

Bosnia's Dual Crisis

I. OVERVIEW

Bosnia and Herzegovina's (BiH) post-war status quo has ended but the international community risks muddling the transition by delaying decisions on a new kind of engagement. Republika Srpska (RS), one of the state's two entities, has defied the High Representative, Bosnia's international governor, and the international community has not backed him up. Instead, the U.S. and the European Union (EU) launched in October 2009 on the Butmir military base outside Sarajevo a high-level effort to persuade the country's leaders to adopt far-reaching constitutional reforms and allow the mandate of the High Representative and his office (OHR) to end. Disagreements over the scope and content of reform make agreement uncertain. But Bosnia's leaders should adopt as much of the EU-U.S. proposal as possible, and the international community should end its protectorate in favour of a new, EU- and NATO-led approach including strong security guarantees.

After fifteen years as an international protectorate, BiH still has to make significant and most likely gradual reforms to provide better governance and services to its citizens. But it is no longer on the verge of armed conflict. RS has no chance of successfully seceding. Indeed, a failed breakaway is now the only way RS could lose the extensive autonomy it has within BiH. Bosniaks, Serbs and Croats still need to develop consensus on the balance between centralisation and de-centralisation they want and on other power-sharing arrangements. But Bosnia must complete its transition to mature statehood now or risk regression.

The Peace Implementation Council (PIC), the international body that oversees the Dayton Peace Agreement (DPA), will meet on 18 November, and two days later the UN Security Council will deliberate. Until then, the EU-U.S. "Butmir talks" are likely to continue. If they succeed, the OHR will close, and Bosnia will accelerate toward EU and NATO integration. If they fail, the international community will have a stark choice: reinforce the OHR for a lengthy political conflict with RS, or devise alternative means led by the EU Special Representative (EUSR). If the Butmir talks are still ongoing, the PIC may delay a decision on the OHR until early 2010, but a decision on transition should be taken before the

country is preoccupied by a tense campaign for the October 2010 general election.

This is a sensitive and potentially dangerous moment, and much could go wrong. A minimalist agreement at Butmir and a decision on OHR closure at the next PIC meeting is still possible. More delay and indecision could be dangerous. Its important past achievements notwithstanding, the OHR has become more a part of Bosnia's political disputes than a facilitator of solutions, and the High Representative's executive (Bonn) powers are no longer effective. The OHR is now a non-democratic dispute resolution mechanism, and that dispute resolution role should now pass to Bosnia's domestic institutions with the temporary and non-executive assistance of the EUSR. Careful, coordinated and determined action between the EU, UN, U.S., Russia and Bosnia's neighbours is necessary to accomplish this.

Bosniak, Serb and Croat leaders agree in principle on some important reforms, though the Serbs want them to be minimal, Bosniaks want them to be extensive and Croats want them to protect their communal prerogatives. Ideally, Bosnia's leaders should adopt the EU-U.S. proposal in its entirety: it is a good compromise – the most one can hope for under these conditions. If they cannot agree on all of it, however, the first priority should be reaching a deal to equip the state for EU integration, put it in compliance with the European Convention of Human Rights (ECHR), make it more functional and resolve the issue of state property. In later stages of the EU (and NATO) accession process, BiH will need greater administrative capacity, to implement and enforce EU legislation; but this can be added gradually, as the need arises and as Bosnian political will matures.

The U.S. and EU negotiators should be flexible and:

- indicate to all parties that there is no single, ideal package of reforms; this is only the first stage; but there are minimum reforms needed for EU and NATO candidacy, including giving the state the authority to negotiate accession commitments with the EU, bringing the constitution into compliance with human rights treaties, and modestly increasing the state's capacity to govern; and
- not set constitutional reform as a condition for OHR closure.

If there is no deal, however, the PIC must choose. It could reinforce the OHR, by clearly supporting its continued mandate in Bosnia through 2010; backing the High Representative's use of the Bonn powers; and reinforcing the EUFOR security mission with mobile gendarmerie units sufficient to enforce OHR decisions. It should then have a clear strategy on how to deal with recalcitrant RS. This approach is problematic and involves clear risks of escalation of tensions and paralysing stalemate if Serbs follow through on their threat to boycott state institutions.

A better option would be for the PIC to announce that the transition to a reinforced EUSR will start on 1 January 2010, instruct the High Representative to consult the parties and use his powers one last time to resolve the state property issue, thus meeting the conditions it set for OHR closure. At the same time, PIC member states should coordinate the following steps to reinforce the Bosnian state:

- ❑ the UN Security Council should renew the EUFOR and NATO mandates for at least one more year, noting their broad authority to enforce compliance with the DPA and provide a secure environment;
- ❑ the UN Security Council should welcome the EU's willingness to take on new responsibilities in BiH, including serving as a guarantor of the DPA, through the deployment of a new EUSR;
- ❑ the EU should appoint a new EUSR with a strong mandate, including to offer advice and facilitation to Bosnia's political actors; to find persons, parties or actions in violation of the DPA; and to make decisions on disbursement or restriction of EU's financial aid to Bosnia;
- ❑ the EU should equip the EUSR with a strong team to facilitate Bosnia's political process, negotiation between political actors and adoption of the EU's *acquis communautaire*; the EUSR should more effectively consult with civil society to explain reforms and EU accession to citizens;
- ❑ the EU should invite Bosnia to apply for membership, upon adoption of minimal reforms; and
- ❑ the North Atlantic Council should spell out in December the conditions that BiH needs to fulfil to be offered a NATO Membership Action Plan.

Taken together, these steps would offer assurance that Bosnia will neither fracture nor stagnate and would match, or exceed, the OHR's actual remaining capacity. Once they are in place, and after the Bosnians or the High Representative have resolved the state property dispute, the OHR can close. The most dangerous option of all, however, would be to take no decisions at all: if

the PIC continues the OHR's mandate past the early months of 2010 but does not substantially reinforce it, Bosnia will be faced with a confrontation between RS and the OHR from which no one will emerge undamaged and which could undermine the long-term operation of the Bosnian state.

II. THE END OF THE STATUS QUO

On 18 September 2009, Valentin Inzko, the High Representative, imposed eight laws using his extraordinary Bonn powers.¹ The next day his principal deputy, Raffi Gregorian, who also serves as supervisor of the Brčko District and enjoys equivalent powers within its borders, imposed a further law.² Less than a week later, Republika Srpska's (RS) Premier Milorad Dodik publicly rejected all nine and threatened to pull all Serb representatives from the Bosnian government if Inzko tried to impose any further measures. The next day the full RS government ordered the RS official gazette not to publish the laws Inzko had, in its words, illegally "attempted" to impose.³ The RS National Assembly confirmed these positions on 1 October, after a two-day debate.⁴

The imposed legislation covers several issues, some merely technical, others highly controversial.⁵ The RS objected

¹ Crisis Group Europe Report N°198, *Bosnia's Incomplete Transition*, 9 March 2009. Background on the origin and nature of the Bonn powers, which allow the High Representative to act in place of the Bosnian government to impose legislation and appoint and remove officials, is available in that report at p. 12 and following.

² "Supervisory Order regulating the status of all electric power transmission lines and facilities situated in the Brčko District of Bosnia and Herzegovina", 19 September 2009. The Brčko Arbitration Tribunal granted the supervisor powers within Brčko District equivalent to those of the High Representative in its Supplemental Award of 15 March 1998.

³ "Zaključak [Conclusion]" 04/1-012-2-1752/09, 24 September 2009.

⁴ Dejan Šajinović, "Parlament neće prihvatati nametnute odluke Inčka [The Parliament will not accept Inzko's imposed decisions]", *Nezavisne novine*, 1 October 2009 (online). The text of the conclusion passed in a split vote and did not gain the support of the larger opposition parties, the Srpska demokratska stranka (SDS, Serb Democratic Party) or the PDP, but both supported the rejection of the OHR's decisions.

⁵ Eight of the nine decisions deal wholly or in part with the Brčko District; four address the operation of the state electrical transmission monopoly, Elektroprenos BiH. The laws on Elektroprenos extend the mandate of the general director (now a Serb) past the end of his term of office, pending appointment of a successor, and allow the executive director (a Bosniak) to act in the general director's place if the latter resigns or "is absent without justified reasons". Two laws obligate the RS and FBiH power companies to provide electricity

to all but most forcefully to the law aimed at allowing the state electrical grid operators, Elektroprenos BiH, to operate without participation of its RS members.⁶ The international community has long seen Elektroprenos BiH as a key state-building element and has been especially sensitive to RS attempts to disrupt or dissolve the company.⁷ RS has equally long resented being pressured into joining the company, in which it is a minority shareholder, and points out that several European states have multiple electricity utilities.

But this conflict is not really about the minutiae of regulating the electricity supply; it is a struggle over the authority to impose decisions between the Office of the High Representative and the RS premier and his supporters. The conflict dates back to 2006, but it escalated in May and June 2009 when the High Representative forced the RS to retract a set of largely symbolic declarations critical of allegedly improper transfers of competencies from the entities to the state. The RS complied, but Dodik lashed out days later, telling the PIC Steering Board that “RS will not accept [the use] of [the OHR’s governing] Bonn powers any more”.⁸

This was not the first RS rejection of OHR decisions, or the first threat to pull out, but it is the most serious.⁹ Dodik implied that a Serb walkout would be long-term: “we will withdraw from all BiH organs and we will not

return to them any more”.¹⁰ He also warned that further OHR impositions would lead to a referendum “in which the people will decide whether they accept” the impositions or not.¹¹

Both sides are standing firm. A similar but milder crisis in October-November 2007 ended with the kind of face-saving compromise that seems impossible today. The only apparent options for the international community are retreat or escalation. Backing down in the face of RS opposition would confirm that the OHR is fatally weakened. Confronting RS likely means a long-lasting Serb walkout from state institutions.

