i>	PHARE	OBNOVA	ECHO	CARDS	IPA	IPA-II
<i>Period</i>	1990-2000	1996-2000	1990-2000	2000-2006	2007-2013	2014-2020
<i>Beneficiary countries</i>	BH,AL,MK	BH,AL,MK	BH,AL,MK	BH,AL,MK	Candidates: HR,TR,MK	All enlargement countries
		HR,SCG,KS	HR,SCG,KS	HR,SCG,KS	Others: SR,MN,AL,BH,K S	
<i>Allocations (only for WB)</i>	1.184 M €	1.476 M €	2.196 M €	5.385 M €	5.189,5 M €	7.244,77 M € ⁶⁷⁰
	TOT 1990-2000: 4.856 M €					
<i>Primary focus</i>	Post-conflict reconstruction			Development and Stabilization	Institution building, <i>acquis</i> compliance	Development and <i>acquis</i> compliance
<i>Management methods</i>	Centralized			Various	Decentralized Implementation System (DIS)	Various (mainly centralised)
<i>Regional programmes</i>	4%	--	6%	4%	8%	25%

Source: Update from Denti, Did EU candidacy differentiation impact on the performance of pre-accession funds?, 2013, p. 67.

⁶⁷⁰ 11.698,668 M € for the whole IPA-II envelope (1,8% of the whole EU MFF), minus 4.453,9 M € for Turkey alone (IPA II Reg 231/2014). Multi-country actions account for 2.958,6 M €, i.e. 25,29% of the total IPA-II envelope.

The Instrument for Pre-Accession Assistance was introduced by the IPA Regulation 718/2007⁶⁷¹ to streamline and replace the previous external assistance instruments of the European Commission: PHARE,⁶⁷² CARDS,⁶⁷³ SAPARD,⁶⁷⁴ ISPA⁶⁷⁵ and ECHO, which had supported the enlargement process towards Central and Eastern Europe as well as the post-war reconstruction in the Western Balkans. IPA funds aimed at supporting enlargement countries in fulfilling the three Copenhagen criteria and were delivered under five components (see table 6.3 below).

IPA funds provided for a single overall structure to pre-accession financial assistance for both official candidate countries⁶⁷⁶ and potential candidates,⁶⁷⁷ while introducing a segmented approach, differentiating between the two categories in the eligibility for assistance components. The first two components, aimed at institution-building and regional cooperation, were accessible to all enlargement countries and meant particularly to support the transition and the implementation of SAA commitments in potential candidates. The last three components (regional development, agriculture, human resources), mimicking EU structural funds most closely, were reserved for candidates countries, with the aim of supporting alignment with the EU *acquis* and prepare them for implementation of EU structural funds. This did not translate in a lower financial commitment for potential

⁶⁷¹ Commission Regulation (EC) No 718/2007 of 12 June 2007 implementing Council Regulation (EC) No 1085/2006 establishing an instrument for pre-accession assistance (IPA) (OJ L 170, 29.6.2007, p. 1), as amended by Commission Regulation (EU) No 80/2010 of 28 January 2010 (OJ L 25, 29.1.2010, p.1).

⁶⁷² Poland and Hungary: Assistance for Reconstructing their Economies.

⁶⁷³ Community Assistance for Reconstruction, Development and Stabilisation.

⁶⁷⁴ Special Accession Programme for Agriculture and Rural Development.

⁶⁷⁵ Instrument for Structural Policy for Pre-Accession.

⁶⁷⁶ Turkey, the former Yugoslav Republic of Macedonia (hereinafter: Macedonia), Montenegro (since 2010), Serbia (since 2012), Croatia (until 2013), and Iceland (until 2013).

⁶⁷⁷ Albania, Bosnia and Herzegovina, Montenegro (until 2010), Serbia (until 2012), and Kosovo.

candidates, as some had feared,⁶⁷⁸ since Component I still included 57% of all funds, and could be used to fund interventions within the scope of the last three components but under centralised management, before the necessary conferral of management to national structures.⁶⁷⁹

IPA funds aimed at assisting enlargement countries in developing the institutions and capacities that would be necessary for them to become EU member states, particularly in terms of policy implementation and management of structural funds. This aim is followed not only through the specific projects financed with IPA funds, but also through the incentive structure inscribed in the set-up of the funds, whose components mirror the EU structural funds. In order to access additional components, enlargement countries needed to achieve candidate status and to develop administrative structures able to sustain an accredited Decentralised Implementation System (DIS) of funds management.⁶⁸⁰ The IPA funds provided enlargement countries with the opportunity to build the necessary structures and gain experience in administering EU monies before being able to receive and absorb the much higher volumes of EU structural funds available upon EU accession. The IPA funds, while maintaining a regional approach and treating all countries equally, were designed to recognise the different stages of advancement of enlargement countries towards EU accession.

⁶⁷⁸ European Stability Initiative (ESI), “Breaking out of the Balkan Ghetto: Why IPA should be changed”, Berlin 2005, p. 1-12.

⁶⁷⁹ See Denti, Did EU candidacy differentiation impact on the performance of pre-accession funds?, 2013.

⁶⁸⁰ The first two IPA components (Transition assistance and institution building; Cross-border cooperation) were open to all potential and candidate countries, under either centralised (at EU delegation level) or joint/concurrent fund management; the next three IPA components (Regional development; Human resources development; Rural development) were accessible once a country reaches candidate status, and required the accreditation by the EU Commission of a national fund management system (Decentralised Implementation System, DIS). The fifth IPA component (Rural development) required the accreditation of a fully decentralised management system without controls *ex ante* from the local EU Delegation.

Introducing a differentiation was meant to provide incentives for both laggards and forerunners.

1.1 Decentralised management and the set-up of policy implementation structures

The management system of IPA funds was more structured, although still flexible. Decentralised management, defined as “transferring the allocated EU-funds to the Ministry of Finance of the beneficiary country who will be responsible for managing the effective contracts and payments”,⁶⁸¹ was the preferred method of implementation under IPA.⁶⁸² The Commission provided for a roadmap towards the establishment of decentralised management, as a final objective for all enlargement countries.

In the first IPA budget period (2007-13), enlargement countries could begin programming and implementing EU pre-accession funds under a centralised management system, according to which the budget cycle is managed by the EU Delegation in the country. The centralised approach was similar to EU development cooperation (EuropAid and ECHO funds). However, to fully benefit from the allocated funds, enlargement countries had to develop national administrative capacities in order to cover tendering, contracting, and payments of EU-funded projects.⁶⁸³ After completing a six-stage roadmap, the national system could achieve “conferral of management” (accreditation) from the European Commission, and the local EU Delegation could delegate the management of EU funds directly to the beneficiary government.

⁶⁸¹ European Commission, *2012 Annual Report on Financial Assistance for Enlargement (IPA, PHARE, CARDS, Turkey Pre-Accession Instrument, Transition Facility)*, SWD/2013/0326, p. 112.

⁶⁸² European Commission, *Annual Report on Financial Assistance for Enlargement in 2014*,. p. 7.

⁶⁸³ Art. 10, IPA Regulation 718/2007.

While decentralised management was a stricter requirement for candidate countries, potential candidates could continue spending EU funds through centralised management by the EU Delegations. On the EU side, management of IPA funds in enlargement countries was distributed among different Directorate-Generals of the European Commission (with e.g. DG AGRI managing Component V on rural development). On the side of the enlargement countries, responsibility was to be centralised in a National IPA Coordinator (NIPAC) and in specific operating structures.

Table 4.3 - Availability of IPA components by candidate status⁶⁸⁴

	<i>IPA components</i>	<i>Management</i>	<i>Candidate countries</i>	<i>Potential candidates</i>	<i>Cf.</i>
1	<i>Transition Assistance and Institution Building</i>	centralised or joint	☑	☑	CARDS Funds
2	<i>Cross-Border Cooperation</i>	centralised / concurrent	☑	☑	Regional Programmes
3	<i>Regional Development</i>	decentralised	☑	☒	Cohesion & Regional Funds
4	<i>Human Resources Development</i>	decentralised	☑	☒	European Social Funds
5	<i>Rural Development</i>	decentralized	☑	☒	CAP / Rural Devt Fund

The gradient of funds management decentralisation was meant to allow candidate countries to gradually build their institutions and administrative capacities in an accession-driven perspective. Decentralised management implied that the authorities in the beneficiary countries were to become the contracting authorities, directly responsible for managing the pre-accession funds – launching tenders and paying contractors – after their administrative capacities had been assessed by the Commission via a series of system audits. This had the

⁶⁸⁴ Denti, Did EU candidacy differentiation impact on the performance of pre-accession funds?, 2013, p. 65.

explicit aim “to prepare the candidate countries and potential candidates to handle EU Structural and Cohesion Funds in the future”.⁶⁸⁵

To remain in the metaphor of EU enlargement as the reproductive moment of EU integration, this mechanism was meant to foster the development of the "digestive apparatus" of future Member States. While they were developing their own domestic structures for implementation of pre-accession aid, they could receive support via EU structures (Delegation), as if via an umbilical cord. Decentralised management after accreditation of domestic structures would be in this metaphor akin to breast-feeding – candidate countries would start absorbing EU funds (IPA) via their own implementation structures in a facilitated way. At the time of accession – comparable to the moment of weaning – they would then have to manage and implement EU structural funds on an equal footing and under the same regulations as any other Member State.

The roadmap for the accreditation of the DIS included six different stages, numbered from 0 to 5. Such steps range from establishing the administrative structure, with the definition of tasks, appointment of the key actors, and provision of adequate staffing and equipment, until the final verification audit by the Commission, which may lead to the conferral of management powers and the signature of a Financing Agreement between the Commission and the state administration. The intermediate steps request the national administrations to: (a) identify the gap between the local procedures and the DIS requirements, through a Gap Assessment Report; (b) take actions in order to fill the gaps, following an Action Plan for Gap Plugging; (c) assess the effective compliance through a Compliance Assessment Report; and (d) obtain the accreditation from the European Commission.

⁶⁸⁵ European Commission, *Annual Report on Financial Assistance for Enlargement in 2014*, p. 7.

Table 4.4 - Roadmap for accreditation of Decentralised Implementation Systems

<i>Status</i>	<i>Scope</i>	<i>Actor</i> ⁶⁸⁶	<i>Outcomes</i>
Stage 0	Establishment of Structures	OS	Appointment of key actors Adequate staffing and equipment
Stage 1	Gap Assessment	TA (FWC) MoF (NF)	<i>Gap Assessment Report</i> <i>Action Plan for Gap Plugging</i>
Stage 2	Gap Plugging	OS / TA	Compliance with requirements
Stage 3	Compliance Assessment	TA	<i>Compliance Assessment Report</i>
Stage 4	Accreditation	NAO	National accreditation and submission of application for conferral of management powers with ex ante control
Stage 5	Verification audit	EC	<i>Conferral of management powers</i> <i>Signature of Financing Agreement</i>

The implementation of the DIS roadmap proceeds separately for each country and for each IPA component, resulting in a highly differentiated pattern of progress. The progress of the different countries on the roadmap towards decentralised management of the IPA funds may provide a measure of mid-term performance of the IPA in its objective of fostering reform and strengthening administrative capacities in pre-accession countries. The presence of clear benchmarks, defined by the formalised stages of the DIS roadmap and reported in the Commission's Annual Report on Financial Assistance for Enlargement,⁶⁸⁷ allows drawing some conclusions based on quantitative data.

⁶⁸⁶ The key actors involved in managing and implementing the IPA funds, as foreseen in the DIS, other than the European Commission (EC), are: the National IPA Coordinator (NIPAC); the Strategic Coordinator for Components III and IV (SCO); the Competent Accrediting Officer (CAO); the National Authorising Officer (NAO); the National Fund (NF); the Operating Structure (OS), with a Central Financial and Contracting Unit (CFCU); and the Audit Authority (AA).

⁶⁸⁷ Data are coded based on the wording from the yearly Commission reports on IPA funds: COM(2008)850, COM(2009)699, COM(2010)687, COM(2011)647, COM(2012)678, COM(2013)625, COM(2014)610, COM(2015)548.

