

Peace Dividend?

What the Discussion about State Property in Bosnia and Herzegovina Really Means

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EXECUTIVE SUMMARY

The question of the allocation of state and defense property in Bosnia and Herzegovina (BiH) is again on the political agenda; a working group convened by the Office of the High Representative (OHR) is expected to continue its work until fall 2023. As the question of state property touches on corruption, environmental protection, local governance, and the nature of BiH as a state, understanding why it matters is important.

Background

State and defense property refers to territory and objects that are currently owned by the state of BiH – an estimated 50% of the territory of the country. This includes property of the former Socialist Republic of BiH and property falling to BiH under the international succession agreement for the former Yugoslavia – immovable objects but also forests, agricultural land, rivers and other bodies of water, and the resources underneath the land, e.g., mines or yet untapped mineral deposits. The issue of who holds ownership over this property was not explicitly regulated in the Dayton constitution, but has come and gone as a policy priority over the years since.

In 2004, the Council of Ministers of BiH established a Commission for State Property; in 2009 an initial Inventory of State Property was established through the Office of the High Representative (OHR). In 2008, the Peace Implementation Council (PIC) included this issue within the “5+2” set of objectives and conditions for the closure of the OHR. In 2012, a decision from the BiH Constitutional Court clarified that the state of BiH is the sole owner of state property; two subsequent rulings in 2020 confirmed this decision. The issue is not mentioned in the EU Commission’s 2019 Avis which lists 14 priorities for opening accession negotiations.

State of Play

Since 2012, in line with Milorad Dodik’s efforts to weaken BiH and strengthen the entity of the Republika Srpska (RS) and reflecting the international community’s unmoored approach to BiH generally, the RS has ignored Constitutional Court rulings, instead illegally and non-transparently disposing of and selling off parts of state property. The issue is once again on the agenda for several reasons.

The key driving force is the critical state of RS public finances, as the entity needs assets and collateral to service past debt and incur additional debt. While most acute in the RS, the promise of new money is appealing to other domestic actors as well.

In addition, Croatia and Serbia, which have increasingly demonstrated their unfinished agendas towards BiH and their interest in a weak state (which would reduce resistance to external meddling), are poised to benefit handsomely from any property sell-off. So are other illiberal powers, both near (Hungary) and far (Russia, China).

The international community over the past several years has demonstrated increasing readiness to support and legitimize dealmaking by the ethnonationalist elites. The US wants to be able to further disengage by claiming Dayton loose ends are tied up. The EU wants to be able to claim that its “soft power” works and to justify the granting of candidacy *post hoc*, particularly since Commission President Ursula von der Leyen is planning to visit the country in October. So there is a premium on signifiers of progress. All claim that beneficial foreign investment would result.

In 2021, Dodik suggested he could curtail his secessionist agenda if state property would be “resolved” to his liking. Rather than reacting to this as the blackmail it was, the European Commission picked up on his offer. In 2022, OHR convened an expert working group that is working in secrecy but is apparently assisting the Parliamentary Assembly in drafting a state law. The working group held its most recent session on July 14, 2023; it will likely continue into October. But the history of the issue suggests that there is no pressing need to try and resolve it now – in fact, the current political climate has produced the worst possible moment for doing so.

Why it Matters

Dodik insists on regulating the issue through an inter-entity agreement; this would feed his agenda of claiming that BiH is not a state but a sort of “state union.” He is therefore using this issue to try to redefine the nature of the state. This also suits Dragan Čović (HDZ BiH) and his backers in Zagreb, as they continue to try to carve out a Croat quasi-entity through “election law reform” and “Federation reform.” While any one of these state-weakening efforts is detrimental to BiH’s future, taken together they amount to dismantling the country. Some suggest that a state law would give the property rights to the level of municipalities. While this would appear to be in line with principles of decentralization, due to BiH’s structure – and the structure’s demonstrated incentives for malgovernance and obstacles to accountability – the long dominant verticals of power will continue to own and strip these assets for the benefits of the parties rather than the communities.

Dealing with this issue without addressing the theft to date would legitimize the corruption that has undergirded Dodik’s project.

Recommendations

1. A solution to the property issue – that is, property apportionment and disposition – should not proceed in the current, increasingly polarized environment. The international community – the EU, the US, the UK, and the other members of the PIC – should not let its priorities be dictated by Milorad Dodik or any of the other incumbents who have their eyes set on state property.
2. A fundamental reset of Western policy is needed to put an end to BiH’s unaccountable ethnocracy and to support development of a new social contract based on *real* devolution to local government, to finally replace the calcified partitocracy.