A Serb withdrawal from state institutions could easily provoke a constitutional crisis. Its immediate consequences would be an end to all legislative activity.¹² The resignation of the chair of the Council of Ministers, a Serb, would force the whole council to resign.¹³ It would not be possible to name a new council, since that requires parliamentary approval.¹⁴ The presidency can in theory function with two members, but if the Serb member does not formally resign, he could block any decision by declaring that it violates a vital national interest.¹⁵ Many state institutions would have difficulty functioning without Serb executives. In practice, state-level government would cease to function through the elections in October 2010, which would be held under conditions of extreme tension.

Bosnia may survive a year of state paralysis, but the implications of a Serb walkout do not stop there. Pressure would grow on Bosniak and Croat leaders and on

to the Brčko District, and another extends the ambit of the state power regulator to Brčko. Three laws grant Brčko residents the right to claim citizenship in either entity and to change their entity citizenship (once). The final law overrules a decision of the BiH Fiscal Council dividing assets obtained from the succession process of the former Yugoslavia and reassigns part of the assets to the state itself and part to Brčko, and (without explanation) increasing the relative share that goes to the Federation vis-à-vis that of the RS.

⁶“Informacija o zakonima koje je pokušao da nametne Visoki Predstavnik za BiH, 18.09.2009. godine [Information on the laws that the High Representative for BiH tried to impose on 18 September 2009]”. They also argued the decision on division of assets violated the constitution of BiH for procedural reasons and objected to several features of the law on citizenship but not to the basic principle.

⁷See Crisis Group Report, *Bosnia's Incomplete Transition*, op. cit., p. 9.

⁸Srećko Latal, “Bosnia: West Confused over OHR Future”, *Balkan Insight*, 30 June 2009 (online).

⁹RS representatives walked out of state institutions most recently in October 2007, returning only after the High Representative modified the decisions to which they had objected, and the European Union added supplementary inducements; see Crisis Group Report, *Bosnia's Incomplete Transition*, op. cit., pp. 12-14. A seasoned European diplomat assessed the current situation as “less tense, but more serious” than the 2007 crisis; Crisis Group interview, Sarajevo, 30 September 2009.

¹⁰S. Jeremić, “RS neće prihvatiti nametnute odluke [RS will not accept imposed decisions]”, *Nezavisne novine*, 26 September 2009 (online).

¹¹Dejan Šajinović, “Ako nametanja nastave, slijedi referendum [If the impositions continue, a referendum follows]”, *Nezavisne novine*, 30 September 2009 (online). Articles 70 and 77 of the RS Constitution allow the Assembly to call a referendum on matters within its competence; for years, however, RS references to a referendum been understood, rightly or wrongly, as allusions to secession.

¹²All state laws require passage by both houses of the Parliamentary Assembly; the House of Peoples cannot meet without at least three Serb delegates present.

¹³The Council of Ministers is Bosnia’s executive branch. If it resigns, it should act in a “technical mandate” pending appointment of a new government, but since all its decisions must include at least one vote from a minister of each constituent people, a full Serb boycott would bring it to a halt.

¹⁴Law on the Council of Ministers, Articles 9, 12, 18 (as amended by decision of the High Representative on 19 October 2007).

¹⁵The vital national interest rule in the state presidency allows any member to veto a decision, with the agreement of the relevant legislature, in this case the RS National Assembly.

the High Representative to change the state's rules to allow at least minimal functions. The moral force of such pressure would be considerable: why should a clear majority of Bosnian citizens be deprived of government at the whim of a Serb party that represents fewer than half the voters of the country's smaller entity? But governing BiH without Serbs, whether by changing the rules to allow the country to operate without their participation, or through direct rule by the High Representative, would fundamentally change its identity and destroy its legitimacy. Post-war Bosnia is a state based on the consent of its three constituent peoples; if it can operate against the wishes of one of them, then consent is lost and disintegration becomes probable.

III. BUTMIR: AN EMERGENCY ATTEMPT TO PUSH THROUGH REFORM

The international community did not forcefully respond to RS's revolt against the authority of the OHR.¹⁶ Instead, on 8-9 October 2009, with a follow up on 20-21 October, the U.S. and the EU jointly organised a high-level effort to broker a grand bargain to reform the constitution so as to allow the OHR to close and push Bosnia toward membership in the EU and NATO.¹⁷ U.S. Deputy Secretary of State James Steinberg and Swedish Foreign Minister Carl Bildt (representing the Presidency of the EU), later joined by the European Commission (EC) commissioner for enlargement, Olli Rehn, hosted the closed-door negotiation at Camp Butmir, headquarters of the international peacekeeping mission.¹⁸ The OHR was almost completely excluded; Inzko was invited, but only in his capacity as EUSR, and did not play a major role.¹⁹

¹⁶The PIC issued a brief, mild communiqué on 24 September 2009, calling on the RS National Assembly to "reconsider"; when the Assembly failed to do so, neither the PIC nor the OHR reacted further.

¹⁷The requirements for OHR closure are the five objectives and two conditions listed by the PIC in February 2008, of which only the resolution of state and defence property remains outstanding. Constitutional reform is not a requirement, but many observers believe Bosniak parties will not consent to any state property resolution – and thus to OHR closure – without it; Crisis Group interviews, EU diplomats, Brussels, 22 October 2009.

¹⁸Other key PIC members, including the Russians and the Turks, were not part of the initiative.

¹⁹Five EUSR and one OHR lawyers were involved in drafting the Butmir proposals, but no OHR personnel had any policymaking role in the process: "We told them what to do, and they obeyed". Crisis Group interview, participant in Butmir

The main features of the EU-U.S. package include: reforming state structures to make them comply with the European Convention of Human Rights (ECHR); creating a larger, more powerful and unicameral legislature and a larger and more powerful Council of Ministers with a prime minister; and giving the state authority to assume responsibilities and make commitments in the EU accession process. It also included a compromise on the resolution of the state property issue, the last remaining condition of those that the PIC in 2008 said needed to be met in order to close the OHR.²⁰ As an inducement for accepting the whole package, Bildt and Steinberg pledged accelerated integration into the EU and NATO.²¹

There was a certain elegance to the EU-U.S. initiative, which tried to forge an opportunity for real progress out of the dangerous, and seemingly unsolvable, confrontation between the RS and the OHR. But in Bosnia's current political climate, a far-reaching deal was unlikely.²²

meetings, Brussels, 22 October 2009. Three former High Representatives recently said that including the OHR in the Butmir process was vital so as "to allow for a proper and dignified conclusion of the peace implementation process and the opening of a new chapter". Paddy Ashdown, Wolfgang Petritsch and Christian Schwarz-Schilling, "Assuring Peace and a European Future in Bosnia and Herzegovina", open letter, 18 October 2009, excerpts published in "Otvoreno pismo Schwarz-Schillinga, Petricha i Ashdowna: Entitetsko glasanje će se morati ukinuti prije ili kasnije [Schwarz-Schilling, Petritsch and Ashdown's open letter: Entity voting will have to be abolished sooner or later]", *Oslobodjenje*, 18 October 2009 (online).

²⁰The conditions set by the PIC in February 2008 to close the OHR – the "five plus two" requirements – are: "Acceptable and Sustainable Resolution of the Issue of Apportionment of Property between State and other levels of government; Acceptable and Sustainable Resolution of Defence Property; Completion of the Brcko Final Award; Fiscal Sustainability (promoted through an Agreement on methodology for a Permanent Indirect Taxation Authority Co-efficient methodology, and establishment of a National Fiscal Council); Entrenchment of the Rule of Law (demonstrated through Adoption of National War Crimes Strategy, passage of Law on Aliens and Asylum, and adoption of National Justice Sector Reform Strategy)". Two additional conditions are: "Signing of the SAA and a positive assessment of the situation in BiH by the PIC Steering Board based on full compliance with the Dayton Peace Agreement". "Declaration by the Steering Board of the Peace Implementation Council", 27 February 2008.

²¹Joint Statement by Foreign Minister Carl Bildt and Deputy Secretary of State James Steinberg, Sarajevo, 21 October 2009.

²²One official briefed on the negotiations believed the participants gave them no better than a 50-50 chance of success. Crisis Group interview, NATO official, Brussels, 23 October 2009.

A. STRATEGIC OBSTACLES

The Butmir process is reminiscent of the last two failed attempts to induce Bosnian constitutional reform: the so-called “April package”, which began in the fall of 2005 and is known after the month in 2006 in which it failed, and the long-simmering police reform, which collapsed in October 2007. The April package is widely believed to have failed when Bosnia’s parties mobilised for the 2006 general election campaign and began trying to win points by adopting maximalist positions attractive to the electorate. Police reform died at the start of the campaign for the 2008 local elections. Butmir also began at an awkward point in Bosnia’s mine-strewn political calendar, with general elections planned in October 2010. The OHR-RS crisis forced the international community to act; but the timing counseled caution and modest goals, not a massive, all-or-nothing push.