Figure 4.1

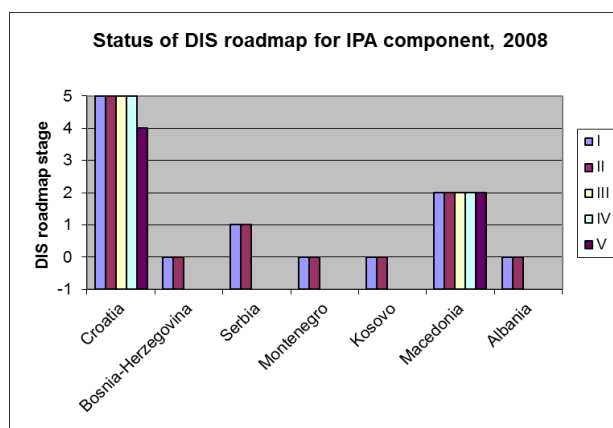


Figure 4.2

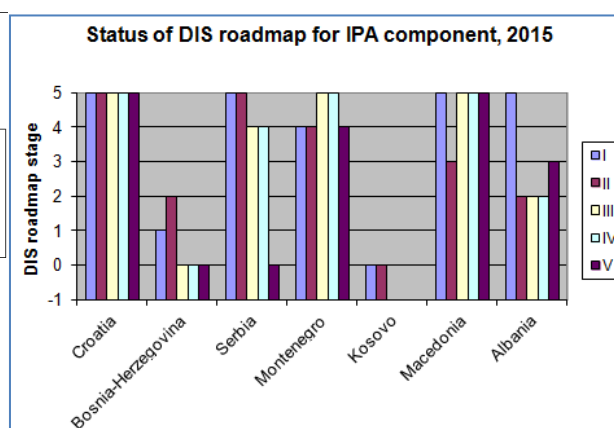


Figure 4.3 - Progress in DIS implementation, 2008-2015

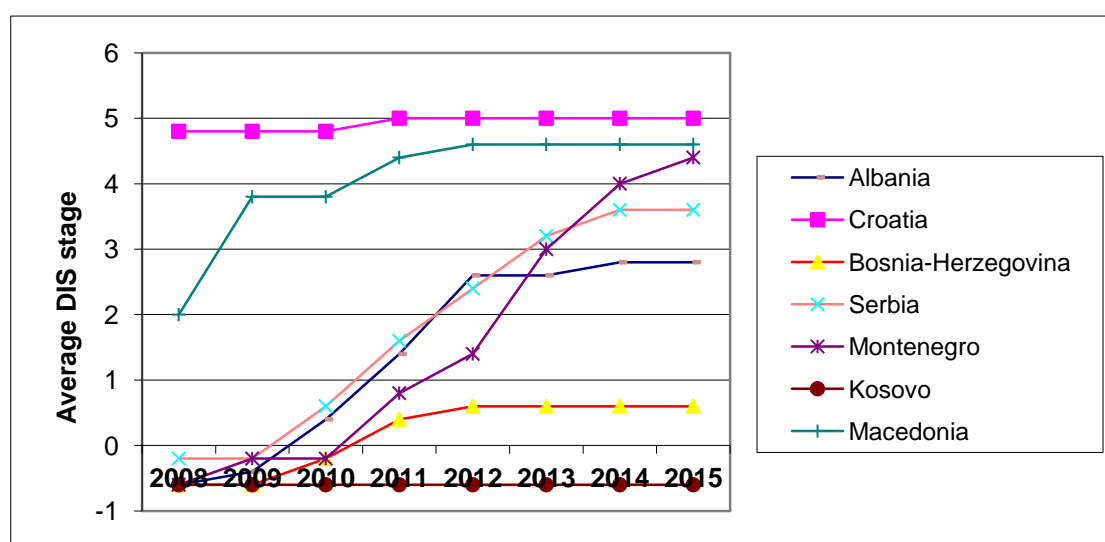


Table 4.5 - Progress in DIS implementation, 2008-2015

<i>average</i>	2008	2009	2010	2011	2012	2013	2014	2015
Croatia	4.8	4.8	4.8	5.0	5.0	5.0	5.0	5.0
Bosnia-Herz.	-0.6	-0.6	-0.2	0.4	0.6	0.6	0.6	0.6
Serbia	-0.2	-0.2	0.6	1.6	2.4	3.2	3.6	3.6
Montenegro	-0.6	-0.2	-0.2	0.8	1.4	3.0	4.0	4.4
Kosovo	-0.6	-0.6	-0.6	-0.6	-0.6	-0.6	-0.6	-0.6
Macedonia	2.0	3.8	3.8	4.4	4.6	4.6	4.6	4.6
Albania	-0.6	-0.4	0.4	1.4	2.6	2.6	2.8	2.8

Figure 4.4 - Progress in DIS implementation (component I only), 2008-2015

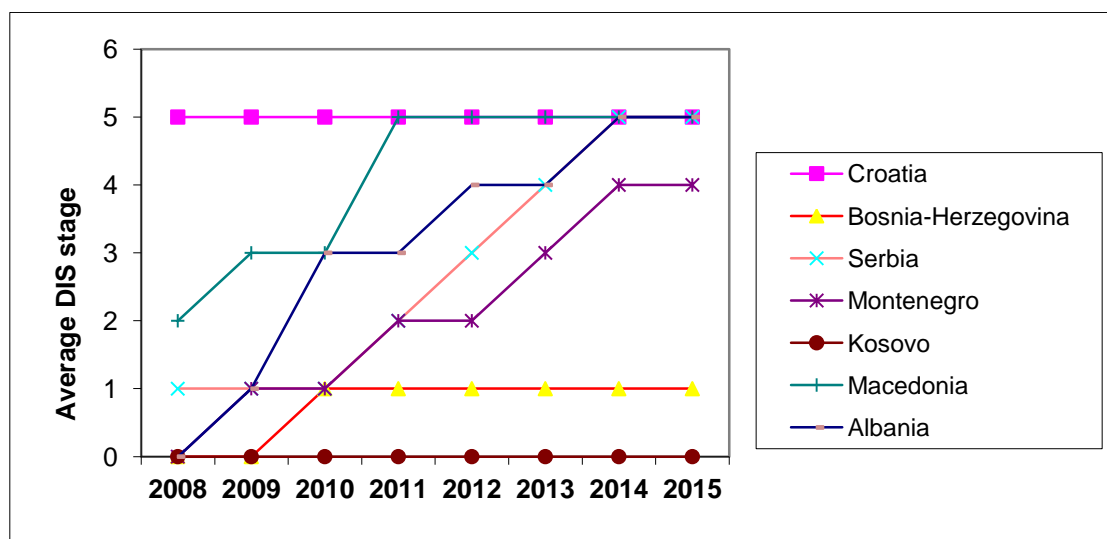


Table 4.6 - Progress in DIS implementation (component I only), 2008-2015

<i>component I</i>	2008	2009	2010	2011	2012	2013	2014	2015
Croatia	5	5	5	5	5	5	5	5
Bosnia-Herz.	0	0	1	1	1	1	1	1
Serbia	1	1	1	2	3	4	5	5
Montenegro	0	1	1	2	2	3	4	4
Kosovo	0	0	0	0	0	0	0	0
Macedonia	2	3	3	5	5	5	5	5
Albania	0	1	3	3	4	4	5	5

Table 4.7 – Date of conferral of management powers per country and component

IPA comp.	I	II	III	IV	V
Croatia				Aug2010	Nov2009
Bosnia-Herz.	-	-	-	-	-
Serbia	March 2014	March 2014	March 2014	March 2014	
Montenegro			April 2014	July 2014	-
Kosovo	-	-	-	-	-
Macedonia	Dec 2010	-	2009	2009	By 2010
Albania	March 2014	-	-	-	-

When taking a look at the picture of the progress in the decentralisation of management of IPA funds in the 2008-2011 period, it is possible to underline some trends.⁶⁸⁸ Croatia remains the highest-scoring country in the DIS roadmap throughout the period, already starting from a very good level; however, it manages to receive management powers for all components only since August 2010. Among the other countries, Macedonia is a frontrunner in implementing decentralised management, for which it receives management powers for all component (save component II) between 2009 and December 2010.⁶⁸⁹ The transition towards decentralised management proceeded smoothly also in Serbia and in Montenegro, which received management powers for four and two components respectively in 2014.⁶⁹⁰ Finally, Albania also completes its DIS roadmap for the first component in March 2014.⁶⁹¹

⁶⁸⁸ In its reports for the years 2010 and 2011, the Commission has stopped detailing explicitly the country progress in terms of DIS stages per component, especially in the case of Albania, Montenegro and Macedonia. Data for such countries are thus the author's interpretation of the Commission's lexicon. Moreover, Serbia and Albania started working on DIS for components III to V even before being formally granted candidate status.

⁶⁸⁹ "For the first time the implementation of all IPA Components, except Component II - Cross-border cooperation, took place under decentralised management, which implies that the management of programmes is undertaken by the relevant national authorities, currently subject to ex ante controls by the European Commission." (European Commission, *2011 Annual Report on Financial Assistance for Enlargement*, COM/2012/0678)

⁶⁹⁰ "Subsequently, the decision [for Serbia] was taken in March 2014." (European Commission, *2013 Annual Report on Financial Assistance for Enlargement*, COM/2014/0610) "On management of EU funds, Serbia has been granted with conferral of management power in March 2014 and the financing agreement has been signed in June for the implementation of this part of IPA 2013 under de-centralised management". (European Commission, *Annual Report on Financial Assistance for Enlargement in 2014*, COM/2015/0548) During 2014, Montenegro made good progress regarding preparations for decentralised management the conferral of management for IPA Component III and IV was finalised in April and July 2014 respectively. (Ibid.)

⁶⁹¹ "Under IPA Component I, the key structures and systems have been put in place and Albania submitted its application for the conferral of management in the beginning of 2012." (European Commission, *2011 Annual Report on Financial Assistance for Enlargement*, COM/2012/0678). "Albania has finalised the preparation for decentralised management of IPA funds under Component I." (European Commission, *2013 Annual Report on Financial Assistance for Enlargement*, COM/2014/0610) In March 2014 the Commission conferred powers to the Albanian Government to manage funds under IPA Component I. (European Commission, *Annual Report on Financial Assistance for Enlargement in 2014*, COM/2015/0548).

While Bosnia and Herzegovina saw some timid progress under component II, it later got mired in domestic quarrels that prevented it from progressing further. Kosovo, finally, was marked “in the early stage” of the process and did not advance towards decentralised management throughout the period.⁶⁹²

Looking at the sole component I (institution-building) – the one accessible to all enlargement countries alike, and the one with the most relevant allocations – as in figure 6.4, it can be seen how Croatia is soon caught up by Macedonia, and by the end of the budgetary period also by Serbia and Albania, while Montenegro’s progress is less steady. As above, Bosnia and Herzegovina remains in the lower echelons, while Kosovo does not even start.

Bosnia and Herzegovina started preparations for management decentralisation in 2006 but never achieved it.⁶⁹³ The Commission reports note how in 2010 “State and entity representatives were unable to reach agreement on the structures to support decentralised implementation of IPA and to prepare for the IPA Components III, IV and V”.⁶⁹⁴ A Decision on the Establishment of the Operating Structure was adopted by the BiH Council of Ministers in September 2011⁶⁹⁵ and by the BiH Parliament in May 2012,⁶⁹⁶ but no concrete follow-up was provided, not even in terms of completing the appointment of key actors such as the Programme Authorising Officer and the Audit Authority (stage 0), thus leading the Commission to remark that “Politically it does not appear realistic to achieve progress towards DIS prior to the establishment of a functioning EU coordination mechanism”.⁶⁹⁷ According to EU officials, the CFCU (Central Financial and Contracting Unit) at the BiH

⁶⁹² European Commission, *2010 Annual Report on Financial Assistance for Enlargement*, COM/2011/0647

⁶⁹³ The Deputy Head of EU Delegation to Bosnia and Herzegovina referred in particular to the lack of alignment in public procurement legislation as the main stumbling blocks. Interview, Sarajevo, 28 November 2014.

⁶⁹⁴ Ibid.

⁶⁹⁵ European Commission, *2011 Annual Report on Financial Assistance for Enlargement*, SWD/2012/0385.

⁶⁹⁶ European Commission, *2012 Annual Report on Financial Assistance for Enlargement*, SWD/2013/0326.

⁶⁹⁷ European Commission, *2012 Annual Report on Financial Assistance for Enlargement*, SWD/2013/0326.

Ministry of Finance was well formed and staffed, but it remained inoperative, as it was not entrusted with funds implementation.⁶⁹⁸ Bosnia and Herzegovina could show some progress towards decentralised management on component II (cross-border cooperation).⁶⁹⁹ Yet, this had to be dropped in the following years, and Bosnia and Herzegovina thus lost the lead role on the IPA cross-border cooperation project with Montenegro, for which it had been preparing, due to the lack of a countrywide strategy.⁷⁰⁰ In 2014, the Commission came to the conclusion that “the country is at a standstill” in its European integration process in terms of both progress towards fulfilling the political criteria (resolution of the Sejdic-Finci issue) and towards decentralised management of financial assistance. In the absence of “an efficient and effective coordination mechanism in order to enable the country to speak with one voice and to interact properly with the EU” and due to the “increasing politicisation of IPA implementation” the Commission had suspended or cancelled several IPA projects in 2013, later reducing the whole IPA envelope for Bosnia and Herzegovina from EUR 109 million to EUR 64 millions. The absence of a coordination mechanism also prevented the country from preparing countrywide strategies, needed for future implementation of the sector approach under IPA II. The Commission decided in this regard “not to start the preparation [of sector approach] until effective coordination is ensured”.⁷⁰¹

⁶⁹⁸ Interview with the Head of Cooperation of the EU Delegation to Bosnia and Herzegovina, December 2014.

⁶⁹⁹ In 2011 its “Control, Finance and Contracting Unit [CFCU] of the Ministry of Finance has assumed the role of the First Level Controller with the assistance of the EU framework contract for the 19 contracts under the IPA Adriatic CBC programme, which were implemented in the shared management mode.” European Commission, *2011 Annual Report on Financial Assistance for Enlargement*, SWD/2012/0385.

⁷⁰⁰ Interviews with officials at Bosnia’s Directorate for European Integration and at the EU Delegation. Sarajevo, December 2014.

⁷⁰¹ European Commission, *2013 Annual Report on Financial Assistance for Enlargement*, COM/2014/0610.

1.2 A premature step? Absorption problems and the return to centralised management

By the end of the budget period in 2014, some countries had indeed developed administrative structures able to sustain a decentralised management - Croatia, Macedonia, and Turkey arrived at managing pre-accession funds directly under the decentralised implementation system. On the other hand, it soon appeared clear that heavy and costly administrative structures, prepared to take over the implementation of structural funds upon accession, should only be set up during the last phases of the EU accession process, and surely only after an enlargement country had achieved candidate status. This would also help avoid the risk of setting up administrative units that would remain inoperative due to political blockages in the EU accession pipeline as with Serbia's delayed candidate status between 2012 and 2014.⁷⁰²

Moreover, achievements of decentralised management varied widely, as mentioned above, and over time even those countries that were successful in introducing decentralised implementation suffered heavily in terms of efficiency in absorbing IPA funds. Commission reports start noting delays in contracting and tendering in Croatia⁷⁰³ and Macedonia in 2011 and 2012 respectively.⁷⁰⁴ In 2012 the Commission noted that:

⁷⁰² Interview with the Head of Cooperation of the EU Delegation to Bosnia and Herzegovina, December 2014.

⁷⁰³ "In 2010, Croatia experienced some delays in contracting and implementation of assistance under Components III and V. This was due to delays in the conferral of decentralised management, newly established bodies adding to pressures on the implementation system and the complexity of some large infrastructure contracts." European Commission, *2010 Annual Report on Financial Assistance for Enlargement*, COM/2011/0647.