Only then should the property issue be tackled, in accordance with the following three principles:

- That it be a state law adopted by the BiH Parliament – not an inter-entity agreement as sought by Dodik;
- That in the division of property among governance layers, a large chunk of property must go to the state and to municipalities, with fail-safes in place to ensure municipalities benefit from these resources free from asset-stripping party agendas;
- That all illegal and unconstitutional (RS) property disposal decisions since the HR’s first disposal ban of state and defense property in 2005, in fact since 1995 – be annulled before any apportionment of the property among BiH’s different layers of government. Any other decision would mean legalizing theft, and irrevocably strangling the authority of the HR/OHR, the Constitutional Court of BiH and Court of BiH, and of the rule of law and constitutionality in general.

Introduction

Approximately half of the territory of Bosnia and Herzegovina (BiH) is made up of public property¹ whose disposition was left unresolved by the 1995 Dayton Peace Agreement. In 2008, the Peace Implementation Council designated a resolution of the ownership of state and immovable defense property as the first two of the “5+2” set of objectives and conditions for the closure of the Office of the High Representative (OHR).² Now the issue has returned to the political agenda, pushed by the Republika Srpska (RS) leadership under Milorad Dodik – just at the time when Dodik has embarked on his most aggressive move to date toward RS secession, and in the context of a broader pursuit of ethnoterritorial division of the country by BiH’s party elites.

Cataloguing state and immovable defense property has been underway for some time; much was done in a state property inventory prepared by OHR over a decade ago. Once again, an expert working group has been convened to detail exactly what is affected and to develop proposals for its allocation. Broadly speaking, this includes a substantial share of forests, rivers, and agricultural land. It also includes structures such as military installations. The fact that much of the property is undeveloped could lead to a false sense that this property has no value. (“It’s just forests,” as one official informally remarked.) Yet these assets have considerable value, hence the impetus for the parties – and their neighbors and backers – to try to control them. First and foremost among those clamoring for this property has been the RS’s President Dodik, backed by Serbian President Aleksandar Vučić.³ Most recently, Dodik made an explicit linkage between his aim to get hold of state property in the RS and his frontal assault on the Constitutional Court of BiH, which in 2012 had adjudicated that this was indeed state property.⁴ In effect, Dodik counts on state property as an asset he can use as collateral for the financial backing thus far given to his regime. While this most overtly plays into Dodik’s broader state-strangling agenda, it benefits HDZ BiH’s Dragan Čović and his own *de facto* third entity interests as well. And while Bosniak parties, or even “civic” parties, could seek to claim some higher ground, in the absence of rule of law, any property giveaway will feed patronage-fueled wealth transfers.

The fact that a decent proportion of this property remains undeveloped itself constitutes an asset. Some of the most effective grassroots activism in the country has been undertaken to protect rivers, forests, and the natural surroundings of BiH more broadly – echoing a regional trend. For example, resistance to “mini” hydroelectric plants that would permanently alter and destroy some of Europe’s last wild rivers unites local activists in BiH with neighbors throughout the Western Balkans. Effective activist movements have mobilized against mining operations that would both negatively affect local

¹ Estimates according to a domestic BiH expert on the property issue; interview, Sarajevo, May 2022.

² “Agenda 5+2.” OHR. Available at: <https://www.ohr.int/agenda-52/>.

³ “Serbian President Vucic reins in Dodik to calm situation in Bosnia.” Eldar Dizdarevic, *Intellinews*. October 25, 2021. Available at: <https://www.intellinews.com/serbian-president-vucic-reins-in-dodik-to-calm-situation-in-bosnia-224718/>.

⁴ “Dodik ponovio da neće prihvatiti odluke Schmidta.” *Radio Sloboda Evropa*. July 2, 2023. Available at: <https://www.slobodnaevropa.org/a/dodik-rs-bih-zakoni-schmidt/32485887.html>.

communities while also offshoring substantial economic benefits, leaving stripped lands in their wake.⁵ It is difficult to imagine how a transfer of property and territorial wealth in a system lacking either effective rule of law or meaningful environmental protection could result in anything other than environmental destruction, ranging from the clear-cutting of forests for timber export, to the damming of rivers and subsequent destruction of unique wildlife species that would never recover. An example is the ongoing construction of a hydropower plant at Buk Bijela on the Drina under an agreement between the RS and Serbia, which – despite a Constitutional Court ruling in 2021 – has been proceeding without state-level approval.⁶

This paper aims to explain the issue and contextualize it in the wider frame of BiH malgovernance and Milorad Dodik’s 17-year drive, with Western acquiescence, to undermine BiH’s constitutional order and to hollow out state institutions of accountability and law. While some in the EU institutions and some member states may see state property as a sweetener with which to bargain with Dodik, flexibility on either state property or the Constitutional Court which protected this public patrimony would accelerate the unraveling of the state, with dangerous consequences.