Time pressure meant the international game plan had to be changed repeatedly at short notice, which contributed to an atmosphere of confusion and encouraged the intransigent to hold out for better deals. The original plan, announced on 1 October 2009, was for a single, marathon conference starting a week later and running several days, with possible extensions if needed to finalise the reform package. Together with the presence of Bildt, Steinberg and Rehn and the venue of a military base, this evoked unavoidable Bosnian associations of the Dayton negotiations at Wright-Patterson air base in Dayton, where the country was born in its present form. This raised expectations, especially among the Bosniak electorate – a Sarajevo weekly ran a cover titled simply “October 8: Day of Victory for BiH” – but also parallel fears, especially among the Serbs.

On the eve of the conference, however, the agenda changed abruptly and without explanation. The 8-9 October meeting would now be a brief session devoted to one-on-one talks between the international hosts and each of the seven participating delegations, with no decision on any specific reforms. Presentation of the actual reform package fell back to a second meeting – “Butmir 2” – on 20-21 October. When that meeting failed to produce agreement, diplomats began speaking of an open-ended process. Technical meetings continued, with another round of high-level talks in early November. Several party leaders tried to organise parallel, or supporting, meetings, in the meantime. The sponsors will take stock at the next meeting of the PIC on 18 and 19 November; the informal working deadline is now early 2010.²³

The package’s sponsors initially came with an all-or-nothing approach, in which Bosnian leaders were to act on a bundle of reform measures without the ability to pick and choose.²⁴ Coupled with the elastic and confusing timing, this left the Bosnians with only one reliable way to affect the process: threatening to reject the whole package unless their priority issues were included (or excluded, as the case might be).²⁵ Most Bosnian participants²⁶ – representing enough parliamentary votes to pass constitutional amendments – agreed on many of the proposed reforms, taken individually on their merits. The difficulty arose from the all-or-nothing approach. The Bosniaks wanted substantial reforms and rejected lesser constitutional changes. Any “substantial” reforms made the package too rich for RS tastes. The search for a perfect balance, using U.S. and EU credibility as neutral arbiters, continues.

The linkage of the few reforms related to state property needed to close the OHR with the more ambitious and controversial constitutional reforms was especially problematic. The Bosniak parties, especially the SBiH and the SDP, who consider the OHR their main negotiating leverage, will not agree to complete the objectives required for closure until there is a deal on constitutional

²⁴ The hosts told the Bosnian leaders that they would consider favourably other similar packages that had widespread support, but that each participant could not pick and choose specific reforms and reject the rest. Crisis Group interview, senior U.S. official, Washington DC, 9 November 2009.

²⁵ This was unfortunate; years of research have shown that people in this situation will reject advantageous offers if they believe them to be somehow unfair, even if the alternative is no gain at all. In BiH, perceptions of fairness vary so widely that the Butmir proposal was seen as unfairly biased by virtually all the parties involved; a senior SDP leader told Crisis Group his party would reject reforms “below a certain level”, even if they were otherwise beneficial. Crisis Group interviews, senior SDA, SDP, SBiH, SNSD and HDZ 1990 leaders, Sarajevo and Banja Luka, October 2009.

²⁶ The parties invited were: the largely Bosniak Party for Democratic Action (SDA, Stranka demokratske akcije), Party for Bosnia and Herzegovina (SBiH, Stranka za Bosnu i Hercegovinu) and Social Democratic Party (SDP, Socijaldemokratska partija Bosne i Hercegovine); the Croat Democratic Union (HDZ, Hrvatska demokratska zajednica) and HDZ 1990; and the mostly Serb League of Independent Social Democrats (SNSD, Savez nezavisnih socijaldemokrata), Party of Democratic Progress (PDP, Partija demokratskog progressa) and Democratic Party (DP, Demokratska partija). The second largest Serb party, the Serb Democratic Party (SDS, Srpska demokratska stranka) was not invited, a snub that made the other Serb parties vulnerable to criticism of selling out to foreign pressure; and the DP refused to attend. As in 2006, it was thus political party representatives, rather than government officials or civil society leaders, who were the interlocutors of choice to discuss the reforms.

²³ Crisis Group interviews, senior European official, Sarajevo, 3 November 2009, U.S. diplomat, Sarajevo, 31 October 2009.

reform. The RS is generally more open to compromise on property because it seeks OHR closure but loathes constitutional reform. Making the OHR's future an integral part of the Butmir talks complicated the search for consensus and damaged the OHR's credibility as a neutral actor.

Finally, the EU/NATO carrots were too vague. While there was much rhetoric about the need to pass reforms to have the "competencies, authorities and functionality needed to meet the requirements of the EU accession process and NATO membership",²⁷ it is not at all clear that BiH has reached the point on its road to membership where these particular reforms are urgent. For the EU at least to receive Bosnia and Herzegovina's membership application (the next step in the candidacy process), the country "needs to be credible", an EC official said, but Brussels focuses on "constitutional evolution", not wholesale reform or a new constitution.²⁸ It was also not clear that Bildt and Steinberg had authority from the full EU and NATO to threaten suspension or promise fast-track accession to the two institutions.²⁹

B. THE PARTIES' POSITIONS

Most Bosniak leaders believe that BiH cannot function under the Dayton Constitution without international supervision, because RS can block most state decisions and institutions.³⁰ The past several years have shown this is a legitimate concern. They accordingly seek reforms that would "unblock" the state and make it much easier to act without full consensus of the entities and the three constituent peoples. Many also believe the international community has a moral obligation to support creation of a strong state, because it failed to stop atrocities during the 1992-1995 war and was primarily responsible for drafting the DPA.

Many Bosniak and international analysts fear that the RS will try to secede unless checked by strong international policy or a strengthened, reformed BiH state. These fears are unrealistic. An RS breakaway would very probably fail to obtain any recognition. Russia and Serbia, RS's

staunchest supporters, strongly oppose a breakup.³¹ RS could easily be split into two separate halves at the Brčko District, and its more prosperous and populous western half would then be isolated by hostile BiH and Croatia. Moreover, the EU could always threaten to accept BiH as a member state, as it did with divided Cyprus, leaving RS outside and trying to re-negotiate a status within Bosnia on worse terms than it currently enjoys. Indeed, a failed breakaway is probably the only way RS could lose the extensive autonomy it has within BiH.

A majority of the Serb elite views the RS as an entity that, while not independent, has broad autonomous governing powers. Many believe Bosniaks and the international community, including the OHR, the U.S. and the EU, want to weaken or partly dissolve that RS.³² They are suspicious of international initiatives that focus on building the central state by increasing institutional functionality.

Croats' primary goal remains territorial autonomy, whether in an entity or some other form. Bosniak opposition to a Croat entity is strong, and the Butmir negotiators have not addressed this perhaps irreconcilable conflict.³³ The second Croat concern is "equality", which means preserving the vital national interest veto, and their ability to elect a member of the state presidency.³⁴

²⁷ Joint Statement, Bildt and Steinberg, op. cit.

²⁸ Crisis Group interview, European Commission official, Brussels, October 2009.

²⁹ The EU had agreed to accept a Bosnian application for membership by the end of 2009 if the Butmir package passed, though actual candidacy status would depend on further progress; likewise, the U.S. was willing to back a NATO Membership Action Plan (MAP) after passage of the Butmir reforms; Crisis Group interview, senior U.S. official, Washington DC, 8 November 2009.

³⁰ Crisis Group interviews, senior SDA, SBiH and SDP leaders, Sarajevo, October 2009.

³¹ Serbia's President Boris Tadić said a breakup could have "catastrophic consequences for the economic and security situation in our country" and lead to conflicts that would "probably be unsolvable for decades to come and very dangerous for the security of the citizens" of newly-formed states; "Tadić: Nacionalni interes Srbije je cjelovita BiH [Serbia's national interest is a united BiH]", *Dnevni Avaz*, 29 October 2009 (online). See also Sanja Škuletić, "Bocan-Harčenko: Ne podržavamo pozive za otcjepljenje RS [Russian ambassador Aleksandar Bocan Harčenko: We do not support calls for RS secession]", *Dnevni Avaz*, 14 October 2009 (online). Traditionally Serbophile states could not easily recognise a separatist RS because to do so would conflict embarrassingly with their refusal to recognise independent Kosovo.

³² See RS Government, "Informacija o efektima prenosa ustavnih ovlaštenja sa Republike Srpske na institucije Bosne i Hercegovine [Information on the effects of transfer of constitutional competencies from Republika Srpska to the institutions of Bosnia and Herzegovina]", March 2009, and National Assembly of Republika Srpska, "Zaključak [Conclusion]" 01-788/09, 14 May 2009.

³³ The April package came two votes short of passage in the Parliamentary Assembly; a split in the major Croat party over the package's perceived failure to address Croat concerns deprived it of two votes. The Butmir package likewise does not deal with any major Croat requests.

³⁴ Crisis Group interview, member of HDZ 1990 leadership, Sarajevo, 16 October 2009. Many Croats resent the election of their representative on the state presidency, Željko Komšić,

C. THE PACKAGE

The international team delivered a set of proposed constitutional amendments to Bosnian leaders on 19 October 2009.³⁵ The amendments build on the April 2006 proposals, taking into account subsequent commentary by the Council of Europe's Venice Commission. The text shows signs of speedy drafting, and some important measures are left unfinished. But overall it is a good and fair proposal, whose adoption would significantly improve both Bosnia's political climate and its functionality. The country's leaders would do well to adopt the amendments in this form, subject to minor corrections. That seems most unlikely to happen. All but one of the seven parties have publicly rejected the package.³⁶ Some of the criticism is for public consumption, and negotiations could still produce an agreement, but probably not without significant changes.

