



# Why My Prescriptions on BiH Are Frequently Misunderstood

Recently, I was characterized for the umpteenth time as longing for a time machine back to 2003 or so, when High Representative (and, lest we forget, EU Special Representative) Paddy Ashdown was at the height of his engagement, using his office strategically to drive reform and institution-building in Bosnia and Herzegovina

Yet what has sometimes been implied with my alleged "Ashdown nostalgia," as University of Trento academic Davide Denti recently termed it, is that I advocate a return to a caricature of the state-building era that is taken as gospel in many EU policy (and academic) circles - particularly the Commission, but also many member states. This imagined past that never was included imposition of state institutions, liberal (ab)use of power to drive non-consensual change, and robbing BiH political elites and citizens alike of "ownership" of state-building and reforms required for eventual EU membership.

## Things Did Not Go as Planned

First, neither I nor my DPC colleagues have advocated a return to externally driven state-building in BiH. Furthermore, the frequent characterization of the state-building effort flies in the face of historical facts. The establishment of institutions during this period (which really began in earnest under Ashdown's predecessor, Wolfgang Petritsch) was overwhelmingly achieved through inter-entity agreement. Milorad Dodik, who now refers to this past practice as "legal violence," in fact supported many of them while in the opposition (as well as further substantial constitutional reform in the 2006 "April Package"). These facts just get in the way of the prevailing revisionism which holds that OHR's role was an aberration,

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preventing the newly enlarged EU from effectively wielding its soft power in BiH. Simply having sticks - embodied in the High Representative and a Chapter 7-mandated deterrent force, EUFOR - is seen as heretical.

It will come as a shock to those who have been briefed to summarily dismiss the Petritsch and Ashdown tenures that well before Ashdown left he was basically advocating a downshift in international assertiveness, coupled with engagement aimed at facilitating BiH's self-propulsion into the EU and NATO - the same that is advocated today. It was he who coined the phrase "from the push of Dayton to the pull of Brussels." And this was the prevailing view - that while it took sticks to get BiH moving, the prospect of EU and NATO membership, replete with carrots along the way, would impel the country forward. This "transition" was in the planning stage at the start of my tenure at OHR in May 2005 and was well underway by 2006. It should be evident by now to any fair-minded observer of BiH that things did not go as planned. From DPC's very first publication on BiH in 2007 - soon after I left OHR - our line has been that a unified Western approach must employ both the Dayton Agreement's enforcement tools and existing EU and NATO inducements. This would limit the maneuvering space of the entrenched political class and shape the environment for organic and durable forward

movement. Transitioning away from an enforcement role is not only desirable but necessary. But getting out of the Dayton enforcement business logically ought to follow BiH graduating from the Dayton construct.

## Facts Demand Recognition

The EU, and the US in its wake, have pointedly refused to admit or accept that linkage, allowing entropy to grow in the gray zone which has emerged between ceasing to enforce the bad old rules and curtail the pressure for new and better ones.

I have never advocated imposing a new constitutional order, by way of a "Dayton 2" conference or any other means. Neither have my colleagues. But facts demand recognition. Dayton is an effective (though theoretically not absolute) evolutionary dead-end, securing the interests of its signatories (and their successors) at the expense of BiH's citizens. Reform under the existing systemic incentives requires the existing beneficiaries of the system to become change agents. To change the system through the system, a supermajority would have to be assembled behind a common agenda, ultimately leading to constitutional revision or replacement. No actors on the existing political menu are even attempting this. The most promising change since my arrival in BiH more than a decade ago is that, in my view, an overwhelming majority of citizens of BiH now recognize viscerally and bitterly that they lost the war, and

their leaders - with their ubiquitous black Audis - won it. This mass potential constituency for rules-based governance, dignity, and accountability has yet to be assembled behind any specific agenda. But it is there to be conjured. This agglomeration of atomized citizens is BiH politicians' greatest fear, as demonstrated in their reaction to the February 2014 protests and the May 2014 floods. Unfortunately, it seems the EU and the US are just as afraid of them as are the political elites. Instead of working to catalyze this reservoir of potential support for a popularly legitimate and functioning country and disarm the oligarchs of their tools of fear and patronage, the West seems to accept both as givens. What DPC and I have advocated is changing the political and social incentive structure by making clear to all in BiH that the existing Dayton rules remain valid and will be enforced until a popularly legitimate overhaul of governance is completed. This entails restoring the credibility of the enforcement mechanisms of OHR and EUFOR (or a NATO force, if the EU prefers to get out of that business) and committing to maintain them indefinitely - until BiH graduates from Dayton with a genuinely democratic and accountable governance structure. These enforcement tools need not be employed in the same fashion as in the thick of the state-building era: pressuring recalcitrant elites to adopt reform. But these enforcement tools are necessary to deny political elites the wide latitude they currently enjoy to leverage fear. There must be no uncertainty that efforts to dismantle the state, institutionally or territorially, or employ violence will be strongly resisted.