Background

State and defense property have been on the domestic and international agenda in BiH for two decades. As BiH’s constitution (Dayton Annex IV) does not contain an express provision regulating the issue of state property, and the issue was thus subject to competing ownership claims by the state, the entities (first and foremost the RS), and Brčko District, in 2004 the international community in BiH began to engage on the issue. At the time, Western engagement in BiH was more principled and strategic, aimed at democratization, state-strengthening and the sidelining of nationalist spoilers. In its September 2004 declaration, the political directors of the PIC Steering Board (SBA) called for a “lasting solution... to the issue of State Property” in a way that ensured that all levels of government possess the necessary resources to carry out their responsibilities.⁷

In December 2004, the Council of Ministers of BiH established the Commission for State Property, tasked with identifying state property to be apportioned to the different layers of governance according to the PIC guidelines, and to prepare necessary legislation. State property was narrowly defined as the property previously owned by the Socialist Republic of BiH, and property of the Socialist Federal Republic of Yugoslavia falling to BiH under the international succession agreement, including property of the Yugoslav People’s Army and Defense Ministry (so-called defense property). As part of the establishment of the joint BiH armed forces, the 2005 Law on Defense of BiH and subsequent Presidency

⁵ “Serbia revokes Rio Tinto lithium mine permits following protests.” *BBC News*. January 21, 2022; available at: <https://www.bbc.com/news/world-europe-60081853>.

⁶ European Commission, *Bosnia and Herzegovina 2022 Report*, p.102, available at <https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Bosnia%20and%20Herzegovina%20Report%202022.pdf>

⁷ See reference in: “Decision Enacting the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina.” *OHR*, March 21, 2005. Available at: <https://www.ohr.int/decision-enacting-the-law-on-the-temporary-prohibition-of-disposal-of-state-property-of-bosnia-and-herzegovina/>.

of BiH decisions identified 57 locations as immovable military property (prospective defense property) to serve BiH's future defense purposes.⁸ Due to competing property claims by the members representing the state, the entities and Brčko District, the Commission never managed to agree on the core issues for which it had been tasked with finding solutions. As part of efforts to help overcome the blockage of the state commission's work, in 2009, under the auspices of the OHR, an initial Inventory of State Property was conducted and identified 1,000 units, 979 of which are situated on the territory of BiH.⁹ Starting in 2005, the High Representative issued several decisions temporarily banning disposal of state property, until a sustainable solution to the issue is found. These remain in effect to date.

The Republika Srpska's adoption in 2010 of a law on state property located on entity territory, which defined all state and defense property located on entity soil as RS property, initiated the ongoing legal-constitutional battle led by the RS authorities under Milorad Dodik. It is based on Dodik's unconstitutional and false claims that the RS is a state, with Dayton BiH constituting a "state union," that is, a confederation of sovereign entities.¹⁰ This unfounded claim has since served as connective tissue with HDZ BiH leader Dragan Čović, as their joint political project is to transform BiH into a loose union of ethnically (and party-) dominated entities and amalgamated cantons.

In a landmark ruling in 2012,¹¹ BiH's Constitutional Court set the record straight, followed by two rulings in 2020. Striking down the RS law, the court's decision made clear that the state of BiH is the sole owner of state property. It underscored that state property undergirded BiH statehood, sovereignty and territorial integrity, including the financing of BiH institutions and its international obligations. Two subsequent rulings in 2020¹² confirmed the 2012 decision and broadened the definition of state property to "public goods," i.e., properties that serve all people in BiH, including natural resources such as agricultural land, seawater and seabeds, river water and beds, lakes, mountains, but also public transport networks and traffic infrastructure. The court also confirmed that the requirements of all levels of government to effectively exercise their functions need to be taken into account in regulating state property. It confirmed that regulating state property was the sole competence of the BiH Parliamentary Assembly. Apportionment of property had to be delineated through a state law, with potential transfer of portions of state property to lower levels of government.

This means that until a lasting solution for the state and defense property issues is found, i.e., a state law is adopted, all public property in BiH remains state property.

⁸ Internal OHR background briefs on state property and the state of implementation of 5+2.