Three areas are especially controversial. The proposal would create a stronger executive, still called the Council of Ministers but with a newly empowered prime minister, that would take over most functions of the state presidency. It would also strip the House of Peoples, one of Bosnia's two legislative chambers, of a legislative role and transform it into a committee within the other chamber, the House of Representatives. The third controversial element is the existing so-called "entity voting" provision, which requires a certain number of votes from each entity for all legislative acts and has frequently been used by RS to block important laws. It would largely be left intact.³⁷ The overall effect of the amendments would be to concentrate state power within a single body, the House of Representatives, creating a purely parliamentary system with no directly-elected executive.

Instead, the House of Representatives' appointed Council of Ministers would take over most Presidency functions, but the text does not say how it would take decisions and exercise its powers. It may be unacceptable to

the RS parties in any event.³⁸ The prime minister, a new position, would gain important powers, including a veto over most ministerial decisions and policies. But the real powers, including foreign affairs and proposing the state budget, are to be exercised collectively by the whole council – and the amendments say nothing about how this would be done.³⁹ This is a serious omission, considering that a dispute over decision-making rules in the council brought BiH to a complete halt in October–November 2007.⁴⁰

A key objection to the House of Peoples as presently constituted is that it is limited to Bosniaks, Serbs and Croats and so disenfranchises national minorities and violates human rights instruments, including the European Convention on Human Rights (ECHR).⁴¹ The House of Peoples currently exercises two vetoes over the legislative process: the "vital national interest" veto, which can only be invoked on behalf of one of the three constituent peoples, and the normal entity-voting procedure it shares with the House of Representatives. The amendment would leave the House of Peoples with a largely unchanged vital national interest veto but strip it of its other roles; it would also allow, in theory, persons of any ethnicity to join the three constituent-people caucuses that together comprise the House.⁴²

Entity voting has been criticised by many including the European Commission, the Venice Commission, three former High Representatives and leading Bosniak politicians.⁴³ RS insists that entity voting "cannot be called

who was elected largely by Bosniak votes on the SDP ticket; indirect election by the House of Peoples would make such an outcome unlikely. Crisis Group interview, US diplomat involved in the talks, Sarajevo, 31 October 2009.

³⁵ The package, a copy (Monday 19 October version) of which was given to Crisis Group, would probably have to be adopted as a single mammoth amendment to address fears that parties would only vote for the parts they liked and boycott others.

³⁶ The SDA has accepted the package.

³⁷ Entity voting allows two thirds of the representatives from either entity to block any action. Constitution, Article IV (3) (d). In practice, the entity voting veto can only be used by the RS, since any measure opposed by two thirds of the more numerous FBiH delegation would fail to attract a simple majority.

³⁸ Crisis Group interview, member of Party of Independent Social Democrats (SNSD, Stranka nezavisnih socijaldemokrata) leadership, Banja Luka, 15 October 2009.

³⁹ Amendments, Article Vbis (8) (a) "Composition, decision-making, vacancies, succession, no-confidence vote and other matters ... shall be regulated by law".

⁴⁰ Crisis Group Report, *Bosnia's Incomplete Transition*, op. cit., p. 12.

⁴¹ A case dealing with this issue is pending against Bosnia and Herzegovina before the European Court of Human Rights (*Sejdić and Finci v. Bosnia and Herzegovina*). Indeed, insofar as the ECHR is directly applicable under Bosnia's constitution and has "priority over all other law" (Article II (2)), the current constitutional provisions governing the House of Peoples and the election of the Presidency are themselves arguably unconstitutional.

⁴² A footnote to the amendment explains this was necessary for human rights reasons. The amendment specifies that the House of Representatives elects the House of Peoples from among its own members, who become members of both Houses.

⁴³ "Bosnia and Herzegovina 2009 Progress Report", Commission of the European Communities, SEC(2009) 1338, 14 October 2009, p. 7: "Misuse of provisions such as the 'entity voting' and complex rules on quorums prevents swift decision making and, therefore, hinders reform.... the problem of blockages due to the entity voting rules needs to be addressed"

into question, at any price".⁴⁴ It has allowed RS delegates to block legislative acts many times, including laws needed to obtain visa-free travel to the EU. But entity voting is a fundamental feature of Bosnia's constitutional architecture and a basis of the post-war settlement: the regional (or federal) limit on majoritarian democracy.⁴⁵ The tension between majority rule and the rights of regions and communities is real, and exists within some EU member states.⁴⁶

[footnote omitted]. The Venice Commission was milder: "Providing for a veto by two-thirds of the members of the HoR from one Entity ... is less problematic than the vital national interest veto", though abrogation should be considered if not "politically impossible". "Opinion on the draft amendments to the Constitution of Bosnia and Herzegovina", European Commission for Democracy through Law (Venice Commission), CDL-AD(2006) 019, 12 June 2006, para. 36. The Venice Commission's deputy general secretary, Thomas Markert, has argued that "entity voting should be limited to issues of special concern to the entities. However, personally I am not sure it is possible to resolve this issue in the current phase of constitutional reform". Sead Numanović, "Entitetsko glasanje treba ograničiti [Entity voting should be limited]", *Dnevni Avaz*, 17 October 2009 (online). Paddy Ashdown, Wolfgang Petritsch and Christian Schwarz-Schilling, "Assuring peace and a European future in Bosnia and Herzegovina", op. cit.: "It may not be necessary to tackle this vital issue at these talks, which comprise the first step on a long process toward Europe. But it is essential that all parties are in no doubt that, before the end of the process ... the abolition of entity voting in its present form will be required for BiH" to become a member of the EU. For positions of the leading Bosniak parties, see S. Rožajac, "Država pati zbog entitetskog glasanja [The state suffers from entity voting]", *Dnevni Avaz*, 14 October 2009 (online).

⁴⁴"Butmirski paket ne može biti osnova za razgovor [The Butmir package cannot be the basis for talks]", *Dnevni Avaz*, 29 October 2009 (online), citing an RS government press release.

⁴⁵The High Representative himself supported keeping such limits, while condemning their abuse: "I think it is good that every people, including the Serbs, has protection. I support that, and no one must be able to dominate another people.... these protections are important, but there must not be abuse". Nataša Krsman, "Incko: Butmirski proces zatvara OHR [The Butmir process closes the OHR]", *Nezavisne novine*, 18 October 2009 (online).

⁴⁶The Northern Ireland Act of 1998, for example, allows any 30 members of the Northern Ireland Assembly to identify any legislative act as of "concern", and passage then requires a concurrent majority of (self-identified) Nationalist and Unionist delegates; Article 42 (1). The executive is led jointly by a First Minister and Deputy First Minister, who must stand together and receive a majority of votes from both communities; the two govern together. The blocking potential of these rules contributed to the suspension of devolved government and direct rule by London from October 2002 to May 2007. In Belgium, where there was no permanent government between the June 2007 polls and 30 December 2008, majority

Reforms of state government are all important but need not all be resolved or even addressed at this stage. A time of exceptionally high national tension, fear and mistrust is ill-suited for the resolution of such deeply controversial questions. Of the three, only the House of Peoples requires urgent reform, and at this stage only to make its election and composition compliant with the ECHR. If the parties can agree to more, they should; but disagreement over the most controversial parts of the package should not be permitted to obstruct adoption of the rest.

Deferring major constitutional surgery to a less fraught moment would have other advantages. Given more time and a more relaxed political atmosphere, it should be possible to address these issues while reducing Bosnia's democratic deficit. The draft amendments would actually increase the distance between voters and their government, by assigning all state authority to the House of Representatives (elected through a complicated proportional system)⁴⁷ and to organs named by it. Under this scheme, the state government would inevitably be the result of opaque coalition deals made by party leaders, some of whom hold no elective office.

D. A GOOD COMPROMISE

Despite the bad atmospherics, and notwithstanding the public rejections of the Butmir package as a whole, most parties are close to agreement on several vitally important measures. The EU and the U.S. should encourage them by stating that even a partial reform now will be rewarded by advancement toward EU and NATO membership. They should also underline the minimum required for such advancement, including the following essential items.⁴⁸

rule is often superseded by a de facto confederal decision-making process based on special majorities to help protect the minority (2/3 overall and a majority in each of the 2 main communities). For example after, the Flemish-speaking parties, largely in line with a constitutional court decision, voted at the Chamber of Representatives on 7 November 2007 for the disentanglement of the Brussels-Halle-Vilvoorde electoral district, the French-speaking parties walked out, subsequently invoking their "conflict of interest" right. The King was forced to intervene to restore dialogue.

⁴⁷BiH uses the Sainte-Laguë method of proportional representation.