⁷⁰⁴ Ibid., European Commission, *2011 Annual Report on Financial Assistance for Enlargement*, COM/2012/0678

The introduction of Decentralised Implementation System (DIS) for Component I in December 2010 triggered a remarkable slow-down in procurement, as it has been the case with Components III and IV where DIS was introduced in 2009. Under these two Components we still observed a considerable number of hick-ups [*sic*] in 2011. Weaknesses in the management and control system reached a new, higher level of concern at the end of 2011.⁷⁰⁵

And the following year it remarked that “the implementation of all programmes whether centralised or decentralised implementation, as detailed above, was often faced with problems of weak political commitment and insufficient human and material resources.”⁷⁰⁶ For the first time the Commission had to de-commit funds for breach of the contracting timeframe, despite extension of the deadline from three to four years, with prospects for further de-commitments the following years “due to the increasing backlog and continuing weak absorption capacity for IPA funds under decentralised implementation”⁷⁰⁷ linked to “understaffing and insufficient managerial capacities in key institutions”.⁷⁰⁸ The contracting situation was reported as worsening again in 2014, with “numerous structural problems which negatively impact on their performance and ultimately on the timely absorption of IPA funds,” leading to risks of de-committment and loss of funds.⁷⁰⁹

The increasing issues with funds absorption may also help explaining the growingly colt-foot approach of the Commission towards decentralised management. In 2012 the progress of Montenegro under component V was deemed not sufficient, and funds allocations for rural

⁷⁰⁵ European Commission, *2011 Annual Report on Financial Assistance for Enlargement*, COM/2012/0678

⁷⁰⁶ European Commission, *2012 Annual Report on Financial Assistance for Enlargement*, SWD/2013/0326.

⁷⁰⁷ Ibid.

⁷⁰⁸ European Commission, *2013 Annual Report on Financial Assistance for Enlargement*, COM/2014/0610.

⁷⁰⁹ European Commission, *Annual Report on Financial Assistance for Enlargement in 2014*, COM/2015/0548

development under IPA2013 were moved under component I, directly managed by the EU Delegation.⁷¹⁰ Montenegro obtained management powers on component V only in 2014.⁷¹¹ Likewise, Albania submitted its application for conferral of management under IPA Component I in early 2012, but it was only in March 2014 that it was deemed ready and conferral of powers followed.⁷¹² Also for Serbia, which progressed steadily towards decentralised management and submitted its application for four IPA components (I, II, III and IV) in 2012, the Commission decided “not to proceed with opening of components III and IV under the current financial perspective 2007-2013”.⁷¹³ Conferral of management powers for the four components was granted to Serbia in March 2014. Independent evaluations also noted “chronic performance problems” under decentralised management.⁷¹⁴ Overall, decentralised management proved “a mixed blessing”, with improved ownership offset by efficiency losses.⁷¹⁵ Decentralised implementation was also deemed responsible of an overall slow-down in the implementation of IPA funds, with up to 7 years between programming and results.⁷¹⁶ Also because of these drawbacks, Macedonia reverted to direct management under IPA-II after 2014.⁷¹⁷

As noted by the Court of Auditors,⁷¹⁸ decentralised management requires a learning period and demanding structures. Both the IPA Regulation and the Financial Regulation⁷¹⁹

⁷¹⁰ European Commission, *2012 Annual Report on Financial Assistance for Enlargement*, SWD/2013/0326.

⁷¹¹ European Commission, *Annual Report on Financial Assistance for Enlargement in 2014*, COM/2015/0548

⁷¹² European Commission, *2011 Annual Report on Financial Assistance for Enlargement*, COM/2012/0678, European Commission, *Annual Report on Financial Assistance for Enlargement in 2014*, COM/2015/0548

⁷¹³ European Commission, *2012 Annual Report on Financial Assistance for Enlargement*, SWD/2013/0326.

⁷¹⁴ Ibid, p. ii, 18. Turkey, which has the bulk of IMBC for IPA-I and IPA-II, reports a backlog of over 600 mln €

⁷¹⁵ Ibid, p. iii.

⁷¹⁶ Ibid, p. 17.

⁷¹⁷ Ibid, p. 16.

⁷¹⁸ European Court of Auditors, *Special Report 21/2016: EU preaccession assistance for strengthening administrative capacity in the Western Balkans: A meta-audit*. No. 21, Luxembourg, 2016.

⁷¹⁹ Council Regulation 1605/2002 (OJ L 248, 16.9.2002)

did not require the Commission to assess the actual readiness of candidate countries to manage the volume and complexity of IPA funds that were being decentralised. Decisions on accreditation thus rested only on the compliance of domestic structures with the requirement for internal controls set out in the Financial Regulation – without, for instance, an assessment of public finance management at country level. As a consequence, national administrations did not prove able to cope with the administrative burden following accreditation: deadlines were broken and the quality of contracting documents proved inadequate, resulting in the loss of projects and funds.⁷²⁰ The administrative burden of managing EU funds proved challenging for even the most advanced public administrations in the region, especially when not as a short-term transition measure towards full EU membership and consequent direct management of EU structural and cohesion funds.⁷²¹ To remain in the newborn metaphor, the passage from breastfeeding to solid food had been premature. It is thus understandable that decentralised management was deemed not feasible or appropriate for the weakest administrations of the Western Balkans. This also helps understanding why repeated calls to grant access to European Structural Funds to the Western Balkans countries⁷²² have not been taken into consideration so far by the Commission: the lack of administrative capacities would make it impossible for enlargement countries to absorb the higher volume of structural funds. Their digestive apparatus is simply not developed enough yet.

⁷²⁰ European Court of Auditors, *Meta-audit*, p. 19. See also European Court of Auditors, *Special Report 11/2016: Strengthening administrative capacity in the former Yugoslav Republic of Macedonia: Limited progress in a difficult context*, No. 11, Luxembourg, 2016, paragraph 47.

⁷²¹ Interaction with a Commission official with knowledge of implementation of IPA funds in Croatia, Brussels, 15 March 2017.

⁷²² Tobias Flessenkemper and Dušan Reljić. "EU Enlargement: A Six Percent Target for the Western Balkans", Berlin: German Institute for International and Security Affairs (SWP), 27 June 2017.

Matteo Bonomi, "Economic governance in the Balkans: Towards a more sustainable path of economic development?", Brussels: European Policy Centre (EPC), 10 November 2016.

Notwithstanding more general issues concerning efficiency of decentralised management, for what concerns Bosnia and Herzegovina as well as Kosovo, which were also lagging behind in the EU integration process, the incentive structure of IPA funds via the decentralised management roadmap proved inadequate to counter the fragmentation of competences and stimulate internal reform and institution building, and was thus not put in place by the EU itself. The strategic priorities for assistance, the decision of which is formally a task of the Council of Minister's Directorate for European Integration (DEI) could not be implemented without a multi-level political agreement between the state and the sub-state entities on the list of projects. After a certain momentum from 2007 to 2009, the process regressed to a fully centralised management.⁷²³ An action programmed under IPA 2008 for 1.5 M € ("Support to the establishment of a Decentralised Implementation System for EU funds management") was cancelled due to lack of progress. The blockage is not due to the skills of human resources in its public administration;⁷²⁴ rather, the problem largely stems from posturing, linked to the defensive-positionalist political culture of Bosnia's ruling elite,⁷²⁵ and the lack of attitude to compromise and consensus.⁷²⁶ In Bosnia's legally and politically fragmented context, a more inclusive process is needed to ensure that selected priorities are supported by all political authorities at different levels, and that agreed-upon

⁷²³ Interview with an official at the EU Delegation to Bosnia and Herzegovina, Sarajevo, December 2014. The system was similar to the one employed by the European Agency for Reconstruction (EAR) in Serbia, Montenegro, Kosovo and Macedonia between 2000 and 2008.

⁷²⁴ Ibid. Unlike Kosovo, Bosnia and Herzegovina enjoys continuity from Yugoslav times in its public administration, which has similar competences, structures, and culture to neighbouring countries.

⁷²⁵ Defensive positionalism refers to the problem of relative gains in cooperation: an actor would refrain from cooperation if it fears that the gains would accrue relatively more to its partners, changing the status quo. See Grieco, Joseph M., *Cooperation Among Nations: Europe, America, and Non-tariff Barriers to Trade*, Ithaca 1990, p. 40.

⁷²⁶ The resistance of Bosnian political elites to external pressure was likened by one interviewee to the Gaul village of Asterix resisting to the Roman Empire. Interview with an officer of the EU Delegation to Bosnia and Herzegovina, November 2014.

projects do not run into quagmires once implementation starts due to lack of cooperation by the competent sub-state authorities as – differently from the context of Croatia or other centralised countries – there is no single lever at the highest political level that may put lower levels into motion.⁷²⁷

With the IPA system challenged both by the inability of its incentive structure to spur Bosnian actors to compromise, and by the disappointing results of decentralised management for funds absorption, the post-2014 financial framework was set for a major overhaul, which came with the replacement of DIS by a sector approach and its new mantra of sector strategies to sustain budget support operations.

2. The IPA-II programme and the shift from *structure* to *function*

The 2007/2013 IPA programme was deemed a step forward in terms of linking results to progress in the accession process, but its implementation remained mostly based on stand-alone projects, with a narrow scope and lacking overall coherence. Several Commission evaluations and discussions in various conferences⁷²⁸ led to the formalisation of the sector approach as a new paradigm for pre-accession assistance in order to foster its effectiveness and efficiency, opening the road towards IPA-II.

The new IPA II legislative framework for the 2014/2020 period reformed the DIS system and replaced it with a sector approach and budget support modalities.⁷²⁹ Management on the

⁷²⁷ Interview with an official at the EU Delegation to Bosnia and Herzegovina, Sarajevo, December 2014.

⁷²⁸ Conference on Donor Coordination in the Western Balkans and Turkey, Tirana, 2009; Conference on Effective Support for Enlargement, Brussels, October 2009; Sarajevo workshop, 2010.

⁷²⁹ Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II). (OJ L 77, 15.3.2014, p.11-26). See also Directorate for

EU side was streamlined within DG NEAR, with the exception of the rural development component, still managed by DG AGRI. Programming under IPA II is based on country Indicative Strategy Papers (ISP) identifying the key and mature sectors for financial assistance, which are then implemented through Action Programmes. The five components of IPA were replaced by five identical policy areas, accessible to candidate countries and potential candidates alike, and nine priority sectors, of which the first two (Democracy and governance; Rule of law and fundamental rights) are allocated 40% of the funds and mirror the three focus sectors (rule of law, economic governance, public administration reform) of the renewed “fundamental firsts” approach of the EU enlargement strategy.⁷³⁰

2.1 Sector budget support as vector of state building in fragile countries

Under the newly introduced sector approach, assistance should be targeted to strategic sectors relevant to EU accession objectives, and implemented through coordinated and coherent assistance packages at sector level. This may be supported by stand-alone projects, by pooled funding, or where appropriate it may lead to sector budget support or general budget support, i.e. the direct transfer of EU funds to the country’s budget accounts, under the fulfilment of specific indicators of performance included in Sector Reform Contracts – provided that domestic systems have sufficient capacities for public finance management and macroeconomic stability. Under a sector approach,

The activities of the government, donors, the private sector and NGOs are considered within the sector framework. The aim is to coordinate the activities of all stakeholders towards objectives established by the

European Integration (DEI), *Sector Approach in Pre-Accession Assistance*, Ares(2013)65573, 18 January 2013.

⁷³⁰ EU enlargement strategy, COM(2015) 611 final, Brussels, 10 November 2015.

government within the EU integration context and a coherent public expenditure framework.⁷³¹

This change of perspective stemmed from the discussion in the development aid community in the late 1990s, leading to the 2005 Paris Declaration on Aid Effectiveness. Strengthening local systems was meant to improve ownership and coherence of financial assistance, while minimising transaction costs. To achieve this, a series of building blocks were required: a sector strategy with objectives, a sector programme, a mid-term budget, and sectoral donor coordination. Moreover, domestic institutions would need strengthening and capacity-building to take the lead, coordinate and monitor performance. This seemed to fit well for the context of the Western Balkans, where EU accession is the main foreign policy aim of each country, the EU is the main donor, and domestic institutions need strengthening to prepare for implementation of the EU *acquis*, thus leveraging on coherence and complementarity. The development of sector approaches was included in the new 2011-2013 IPA Multi-annual Indicative Planning Documents (MIPD).⁷³²

Budget support is defined as “a means of delivering effective aid and durable results in support of EU partners’ reform efforts and the Sustainable Development Goals” that involves “the transfer of financial resources to the National Treasury of a partner country, following the fulfilment by the latter of the agreed conditions”.⁷³³ Budget support is envisaged as a bilateral contractual relation between the EU and a third country, based on specific eligibility criteria and conditions – including the existence of macro-economic stability and of a reliable domestic system of public finance management. Budget support involves: (1) policy dialogue

⁷³¹ Ministry of Finance and Treasury of Bosnia and Herzegovina (MoFT) and European Commission (EC), *Implementing sector approaches in the context of Enlargement, Challenges and lessons learnt from the Sarajevo Workshop 22-24 March 2010, A “How to” note*, October 2010, p. 2.

⁷³² *Ibid.*, p.3-4.

⁷³³ European Commission, *Budget Support Guidelines - September 2017*, p. 5.

to agree on the results to be achieved; (2) assessment of the progress (performance monitoring); (3) financial transfers to the Treasury based on fulfilment of result indicators; and (4) capacity-building support to strengthen domestic institutions and their transparency and accountability.⁷³⁴

Budget support is meant as a result-oriented modality of aid delivery; by using domestic country systems, it aims at “improving the accountability of the government towards its citizens, rather than creating parallel structures administered outside the budget by third parties”.⁷³⁵ Its domestic linkage is also meant to ensure ownership and hence alignment with country priorities and sustainable results. Sound macroeconomic and fiscal policies are taken as a prerequisite for possible public support operations, which are “specifically designed to support policy reforms and institutional strengthening”,⁷³⁶ usually enshrined in sector reform strategies. According to the Commission, budget support “improves accountability” via increased transparency and thus “helps tackling corruption” by strengthening oversight institutions, both formal (audit systems, Parliament) and informal (civil society participation).⁷³⁷ Budget support is thus foreseen as a “vector of change” for “state building in fragile states”.⁷³⁸

In terms of implementing modalities, budget support is foreseen in three forms: Sustainable Development Goals Contracts, Sector Reform Contracts and State Building Contracts. The latter are foreseen “to support transition processes towards recovery, development and democratic governance, and addressing structural causes of fragility, to help partner countries to ensure vital state functions and to deliver basic services to the

⁷³⁴ Ibid.