## Effectively No Rules

A starting point would be to underscore that any attempt at RS independence not only will not be recognized, but will be forcefully pre-empted. A troop presence in Brcko would make this abundantly clear. Once fear of renewed violence is defused, the West can exploit the evident vulnerability of the political elites, who have come to expect external subsidization of their patronage systems to maintain social peace, with much stricter economic conditionality than has thus far been applied - demanding delivery of socially vital reforms in health care, for example, prior to further disbursements. These measures would not impede BiH's European path; they would actually make it possible. Perversely, the EU institutional mindset is far more animated by the persistence of these enforcement mechanisms than it is by the dysfunctional system they were established

to enforce. This disconnect has allowed the downward spiral since 2006. Had it been made clear to all concerned in 2005 that a strong High Representative and Chapter 7 military force would remain until Dayton was replaced - and until so reformed, that BiH could not join the EU or NATO - the situation in the country would not have descended to its current lows. So there is ample potential leverage and social capital in BiH to



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work with, were the EU and the US willing to engage differently. Furthermore, creative engagement with citizens to develop a real constituency for functioning democratic institutions is something the international community has done before in BiH. The Bulldozer Commission effectively married bottom-up input on laws, regulations and practices which impeded initiative and economic development with the OHR's top-down enforcement (and attendant intimidation) power. The reforms which emerged were limited - but not because the top-down/bottom-up partnership failed to deliver, but rather due to higher-level political and structural impediments. This is where the EU Reform Agenda has hit the wall as well - but without the bottom-up partnership which EU ambassadors avowedly wanted to create, but never really pursued effectively. After the international community unilaterally disarmed, abandoning its leverage, BiH politicians could safely ignore it. The country's elites also resumed their contempt for BiH citizens, whom they had to take seriously - all too briefly - when the citizens had international backup. In a system that had no institutionalized accountability, the only way to achieve accountability was from without. That used to be the wider international community. Now there are effectively no rules. And the BiH political elites demonstrate daily in both words and deeds that they understand this fully.

My colleagues and I - most recently Valery Perry in a hearing before the U.S. Senators and Congressmen - have advocated a top-down/bottom-up approach on agriculture which owes much to the Bulldozer example, except

in this case with the EU in the role of making the demands. In brief, the EU should directly support those farmers in the RS who have been heavily integrated into the Croatian market, some of whom have organized in favor of a state Ministry of Agriculture. - In theory, the EU ought to be doing this for its own interests, which was the case until 2011: the EC Progress Reports called for an Agriculture Ministry up until that time. But

RS President Milorad Dodik insists that inter-entity coordination is sufficient to address statewide problems. So instead, the EU Delegation and the Commission's Directorate for Enlargement have reduced their demands over time to accommodate Dodik's implacable opposition to any state institutions or competences. Now mere "coordination" will do.

## "Business as Usual" Approach Will Not Work

Yet despite his mantra of coordination, Dodik has proven unwilling to actually engage in coordination. The fact that Krajina and Posavina dairy farmers were the most hurt by the loss of market access to Croatia supplied the EU a big public advocacy stick with which to thrash Dodik and compel him to publicly answer for the real-life impact of his ideology in the RS and to defend his active stunting of economic opportunity for farmers, thereby undercutting him on his home turf and on an issue where he claims superior skill - the economy. But when I proposed to the previous EUSR, Peter Sorensen, that he hold a press conference in Gradiska, site of one of the two veterinary/phytosanitary inspection border crossings, and to lay out the facts to RS farmers and citizens at large, - noting it was well within his mandate and capabilities to do so - he merely said "that's easy for you to say." Which brings me to my hypothesis of why everything my colleagues and I say, write, and advocate, is consistently mischaracterized as "Ashdown nostalgia." What I've proposed is quite different. I don't believe that most of those



who allege I hold this mindset willfully misinterpret what I have actually said (although some do). Rather, I think from their vantage point any discussion of enforcement, deterrence, or sticks represents an admission that the "business as usual" enlargement approach will not work in BiH. And admitting this would be blasphemy, deviating from the dogma that the EU's vaunted soft power will ultimately prove transformative in BiH as it had elsewhere.

Calling out by name and transgression the political leaders who operationally are treated as the oligarchs they are, but formally and publicly are treated as democratic tribunes of their respective tribes, would apparently be bad form in an EU which itself developed through an elite-driven process. Engaging directly with citizens in a strategic partnership to compel the leaders to dismantle their comfortable ecosystem doesn't fit the script of the way enlargement is supposed to work. According to this Brussels worldview, the domestic politicians are supposed to want in and in fact have become quite good at talking the talk. But they demonstrate regularly that they don't really want in at all, or at best want in on their own terms, without having to change their comfortable (and profitable) operating system. With its Reform Agenda, the EU has effectively doubled down on a solid decade of failure to affect this well-worn dynamic, subverting accomplishments made at great cost and making its own situation in BiH untenable. Departing from the comfort zone of accepted roles and evidence-free belief systems is evidently less palatable than changing tack and experimenting with an aim to succeed. Deviation from EU dogma is apparently a worse career move than perpetuating policy failure.