⁴⁸The European Commission considers three reforms to be necessary before Bosnia can move any further toward European integration: first, the state must have the authority to conclude agreements and make commitments to the EU and, with the entities, enforce compliance; secondly, the constitution must comply with the ECHR; and thirdly, there must be "at least some progress toward making the state more func-

1. EU clause

The sides appear to have quickly agreed to an amendment of the constitution that would guarantee BiH speaks to Brussels in its accession negotiations with one voice. To become a candidate for EU membership, a state must be able to put EU rules and procedures into effect.⁴⁹ This requires giving the state new powers and competencies. RS leaders recognise this⁵⁰ and together with other Bosnian parties appear to have agreed to the relevant EC-proposed amendment.⁵¹ Responsibility for negotiating agreements with and undertaking commitments to the EU would rest with the state – though the entities would advise and consent in advance – and enforcement of agreements and commitments would be a joint responsibility of the state and entity governments, “in accordance with their respective responsibilities as laid down in this Constitution”.⁵² The amendment enables the state with respect to European integration, without changing the balance of powers and responsibilities between it and the entities; it deserves broad support.

2. ECHR compliance

Two features of Bosnia's constitution violate human rights principles protected by the ECHR. The presidency is limited to members of the three constituent peoples, thus excluding minorities, and is also limited regionally: only a Serb can be elected from the RS, and only one Croat and one Bosniak from the remainder of the country (the FBiH). The latter in effect disenfranchises non-majority candidates in the entities. Likewise, the House of Peoples is limited to members of the constituent peoples, who must also be from the RS (for Serbs) and the FBiH (for Bosniaks and Croats). They are elected

tional”. Crisis Group interview, EC officials, Brussels, 22 October 2009.

⁴⁹ In 1995 the Madrid European Council clarified that a candidate country must also be able to put the EU rules and procedures into effect. Accession also requires it to have created the conditions for its integration by adapting its administrative structures. While it is important for EU legislation to be transposed into national legislation, it is even more important for the legislation to be implemented and enforced effectively through the appropriate administrative and judicial structures.

⁵⁰ Crisis Group interviews, Serbian foreign ministry, Belgrade, 14 October 2009; senior SNSD official, Banja Luka, 15 October 2009.

⁵¹ Article III (6), “Relations with International Organizations”; a footnote states that the Czech Republic, France, Germany, the Netherlands, Romania, the Slovak Republic and Slovenia have similar provisions.

⁵² Ibid. Entity representatives already participate within state delegations in EU talks. Crisis Group interviews, European Commission officials, Brussels, 22 October 2009.

by the entity legislatures, with the FBiH voting reserved for Bosniak and Croat legislators (thus fully disenfranchising Serbs from the FBiH). No one defends these provisions, which are plainly unacceptable.

The Butmir proposal would resolve the human rights problems in part by drastically reducing the powers of the presidency and the House of Peoples. The problem arises from contradictory Serb and Croat interests. As the smallest community, Croats insist on a guarantee that they alone can choose their member of the presidency and their delegates in the House of Peoples, who hold a vital national interest veto over legislation. This means these bodies must have weak powers, so as not to disempower minorities.⁵³ But the Serbs resist transferring the presidency's and House of Peoples' powers to other bodies, where the entity influence is attenuated.⁵⁴

To avoid another round of elections which violate ECHR principles, this issue should be resolved by April 2010. If the Butmir proposals on the presidency and the House of Peoples prove unacceptable, other options exist. The presidency could be made up of one representative from the RS and two from the Federation, or it could be elected indirectly, as proposed in Butmir, but remain a collective body and perhaps retain some of its competencies. The House of Peoples could retain its legislative powers but be elected territorially, or be opened to minorities reaching a certain threshold.⁵⁵ Given time, more elegant solutions that satisfy all sides may appear, especially if reforms in other areas of the state apparatus remove some of the obstacles.⁵⁶

3. A more functional state

Bosnia's Parliamentary Assembly is tiny by comparison to those of other aspiring EU candidate states. With only 42 delegates in the more important House of Representatives, working through the extensive *acquis communautaire* would be an overwhelming challenge,

⁵³ The Council of Europe's Venice Commission noted that a House of Peoples elected only by part of the BiH electorate – namely, Bosniaks, Serbs and Croats – and based on ethnicity violated the ECHR if it had full legislative powers, but could be acceptable if it held only a veto power. CDL-AD (2005) 004, para. 80.

⁵⁴ Crisis Group interview, senior SNSD member, Banja Luka, 15 October 2009.

⁵⁵ In either case, elected delegates would form national caucuses that would exercise the vital national interest veto; territorially, the RS could elect five delegates and each of the ten FBiH cantons one. This would reduce the Croat caucus but keep its veto intact.

⁵⁶ Reform of the FBiH could, for example, alleviate some of the human rights issues; growing trust could make a stronger executive more palatable.

even in conditions of political harmony and without entity voting. International observers have recommended “at least 100” delegates.⁵⁷ Increasing the size of the House of Representatives is a multi-purpose reform: it would enhance state capacity without changing the entity-state balance and is attractive to political leaders because it would offer more posts for party cadres. A much larger House would also give non-majority voters a stronger voice. The small Croat population of RS is too small to elect one of that entity’s fourteen delegates, for example, but it could probably do so in a larger candidate pool, and the same is true of Bosniaks and Serbs in places where they are regionally outnumbered. Tripling the current House, to 126 seats, should be considered.

The draft amendments only provide for 87 representatives, 21 of whom would have added duties as members of the House of Peoples. They would also create three seats reserved for national minority candidates, a dubious proposal held over from the April 2006 package.⁵⁸ More problematically, the amendments would abolish the fixed number of seats reserved for each entity in favour of a single, countrywide electoral district.⁵⁹ This would require candidates to identify themselves, for the purpose of entity voting, with one of the entities, an added complication that would have to be regulated by law.⁶⁰ A simple expansion, with no other change, would produce most of the benefits and should be possible without controversy.

4. State property

The keystone to all other reform is resolution of the state property objective, identified by the PIC as a condition for the OHR to close. Once that issue is resolved, the OHR should close. However, the link with the OHR dominates the debate over state property: Bosniak parties will not agree to a state property proposal until RS agrees to constitutional reform, and the RS will not back a reform unless it includes the end of the OHR mandate.⁶¹ In other words, resolution of state property is elusive not because the problem is inherently hard but because the PIC has linked it to Bosnia’s most controversial issue, the fate of the OHR.

The original Butmir proposal was apparently to give the state and its entities the property it required to perform its duties as they currently stand and to freeze the rest for five years or until the state identified what additional property it needed to perform additional duties.⁶² Thereafter the rest of the (unclaimed) property would be divided territorially between the two entities. The predominantly Bosniak SDA, at least, has said this is not a workable proposal for procedural reasons.⁶³ Part of the dispute is about money; much of the contested property will eventually be sold or leased, and its disposition will affect the financial balance between the state and entity governments.⁶⁴ The PIC has described the state property objective as “endow[ing] the State with ownership over assets needed to fulfil its Constitutional responsibilities”.⁶⁵ The November 2008 agreement between the SDA, SNSD and HDZ and the Butmir proposal both satisfy that requirement.⁶⁶

IV. MAKING DIFFICULT CHOICES

In the current difficult environment, the PIC members will be faced with difficult policy choices at their 18 November 2009 meeting. If Bosnia’s leaders adopt, or signal a commitment to adopt, a set of amendments corresponding to the minimal package outlined above, the PIC should close the OHR, and the U.S. and EU should appropriately reward Bosnia as promised. The real challenge will come if there is no deal, and talks collapse, returning RS’s revolt against the OHR to centre stage. If that happens, the PIC will have to choose between ending the OHR and reinforcing it. Recent developments show the status quo is untenable; if the international community wants to continue to protect BiH’s sovereignty, it must change the form of its engagement in the coming months.

⁵⁷ Crisis Group interview, EU member state ambassador, Sarajevo, 14 January 2009.

⁵⁸ Minority seats currently exist only in the Brčko District and Mostar city legislatures; in both cases, they are elected by very small numbers of voters and caucus with one of the three constituent peoples, often the majority.

⁵⁹ Article IV (2) (b).

⁶⁰ Article IV (9) (b).

⁶¹ Crisis Group interview, EU and EC officials, Brussels, 22 October 2009.

⁶² The proposal recommends considering only the state property whose disposal was prohibited by the High Representative on 18 March 2005, namely property inherited from the former Yugoslavia and property owned, as of 31 December 1991, by the former Socialist Republic of BiH; the distribution of other state-owned property would be deferred and not considered necessary for OHR transition. Crisis Group interview, EU officials, Brussels, 22 October 2009.

⁶³ Crisis Group interview, senior SDA official, Sarajevo, 13 October 2009.

⁶⁴ Crisis Group interview, senior Bosnian official, Sarajevo, 16 October 2009.

⁶⁵ “Communiqué of the Steering Board of the Peace Implementation Council”, 20 November 2008.

⁶⁶ See Crisis Group Report, *Bosnia’s Incomplete Transition*, op. cit., p. 4.

There will be a temptation simply to give up, close the OHR and leave Bosnia to its own devices. That would be a dangerous and probably costly mistake. In a March 2009 report, Crisis Group argued that the OHR should not be closed at that time, because early closure would risk both undermining the EU's credibility and ability to apply conditionality, and eliminating the international community's ability to respond to serious threats to Dayton or "to act creatively to unblock deliberate obstruction". It would have been premature, because the EU had not yet fully prepared for its new role, and the political parties in BiH were engaged in sensitive negotiations over constitutional reform (the "Prud process").