⁷³⁵ Ibid., p.6.

⁷³⁶ Ibid., p.7.

⁷³⁷ Ibid.

⁷³⁸ Ibid., p.9.

population”.⁷³⁹ On the other hand, Sector Reform Contracts are foreseen for cases in which objectives are narrower and focused on improving public policies and service delivery in a specific sector, “supporting an acceleration of reforms and in improving efficiency and effectiveness of sector expenditures”.⁷⁴⁰ All of them are subject to four eligibility criteria: “national/sector policies and reforms (‘public policies’); stable macro-economic framework; public financial management; transparency and oversight of the budget”.⁷⁴¹

As an implementing modality of EU financial assistance that foresees direct transfers into the Treasury, budget support was initially seen favourably by beneficiaries in enlargement countries, as a sort of a “gift”.⁷⁴² Yet, its implementation proved not so easy for country authorities. Its “intrusive” character, with time, risked giving rise to a certain “fatigue”. Firstly, because of its prerequisites (sector policies, PFM strategy, result indicators) and its concrete modalities, requiring the opening to external scrutiny of “the very earth of government” and of the political-administrative patronage links, i.e. the treasury system. “Suddenly we saw more transparency in the use of donor funds, we discovered overlaps and hole-covering”. Secondly, because authorities soon discovered that the disbursement of the “gift” is actually conditioned to achieving results: “when we had to pay the first tranche, we could pay only one third of it, cause the result indicators had not been fulfilled yet”. The move towards budget support also required a change of mindset, from a project-based approach (sometimes simply used as constituency-building under a patronage logic) to a systemic approach requiring developed strategies and programmes, in which it is less easy to suddenly include requests for purely electoral handouts. At the same time, its prerequisites

⁷³⁹ Ibid., p.12.

⁷⁴⁰ Ibid., p.11.

⁷⁴¹ Ibid.

⁷⁴² This and following quotes: from interaction with a Commission official, formerly Head of Cooperation in a country with a Sector Budget Support programme, October 2017.

(strengthening public finance management, e.g. audit authorities, procurement commissions, administrative procedures) made it so that a move towards budget support is seen as “triggering reform by design”.⁷⁴³

While decentralised management by the domestic authorities (now called “indirect management” under IPA II) was the default management mode under IPA I, in the new IPA II instrument a more flexible approach to aid modalities was introduced.⁷⁴⁴ The Commission decided not to request new national structures to be put in place too early in the process towards EU membership, and identified the finalisation of the preparations for opening the negotiation chapters relevant for the future management of cohesion/structural funds as the benchmark for asking an action plan to this aim. Also those structures already set up under IPA I would have been subject to an assessment of positive performance before entrusting them with indirect management under IPA II. In the understanding of the Commission, indirect management should have been used primarily as a learning tool to prepare the national authorities for managing future structural/cohesion funds, and thus applied mainly to IPA actions mirroring those funded by the EU in the Member States.

Seeing the delays and implementation issues caused by indirect management under IPA I, this implementation modality was swiftly scaled down under IPA II. The Commission aimed to be very selective in the use of indirect management, while at the same time acknowledging the investments already undertaken by the enlargement countries and the need to make good use of the structures already set up, thus foreseeing a balanced mix of implementation modalities under IPA II.

⁷⁴³ Ibid.

⁷⁴⁴ While “assistance should continue to make use of structures and instruments that have proved their worth in the pre-accession process (...), the transition from direct to indirect management by the IPA II beneficiaries should be progressive and in line with the respective capacities of those IPA II beneficiaries”. IPA II Regulation 231/2014, Art.15.

Countries such as Bosnia and Herzegovina could thus continue with direct management of funds by the EU Delegation, while the progressive maturation of different sectors could with time lead to financial assistance under budget support modalities. For these reasons, the Indicative Strategy Paper for BiH was originally limited to a three-year period, 2014-2017, rather than up to 2020, in order to leave it to a later moment the identification of the mature sectors for which a budget support operation could be envisaged – in the hope that this would also have spurred preparations on the Bosnian side.

IPA II thus marked a shift away from the decentralisation of management that had been so much in focus under IPA I, towards a more function-oriented system in which an obligation of result is coupled with more flexibility with regards to the means to achieve it, thus adding flexibility to the system and facilitating context-sensitive local solutions. Under IPA II, the implementation of EU funds is still entrusted to national authorities, but by making use of existing administrative systems rather than seeking wholesale reform in accordance with an external model. The EU demands a sound system of checks and balances (public finance management and public procurement standards), but does no longer prescribe the establishment of new domestic structures and their external accreditation by the Commission.⁷⁴⁵ This alternative mode of implementation attests to an ongoing shift from *structures* to *functions* in the conceptualisation of EU enlargement policy, accompanied by a more result-oriented approach to what is required from candidate countries.⁷⁴⁶ By becoming less prescriptive about the means, while retaining an obligation of results, the EU may better manage to accommodate state structures that depart from the usual model of centralised administrations, such as those of Bosnia and Herzegovina. Domestic ownership and flexibility may benefit from such a change.

⁷⁴⁵ Interview with the Head of Cooperation of the EU Delegation to Bosnia and Herzegovina, December 2014.

⁷⁴⁶ Interview with an official from the EU Delegation to Bosnia and Herzegovina, December 2014.

The new approach to financial assistance is not without its own risks, though. The *acquis* remains a reference point for the IPA II, and management decentralisation is still among its aims. Yet, the financial instrument is more geared to support the general socio-economic objectives of development, rather than the specific objective of preparation for EU accession.⁷⁴⁷ In this, the IPA II is more consistent with other EU external funds, from neighbourhood policy to development cooperation, as well as with pre-2007 instruments for the Western Balkans, rather than designed for the specific aim of enlargement policy. Insofar as it focuses on local needs and ownership rather than on the preparation of candidates for the post-accession management of EU funds, it risks sending to the candidate countries a wrong message of uncertain commitment and time horizon for EU accession.

It remains to be seen whether the changes foreseen by the IPA II will allow the political blockages that have mired the implementation of its predecessor to be overcome. Bosnia and Herzegovina may now in principle receive assistance in all sectors, including agriculture/rural development, employment and social policy, and not just to the ones for institution-building and cross-border cooperation. Moreover, the sector approach requires the previous identification of strategic needs and priorities and allows for a flexible allocation of funding; this should lead to more efficient planning of projects. The risk remains that Bosnia might fall behind even under these modalities of implementation.

2.2 Countrywide strategies as the new mantra of EU financial assistance

A mapping study conducted by the HTSPE consultancy in 2014⁷⁴⁸ led to the identification of those sectors deemed mature enough for sector approach, based on criteria including sectoral strategies, institutions, financial resources, coordination, and sound

⁷⁴⁷ Wolfgang Koeth, “The New Instrument for Pre-Accession Assistance (IPA II): Less Accession, More Assistance?” *EIPA working paper 2014/W/01*, 2014.

⁷⁴⁸ HTSPE, Study on Mapping of Sector Strategies for IPA, 2014.

country-wide finance management. The study found Serbia almost ready for sector approach in public administration reform, justice, and home affairs, and Bosnia and Herzegovina almost ready in public administration reform and justice, with the other enlargement countries still lagging behind in most sectors. Observers from the Bosnian civil society deemed it “very likely that BiH will not be eligible for sector approach in the delivery of IPA funds for 2014 in a large number of sectors”.⁷⁴⁹ EU officials as well considered the study as likely overly optimistic on Bosnia and Herzegovina,⁷⁵⁰ also because the country still lacked the prerequisite of a countrywide public finance management strategy.⁷⁵¹ Overall the implementation of sector approach remained in transition at mid-term.

With the introduction of sector approach, the mantra of EU financial assistance shifted from accreditation of decentralised management to the adoption of national sector strategies (in Bosnia and Herzegovina denominated “countrywide strategies”). A strategy, or plan, is a policy document that states the government’s objectives in a given sector in a mid-term perspective (3 to 5 years); strategy and ensuing activities would then be reflected in a budget. Achieving consensus among governmental actors, donors and stakeholders on the sector priorities was considered as one of the main aim of the development of sector strategies, whose implementation would later be co-financed by domestic and international actors.

In case of Bosnia and Herzegovina, though, the main challenge would prove to be the establishment of consensus among governmental actors at different levels. In fact, EU officials planning financial assistance soon noticed how Bosnia’s case was “more problematic

⁷⁴⁹ Foreign Policy Initiative BH (FPI BH), *What does IPA II mean to us?* Sarajevo, June 2014, p. 4.

⁷⁵⁰ Interaction with EU officials and DAI Europe consortium evaluators, 13 October 2017.

⁷⁵¹ An agreement to produce a countrywide PFM strategy was reached in July 2016 between the state, entities, and Brčko District authorities. With EU-funded IMF and SIGMA assistance, the BiH state and the Federation entity produced their own PFM strategies. The RS entity did not share the draft or adopt its own PFM strategy, citing concerns with the off-track IMF arrangement, despite Commission explanations regarding assessment of macroeconomic stability.

than a ‘normal’ state”.⁷⁵² Given the distribution of competences in the country, a national or countrywide strategy in Bosnia and Herzegovina would necessarily require multi-level sectoral cooperation – which, given the outstanding state contestation, would prove elusive. To the least, achieving consensus between authorities at all levels – often (ethno)politically opposed to one another – would require more time. Consensus comes at the expense of efficiency, but in the case of financial assistance this runs the risk of crushing against the hard deadlines of the annual programming cycles. Early-developed strategies in Bosnia and Herzegovina included those on justice and on public administration reform (PAR). For what concerns other sector strategies, their development remained marred by controversy, as Republika Srpska often did not take part in the efforts to develop them.

For what concerns the first, the Justice Sector Reform Strategy (JSRS) would constitute a first backbone for a sector approach to justice and home affairs. In this regard, despite agreement on sector priorities and clarification of role and responsibilities of each stakeholder, the lack of capacities, institutional coordination, and political will, all contribute to explain the difficulties in the implementation of the strategy.

On the public administration reform strategy, issues of ownership and administrative capacities continued to hinder its implementation.⁷⁵³ Disagreements concern the foreseen horizontal scope (restricted to civil services for the RS, extended to the wider public sector for the Federation) as well as vertical scope (limited to the state, entities and Brčko District for the RS, extended to involve also the cantons for the Federation). At the same time, a worrying trend of adoption of civil service laws in different cantons, with increased risks of politicisation, has emerged, while the Federation Supreme Court had to strike down the amendments to the Federation civil service law that allowed the entity government to appoint

⁷⁵² Interaction with a Commission official dealing with financial assistance, 13 October 2017.

⁷⁵³ BiH MoFT / EC, *Implementing sector approaches in the context of Enlargement*, 2010.

senior- and middle-level civil servants. An approach based on complementarity of competences between different levels of governance, rather than competitive competences, remains to be developed. The PAR strategy had expired in 2014, but a revised action plan is still being implemented. A draft countrywide strategic framework on public administration reform was prepared with the support of SIGMA, UK-funded experts and GiZ, and by the end of 2017 it was undergoing public consultations, but concerns were raised about its quality.

In the agriculture sector, a Strategic plan for rural development of Bosnia and Herzegovina 2018-2021 was adopted by all governments in BiH by early 2018; its parliamentary adoption remain pending and necessary for Bosnia and Herzegovina to access EU funds for agriculture under IPA2018 (disbursement starting in 2019).

In the employment sector, the BiH authorities finally asked the Commission to postpone the preparation of the Sector reform contract to 2019. Budget support in the Employment sector remained marred not only by the lack of a countrywide sector strategy, but also by the fact that Bosnia and Herzegovina still lacks a public finance management strategy – a prerequisite for any budget support operation.

In the transport sector, a BiH Transport Policy Document had been adopted by the BiH Council of Ministers in 2008 and later rejected by Parliament due to opposition from RS-based parties. Multi-level consultations resumed in early 2014. The document was re-adopted by the Council of Ministers, but again rejected by Parliament. The European Commission encouraged the establishment of a sectoral working group (with ministries of transport at state and entity levels) to identify a way forward. With support from the UK embassy, BiH authorities finally agreed to a countrywide strategy one day before the 2016 Paris Summit of the Berlin process, at which they hoped to achieve financing grants and loans for infrastructural connectivity projects. This was considered too last-moment by the European

Commission and international financing institutions alike. At the following year's summit in Trieste, Bosnia and Herzegovina announced at the very last moment that it would not have been able to take part in the signature of the Transport Community Treaty. The diplomatic fiasco led the European Commission to freeze the IPA grants which would have worked as co-financing for EBRD's loans for infrastructural investments (Corridor V-c sectors and Brčko Port). While Bosnia and Herzegovina finally signed the Transport Community Treaty by late September, after heavy advocacy efforts, the law on fuel excises, considered by IMF and EBRD as a necessary indicator of the fiscal space available to co-finance infrastructural projects, could only be adopted by the BiH Parliament in mid December 2017.

The energy sector is another one in which competence is mostly constitutionally allocated at sub-state levels. Despite a comprehensive study developed in 2008 through a World Bank loan,⁷⁵⁴ providing the basis for the development of a countrywide energy strategy, an entity-level strategy for Republika Srpska alone was adopted in 2010 with a 2030 perspective. The Federation entity also developed and adopted in 2009 a Strategic plan and program for the development of the energy sector. A BiH framework energy strategy was developed in the course of 2017 with the support of the UK embassy under a "modular approach"— combining the two entity-level strategies in a single document while ensuring that entities' respective interests are fulfilled and investments are made based on the agreed ratio. Yet, this raised concerns on the technical efficiency and financial soundness of the strategy.