The good news is that it doesn't have to be this way. The bad news is that admitting that a toolbox (already at hand) wider than that normally employed in countries with a "membership perspective" is needed, thereby deviating from the pat proclamation that the EU is the "only game in town", is harder to swallow in Brussels and many member states than continuing with a proven failure of a policy. If the EU were willing to develop a strategy from an honest appraisal of the existing situation and working in common cause with BiH's citizens against the political elites, it could succeed. But after 11 years in Sarajevo, I've come to the conclusion that part of the reason the EU can't bring itself to effectively engage with BiH's citizens is that it never developed this skill set on its own turf with its own citizens. In a union of democracies, this was deemed superfluous. This helps explain the rise of anti-EU populism throughout the Union. The problem isn't mandates; it's mindsets.

# Belgrade Court delays Djukic Trial Indefinitely

The trial in Belgrade of Novak Djukic - convicted earlier in Sarajevo of ordering a deadly artillery strike on Tuzla - is on hold after the Bosnian court failed to provide Serbia with the requested case material

**D**espite his conviction in a Bosnian court for war crimes, former Bosnian Serb soldier Novak Djukic will not appear any time soon in a court in the Serbian capital after Bosnia failed to meet the demands set by Belgrade to continue his trial. The last time Djukic showed up at the trial at the Belgrade Higher Court, where judges were due to rule on the fate of his case, was on June 1.

Bosnia's state court, the Court of Bosnia and Herzegovina, jailed the former commander of the Bosnian Serb Army's Ozren Tactical Group for 20 years in June 2014 for ordering an artillery squad to shell the Bosnian town of Tuzla on May 25, 1995. Seventy-one people died in the attack. But the former general did not turn up to serve his sentence in Bosnia, claiming he was undergoing medical treatment in Serbia. He has not returned to Bosnia since.

Bosnia issued an international arrest warrant for him in October 2014, but Djukic cannot be extradited to Bosnia because the two countries have no mutual extradition treaty. Serbia then offered to deal with the case, but the Serbian prosecution and Djukic's lawyer said on June 1 that, without the complete files about his verdict from Bosnia, the ex-general cannot prepare his testimony properly.

Following a decision of the Higher Court, Serbia's Ministry of Justice filed a request to its counterparts in Sarajevo for the case material to be transferred to Bosnia. But the Court of Bosnia and Herzegovina, which confirmed to BIRN that it received the request, says there is no basis for the submission of the whole case material. It says the court in Belgrade does not need to confirm the Bosnian court verdict, but just to take over enforcement of the sentence.

Serbia signed an agreement with Bosnia in 2010, which allows Sarajevo and Belgrade to ask each other to take over enforcement of sentences.

"The Court of BiH in its response recalled the agreement between our country and Serbia about mutual enforcement of court decisions in criminal matters, which is not related to the recognition of judgments made by the courts of Bosnia and Herzegovina and Serbia, but only to the enforcement of court decisions," the Bosnian court said.

The Bosnian court noted that while



Novak Djukic

Djukic's defense had asked for the entire file, so the Serbian judiciary could review the legality of the verdict, there was no legal basis for that.

"Not a single agreement, or international act, stipulates that the enforcement court should evaluate the legality of conducted procedure of the court of the country that requests enforcement, so this also cannot be done by the Higher Court in Belgrade, because it is not competent as a higher court to examine the legality of the conducted procedure against Djukic," the Court of BiH added.

It added that the Constitutional Court of Bosnia has already rejected Djukic's complaint in which he said that his human rights had been violated because he did not have a fair trial.

Djukic's lawyer, Milorad Konstantinovic, told BIRN that he had not yet seen the response of the Court of BiH, but he believes the Serbian judiciary should determine whether his client had a fair trial in Bosnia.

"How can the fairness of the proceedings be determined if there is no a review of the case file? It is a legal right in Serbia that every convicted person can try to prove that the procedure in the country that is seeking recognition of judicial decisions was not fair," Konstantinovic said.

He added that the Belgrade High Court was not seeking to review the legality of the judgment, but only to rule on whether Djukic had a fair trial in Bosnia. "The procedure for recognition of a foreign court's decision would be meaningless if it was only about putting a seal or signature on it. This is why concealment of the files by the Court of BiH becomes more indicative," Konstantinovic added. He says the procedure will not be resumed until the records of the Bosnian state court arrive.