Much has changed since then. The U.S. and EU decision in effect to exclude the OHR from the Butmir talks has seriously eroded the High Representative's credibility. The home-grown Prud reform talks have collapsed, while the High Representative's Bonn power interventions have unblocked little but escalated tensions alarmingly.⁶⁷ Bosnian parties have co-opted the PIC's "five plus two" objectives and conditions for OHR closure, turning them into a negotiating asset and thus complicating attempts to reach a consensus on reform. While renewed conflict is not likely, security risks are growing, and likely to increase even more in the fraught months just before and just after the closure of the OHR and the transition to full national responsibility. In its current form the OHR cannot respond adequately to those challenges and risks, and its ongoing presence may be making them worse. The PIC must choose between a strengthened OHR and a Bosnia stabilised through other means.

1. Reinforce the OHR

Some observers believe that the political environment has become so tense that rather than closing the OHR,

the PIC should be considering ways to reinforce it.⁶⁸ In 2006, when the PIC first began planning closure, it did so because the domestic situation seemed stable enough to end international supervision. Now political dynamics are possibly the worst they have been since the war ended in 1995. Some fear that without the OHR, RS Prime Minister Dodik would defy political logic and seek RS independence and that little could stop the RS from paralysing the state in hopes of building frustration and, eventually, a consensus in favor of its secession.⁶⁹ With the wartime experience in mind, many Bosniaks at least question EU member states' ability to react rapidly to a crisis.

At a minimum, an OHR reinforced to confront RS will require broad and deep support from the PIC Steering Board; an end to the constant debate over the Office's closure; unambiguous authority to use the Bonn powers, possibly in an extended form; and enhanced military or gendarme units (within EUFOR) to enforce decisions. An office that lives with the threat of closure debated anew at each of the three or four annual PIC meetings (and endlessly in the Bosnian press) is not a credible deterrent; neither is one whose decisions are vetted in distressingly public disputes between Brussels, Sarajevo and Washington.

Few in the EU are likely to support an OHR strengthened in this way;⁷⁰ and without consensus, it would be hard to build up the OHR since EU member states now pay more than half the office's budget, and the High Representative has historically always been a senior European official.⁷¹ One solution being discussed is to de-link the High Representative from his other role as EUSR and to appoint a new, possibly American, High

⁶⁷ Since Crisis Group's March 2009 report, the High Representative has used his Bonn powers to: remove two police officials from office (6 June 2009); repeal political statements issued by the RS Government and National Assembly (20 June 2009); extend Mostar city's interim budget for three months (27 July 2009); establish a team to inventory state property (12 September 2009); deal with the Elektroprenos BiH, Brčko and financial issues described above (18 September 2009); and order the Mostar city council to observe parts of its own statute (30 October 2009), as well as revoke several past OHR decisions seizing travel documents and barring persons from public life (13 March, 24 April and 21 August 2009). Senior EC and European Union Police Mission (EUPM) officials told Crisis Group the removals of the police officials were unnecessary and based on thin evidence. Crisis Group interviews, Sarajevo and Brussels, September and 21 October and 2009. The repercussions of the 20 June repeal have been wholly negative and set the stage for the current showdown.

⁶⁸ According to this argument, even if the property issue was resolved, the second condition, "a positive assessment of the situation in BiH ... based on full compliance with the Dayton Peace Agreement" has not been met. "Declaration by the Steering Board of the Peace Implementation Council", 27 February 2008.

⁶⁹ One popular assumption amongst foreign analysts is that if the OHR is closed now, Bosnian Serb elites will feel empowered by their victory over the OHR and begin to attack the Bosnian state. See, for example, Kurt Bassuener and James Lyon, "Unfinished Business in Bosnia and Herzegovina: What is to be Done?" United States Institute of Peace Briefing, May 2009, pp. 4-5.

⁷⁰ The UK would support a stronger OHR. Crisis Group interview, Crisis Group, former senior OHR official, November 2009. A senior U.S. official argues it is not feasible to reinforce the OHR now, but that if the situation deteriorates, reinforcement may become politically possible. Crisis Group interview, Washington DC, 8 November 2009.

⁷¹ Crisis Group interview, PIC Steering Board diplomat, Sarajevo, 30 October 2009.

Representative.⁷² The EUSR would take sole charge of the EU accession process in this scheme, while the High Representative would defend Dayton and state-building reforms, answering only to the PIC. The OHR would remain until Bosnia had enacted “major constitutional reforms” that allowed the state itself to take over the High Representative’s powers. This would free the High Representative to act without seeking approval from the EU, but at the cost of making U.S.-EU coordination in Bosnia much more difficult.⁷³

In theory, a separate High Representative need not be resident in BiH in the long run; he or she could operate from abroad, supported by a reduced office in Sarajevo and liaison offices in Banja Luka, Mostar and Brčko; the position might be held concurrently by the supervisor of the Brčko District, while supervision lasts. The High Representative would still need Bonn powers, including the authority to remove or suspend officials obstructing Dayton or posing a threat to security; the power to revoke any executive or legislative acts that contravene Dayton or “undermine existing reforms”; and the ability to issue binding orders to state officials in truly grave situations. The power to impose legislation may no longer be necessary and could be explicitly abandoned.

Under such a scenario, the OHR would need strong and united political backing from the PIC Steering Board. The current High Representative, Valentin Inzko, and his predecessor, Miroslav Lajčák, have at times been hampered by weak PIC support. Russia and several EU members of the Steering Board have traditionally been averse to strong OHR action, as has the EU foreign policy chief, Javier Solana. If the PIC wanted to continue to rule by consensus, advocates of a strengthened OHR would have to find a way to persuade its reluctant members to support, or at least not to block, OHR action.

A reinforced High Representative would re-engage his powers in Bosnia, most probably first to respond to the RS’s challenge to the last set of OHR-imposed laws and threat to withdraw from state institutions. The High Representative would clearly state that parties that do not conform to international law or principles will be sanctioned and that without such conformity progress toward Euro-Atlantic integration is not possible.⁷⁴ Other disputes, such as a possible state-level indictment of

senior RS leaders,⁷⁵ could also easily generate a strong pull for OHR intervention. Bosniak and Croat leaders have often called on the OHR to act during disputes with one another, or between the state and RS.⁷⁶

In the past, High Representatives have found support in the international military presence, especially in tense standoffs with Croat hardliners in Herzegovina. Since 2007, that presence – fewer than 2,000 troops – has been too small to provide backup in any real confrontation.⁷⁷ When RS officials temporarily blocked OHR and NATO staff access to local state property registers in September 2009, for example, EUFOR did not react and was perceived, therefore, as weak.⁷⁸ The peacekeeping forces have little operational capacity and function largely as a psychological assurance of stability and a last-resort bridgehead for reinforcements in case of mass violence. EUFOR’s manpower is likely to decline even further in 2010, when several troop-contributing countries indicate they intend to unilaterally withdraw their contingents.⁷⁹

Even with stronger political determination, the OHR may find that, in the face of RS intransigence or threats of inter-communal violence, it has lost the ability to ob-

⁷⁵ The State Investigation and Protection Agency (SIPA) investigation of fraud in RS, which reportedly targets Milorad Dodik among others, remains open, and an international state prosecutor has reportedly given SIPA a deadline of 12 December 2009 for collection of evidence related to a major RS construction project. “Lukač dobio nalog za istragu dan prijete mandata [Lukač received the investigation order the day before his mandate expired]”, *Nezavisne novine*, 30 September 2009 (online). The article, which does not mention Dodik by name, notes that all international prosecutors’ mandates currently expire on 31 December 2009.

⁷⁶ For example, Adil Osmanović, a vice president of the SDA (and the Bosniak vice president of RS) called for the OHR to “establish the kind of capacity it had ... after the establishment of the Bonn powers, so that the process of establishing a functional state can be completed”. Rade Šegrt, “Adil Osmanović: OHR ne smije da popušta [The OHR must not back down]”, *Nezavisne novine*, 27 September 2009 (online); see also S. Rožajac, “Bošnjaci će od OHR-a tražiti da vrati odrednicu ‘bosanski’ [The Bosniaks will ask the OHR to restore the ‘Bosnian’ prefix]”, *Dnevni Avaz*, 26 October 2009 (online); and the appeals for OHR action cited in Crisis Group Europe Briefing N°54, *Bosnia: A Test of Political Maturity in Mostar*, 27 July 2009, and Crisis Group Report, *Bosnia’s Incomplete Transition*, op. cit.

⁷⁷ See Crisis Group Europe Report N°180, *Ensuring Bosnia’s Future: A New International Engagement Strategy*, 15 February 2007, pp. 4-5.

⁷⁸ Rade Šegrt, “NATO i OHR spriječeni da uđu u katastar [NATO and OHR prevented from entering the cadastral office]”, *Nezavisne novine*, 30 September 2009 (online).

⁷⁹ Crisis Group interview, European military official, Brussels, 10 September 2009.

⁷² The rest of this paragraph and the next is based on an October 2009 policy proposal by a former senior OHR official.

⁷³ Crisis Group interview, senior U.S. official, Washington DC, 8 November 2009.

⁷⁴ Crisis Group interview, former senior OHR official, November 2009.

tain consensual compliance with Bonn powers and that coercion would have to be used to enforce decisions. This need not involve heavily armed units; paramilitary units such as gendarmerie or Italy's Carabinieri, suitably equipped with helicopter and ground transport, could be sufficient; a permanent element might be deployed to the strategic Brčko District. But employing such external coercion would be a serious regression.