In the environment sector, the development of a countrywide strategy was initially stalled by Republika Srpska disagreement, as competence in the sector is mainly at entity level. Consultations restarted in December 2013 in the framework of the EnvIS project,⁷⁵⁵ focusing

⁷⁵⁴ BiH Ministry of Foreign Trade and Economic Relations (MoFTER), Energy Sector Study for Bosnia and Herzegovina, 2008.

⁷⁵⁵ Strengthening of BiH Environmental Institutions and Preparations for pre-Accession Funds (EnvIS)

on the development in parallel of strategic documents at different levels of governance, in line with constitutional competencies. An Environmental Approximation Strategy was finally adopted in May 2017, complemented by a programme of approximation for each entity and the Brčko District, thus opening up for the possibility of IPA support to the sector under IPA2018 starting from 2019. It was not published in the Official Gazette by the end of 2017, and its “modular” framework raised concerns as to the quality of the document.

For what concerns the strategy on public finance management (PFM) – a prerequisite for budget support in all other sectors – following the agreement to produce a countrywide PFM strategy in June 2016 separate strategies were developed by the different levels with the assistance of EU-funded IMF and SIGMA experts, to be later consolidated in a single countrywide document. The respective strategies were adopted by the Federation entity, the Brčko District and the state level between December 2016 and June 2017. Nevertheless, the Republika Srpska entity did not share their draft strategy nor did they adopt it in the course of 2017, citing the off-track IMF programme as a pretext, despite Commission reassurances that the macroeconomic stability prerequisite is assessed by the EU based on its own parameters.

Table 4.8 – Development of countrywide sector strategies

Public financial management	Modular; RS missing	No draft available
Public administration reform		Draft under consultation
Justice sector reform		In force (2014-2018)
Transport		Adopted July 2016
Rural development	Modular; all levels present	Pending parl. adoption
Employment	Modular; FBiH missing	No draft available
Energy	Modular; all levels present	Consent by RS needed
Environment	Modular; all levels present	Not published in OJ yet

3. Mirroring consensus engines: country-wide strategies and the Coordination Mechanism

Another example of the Bosnian mirroring of EU consensus engines is in the Coordination Mechanism. As Bosnia and Herzegovina is structured as an asymmetric federation, the same sector (e.g. education) may be exclusive competence of one entity and of the cantons in the other entity, with further devolution to municipalities in some cantons, and with the state administration having a narrow role of overall coordination.⁷⁵⁶ This has led to the issue of Bosnia not being able to speak with one voice to the EU, for instance not being able to agree on those country-wide strategies necessary for the new sector-based mode of implementation of IPA funds, as discussed above.

3.1 The growth and decline of the Directorate for European Integration

The issue of coordination of EU affairs in Bosnia and Herzegovina started to become topical already in the early 2000s, with the introduction of financial assistance programmes (CARDS) that required a substantial input by the country authorities. A Ministry of European Integration (MEI) had been established in 2000.⁷⁵⁷ It was later replaced by the Directorate for European Integration (DEI), an expert body attached to the BiH Council of Ministers,⁷⁵⁸ tasked with co-ordinating the process of EU integration of Bosnia and Herzegovina. The DEI presents itself as "a permanent, independent and expert body of the Council of Ministers", "responsible for coordination of activities of the BiH authorities and supervision of the implementation of decisions passed by the relevant institutions in BiH concerning the

⁷⁵⁶ See Keil, *Multinational Federalism*, 2013, p. 115-116.

⁷⁵⁷ Decision of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, passed on June 22, 2000.

⁷⁵⁸ Law on Council of Ministers of BiH, Official Gazette of BiH, No. 38/2002, of December 18, 2002.

requirements for the European integration." ⁷⁵⁹ The DEI is in principle competent for both horizontal coordination – between different ministries and agencies at the state level – and vertical coordination – between authorities at different levels of governance: state, entities, cantons. The DEI Director is the National IPA Coordinator (NIPAC) and the directorate also conducts outreach and public information campaigns. ⁷⁶⁰ Its competences are listed as follows:

Co-ordination of activities on harmonisation of the BiH legal system with the EU accession standards (*acquis communautaire*); Verification of the coherence of all draft laws and regulations submitted to the Council of Ministers by all ministries and administrative units with directives of the "White Paper – Preparation of Associated States of Central and Eastern Europe for Integration into the Internal Market of the Union"; Harmonisation of the activities of the authorities and institutions of BiH in the field of the EU integration; Co-ordination of enforcement of decisions passed by relevant authorities and institutions of BiH, Entities and of the Brčko District of BiH in regard to all activities necessary in the field of the EU integration; Acting as the central operational partner of the institutions of the European Commission in the process of stabilisation and association; Co-ordination of the EU assistance. ⁷⁶¹

As the main counterpart of the European Commission in the process of EU integration of Bosnia and Herzegovina, the DEI (and the MEI before it) was established with the aim of

⁷⁵⁹ Directorate for European Integration (DEI), *About us*, http://www.vijeceministara.gov.ba/saopstenja/saopstenja_predsiedavajuceg/default.aspx?id=1719&langTag=en-US

⁷⁶⁰ Ibid.

⁷⁶¹ Council of Ministers of Bosnia and Herzegovina, *Directorate for European Integration* http://www.vijeceministara.gov.ba/stalna_tijela/dei/default.aspx?id=1719&langTag=en-US

becoming the spokesperson for Bosnia and Herzegovina as a whole, through which the country could have "spoken with a single voice" to the European Union. Yet, this proved not possible in the following years. Vertical coordination between levels of governance proved particularly challenging. The uneven distribution of competences between state and entities (and their frequent contestation – one of the features of state contestation in BiH), and the institutional basis of the DEI as an expert body of the state-level Council of Ministers, made so that any initiative of DEI got to be seen by the entities as yet another attempt of the state-level to grab some powers at their expense. With Milorad Dodik's openly secessionist SNSD party coming to power in 2006, Republika Srpska started undermining DEI's standing and activities, up to claiming a separate track for EU accession.⁷⁶²

The DEI was considered as "a rare case where a central state-level institution exists with a full capacity to coordinate policies at lower levels".⁷⁶³ Yet, these capacities were hampered by the will of sub-state entities to jealously preserve their competences and not allow any state-level institution to have to deal with them, not even with a coordination role. Observers had called for "constitutional reforms that would allow the state to play a stronger coordination role";⁷⁶⁴ in fact, the 2006 "April package" of constitutional reforms would have included a specific clause for EU integration.⁷⁶⁵ Since the failure of the latter, the DEI remained tasked with coordinating counterparts that did not wish to be coordinated by it.

⁷⁶² "Some political representatives are questioning Bosnia and Herzegovina's capacity to function as a country and are calling for an Entity-level EU agenda separate from the Bosnia and Herzegovina state". European Commission, *Bosnia and Herzegovina 2012 Progress Report*, SWD(2012)335, p. 7.

⁷⁶³ CPS.ba, October 2013, p.3

⁷⁶⁴ Ibid.

⁷⁶⁵ The "April package" of constitutional amendments included an EU integration clause, entrusting responsibility for negotiating agreements with and undertaking commitments to the EU to the State level, after previous advise and consent of the entities, and recognising shared responsibility of the two levels of government for the fulfilment of international and European commitments.

While in 2005 the Commission had welcomed the growing role of DEI, "now able to act as a real National Aid Coordinator", and the promising steps towards possible future decentralisation of financial assistance,⁷⁶⁶ in 2007 they noted that DEI's work to "promote the objective of European integration by continuing its efforts to improve coordination of State and Entity ministries" had been "hampered by the politicised climate" and that coordination among authorities remained "minimal" and "depend[ing] largely on personal and party interests".⁷⁶⁷ The following year, while noting the progress in horizontal coordination, for which "units for European integration have been established in each ministry in the Council of Ministers", the Commission also remarked the significant delays in the adoption of the action plan for the implementation of the European Partnership priorities, "as a result of Republika Srpska's challenges to the competences of the State level in a number of areas".⁷⁶⁸

3.2 The debate on the need for a coordination mechanism

The overall lack of legislative coordination between state and entities is briefly noted in all the Commission progress reports on BiH from 2006 onwards. The discussion on a coordination mechanism starts in 2011, when the Commission noted that "the EU accession process requires political will and functional institutions at all levels with an effective coordination mechanism on EU matters,"⁷⁶⁹ as the DEI "remains without the necessary authority to drive the EU integration process forward" and its role "requires further strengthening".⁷⁷⁰ Political discord among authorities had also delayed programming for

⁷⁶⁶ European Commission, *Bosnia and Herzegovina 2005 Progress Report*, SEC(2005)1422, p. 7.

⁷⁶⁷ European Commission, *Bosnia and Herzegovina 2007 Progress Report*, SEC(2007)1430, p. 9.

⁷⁶⁸ European Commission, *Bosnia and Herzegovina 2008 Progress Report*, SEC(2008)2693, p. 10.

⁷⁶⁹ European Commission, *Bosnia and Herzegovina 2011 Progress Report*, SEC(2011)1206, p. 4.

⁷⁷⁰ *Ibid.*, p. 9-10.

IPA2011.⁷⁷¹ The call was repeated in the 2012 report,⁷⁷² as lack of agreement on priorities continued to hamper the programming of financial assistance⁷⁷³. The Commission noted that "Establishing an effective coordination mechanism between various levels of government for the transposition, implementation and enforcement of EU laws so that the country can speak with one voice on EU matters, remains an issue to be addressed".⁷⁷⁴ No progress was reported the following year either, as "efforts led by the Council of Ministers to define an effective coordination mechanism between various levels of government for the transposition, implementation and enforcement of EU laws have not yielded results".⁷⁷⁵ One SA Sub-Committee meeting was reportedly also cancelled due to lack of a common position on the BiH side on the topics to be discussed, "which is without precedent. This illustrates the urgent need for an effective coordination mechanism on EU matters."⁷⁷⁶ In 2014 the Commission noted once more that "a well-functioning coordination mechanism on EU matters" was required to improve the efficiency of the interaction between levels of government, and that the lack of agreement on countrywide strategies (a precondition for financial assistance) had

⁷⁷¹ The Commission remarked that "The difficulties encountered during the programming exercise demonstrate the need to urgently address the issue of coordination on EU matters within the country's institutions at every level. Strengthening coordination mechanisms on the programming of future EU financial assistance and on other EU matters, is an issue to be addressed as a matter of urgency." Ibid., p. 6.

⁷⁷² "The need for an effective coordination mechanism between various levels of government for the transposition, implementation and enforcement of EU laws remains to be addressed as a matter of priority, so that the country can speak with one voice on EU matters and make an effective use of the EU's pre-accession assistance". European Commission, *Bosnia and Herzegovina 2012 Progress Report*, SWD(2012)335, p. 5.

⁷⁷³ "The lack of agreement between stakeholders in the country regarding the projects to be financed under the IPA 2012 national programme delayed the completion of the programming exercise in 2012. The difficulties encountered during the programming exercise demonstrate the need to urgently address the issue of coordination on EU matters at every level. Strengthening coordination mechanisms on the programming of future EU financial assistance and on other EU matters, is an issue to be addressed as a matter of urgency". European Commission, *Bosnia and Herzegovina 2012 Progress Report*, SWD(2012)335, p. 7.

⁷⁷⁴ Ibid., p. 9.

⁷⁷⁵ European Commission, *Bosnia and Herzegovina 2013 Progress Report*, COM(2013) 700, p. 6.

⁷⁷⁶ Ibid., p. 5.

caused "a substantial reduction of funding".⁷⁷⁷ An agreement on the matter was still out of reach, "despite intensive facilitation efforts by the EU".⁷⁷⁸ The role of DEI was also seen as further weakening due to disagreement within the Council of Ministers and lack of cooperation from the entities.⁷⁷⁹ Several sub-committees had to be cancelled. The entry into force of the Stabilisation and Association Agreement in 2015 made the need for an effective coordination mechanism even more stringent.⁷⁸⁰ Only two sub-committees could be held in 2014/15.⁷⁸¹ One of the main reasons was also the suspicion, from the Republika Srpska authorities, that the coordination mechanism could be used to "upload" competences from the entity to the state level under the flag of European integration, as had been foreseen in the 2006 April package. This was one misconception that took long to address.

3.3 Getting to an agreement on the coordination mechanism

In early June 2015, while the Reform Agenda was being finalised the BiH Council of Ministers decided to re-table the 2013 proposal for a coordination mechanism, then submitted by Prime Minister Bevanđa and proposing it for adoption by the entity governments after alignment with the now-in-force SAA. The main principles for the coordination mechanism, as agreed by all Bosnian actors, included: (a) full respect for the constitutionally-mandated distribution of competences between the different levels of governance; the coordination mechanism was not supposed to be a tool for shifting competences between different levels; (b) responsibility of each level to timely and efficiently implement the obligations stemming from EU integration, in their own sphere of competence; (c) full compliance with the SAA and the decisions of the joint SA bodies; and (d) consensus as the main principle of decision-

⁷⁷⁷ European Commission, *Bosnia and Herzegovina 2014 Progress Report*, SWD(2014)305, p. 1.

⁷⁷⁸ *Ibid.*, p. 7.

⁷⁷⁹ *Ibid.*, p. 9.

⁷⁸⁰ European Commission, *Bosnia and Herzegovina 2015 Progress Report*, SWD(2015)214, p. 8.

⁷⁸¹ *Ibid.*

making among the appointed members of the coordination bodies. Participation in the mechanism's bodies also meant to establish permanent delegations for participation in the joint EU-BiH SA bodies,⁷⁸² which had till then remained a matter of controversy between state and entities.