⁹ *Inventory of State Property in Bosnia and Herzegovina Compiled Under the Auspices of The Office of the High Representative. Final Report*. December 2009. Available at:

<https://www.ohr.int/stateproperty/Final%20Report%20on%20the%20State%20Property%20Inventory.pdf>.

¹⁰ "Dodik: Bosnia is where I live, RS and Serbia are my state." *B92*. January 13, 2016. Available at:

https://www.b92.net/eng/news/region.php?nav_id=96681; "Dodik: Nobody takes PIC ambassadors' conclusions seriously." *N1*. December 12, 2018. Available at <https://n1info.ba/english/news/a302967-dodik-nobody-takes-pic-ambassadorsand39-conclusions-seriously/>

¹¹ Constitutional Court ruling U-1/11, July 13, 2012; Judge Zlatko M. Knežević wrote a dissenting opinion. For court rulings, see: <https://www.ustavnisud.ba/en/decisions?sp=DatumDesc&>

¹² Constitutional Court ruling U-8/19, February 7, 2020, Constitutional Court ruling U-9/19, February 6, 2020. Judges Zlatko M. Knežević and Miodrag Simović dissented with the majority opinion in both.

Yet Dodik has insisted on the allocation of property through inter-entity agreement, bypassing the state. Since 2012, the RS has largely ignored rulings by the BiH Constitutional Court and the Court of BiH, illegally disposing of and selling parcels of state property, and registering at least some defense properties as RS property, thus consistently undermining the rule of law, constitutionality, and the authority of the Office of the High Representative. To date, the status of those properties on entity soil is inaccessible to all but the RS authorities. At the same time, the 2012 ruling marked the beginning of Dodik's continuous attacks against the Constitutional Court, including smear campaigns against its three international judges and a demand to end their mandate. This position was later supported by his partner Dragan Čović.

On a policy level, the international community has until recently disengaged from the issue of state and defense property, basically categorizing it as one of the "intractable" issues (alongside constitutional reform and election law reform). It is not mentioned in the EU Commission's May 2019 Avis, i.e., the 14 priorities containing some two dozen reform conditions for opening accession negotiations with BiH.¹³

2023: The State of Play

While state and defense property had been a longstanding unresolved issue, Milorad Dodik returned it to the top of the political agenda in 2021, just as he embarked on an unprecedented acceleration of his long-term RS secession threat, this time including concrete legislative steps. In February 2022, a decade after the Constitutional Court's landmark ruling, the RS National Assembly (RSNA) passed a new, unconstitutional entity law on immovable property. When the High Representative suspended the law in April that year and the Constitutional Court struck it down in September,¹⁴ the RSNA in December simply passed a new, almost identical law, which took effect in early 2023 – only to be suspended by the HR again.¹⁵

Why is this on the agenda now?

State and defense property has been on the agenda on and off for nearly two decades. Why should it be such a priority now, when there are more pressing issues the country should be dealing with (e.g., effective prosecution of corruption, strategies to address the demographic crisis, and the need to support a new social contract to replace a system which has failed to deliver for people)? There are both domestic and international reasons.

¹³ See European Commission, *Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union*, May 29, 2019, available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2019-05/20190529-bosnia-and-herzegovina-opinion.pdf>

¹⁴ Office of the High Representative, "Decision Enacting the Law on Amendments to the Law on the Temporary Prohibition of Disposal of State Property of Bosnia and Herzegovina," April 12, 2022. Available at: <https://www.ohr.int/decision-enacting-the-law-on-amendments-to-the-law-on-the-temporary-prohibition-of-disposal-of-state-property-of-bosnia-and-herzegovina/>.

¹⁵ Office of the High Representative, "Notice on the Application of the High Representative's Order of 12 April 2022 to the RS Law on Immovable Property Used for Functioning of Public Authority," February 27, 2023. Available at: <https://www.ohr.int/notice-on-the-application-of-the-high-representatives-order-of-12-april-2022-to-the-rs-law-on-immovable-property-used-for-functioning-of-public-authority/>.

Domestic factors

Domestically, quite simply, the issue is money. This is particularly the case for Milorad Dodik, whose government has taken on substantial debt. While a recent bond issue has kept the proverbial wolf from the door, these debts will only accrue. In addition to the financial realities of the debt payments – much of which was taken on while he was leader of that entity – he needs the cash infusion to keep his political patronage machine alive. In the past he was able to do this through the spoils of privatization; just one example of which was telecoms privatization.¹⁶ However, while the RS's financial crisis is the most acute, other political leaders also see the opportunity to lock in political and financial advantages by strategically securing what they can in any property hand-out; again learning from lessons from similar privatization processes after the war. Public property throughout BiH has been exploited illegally – effectively privatized – by ruling parties at various levels.¹⁷ These parties seek a solution that not only allows them access to public goods, but amnesties them for property already illegally appropriated.