This option would require a plan for dealing with the likely RS response: withdrawal of its representatives from state institutions, possibly through the October 2010 elections or even thereafter. It is hard to see how the High Representative, even with a reinforced mandate and resources, could govern BiH during a protracted Serb boycott, without inflicting lasting damage to state institutions and to the country's legitimacy in the eyes of ordinary non-Bosniak citizens. Nevertheless, for many Bosniaks such extraordinary interventions remain highly desirable, even fourteen years after Dayton.

2. Reinforce the state

Since 2006, the PIC has stated that it wants to close the OHR and rely on the EU to help move BiH forward. The main argument for closure has been to allow "BiH to take responsibility for its own affairs".⁸⁰ The EU will not accept a membership application while BiH is still under OHR tutelage.⁸¹ More worryingly, the OHR has become part of the domestic political debate, with discussions about closure exacerbating tensions between the Bosnian parties rather than helping resolve them. Now that the OHR's authority has been formally challenged by the RS, and as the PIC has not reaffirmed its commitment to back the OHR and its September decisions,⁸² the Bonn powers can no longer be considered a useful tool to impose decisions against the will of any local party. Assuming it will not reinforce the OHR at its November 2009 meeting, the PIC should announce that the transition to a reinforced EUSR will begin on 1 January 2010 and decide to put in place alternative stabilising measures. After a reasonable transition it should

then close the OHR; transition should start by early 2010, so as to not occur in the midst of campaigns for the October 2010 nationwide elections.

The High Representative could then announce that he will step down in three to six months, thus giving time for an orderly transition. The PIC would not name a successor, but it might also note that closure of the OHR does not revoke Annex 10 of the Dayton Peace Agreement, which describes the High Representative's powers and responsibilities. Were BiH to fall into a truly dangerous crisis – extensive organised violence or state disintegration – the international community might respond by re-appointing a new High Representative with full powers. This would be a difficult step, requiring a high degree of consensus and, as a practical political matter, probably UN Security Council consideration.⁸³

Closing the OHR requires completion of the PIC's five objectives, most notably resolution of the state and defence property issue.⁸⁴ The Bosniak SDA, Serb SNSD and Croat HDZ parties accepted the substance of this reform in November 2008, but the talks have since collapsed.⁸⁵ Bosniak and Serb leaders could not agree on technical matters and have been stuck in an arcane and seemingly irreconcilable dispute over legal procedure ever since.⁸⁶ To enable the OHR's closure and after consulting the parties, the High Representative could impose a solution, on the basis of what has already been agreed

⁸⁰ PIC Steering Board, "Towards Ownership: From Peace Implementation to Euro-Atlantic Integration", 23 June 2006.

⁸¹ Advocates of the first option (reinforcing the OHR) tend to agree that as long as a strong OHR is steering BiH towards peace, security and reform, BiH cannot become an EU member.

⁸² During the last confrontation over Elektroprenos, for example, the reaction was much more blunt: the PIC warned that "any move to implement" RS plans to withdraw from the company would "be subject to appropriate measures". "Declaration by the Steering Board of the Peace Implementation Council", 31 October 2007; and "Statement by the ambassadors of the Peace Implementation Council's Steering Board", 12 September 2008.

⁸³ Annex 10 states that "the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions". This has not required Security Council action to appoint new High Representatives: Christian Schwarz-Schilling was named without a resolution; his successors Miroslav Lajčák and Valentin Inzko were appointed by the PIC in a step the UNSC "welcome[d] and agree[d] to", without reference to its Chapter 7 authority. UNSC Resolutions 1764, 29 June 2007 and 1869, 25 March 2009. BiH would be a part of this discussion, as it is scheduled to join the Security Council for a two-year term, beginning 1 January 2010.

⁸⁴ At its last meeting the PIC noted that while Brčko District's institutions were "functioning effectively and apparently permanently" the entities had failed to fulfill several requirements: "to resolve mutual debts, allow for change of entity citizenship for Brčko residents, [and] to regulate the supply of electricity". "Communiqué of the Steering Board of the Peace Implementation Council", 30 June 2009. As noted above, RS refused to honour the OHR decisions which resolved these issues; the RS objected to the use of the Bonn powers and to several details of the imposed laws, not to the requirements themselves.

⁸⁵ Crisis Group Report, *Bosnia's Incomplete Transition*, op. cit., p. 4; and Crisis Group interview, senior SDA leader, Sarajevo, 13 October 2009.

⁸⁶ Crisis Group interview, European Commission officials, Brussels, 22 October 2009.

in substance and taking into account the genuine procedural issues that have arisen.⁸⁷ This can be done in the months after his resignation has been announced, but before it has taken effect. Decisions issued in that limited period are clearly not the start of a campaign of interventions and are less likely to provoke resistance. The OHR should in this period also work out a compromise to the remaining, largely technical, disputes over his September 2009 decisions on the Brčko district.

The Security Council should re-authorise the EUFOR mission for one more year on 20 November 2009. While the mission does little beyond providing a sense of security, its legal powers are considerable and should not be ended until BiH has weathered the transition to a post-OHR world. The EUFOR commander has the right, under Annex 1A of Dayton, to “monitor and help ensure compliance by all Parties with this Annex”, to “help create secure conditions for ... other tasks associated with the peace settlement”, “to respond appropriately to deliberate violence” and “to observe, monitor, and inspect any Forces, facility or activity in Bosnia and Herzegovina that ... may have military capability”.⁸⁸

Arguably, EUFOR could act to prevent the unlikely occurrence of an RS breakaway attempt or an attempt to dissolve the RS, citing its duty to “ensure compliance” with Dayton. Its effectiveness, even without deployment of additional troops, would not be less than the High Representative’s Bonn powers. But EUFOR cannot easily be drawn, as the OHR has been, into Bosnia’s internal political disputes and its presence does not foster dependency.

In addition to EUFOR, NATO can provide at least a psychological, and if necessary, in support of EUFOR, a hard security guarantee.⁸⁹ Even though Bosnia-Herze-

govina does not have the institutional capacity to fully implement the NATO Individual Partnership Action Plan (IPAP) it signed in 2006,⁹⁰ the sense of security of all three parties in BiH could be reinforced with the Alliance’s renewed commitment to the country’s NATO membership. As one analyst argues, “NATO membership both protects Republika Srpska and prevents it from seceding”; the leader of a major Bosniak party believes that “NATO membership takes fear out of the equation”.⁹¹ Even though Serbs are the least interested in NATO membership among Bosnians, elites in Banja Luka have clearly expressed membership aspirations.⁹²

Analysts have advocated a Membership Action Plan (MAP) for BiH at the December NATO meeting of foreign ministers⁹³ and NATO’s more high-level direct support of BiH’s reform process.⁹⁴ One idea might be to condition the MAP in December to specific reforms, such as the minimalist Butmir package described above; alternatively full membership could be made conditional on such steps.⁹⁵ NATO and the EUSR would have to

thus still has peace enforcement authority from the Security Council; this should continue for at least another year.

⁹⁰Crisis Group interview, NATO official, Brussels, October 2009. BiH was invited to begin an intensified dialogue on the full range of issues relating to its NATO membership aspiration at the April 2008 Bucharest Summit.

⁹¹Edward P. Joseph, “Europe’s Balkan Failure”, *Foreign Policy*, May 2009 (online); Crisis Group email correspondence, Edward P. Joseph, 29 October 2009.

⁹²Dodik has said that although many Serbs harbour “fears and animosity” toward NATO, it was still “very important to continue making our way to NATO”, because it will “guarantee stability”, and that “insofar as we are moving toward [NATO], it signifies our global security on our territory, and this is a much bigger gain than the objections why we should not” join. Rade Šegrt, “Milorad Dodik: Razgovori u BiH mogući samo bez prisustva stranaca [Talks in BiH are only possible without the presence of foreigners]”, *Nezavisne novine*, 26 October 2009 (online).

⁹³Crisis Group interview, NATO official, Brussels, October 2009.

⁹⁴For example, recommending that the existing position of political adviser within the NATO mission in Sarajevo be filled by an ambassadorial-level U.S. diplomat as “senior civilian representative” to the NATO mission in Sarajevo. This senior civilian representative should have primary responsibility for defence and security sector reform and NATO/Partnership for Peace integration. “NATO-Western Balkans Support Act of 2009”, bill sponsored by Senator John Kerry, S-1559, www.govtrack.us/congress/billtext.xpd?bill=s111-1559.

⁹⁵The above bill, for example, calls on the U.S. Congress to endorse cooperation with BiH “to determine a realistic timetable and plan ... for Bosnia and Herzegovina to meet the criteria for NATO membership, with the goal of improving the functionality of the Government of Bosnia and Herzegovina through the achievement of the commonly accepted political, military, economic, and social standards”; and “declares

⁸⁷The dispute concerns the order in which state property is to be legally registered. The SDA insists that it must first all be registered to the state itself but offers to then transfer ownership of part of it to the entities in the same legal act. The SNSD fears this could somehow be a trick and insists that property destined for the entities be registered directly in their name. The OHR could adopt the SDA’s solution, with an added provision that any legal challenge to the transfer from state to entity – the SNSD fear – would void the initial registration as well.