The SAA does not explicitly regulate how the partner country should internally coordinate in EU-related matters nor who should participate in the SA joint bodies from their side. The SAA does not prejudge internal decision-making structures and procedures, as these are linked to the domestic distribution of competences, and the EU has no appetite to get involved in internal political disputes. The only prescription, in this case, is that the partner country may present in the joint bodies a common position that represents and binds Bosnia and Herzegovina as a whole as party to the SAA, irrespective of the actual composition of the participant delegation. This requires a prior coordination and agreement. Yet, it had been consistent practice in previous cases (most notably Serbia and Croatia) that these matters are regulated together and that EU affairs coordination is based on the institutional provisions of the SAA, thus creating a strong link between the joint bodies and the domestic follow-up. The BiH authorities thus decided (and the EU Delegation concurred with their evaluation) that the optimal solution would have been to align the internal coordination mechanism with the structure of the joint bodies under the SAA.

A Decision on the Coordination Mechanism was adopted by the BiH Council of Ministers in January 2016,⁷⁸³ but soon contested by the Republika Srpska entity. The agreement on the coordination mechanism was one the three consensus-enablers established by the EU Council in order to take into consideration Bosnia and Herzegovina's EU

⁷⁸² SA Council, SA Committee, SubCommittees and SA Parliamentary Committee, as regulated by art. 115-121 SAA.

⁷⁸³ BiH Council of Ministers, Decision on the Coordination Mechanism, *BiH Official Gazette* 8/16.

membership application, deposited in February 2016. Consultations continued up to the summer, with Bosniak parties also positing a deal on the coordination mechanism as a condition for their go-ahead of the (much coveted by the cash-strapped RS authorities) IMF's Extended Financial Facility. A deal was reached at an informal dinner between the Bosniak BiH Presidency member and the RS President at the Motel *Barka* in East Sarajevo on 31 July, upon facilitation by the EU Ambassador, which also allowed for immediate signing and dispatching of a two-weeks-delayed Letter of Intent to the IMF. Yet this raised the politically-motivated objections of the Croat parties.

After further negotiations, in late August 2016 all Bosnian authorities finally agreed⁷⁸⁴ on the set up and procedures of the Coordination Mechanism - a series of structures to mirror, on the BiH side, the joint bodies of the EU-BiH Stabilisation and Association (SA) policy cycle (see table 6.7 below). This coordination mechanism is meant to bring together all Bosnian authorities competent on a specific issue, at different levels of governance, in order to agree on a common position for the country before EU talks. The structures of the mechanism, deciding by consensus, allow for the escalation of contentious issues from the technical to the political level, and foresees as final authorities a series of sectoral ministerial conferences⁷⁸⁵ and a *collegium* at prime ministers' level, tasked to take final decisions on the matters of highest controversy. Dispute resolution by escalation did not in principle prevent controversies from being simply passed on at the higher technical/political level; to avoid such buck-passing, the rules of procedure foresaw that any request should include also background and possible models for resolution.

⁷⁸⁴ BiH Council of Ministers, Decision on the Coordination System in the Process of European Integration in BiH, 23 August 2016, published in the *BiH Official Gazette* 72/16.

⁷⁸⁵ The ministerial-level meetings of the Structured Dialogue on Justice, taking place since 2015, already anticipate the ministerial conference in justice and home affairs as foreseen by the coordination mechanism.

Table 5.7 – Bosnia and Herzegovina’s Coordination Mechanism

<i>SA bodies (BiH members)</i>	<i>BiH coordination structure</i>	<i>Members</i>	<i>Role</i>
SA Council (CoM Chair and deputies)	Collegium for EU integration	BiH CoM chair and deputies; 2 entity PMs; 10 cantonal PMs; Brčko Mayor (16). All presenting agreed positions for each level.	Overall political coordination: strategic guidance and highest instance of dispute settlement
	Ministerial Conferences	Competent ministers at all levels in each sector	Political sectoral coordination
SA Committee (DEI Director)	Commission for EU Integration	DEI Director + coordinators at entity, cantons and Brčko level.	Overall technical coordination; Implement. SAA obligations; Identification of competences
SA SubCommittees (Assistant Ministers)	Sub- Commissions (8)	Representatives of each competent government (assistant ministers; chairs and deputy chairs of Working Groups)	Technical sectoral coordination; coordination of WGs per each EU-BiH SubCommittee
	Working Groups (35)	Sectoral representatives of competent institutions, as confirmed by the BiH Council of Ministers	Operational level

As a consensus-building engine, the coordination mechanism aimed for the widest participation and consensual decision-making. The compromise managed to ensure the broadest participation, including of cantons: fully at the technical level and more restrictively at the political level, where their representatives need to present previously-coordinated common positions (though this intra-entity coordination is not addressed in the mechanism itself) and may vote only on those issues falling under their exclusive competence. On the other hand, its functionality and efficiency remained in doubt. The structure seemed cumbersome and complex; potential issues included both logistic management (setting calendars and venues) and the risk of clogging the political level with technical issues being

escalated from the lower levels, in case of lack of political mandate. The issue of achieving consensus in assemblies of over 100 representatives, and the legal value (if any) of the “guidelines” agreed by the various coordination bodies also remained in doubt. Yet, the coordination mechanism was welcomed by EU actors as a first-ever compromise attempt with a realistic chance of finalisation and agreement, and particularly helping overcome one thorny political obstacle with Republika Srpska that had complicated thus far EU-BiH relations, allowing for a new phase of relations to start with the implementation of the Reform Agenda and the foreseen presentation of the EU membership application of Bosnia and Herzegovina.

However, Republika Srpska authorities did not stop challenging EU integration efforts, by trying to set up direct lines of reporting to the European Commission ("a practice which directly challenges the need for the country to ensure a single channel of communication with the EU"), and by not participating in the development of countrywide strategies for financial assistance, reportedly while waiting for the bodies under the coordination mechanism to be established, "with a major negative impact on programming and implementing the EU's financial assistance" .⁷⁸⁶

3.4 The slow establishment of the coordination mechanism

The first testing ground for the coordination mechanism consisted in the consolidation into a single set of the replies of the Bosnian public administration bodies at all levels to the Questionnaire that the European Commission presented to the Bosnian authorities in December 2016.⁷⁸⁷ The coordination mechanism should also be made use for in order to agree on the country-wide strategies needed to access EU funds, as well as in any other situation that may require domestic multi-level agreement on EU-related matters, to avoid situations

⁷⁸⁶ European Commission, *Bosnia and Herzegovina 2016 Report*, SWD(2016)365 final, p. 4.

⁷⁸⁷ The process, managed by 35 working groups supported by the DEI, should come to a close by early 2018.

such as the missed signature of the Transport Community Treaty at the July 2017 Western Balkans summit in Trieste, reportedly due to lack of agreement by the Republika Srpska entity government.

In fact, the establishment of the coordination mechanism proceeded very slowly during 2017, and the preparation of the replies to the Commission's Questionnaire equally saw delays. A Decision of the BiH Council of Ministers identifying the members and rotating chairs of the 33 acquis-based working groups under the coordination mechanism was adopted in late March 2017, with over 1,300 members overall.⁷⁸⁸ The finalisation of this list was a long-standing requirement by Republika Srpska to contribute to the process of preparation of the consolidated replies to the Commission's Questionnaire via the online software managed by DEI. The Decision, which implements the political agreement reached at the meeting of 14 March 2017 of the BiH Collegium for EU Integration, rests on the principle of inclusion of all levels of governance in all working groups (thus also in cases for which there is no explicit competence of the lower levels), and 6-month rotation of the chairmanship of each working group. A compromise was reached on the presence of the Federation BiH Ministry of Culture and Sports and Federation BiH Ministry of Education and Culture (whose role and competence is contested by the Federation cantons), providing for their participation with observer status only, without voting or chairmanship power. The decision, finally, identifies the institutional members of each working group while leaving it to the Commission for EU Integration to finalise (and eventually amend) the personal identification of the members of each body. In such a configuration, the DEI took a backseat, providing "professional, technical and IT support" to the chairs and secretaries of the working group, while not performing such functions itself – a solution agreed in order to overcome the reservations of

⁷⁸⁸ Decision of the BiH Council of Ministers to Establish European Integration Working Groups. See Council of Ministers of Bosnia and Herzegovina, *Council of Ministers of Bosnia and Herzegovina at Extraordinary Session*, Press Release, 31 March 2017.

Republika Srpska, which up until May 2017 continued to deliberately ignore any direct communication from DEI. As of June the working groups started working on the consolidation of the replies to the Commission Questionnaire.

As with the Structured Dialogue on Justice, the Coordination Mechanism is a second example of the export of EU-typical consensus engines in the Bosnian context, with the aim to foster a less confrontational attitude between authorities at different levels and overcome defensive positionalism, and alleviate state contestation while preserving and strengthening the legitimacy of political institutions, in line with a member state building model. The bodies under the coordination mechanism appear as yet another instance of consensus-building engines, exported by the EU integration process in BiH. In this case, and differently from the Structured Dialogue on Justice, the coordination mechanism remains a trans-governmental body within a vertical hierarchy – without input from external actors such as civil society and EU officials (although the working groups have the faculty to extend *ad hoc* invitations to NGOs and academia). The Coordination Mechanism, while not impinging on the internal distribution of competences, should allow with time Bosnian authorities at all levels to achieve prior political consensus on EU-related issues and reforms, avoiding the all-too-often *ex post* blockages that characterize Bosnian politics. On the other hand, as it is a typical feature of consensus-building engines, with its emphasis on inclusivity and participation the coordination mechanism remains an unwieldy procedure with inevitable trade-offs in terms of efficiency and speed. The finalisation of a single set of coordinated and consolidated replies to the Commission's Questionnaire, expected by early 2018, will show whether the approach will prove able to broker compromise and smoothen Bosnia and Herzegovina's EU integration process in the future (for instance facilitating the agreement on countrywide sector strategies allowing for IPA financial support), and will thus have deserved all the resources required to agree and setting it up, or whether it will remain a politically expedient attempt,

and problems of defensive positionalism and confrontational political culture will present themselves again in different forms and occasions.

Conclusions

This chapter has focused on the other dimension of statehood, capacity, directly linked with the Copenhagen criteria concerning the “administrative and institutional capacity to effectively implement the *acquis* and ability to take on the obligations of membership”, as well as to the standard notion of international state-building as a way to prevent the collapse of weak states into war.

By analysing the Instrument for Pre-accession Assistance (IPA), it highlighted how EU-led capacity building is not merely aimed at strengthening state structures, but focuses specifically on those bodies that are directly responsible and necessary for the implementation of the EU *acquis*, and how it does not merely follow an outside-in, top-down approach, but rather requires target countries to develop local solutions to adapt their structures to the requirements of the EU *acquis*.

EU practices of capacity building in its enlargement policy therefore show a specific rationale and structure, which is the product of a learning process, which can be perceived in the evolution from IPA to IPA-II. EU practices of capacity building started from an incentive-based approach to institution building, as in the thrust towards decentralised management. Also due to the mixed results of such an approach, the EU later shifted its focus from *structures* to *functions*, away from a pre-determined blueprint and towards local adaptations to the domestic context.

EU-driven capacity building is not separate from wider societal and political needs. The shift to a sector approach under IPA-II translated in a novel emphasis on the need for countrywide sector strategies, which in a highly decentralised country like Bosnia and Herzegovina necessitate a wide consensus among political actors at multiple levels of governance. The EU thus leverages on this commitment to foster domestic policy dialogue and overcome state contestation.

Financial assistance has thus been the instrument for supporting the capacity dimension of statehood in Bosnia and Herzegovina, first under an incentive-based model to institution-building (IPA DIS) and then via consensus-generating mechanisms in line with the approach of member states building (coordination mechanism).

Finally, consensus-generating mechanisms emerge in this area too, such as in the debate on a coordination mechanism (a trans-governmental body within a vertical hierarchy, with input from external stakeholders where needed) through which the competent authorities at all levels of government may agree on countrywide strategies in order to “speak with a single BiH voice to the EU”.

EU practices thus evolved from incentive-based institution-building to the establishment of consensus-generating mechanisms. This evolution also shows a learning process of the EU on how best to support capacity-building in the context of state contestation within its enlargement region.

General Conclusions

This dissertation starts from the general problematique surrounding European enlargement policy today – how to prepare Western Balkan countries for EU accession – and focuses on the issue of “member state building”, i.e. the specific actions that the EU needs to undertake in order to help building states capable of implementing the *acquis* as well as of respecting the required standards of democracy. This involves facing issues of contestation of state authority and, more generally, responding to the call to “build functional states while integrating them”. This dissertation claims that, in order to cope with contested statehood in applicant countries, the EU has over time adapted its enlargement practices to include state-building elements. These include exporting consensus-generating mechanisms, adapted from the EU’s own internal experience, aimed at fostering domestic consensus as a precondition for reinforcing both the administrative capacities and the political legitimacy of a country’s institutions.

The starting point of this research was the puzzle of the missing Europeanisation in the Western Balkans. The EU enlargement policy aims to transform applicant countries into fully-fledged member states, committed to abide by the EU *acquis* and able to take part in the EU’s decision-making and policy implementation processes. Despite these long-term efforts and multiple attempts at refining the strategies of “external Europeanization”,⁷⁸⁹ the process of Europeanisation seems to encounter significant difficulties in the Western Balkans.

⁷⁸⁹ Lavenex and Schimmelfennig (eds.), *EU External Governance*, 2010.

Following the intuition of Linz and Stepan on the role of the contestation of the polity in explaining post-communist transitions,⁷⁹⁰ the literature on Europeanization noted how the contestation of statehood impinges on the will and capacity of prospective accession countries to comply with EU standards and hinders the causal mechanisms of Europeanisation, normally seen to operate through conditionality and socialisation.⁷⁹¹ This has led the EU to fall into cycles of mismanaged conditionality, such as in the cases of police reform and constitutional reform processes in Bosnia and Herzegovina that are described in the second chapter of the thesis. This dissertation sought to illustrate the cyclical trial-and-error process of the EU in Bosnia and Herzegovina and identify the outcomes of such learning process.