The neighborhood

These giveaways must also be seen in light of continued unfulfilled appetites towards the country by its neighbors. Both Croatia and Serbia – in addition to having direct political interests through their affiliates in the country – are poised to benefit handsomely by a property giveaway that would allow their own firms to get in the game to strip the assets of BiH. Hungary, whose Prime Minister Viktor Orbán is a key Dodik ally and benefactor, is also likely to receive preferential treatment. Nor would Sarajevo-based parties be left out of the party, with their preferred partners, near and far. Abuse of the public trust is the common denominator of BiH politics.

International factors

It has been clear for at least three years that the EU and the US are increasingly willing to make deals with the nationalist parties in a way that they were not at the time when they paid at least lip service to the notion that BiH could make reforms and end the divisive ethno-nationalist political system that has hobbled the country. Transactionalist dealmaking, freed of democratic principles and Western red lines with the nationalist parties has been on a clear trajectory since the June 2020 “Mostar deal”,¹⁸ which sanctioned the *de facto* ethnoterritorial redivision of the town. This arrangement also opened the path for ongoing backroom talks on so-called election law reform, the fruits of which have been most evident in the two impositions of the High Representative in 2022 and 2023 related to the election law. For the US, the main aim seems to be completing a handoff of the region to the EU. In terms of the EU, it remains fixated on divesting BiH's Dayton peace of its enforcement tools to better conform to its enlargement theology, as well as – more immediately – to proclaim “signifiers of progress,” now that BiH was gifted candidacy.

¹⁶ MTS, “Telekom Srpske a.d. Banja Luka,” November 6, 2020. Available at: <https://mts.rs/About-Telekom/About-us/a90059-Telekom-Srpske-a.d.-Banja-Luka.html>.

¹⁷ Discussion with environmental activists in BiH, July 2023.

¹⁸ Bodo Weber, “The West's Dirty Mostar Deal: Deliverables in the Absence of a BiH Policy.” *DPC Policy Note #16*, December 2020. Available at: http://www.democratizationpolicy.org/wp-content/uploads/2020/12/DPC-Policy-Note16_The-Wests-Dirty-Mostar-Deal.pdf.

The “let’s make a deal” mentality suggests that for some time there has been a belief that each of the three main political groups should “get” something as part of a “package deal”: the Croats would get the election and political reform they want to secure a *de facto* if not eventually *de jure* third entity; the Serbs would get property to further solidify their long-term partition interests; and the Bosniaks would get a law passed in parliament criminalizing the denial of genocide. Those who do not fit into these groups get nothing.

A number of arguments will likely be used to justify this engagement by outside actors. The interest in the issue among the parties is clear as the assets related to state and defense property are one of the last large pools of resources and assets that can be stripped in a country where the spoils of prior privatization have already been squandered and allocated with little long-term benefits to the citizens or communities apparent.

The issue of state and defense property also figures prominently on the “5+2 agenda.” This agenda of five objectives and two criteria was articulated in 2008, when hopes for a time-driven “transition” from OHR to EUSR were dashed by two years of relentless and undeniable regression.¹⁹ As one can see from reviewing these seven points, they are a mix of desired reforms that cover economic and governance/justice issues, along with a failsafe in the second condition, the 5+2’s “elastic clause.”²⁰ Over time, and in the absence of meaningful progress, they have become a totem that can be used to justify watered-down conditions to enable declaration that sufficient progress and reform has been made and to downgrade some of the Dayton instruments that have been put in place – including the chance to “declare victory” and call for the closure of OHR (something sought in particular by some EU institutions). For the US, fulfillment of these objectives would make it easier for its engagement to shift or be reduced. For the EU, declaration of their fulfillment would help them to make the argument that the country is making meaningful progress, as well as ensure EU primacy among international actors in BiH. (However, as noted above, property is not a part of the Avis reform conditionality.)

There will also be arguments that addressing the issue of state and defense property is necessary to promote and stimulate investment. These voices will note that the failure to resolve this issue is leaving an untapped resource that could serve the interests of investment or collateral for investors. For particularly the US and UK, a general tendency to support privatization and view public assets as inherently inefficient resonates with their view that taking these assets out of the public gift would strip them as party patronage reservoirs.²¹ The same mentality drove privatization in the postwar period; the role of privatized public assets in funding partitocracies is simply ignored.