⁸⁸General Framework Agreement for Peace, Annex 1a, Article VI (2), (3) and (6). EUFOR, as the legal successor to the Implementation Force (IFOR), enjoys the same powers and may use military force as needed in their implementation. UN Security Council Resolution 1845 (2008).

⁸⁹Although the NATO contingent in Bosnia is small and largely civilian, dedicated to training and searching for fugitives from justice, NATO is also a successor to IFOR and

cooperate closely, with NATO membership serving as a quicker (but less comprehensive) incentive to reform than EU membership. On the ground, NATO's presence could be reinforced after the conclusion of agreements with the BiH government on the use of military facilities for alliance training exercises.

Closing the OHR would clearly signal to the Bosnian parties that their apprenticeship is over, and responsibility for BiH rests primarily with them.⁹⁶ The authority to interpret the DPA would shift from the OHR to local institutions, particularly over time to the Constitutional Court, which would need to be accepted by the parties as the state-owned dispute resolution mechanism required to contribute to making BiH a functioning state.⁹⁷ Alternatively, the parties could agree to another interim arrangement for dispute resolution in advance of constitutional reform.

A new EUSR would not claim to have Bonn-type powers, especially to impose legislation. Rather he/she would facilitate political talks between the parties, as well as monitor, report and assist in bringing Bosnia's legislation into compliance with the *acquis communautaire*. This allows the EUSR to serve as a witness and/or referee for Bosnian political negotiations, a role especially important to Bosniak leaders.⁹⁸ The EU Stabilisation and Association (SAA) process, and to a much greater degree candidacy, are clearly going to require BiH to make substantial changes to its legislation and its constitution. For now Bosnian Serbs are less keen on EU membership than the Bosniaks and Croats and can still stall on reform, penalising the whole country. But in the longer term, especially as Serbia moves fast forward on the EU accession track, positions in RS may shift, with EU membership being recognised as clearly benefiting all BiH citizens alike.

that United States support for Bosnia and Herzegovina's membership should be contingent upon thorough achievement of these exacting requirements, and that NATO membership criteria must not be compromised".

⁹⁶ A European Council diplomat pointed out that the "OHR transition" is not from OHR to EUSR, but from OHR to the Bosnian authorities. Crisis Group interview, Brussels, 22 October 2009.

⁹⁷ The Constitutional Court has "exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina", and makes "final and binding" decisions. Constitution, Article VI (3), (4).

⁹⁸ Crisis Group interviews, senior Bosniak leader, Sarajevo, 25 March 2009; senior U.S. official, Washington DC, 8 November 2009.

A reinforced EUSR will only successfully encourage stability and reform in BiH if EU member states give the incumbent strong political backing, including allowing the EUSR to make policy decisions as well as policy recommendations that the Council and Commission will receive sympathetically. Thus, as recommended by Crisis Group in its March 2009 report, the EUSR should be a senior official double hatted as the head of the Delegation of the European Commission.⁹⁹ He/she should specifically have the mandate to:

- ❑ maintain close contact with and offer advice and facilitation to the Government of Bosnia and Herzegovina and its entities;
- ❑ monitor, report and advise on compliance with the Dayton Peace Agreement and the country's progress in the Stabilisation and Association Process;
- ❑ monitor, report on and assist in the process of bringing Bosnia's legislation into compliance with the EU's *acquis communautaire* and strengthening the capacity of Bosnian institutions to implement and enforce this legislation;
- ❑ disburse or restrict Instrument for Pre-accession Assistance funds – which should be significantly increased – as deemed appropriate to encourage progress toward European integration; and
- ❑ make recommendations, as may be required, regarding visa bans, asset freezes and suspension of the Stabilisation and Association Agreement (SAA).

In addition, the EU should grant its EUSR authority to find a party in breach of the DPA if necessary. In the event of such a finding, Brussels and the member states would then be obliged to eschew any contacts or actions with the guilty party that would encourage it in its breach and to work through the EUSR to persuade the party to return to the fold.

For the EU to serve as a real security guarantor, the EU Presidency should negotiate an agreement with BiH guaranteeing the Dayton Peace Agreement, pursuant to which the EU would specifically pledge that it will not recognise or accept any solution to the state's problems imposed on one or more of its constituent nations without consent; abolition of one or both entities or deprivation of their rights without consent; and an entity's uni-

⁹⁹ As with other European Security and Defence Policy (ESDP) missions, experienced third party nationals should also be invited to serve in the EUSR office. Some EU member states are sceptical of this arrangement, but in BiH, where the U.S., Turkey and Russia have played significant political and military roles for over a decade, including them would help build international community cohesion and diminish competition.

lateral withdrawal from the state or its institutions. To cement the EUSR's international legitimacy to intervene, the UN Security Council should welcome by resolution the EU's support for the maintenance of peace and stability in Bosnia and Herzegovina and invite the EUSR to report regularly to it.

V. CONCLUSION

Bosnia has made remarkable progress since the war. Even in the midst of the current bitter conflict, its lawmakers have adopted virtually all the laws required by the EU as a condition for visa-free travel. Some of these were controversial and were delayed by the RS's entity veto but eventually passed; indeed, BiH has caught up with and in some respects pulled ahead of its neighbours. Popular anxieties notwithstanding, the country is not at risk of armed conflict; as its widely respected Bosniak defence minister recently pointed out, "There is no capacity to provoke a war, or fuel to sustain [a war], either in Bosnia and Herzegovina or in our neighbourhood".¹⁰⁰

But serious conflict over the nature of the state and the role of the international community remain. The Bosniaks and Serbs, especially, disagree about what kind of international presence they want and whether they seek a centralised or decentralised state. The Serbs have now raised the stakes and defied the OHR, but this is very different from rejecting the state. The OHR is a legitimate authority but it is also provisional and not based on either democratic principles or the consent of the governed. The state is permanent, democratic and based on consent, however much it is contested and argued over. Bosnia cannot survive without general acceptance of the state.

The conflict over the future of the OHR should end now; the office should close and be replaced by a reinforced EUSR. A strengthened EUSR, backed by incentives of eventual EU and NATO integration, is better placed to deliver whatever may be missing in BiH's constitutional and governance jigsaw. If BiH cannot work in its present form, keeping the OHR open will not push its citizens toward reform and may sow enough discord to push reform out of reach. Defending the OHR's authority is not worth doing if it runs a high risk of eroding state legitimacy or estranging communities – Serbs, specifically – from the state.

BiH's legitimacy and stability do not rest on a foundation of patriotism or common identity but instead on a community of interest, reinforced by the absence of viable alternatives and a common fear of violent disintegration. RS's Serbs may resent the state, but BiH's long-term stagnation would eventually damage their fortunes too. Independence is not an option for the Serbs: it would mean isolation and a dramatic loss of their status and influence. Bosnia's disputes will only be resolved over time, as the state's growing ability to govern, represent its citizens and deliver services – starting with visa-free travel throughout Europe – strengthens its appeal. When the BiH government agrees on policies that improve the lives of its people in ways that the entity governments have failed to deliver, working together with civil society organizations, statebuilding will acquire the kind of popular support it needs to succeed.

Sarajevo/Brussels, 12 November 2009

¹⁰⁰“Cikotić: U BiH neće biti rata [Selmo Cikotić: There will not be war in BiH]”, *Dnevni Avaz*, 8 November 2009 (online).

APPENDIX A

MAP OF BOSNIA AND HERZEGOVINA



APPENDIX B

ABOUT THE INTERNATIONAL CRISIS GROUP

The International Crisis Group (Crisis Group) is an independent, non-profit, non-governmental organisation, with some 130 staff members on five continents, working through field-based analysis and high-level advocacy to prevent and resolve deadly conflict.

Crisis Group's approach is grounded in field research. Teams of political analysts are located within or close by countries at risk of outbreak, escalation or recurrence of violent conflict. Based on information and assessments from the field, it produces analytical reports containing practical recommendations targeted at key international decision-takers. Crisis Group also publishes *CrisisWatch*, a twelve-page monthly bulletin, providing a succinct regular update on the state of play in all the most significant situations of conflict or potential conflict around the world.

Crisis Group's reports and briefing papers are distributed widely by email and made available simultaneously on the website, www.crisisgroup.org. Crisis Group works closely with governments and those who influence them, including the media, to highlight its crisis analyses and to generate support for its policy prescriptions.

The Crisis Group Board – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring the reports and recommendations to the attention of senior policy-makers around the world. Crisis Group is co-chaired by the former European Commissioner for External Relations Christopher Patten and former U.S. Ambassador Thomas Pickering. Its President and Chief Executive since July 2009 has been Louise Arbour, former UN High Commissioner for Human Rights and Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

Crisis Group's international headquarters are in Brussels, with major advocacy offices in Washington DC (where it is based as a legal entity) and New York, a smaller one in London and liaison presences in Moscow and Beijing. The organisation currently operates nine regional offices (in Bishkek, Bogotá, Dakar, Islamabad, Istanbul, Jakarta, Nairobi, Pristina and Tbilisi) and has local field representation in eighteen additional locations (Abuja, Baku, Bangkok, Beirut, Cairo, Colombo, Damascus, Dili, Jerusalem, Kabul, Kathmandu, Kinshasa, Ouagadougou, Port-au-Prince, Pretoria, Sarajevo, Seoul and Tehran). Crisis Group currently covers some 60 areas of actual or potential conflict across four continents. In Africa, this includes Burundi, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Democratic

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