This thesis rejected Fukuyama's "stateness first" hypothesis⁷⁹² as too deterministic and static. According to this view statehood is a crucial precondition which may help or hinder Europeanisation, and apparently one on which the EU has no influence, being rather determined by long-term structural and cultural processes. The dissertation thus started from an alternative theoretical lens that, following Sbragia,⁷⁹³ see how the EU and its member states have over time become mutually constitutive. The dissertation thus adopted a research design that posits statehood and its contestation as the *dependent* variable, and investigated whether and how the EU affects it through the pre-accession process. The thesis therefore asked which notions of statehood and sovereignty underpin EU practices of state-building, and to what extent these differ from those of other international agencies. Moreover, it also asked in what way and to what extent the EU has adapted over time to take into account the contestation of statehood within its enlargement policy, and which specific practices have been enacted by the EU to respond to the contestation of statehood.

⁷⁹⁰ Linz and Stepan, *Problems of Democratic Transition and Consolidation*, 1996.

⁷⁹¹ Elbasani, *European Integration and Transformation in the Western Balkans*, 2013.
Börzel, *When Europeanization Hits Limited Statehood*, 2013.

⁷⁹² Fukuyama, 'Stateness' First, 2005, p. 84.

⁷⁹³ Sbragia, *From 'Nation-State' to 'Member-State'*, 1994.

By bridging the literature on European integration, state building, and Europeanisation, this study traced the transformations of sovereignty and of the state throughout the process of European integration. After reviewing in detail the case of Bosnia and Herzegovina and the two crucial processes of police reform and constitutional reform, this thesis comes to the conclusion that the EU *can* indeed affect statehood, provided that it is ready to adapt to the circumstances and that it refrains from imposing a set script. This thesis has shown that both processes of state building and EU accession can be pursued jointly – “building functional member states while integrating them” is indeed possible! – but that this must be carefully managed, involving where necessary the adaptation of consolidated practices that have traditionally worked in previous rounds of enlargement.

The main argument of the dissertation is that the EU has learned to adapt, by enacting practices of state building to cope with contested statehood in its enlargement policy. To this end, the EU tended to export its own internal mechanisms of consensus-building, thus encouraging domestic political actors to move from a defensive-positionalist attitude to a more cooperative one which is a precondition for reinforcing both the administrative capacities and the political legitimacy of a country’s institutions and overall statehood.

In order to explore this difficult balancing act, the thesis adopted a qualitative methodology based on social constructivism, which allowed to consider actors’ interests and preferences as endogenous to the process of interaction and to show how identity is increasingly defined by membership in a social community. This perspective proved useful to highlight the transformation of sovereignty and statehood within the European integration process. First of all, a notion of “sovereignty as participation” emerged as the guiding notion that underpins the EU practices of state-building. According to this notion, EU member states are sovereign in so far as they can participate in the common decision-making and policy implementation, rather than being excluded from them. Secondly, following the

literature on the transformations of the state within European integration, the thesis highlighted the growth of a double duty of accountability, to the domestic and to the international level, as well as the relativisation of the linkages between state and society, and the development of consensus-generating mechanisms.

Through the study of two policy processes in Bosnia and Herzegovina (the Structured Dialogue on Justice and the Instrument for Pre-Accession Assistance), the dissertation examined how the EU aims at reinforcing at the same time both dimensions of statehood, reinforcing the capacities of domestic institutions while also enhancing their political legitimacy via the introduction of consensus-generating mechanisms. It is the role of the EU as an interested mediator and the emancipatory potential of accession that set member state building apart from ‘liberal peace’ international state building. “Member state building” thus emerges as an enlargement-specific form of EU-led state building, allowing the EU to cope with contested statehood in its candidate countries and potential candidates. While remaining anchored within the EU *acquis* and the EU accession perspective, member state building, contextualises state building practices within the EU enlargement process.

In terms of research design, the study included two within-country policy processes, based on the “most different” approach, showing how in distinct policy areas (justice and home affairs, and the management of pre-accession assistance) it is possible to witness the same type of EU response to issues of state contestation. The use of two cases from the same country allowed to control for all other variables and make for easier comparability.

Bosnia and Herzegovina was selected, among the universe of cases, as a crucial example to study the approach of the EU to contested states. The contestation of state structures in Bosnia and Herzegovina is related to the domestic challenges of sub-state actors in a highly decentralised and complex post-war governance system, rather than to issue of international

non-recognition. These features have already caused the EU to get trapped into mismanaged conditionality in the past. Yet, the case of Bosnia and Herzegovina is not idiosyncratic, and the findings of this study are not to be seen only as a pragmatic response to failure, a mere adaptation of EU policies to peculiar local conditions. Rather, Bosnia and Herzegovina is selected as the context of the two case studies because its domestic features allow to better identify the processes at stake and make more evident how the EU strives to achieve an impact on issues of state contestation. If it is possible to see the EU adapt its strategies and policies to cope with the effects of state contestation in the Bosnian case, it is likely that similar developments may be in place also in other, less complex cases in which the EU is faced with state contestation.

In terms of methods, the use of process tracing allowed to follow the development of policy responses and the learning process at stake. This is applied to the documentary analysis of written sources, coupled with semi-structured interviews with stakeholders in Brussels and Sarajevo.

Time-wise, the study focuses on the 2011-2016 period, going as back as 2007 for what concerns financial assistance in order to include both EU financial cycles (2007-2013 and 2014-2020). The year 2011 is taken as a turning point for its role as a marker of discontinuity: in 2011 the new, reinforced EU presence in the country was inaugurated, with a single Head of EU Delegation and EU Special Representative, separate from the OHR, and in the same year the Structured Dialogue on Justice was launched, propelling the EU to the helm of this new exercise.

The thesis also has some clear limitations. Although the thesis identifies and theorizes the EU practices of member state building, it does not put forward any claims on their degree of effectiveness. On the one hand, this would be premature, as the Structured Dialogue on

Justice has not yet borne its final fruits, and equally the implementation of pre-accession funds is still ongoing. On the other hand, a focus on effectiveness would require a different methodology and a different theoretical basis, more interested in how to define what to call success in the Bosnian context. Rather, in this thesis I keep the analytical focus on the practices of EU member state-building, leaving it to future research to assess its effectiveness.

Finally, in the last phases of the study my own position also changed as I took up a position as policy officer at the European Commission, DG NEAR, so that the research has taken up some characteristics of participant observation. This has allowed me to validate from within the insights previously achieved via documentary research and interviews, thus minimising the risks of reactivity.⁷⁹⁴ Yet, this also entailed a risk of loss of objectivity, which was mitigated by having already conducted most of the research before taking up positions within the EU institutions.

These general conclusions recall the findings of each chapter of the dissertation, to then highlight the theoretical and policy implications of the study, and finally set the avenues for future research.

1. Summary of the findings

Chapter I investigated the notion of EU member state and its transformations throughout European integration. It introduced a thicker notion of EU member state, and identified social constructivism as the ontological perspective best suited to explore the mutual constitutiveness between the Union and its member states. The following section

⁷⁹⁴ Reactivity occurs when the instruments of the study or the individuals conducting the study affect the subject of the study (e.g. survey respondent) in a way that changes what is being measured or inquired. For instance, answers to an interview may be skewed by the wish to portray the organisation in a way that is deemed appropriate in relation to the identity of the interviewer. See “Reactivity”, In: Paul J. Lavrakas (ed.) *Encyclopedia of Survey Research Methods*, Thousand Oaks, CA, Sage, 2008

problematized sovereignty, highlighting the notion of sovereignty as participation as a middle way between the opposing notions of sovereignty as control or as responsibility. Sovereignty as participation points to a transformation from the unitary to the disaggregated state underlining the functional autonomy of different state institutions in their transboundary relations, an understanding which is investigated in the rest of the chapter. The widely used framework of Europeanisation may help to explain the domestic effects of Europe and the transformation from nation states into member states via a double (domestic and international) relationship of accountability. Yet, the explanatory power of Europeanisation came to a standstill when facing the issue of contested statehood. The chapter put forward, as a heuristic alternative, the concept of member state building as the enlargement-specific form of state building.

Member state building employs a wider set of tools than international state-building. Over time, it has grown into a project that does not only seek to strengthen the administrative efficiency through capacity-building projects (“capacities”), but it also takes into consideration the relationships between state and society (“legitimacy”), addressing both by the introduction of consensus-generating mechanisms, identified in political dialogue and coordination tools. The double emphasis on both the capacities and the legitimacy of state institutions provides EU member state building with a broad transformative potential, and highlights how the identity features of the EU emerge in its enlargement policy – the reproductive moment of the regional integration process.

Chapter II introduces the context of Bosnia and Herzegovina as the setting of the case studies considered. After a short introduction to the Dayton political order, the chapter discussed the multiple transitions (to democracy, market economy, statehood, and peace) that make it the country with the most layers of complexity in governance in the region. It then analysed Bosnia and Herzegovina as a state whose contestation stems from the simultaneous

presence of a complex federal and consociational structure, and of sub-state centrifugal tendencies coupled with the direct intervention of international actors with executive powers. The chapter also took a look at the Dayton institutional framework under the lenses of the consociational and integrative models of power-sharing. The second part of the chapter looked at the interactions between the European Union and Bosnia and Herzegovina over time, highlighting in particular how the EU struggled to adapt its approach to the specific Bosnian post-conflict context and to get to the helm of the international presence in the country. The EU twice remained stuck in cycles of mismanaged conditionality, in the case of the police reform process (2005-2008) and of the *Sejdić-Finci* constitutional reform process (2008-2014). The shift towards a streamlined EU presence and the rescheduling of conditionality with the “new approach” to Bosnia and Herzegovina in late 2014 led to a rebalanced conditionality and a different standing of the EU in the country, which enabled the re-opening of the EU path and the achievement of relative successes in the 2014-2016 period, also highlighting the consolidation of a strategy of member state building as stateness-aware enlargement or “limited state-building”.

With the exception of executive and sanctioning powers, which remain vested in the OHR, the EU retains full instrumentality in Bosnia and Herzegovina. Its tools encompass enlargement policy, with policy dialogue and financial assistance; Common Foreign and Security Policy, with the EU Special Representative conducting activities of political dialogue and mediation, including the Structured Dialogue on Justice; and Common Security and Defence Policy, including the EUFOR Althea military mission. The thesis seeks to understand why, with such a wide range of policies available to it, the EU chose to use softer tools, such as financial assistance and political dialogue, to conduct state building activities in Bosnia and Herzegovina. I argue that this can be explained through the consideration of the latter as part of a member state building strategy that aims to overcome state contestation by strengthening

domestic legitimacy and supporting the consolidation of the institutions needed by a future EU member state, remaining strictly within the perimeter of the EU *acquis*.

The thesis highlights why this makes Bosnia and Herzegovina a crucial case to study the approach of the European Union to atypical candidate countries, and the practices enacted by the EU to cope with the contestation of statehood as intervening variable of the process of Europeanisation. Understanding how the EU has been able to find and enact strategies to cope with contested statehood in the case of Bosnia and Herzegovina provides a reason to assume that similar adaptations may be present in other cases too.

Chapter III then delved into the first case study, looking at the Structured Dialogue on Justice as an exercise in domestic legitimacy-building in JHA matters that ran from 2011 to 2016. The EU in Bosnia and Herzegovina enacted a strategy of governance by dialogue and deliberation, exporting in the context of EU enlargement the transgovernmental and deliberative settings typical of comitology and governance networks. In the setting of the structured dialogue, the EU, as an interested mediator, facilitated discussion between domestic authorities and stakeholders with different domestic sources of legitimacy, contributing to fostering consensus in order to restore domestic legitimacy in the justice sector, resorting neither to executive powers nor to conditionality. As a consensus-generating mechanism, the Structured Dialogue allowed the EU to react to the contestation of statehood in Bosnia and Herzegovina, thus standing out as one instance of the EU's practices of member state building.

Finally, Chapter IV focused on the other dimension of statehood, capacity. By analysing the instrument for pre-accession assistance, it highlighted how EU-led capacity building focuses specifically on those bodies that are directly responsible and necessary for the implementation of the EU *acquis*, and requires target countries to develop local solutions to

adapt their structures to the requirements of the EU *acquis*. EU practices of capacity building started from an incentive-based approach to institution building, as in the thrust towards decentralised management. The EU then shifted its focus from *structures* to *functions*, away from a pre-determined top-down blueprint and towards local adaptations to the domestic context, as in the sector approach to financial assistance. Finally, consensus-generating mechanisms emerge in this area too, such as in the debate on a coordination mechanism (a trans-governmental body within a vertical hierarchy, with input from external stakeholders where needed) through which all competent institutions may agree on countrywide strategies in order to “speak with a single BiH voice to the EU”. EU practices thus evolved from incentive-based institution-building to the establishment of consensus-generating mechanisms. This evolution also traces the learning process of the EU on how best to support capacity-building in the context of state contestation within its enlargement region.

The theoretical understanding provided in Chapters I and II and the empirical insights developed in Chapters III and IV allow one to draw conclusions on the specific practices of member state building enacted by the EU to cope with state contestation in its enlargement policy. Based on a notion of sovereignty as participation, such practices aim to restore both the legitimacy and the capacity facets of statehood, via the export of consensus-building mechanisms which mirror the EU’s internal governance, in order to break the cycle of confrontation on the border and competences of the polity rather than on policies, which characterizes situations of contested statehood. The result is a specific form of state building, in line with the EU’s identity and policy aims, which may prove able to bridge the gap inherent in the requirement of “building functional member states while integrating them”.⁷⁹⁵

It is still too early to draw conclusions on whether such consensus-generating mechanisms, with their emphasis on inclusivity and participation, may be sufficient to cope with the

⁷⁹⁵ ICB, *The Balkans in Europe’s future*, 2005, p. 29.

defensive positionalist attitude of Bosnian political elites, which derives from the structural conditions of politics in a contested state. The use of the coordination mechanism to agree on a single set of coordinated and consolidated replies to the Commission's Questionnaire, expected by early 2018, and the adoption of countrywide strategies allowing for IPA financial support will provide a first yardstick to evaluate whether the use of such unwieldy procedures, with inevitable trade-offs in terms of efficiency and speediness, will have been justified. Likewise, the final results of the Structured Dialogue on Justice remain dependent on the capacity of the Bosnian elites to reach a final agreement on the text of the draft laws being discussed within it. In the future a similar approach could be extended to more policy areas within the framework of EU accession negotiation. The debate between domestic actors on how to implement the EU *acquis* on the basis of the present distribution of competences may finally lead to a set of agreed constitutional and legislative changes in order to ensure the functionality of Bosnia and Herzegovina's complex political structure in the framework of European integration, and make it compatible with membership in the European Union.