¹⁹ “Democratization Policy Council Reaction to the PIC Steering Board Declaration of February 27, 2008.” Available at: www.democratizationpolicy.org/pdf/post-pic-assessment.pdf.

²⁰ Office of the High Representative, “A positive assessment of the situation in BiH by the PIC SB based on full compliance with the Dayton Peace Agreement” and “Agenda 5+2,” available at: <https://www.ohr.int/agenda-52/>.

²¹ This is already evident in terms of the allocation of mining rights. A recent investigation of the consequences of the exploitation of a mine in Vareš by a firm from the UK was recently published by the Center for Investigative Journalism. “The Zenica Government Treat For The World’s Ore Traders.” July 7, 2023. Available at <https://cin.ba/en/the-zenica-government-treat-for-the-worlds-ore-traders/>.

The Current Process

Dodik in 2021 raised the prospect of state property as a way to end his secession threats and related actions; rather than viewing this as the blackmail it was, the European Commission picked up on his offer during a visit to BiH by enlargement commissioner Olivér Várhelyi in November, for the first time presenting the idea of a package deal to political leaders behind closed doors.²² The OHR then decided to re-engage on the issue and in 2022 convened an expert working group made up of four international and four domestic legal experts. The group held eight expert consultation meetings between April and July 2023 on individual aspects of the property issue in the presence of OHR and EU Delegation officials, hosted by various Western embassies in Sarajevo. The working group's activities have proceeded in secrecy; neither the names of the experts nor the concrete mandate of the group has been made public. According to an interlocutor,²³ the role of the group is to assist the Parliamentary Assembly in the potential drafting of a state law by providing guidelines and principles for the future regulation of the property issue. This includes the OHR's insistence on a state law, i.e., rejection of Dodik's demand for an inter-entity agreement. The group is expected to complete its work by the end of 2023. As an interlocutor noted, "the OHR initiative is supported by officials of the European Commission, because they want to get OHR closed."²⁴

The Bigger Picture - What this Means for BiH

While all of these issues are important, the bigger picture politics underlying these discussions should not be obscured by legalese or the language of economic expediency.

The nature of the state and its parts

First, this is very much about Dodik – and his allies – trying to firmly and perhaps finally redefine the nature of BiH as a state, and in doing so, to further calcify the myth that the RS in itself is a state. However, allowing Dodik to proceed further would stoke dismemberment trends in the current environment, with attendant potential security risks. Some in the international community feel that there has been "success" in dealing with Dragan Čović and his HDZ BiH as the words "third entity" are no longer openly uttered. But to do so requires willfully ignoring the fact that this is only because those aims are being pursued through election law reform (an agenda which both HDZ BiH and the Croatian HDZ continue to pursue),²⁵ "Federation reform," and coalition governance at the Federation and state level. The HDZ BiH, in collaboration with Dodik in the RS, is intent on carving-out a *de facto* territorial and political unit, while avoiding the term "entity." This makes them into allies on the state property

²² "Otkrivena Dodikova strategija: Secesija 6 mjeseci na čekanju jer mu trebaju sredstva da plati kamate." *Klix*. December 6, 2021. Available at: <https://www.klix.ba/vijesti/bih/otkrivena-dodikova-strategija-secesija-6-mjeseci-na-cekaju-je-mu-trebaju-sredstva-da-plati-kamate/211206102>.

²³ Interview with an international official with insight into the workings of the working group, June 2023.

²⁴ Interview with an international official, Sarajevo, June 2023.

²⁵ "Plenković i Krišto: Rješenje izbornog zakona prioritet," *Vijesti.ba*, June 20, 2023. Available at: <https://www.vijesti.ba/clanak/603269/plenkovic-i-kristo-rjesenje-izbornog-zakona-prioritet>.

issue – and the issue of the composition of the BiH Constitutional Court as well.²⁶

Legalizing theft and funding future oligarchy

OHR's expert group on state property, by all indications, envisions a law passed by the BiH Parliamentary Assembly to regulate state property (and thus supersede the previous disposal injunctions by the Constitutional Court of BiH and the High Representative). Apparently, the idea is to ensure that both the state and municipalities have a greater proportion of the public property identified; the current political power dynamic is built from the middle layers (entities and cantons) out. But there is ample reason to be skeptical that such a law would move forward in parliamentary procedure, given the political divisions which have become even more evident since Dodik's direct assault on the Constitutional Court's (Dayton-specified) configuration. Sarajevo-based political parties, both in the state government coalition (the Troika of SDP, NiP, and NS) and in opposition (SDA, DF), have – at least declaratively – committed to defending the state's property prerogatives (as ruled by the Court); Dodik's SNSD and Čović's HDZ are against. An imposition by the High Representative would be rejected/ignored by Dodik. It is hard to see a political resolution in the foreseeable future, absent the international will to successfully confront Dodik's challenge to the Dayton order and its enforcement mechanism.

But even if Dodik and the RS would in the end give in on this status aspect of the property issue – a highly unlikely U-turn – there is still a deeper issue below the waterline that risks being forgotten, or willfully sidelined: that of the illegal disposition of state property since 1995. Discussions with international actors engaged on this question reveal that there is no appetite to confront this backlog of criminal abuse of the public trust – illegal appropriation, to be plain. Instead, the attitude seems to be that resolution of the allocation of the properties to layers of government should be sufficient, even if that means legalizing illegal appropriation after the fact. Such a posture would signal effective acceptance of the criminal enrichment of BiH's political class for managerial simplicity, and thus, “moving on.” It would also feed public cynicism that political elites rarely if ever pay a price for their widely recognized (and increasingly shameless) malfeasance – and when they do, the punishment is rarely commensurate with the scale of abuse. (While diplomats will in turn blame citizens for “voting for these guys”, the fact that this is all happening at a time of increasing electoral engineering to lock in party influence and positions can't be ignored.) It is hard to see how such an act would make above-board investors feel secure, be they foreign or domestic. The popular sense of accumulated injustice at the hands of political power is palpable (and one of many drivers of emigration). Such a posture would also sit in stark contrast to regular international rhetoric on the centrality of fighting institutional corruption.

Even worse, legalizing all post-1995 (and particularly all post-2005) illegal disposition of state property by the RS instead of annulling all those decisions consistent with the OHR disposal bans and multiple Constitutional Court and Court of BiH rulings would annul those legally binding decisions *post hoc*. This would destroy the post-war authority of the OHR and deal a death blow to the rule of law and

²⁶ “Milorad Dodik i Dragan Čović saglasni da treba ‘izbaciti’ strane sudije iz Ustavnog suda BiH,” *Danas*, June 30, 2023. Available at: <https://www.danas.rs/svet/region/milorad-dodik-i-dragan-covic-saglasni-da-treba-izbaciti-strane-sudije-iz-ustavnog-suda-bih/>.

constitutionality in BiH.

Very few lessons have been learned from the failed, nontransparent, and corrupt privatization processes in the region and beyond beginning in the early 1990s.²⁷ In systems lacking transparency and the rule of law, privatization of public assets has played a large role in contributing to the rise of oligarchy and entrenched illiberal politicians who seek to subvert democratic practice and accountability. However, it is still common to hear – particularly from Americans – that “they can only steal it once.” The underlying idea is that even if public property *is* stolen once, over time it will somehow begin – through private hands – to benefit the community, if nothing else through establishing legal clarity. This has not happened; all it takes is one time to lock in a nearly insurmountable political and economic advantage.

In the case of BiH today, there is also a sense of futility because corruption is already seen as endemic and ubiquitous, and is even triumphantly displayed for effect. Some in politics have even said privately, “well they are already using it illegally, or they have already stolen it so this would just make it legal.” This is stunningly small-minded, as well as self-serving, thinking. The notion that a process agreed by the local elites yet facilitated and endorsed as democratic, clean and transparent by an international community that claims to represent values-based democracy is absurd and damaging to the very countries and institutions that purport to support democratic governance.

Lip service to local governance while entrenching three party power verticals

It is already clear that language is being used in a very specific way, in order to make such a substantial transfer of wealth and assets seem rational, logical, and risk-free. There is, for example, talk that assets should be devolved to the municipalities. On its face, this sounds rational and even beneficial. However, it is facile to believe that in a country with the current political incentive structure and level of impunity, any substantial assets would actually remain in that local community. Instead, the vertical political party system would simply ensure an upward transfer of wealth from the municipalities to the locus of power held by the three dominant nationalist political groups, be it at the canton or entity level. Unchecked party power would short-circuit even the most generous allocation of public assets to municipalities under the current system. Even if the international community insisted on language aimed at ensuring that the wealth would benefit the communities, the structure of political party control would render that meaningless.