2. Theoretical implications

To address the first set of research questions – *which notions of statehood and sovereignty underpin EU practices of state-building, and to what extent the EU's practices of state building differ from those of other international agencies* – the thesis has traced the transformations of sovereignty and of the state throughout European integration, and identified the polity ideas that underpin the state building practices of the EU in third countries, in particular in future member states, as in the context of its enlargement policy. Through a social constructivist perspective, able to show the mutual constitutiveness between the Union and its member states, the study has identified the notion of sovereignty-as-

participation as the basis of the relations between the EU and its member states, as well as of the EU's external action. Moreover, by investigating statehood and its contestation as the dependent variable of EU influence, and introducing the notion of member state building, the thesis proposes to reconceptualise the debate on the limits of Europeanisation, looking at the ways in which the EU addresses state contestation in its candidate countries and potential candidates. Limited or contested statehood is not a fundamental blockage for EU action, I argue, and the EU does have an influence on statehood itself, when this is considered under its dimensions of capacity and legitimacy. Member state building thus emerges as an enlargement-specific form of EU-led state building, set apart from 'liberal peace' international state building by its specific aim to build future EU member states, and the ensuing need to preserve and restore internal democratic legitimacy in parallel to building state capacities.

To address the second set of research questions – *whether and how the EU has adapted over time to take into account the contestation of statehood within its enlargement policy and which specific practices have been enacted by the EU to respond to the contestation of statehood* – this study has delved into the specific context of Bosnia and Herzegovina and investigated two case studies of EU practices of member state building. On the one hand, it can be seen how the approach gradually emerged from a trial-and-error process in which the EU slowly came out at the helm of the international community in the country – with the decoupling from the OHR in 2011 – and had to adjust its policy instruments to the local situation and to its own elements of relative advantage. The failures of the cycles of mismanaged conditionality in the cases of the police reform (2005-2008) and of the Sejdić–Finci constitutional reform (2009-2014) provided clear lessons to the EU about the need to stick closely to the perimeter of the EU *acquis* to preserve credibility in conditionality; to maintain a technical approach to prevent the attempts at politicisation; and to keep clear red

lines about the process format in order to avoid being sucked into the spiral of informality and mediation of closed-door “leaders’ talks”.

The EU practices of member state building are then highlighted in two different processes: the Structured Dialogue on Justice, a policy dialogue instrument aimed at fostering consensus around institutions and reforms in the justice sector, and thus at restoring *legitimacy*; and the funds for pre-accession assistance (IPA), a financial instrument aimed at strengthening state structures to create the necessary *capacities* for the management of EU funds, including by fostering consensus around the overall policy aims of the country (debate on the countrywide strategies). The finding of similar consensus-building mechanisms in different policy areas in which the EU is engaged in Bosnia and Herzegovina provides a validation of the theoretical approach chosen. In order to strengthen both capacities and legitimacy in the target country at the same time, the EU tends to export the same format of its own internal procedures – what Bickerton refers to as the EU’s “consensus-generating mechanisms”⁷⁹⁶ – and to resort to instruments of network governance, rather than making use of more coercive measures that would undermine the legitimacy side of state-building.

The theoretical relevance and implication of such a study is multiple. First, it adds to the studies on European integration by offering a social constructivist interpretation of EU practices towards its candidate countries. Based on the mutual constitutiveness of the Union and of its member states, and on sovereignty as participation as the polity notion underpinning EU activities in its enlargement region, the EU reproduces itself by fostering the development of compatible structures across its borders, and then integrating them. As Bosnia and Herzegovina is a state in the making, so is also the EU; their constantly unstable equilibria speak to each other, albeit in the diversity of structures and issues. This is a dialogue that is aimed at final convergence through accession.

⁷⁹⁶ Bickerton, *European integration: from nation-states to member states*, 2012, p. 35.

Secondly, the dissertation adds to the debate on the external action of the EU by establishing a dialogue between the literatures on Europeanisation and on state-building, and reframing the debate on the limits of Europeanisation and of the transformative power of Europe via the concept of member state building. It shows that the domestic impact of Europe is not obliterated by the contestation of statehood, but rather that the EU enacts specific practices in order to restore consensus around statehood. Member state building emerges as an enlargement-specific form of state building conducted by the EU, set apart from 'liberal peace' international state building by its specific aim (building future member states), priorities (restore capacities and legitimacy at the same time) and instruments (export of consensus-generation engines).

More broadly, the study offers a contribution to international studies by putting forward an analysis of the transformations of the state in relation to the EU. Member state building points to an unprecedented process of state transformation by interaction and integration. This process starts at the early stages of interaction between the EU and a third country (association) and accelerates during the pre-accession period, leading after accession to the full integration of the state structures with those of the EU. As noted above, this process can only be comprehended under a theoretical perspective that posits the mutual constitutiveness of the Union and its member states. Studying its different phases is pivotal to achieving an understanding of the whole process.

3. Policy implications

Bosnia and Herzegovina is characterized by a very specific form of internal contestation. And yet, there is no special treatment for unique cases in EU policy, since all candidate countries and potential candidates are meant to be treated equally and fairly. The adaptation of

the EU enlargement policy thus cannot move towards lowering the bar, in an *ad hoc* fashion; rather, it needs to consider the particular local conditions, and include specific mechanisms and procedures to adjust to the local context while keeping the consistency of the process and avoiding double standards that may be exploited by other actors in the future.

In the Bosnian context, the most characteristic element – as noted by several interviewees⁷⁹⁷ – is the pervasive polarisation and politicisation of even the most technical policy areas. This goes hand in hand with a defensive-positionalist attitude by the members of the ruling elites, who continue to hold deeply divergent visions of the long-term future of the country, consider compromise as a failure, and believe from their own experience with international actors since 1995 that merely by sitting out on their commitments they can push the EU to give up on its requirements and reward them for the sake of ‘stability’.

To succeed in reinforcing domestic institutions in a pre-accession perspective, the EU thus had to learn the hard way about the need to stick to the perimeter of the EU *acquis*, to maintain credibility of conditionality; to carefully calibrate sanctions and rewards, maintaining the proportionality of conditionality; and to get engaged at the technical level to ensure its clarity.

At the same time, in parallel with the rebalancing of conditionality, the EU learned the need for a maieutic approach to state building. Member state building finds its rationale in the need to work in partnership between the EU and the enlargement country, in order to devise the specific and locally adapted solutions that may be compatible with future integration in the Union.

⁷⁹⁷ Interviews with diplomatic representatives of EU member states in Sarajevo and officials of the EU Delegation to Bosnia and Herzegovina, November / December 2014.

The final aim of the EU accession process foresees Bosnia and Herzegovina as a functional state, able to take part in the decision-making and in the policy-implementation processes at European level. At the end of the process, Bosnia and Herzegovina shall be able to sit at the table, on an equal footing, with all other EU member states. This final aim highlights the emancipatory potential of EU-led state building in the enlargement region, and sets it apart from the state building efforts of other international organisations, which may be criticised for reproducing imperialist or simply unequal power relations. For the same reason, linked to the need to reinforce the democratic legitimacy of domestic institutions, the EU cannot resort to coercive tools and impose legislation.

Member state building, which supports the objective of EU accession, aims to reinforce the capacities and legitimacy of institutions, and does so by exporting consensus-generating mechanisms, typical of the EU setting, to the Bosnian environment. The aim of these consensus engines is not simply to depoliticise – i.e. decreasing the political salience of a policy and the related political costs of an agreement – but also to redirect the discussion towards the supranational level, the accession to which is understood as being the objective of all sides at the table.

4. Perspectives for future research

An analysis of the EU practices of member state building, as proposed in this dissertation, may be complemented by widening the scope of the policy areas under scrutiny – for instance by including in the comparison the area of socio-economic policy as well, in which the EU has had a strong influence since 2015 following the adoption of the three-year Reform Agenda, in close cooperation with other financial institutions, to see whether the same

mechanisms of consensus-building emerge, and whether these achieve the same effects of legitimacy and capacity building in a policy area that is paradoxically less contested. The relations between the EU and different international institutions involved in the member state building process (the Council of Europe for what concerns justice and home affairs, the IMF, World Bank or EBRD in the socio-economic area) may be one further area of interest.

A further promising avenue of research could include a comparison with other cases of state contestation of a more internal nature in the Western Balkans. Leaving aside the thorny case of Kosovo-Serbia relations, the cases most conducive to a comparison with Bosnia and Herzegovina are Albania and Macedonia. The recent territorial and judicial reforms in Albania, as well as the foreseen reforms following the change in government in Macedonia, could constitute good case studies to see whether the EU is also exporting consensus-building mechanisms to these countries, which are at a more advanced stage in the EU enlargement process, and where the international community is also less present, with the EU therefore already in a more prominent position.

Broadening the picture even more, a further promising avenue of study could consist in comparing EU state building efforts in the enlargement region to those in the neighbourhood region, as well as comparing them to efforts even further, in Africa and Asia, to highlight the enlargement-specific aspects of member state building as a policy aimed at fostering the consolidation of future EU member states, as opposed to wider EU policy approaches to state building and peace building. This could also be complemented by making comparisons with the findings of the literature on external governance,⁷⁹⁸ to evaluate whether the EU merely exports norms and practices to its neighbourhood and further afield, as

⁷⁹⁸ Sandra Lavenex, Frank Schimmelfennig (eds.) *EU External Governance: Projecting EU Rules beyond Membership*. Abingdon, Routledge, 2010

opposed to getting engaged in a hands-on institutional development in the enlargement region to ensure future compatibility of local solutions with the EU *acquis*.

Finally, one interesting avenue of research could consist in studying the recursive effect of the development of member state building approaches on the further integration of the European construction. The democratic deconsolidation and slippery slope towards “illiberal democracy” in Hungary and Poland (but other member states are also at risk) have brought to the fore the need for the EU to identify instruments to ensure and protect the rule of law not only in the sphere of EU law but also within the domestic legal order of its member states. In line with the tradition of enlargement policy as a precursor of standards that are first requested for candidate states to be later constitutionalised for member states too, it may be interesting to see whether the approach of member state building in the enlargement policy could constitute a blueprint for future attempts at the constitutionalisation of rule of law and democratic criteria within EU member states.

List of interviews

Ms Jasminka Ajanović, Deputy Head of Mission, Permanent Representation of Bosnia and Herzegovina to the European Union (Brussels, February 2015)

Mr Melvin Asin, Head of Operations, EU Delegation to Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Andrea Battista, Ad-Interim Head of the Legal Office, EU Special Representative in Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Julien Berthoud, Legal Adviser, EU Special Representative in Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Martino Bianchi, Political Adviser, OSCE Mission to Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Steven Blockmans, Head of the EU foreign policy unit, Centre for European Policy Studies (Brussels, February 2015)

Mr David Brozina, Deputy Head of Mission, Embassy of Slovenia in Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Jean-Pierre Biebuyck, Head of the Diplomatic Bureau of Belgium in Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Alberto Cammarata, Rule of Law desk officer for Bosnia and Herzegovina, DG NEAR, European Commission (Brussels, April 2016)

Mr Adnan Čerimagić, Analyst, European Stability Initiative (Sarajevo, December 2014)

Mr Fernando Criado Alonso, Enlargement Unit, European External Action Service (Brussels, February 2015)

Mr Renzo Daviddi, Deputy Head of Mission, EU Delegation to Bosnia and Herzegovina (Sarajevo, November 2014)

Mr Drino Galičić, Legal Adviser, EU Special Representative in Bosnia and Herzegovina (Sarajevo, November 2014; August 2015)

Mr Duško Glodić, Policy Officer, Directorate for European Integration (DEI), Council of Ministers of Bosnia and Herzegovina (Sarajevo, December 2014)

Ms Inela Hadžić, Programme Coordinator, Sarajevo Open Centre (SOC) / Initiative for Monitoring of European Integration of BiH (Sarajevo, December 2014)

Mr Dimitris Kalogeras, Policy Officer, Finance and Contracts unit, EU Delegation to Bosnia and Herzegovina (Sarajevo, December 2014)

Ms Ivana Korajlić, Program manager and spokesperson, Transparency International BiH, Banja Luka (August 2015)

Mr François Legué, Deputy Head of Mission, Embassy of France in Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Stefan Lehne, Visiting Scholar, Carnegie Europe (Brussels, February 2015)

Mr Andy McGuffie, Head of Communications, EU Delegation to Bosnia and Herzegovina
(Sarajevo, November 2014)

Ms Christine McNeill, First Secretary (Political), Embassy of the United Kingdom in Bosnia
and Herzegovina (Sarajevo, December 2014)

Mr William Noë, Economics Desk Officer for Bosnia and Herzegovina, DG NEAR,
European Commission (Brussels, February 2015)

Mr Jon O'Shaughnessy, Press, Political and Project Officer, Embassy of the United Kingdom
in Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Adrian Pollman, Deputy Head of Mission, Embassy of Germany in Bosnia and
Herzegovina (Sarajevo, December 2014)

Mr Jožo Radoš, Member of the European Parliament, ALDE/Croatia
(Brussels, February 2015)

Ms Darija Ramljak, Head of Unit, Directorate for European Integration (DEI), Council of
Ministers of Bosnia and Herzegovina (Sarajevo, December 2014)

Ms Nevenka Savić, Director, Directorate for European Integration (DEI), Council of
Ministers of Bosnia and Herzegovina (Sarajevo, December 2014)

Mr Jan Šnajdauf, Head of Political/Economic Section, EU Delegation to Bosnia and
Herzegovina (Sarajevo, December 2014)

Mr Davor Ivo Stier, Member of the European Parliament, EPP/Croatia
(Brussels, February 2015)

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