The ugly reality is that – as with Dodik’s frontal assault on the existing constitutional order – until that order is changed through popular consent to one that enshrines functionality of accountability mechanisms, both political and legal, state property should remain on ice, legally in the purview of the state. Furthermore, continued impunity for the protracted and accumulated abuse of public property is

²⁷ Sarah Chayes explores these links in her 2015 book, *Thieves of State: Why Corruption Threatens Global Security*. DPC and Eurothink used her models for a study of political economy trends in BiH and North Macedonia: *Sell Out, Tune Out, Get Out, or Freak Out? Understanding Corruption, State Capture, Radicalization, Pacification, Resilience, and Emigration in Bosnia and Herzegovina and North Macedonia*. (Ed.) Eurothink. Skopje, 2021. Available at: <http://www.democratizationpolicy.org/wp-content/uploads/2021/04/Eurothink-DPC-Final-Report-to-Publish-March-2021.pdf>.

untenable – and could provide a popular binding agent for a new social contract. *Usage rights* for local communities, with some sort of popularly derived oversight backed by international enforcement power, should be considered as an interim measure for the benefit of local communities in the meantime.

Conclusions and Recommendations

The state property issue has remained unresolved since the war, and there are strong, legitimate reasons to seek its resolution. However, given the nature of the political economy set at Dayton and reinforced since 2006, and given the divisive ethnoterritorial dynamics supported by the West's appeasement policy for the past three years, there is no way to square the circle without the state of BiH and the country's citizens being the losers in what is a question of public property. While political interests are differentiated, the common denominator among them remains as it has been since Dayton's signature: abuse of the public trust and impunity for these abuses. Any "solution" arrived at in the BiH PA would be reduced to those factors.

The idea that this wealth transfer would be pursued and legitimized at a time of increasing political polarization, radicalization and division is absurd. And further, while this issue has surfaced in the media periodically, and while a working group has been established to delineate the assets, there has been no serious effort to find out whether *citizens* want to see the last vestiges of common wealth and assets parceled out for disposal (and presumed illicit gain) among layers of a system run by politicians and political parties that they have overwhelmingly and consistently noted they believe are corrupt and whom they do not trust.²⁸ There have been no conversations about the kind of social contract that people want to see. There have been no discussions on whether or not people want these public assets to be transferred into private hands or perhaps held in some community-organized and supervised community trust. No options have been seriously discussed with the people of this country even though it is difficult to identify how the average BiH citizen benefited from previous privatization.

Rather than being a cynical exercise based on appeasing nationalist party appetites, this should be viewed as an opportunity to (re)build local governance, ownership and participation. These are the conversations that should be leading the agenda – related to property but also related to the kind of future that people want to have. And there should be no final carve-up and giveaway of the country to political leaders who have failed to shepherd the country and the people to a more prosperous future.

Recommendations

1. A solution to the property issue – that is, property apportionment and disposition – should not proceed in the current, increasingly polarized environment. The international community – the EU, the US, the UK, and the other members of the PIC – should not let its priorities be dictated by Milorad Dodik

²⁸ "Expert Report on Rule of Law Issues in Bosnia and Herzegovina" (commonly known as the "Priebe report). Cited at page 13, paragraph #61. Available at: <https://europa.ba/wp-content/uploads/2019/12/ExpertReportonRuleofLawissuesinBosniaandHerzegovina.pdf>.

or any of the other incumbents who have their eyes set on state property.

2. An effort to support development of a new social contract based on real devolution to local government must be supported and cultivated to finally replace the calcified partitocracy – a dialogue that neither domestic nor international actors have so far engaged in or supported. A reset, values-based Western policy need not be prescriptive, but simply be clear on its own criteria for entry into the EU and NATO, as well as conditions for further assistance. These would include an end to the unaccountable ethnocracy which has typified Dayton BiH – particularly since 2006, when Western enforcement flagged.

The property issue should only be tackled in the future, after a conducive environment as outlined above has been established. Once these conditions are in place, any solution must be based on three principles:

- That it be a state law adopted by the BiH Parliament – not an inter-entity agreement as sought by Dodik;
- In the division of property among governance layers, a large chunk of property must go to the state and to municipalities, with fail-safes in place to ensure municipalities can benefit from these resources free from asset-stripping party agendas;
- That all illegal and unconstitutional (RS) property disposal decisions since the HR's first disposal ban of state and defense property in 2005, in fact since 1995 – be annulled before any apportionment of the property among BiH's different layers of government. Any other decision would mean legalizing theft, and irrevocably strangling the authority of the HR/OHR, the Constitutional Court of BiH and Court of BiH, and of the rule of law and constitutionality in general.