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### Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans

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# **Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans**

FLORIAN BIEBER

SINCE THE EARLY 2000S THE EU HAS EMERGED AS THE PRIMARY ACTOR in state building in the Western Balkans. Based on a dual strategy of state building and European integration, the EU has sought to replace other international organisations in the post-conflict reconstruction of the Western Balkans. The record of this experience has been mixed. This essay will discuss the dual approach of the EU and examine its application to Bosnia & Hercegovina (Bosna i Hercegovina, BiH), Serbia and Montenegro, and Kosovo. It argues that the EU's approach has relied strongly on the effect of conditionality as a tool of state building; however, as the case studies will demonstrate, the conditionality approach has been largely ineffective in regard to state building, in part due to the lack of commitment of political elites to EU integration and the persistence of status issues on the policy agenda. The essay will seek to examine the causes of this failure and what this means for future EU-driven state building in the Western Balkans and in other post-conflict regions.

Since the early 1990s, different international actors have promoted the reform and creation of states as a solution to the conflicts that erupted on the territory of the former Yugoslavia. In fact, one of the first of many failed peace plans was the 'Arrangements for a general settlement' proposed by the EC mediator for Yugoslavia, Lord Carrington in September 1991, which sought to create an association of independent republics (UN Secretary General 1991, pp. 29–45). Numerous subsequent proposals have been drafted for Croatia (Z4 plan), BiH (Cutileiro Plan, Vance–Owen Plan, Owen–Stoltenberg Plan, Contact Group plan), Kosovo (Rambouillet) and Macedonia (Ohrid Framework Agreement) (Bieber 2012). Some failed at the negotiation stage, while others have been implemented with varying degrees of success. A key feature of these plans has been the establishment of a particular form of state to accommodate competing claims: a minimalist state. Together with ending hostility, the structure of post-war governance has rightfully been the key concern of international mediators, but also of parties to the conflict. As the conflicts were rooted in disputes over governance and ethnic dominance, negotiating the shape and

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structure of the state in question was the obvious and only alternative to redrawing borders, a distinctly more problematic option (Jenne 2009, pp. 273–89). Minimalist states, as I will discuss later, need to be distinguished from weak or failed states. The latter categories do not presuppose international state-building efforts and have become synonymous with the failure of domestic (or international) state building and they either risk causing conflict or coexist with a low level conflict. Minimalist states, on the other hand, constitute an effort to address the sources of conflict and state weakness by fostering state structures which fall short of the set of functions most states are widely expected to carry out, but by doing so might be able to endure. This text will explore the tension between these minimalist states in the Western Balkans and the requirements of EU integration, which has greatly increased the requirements from states in the region.

In the Western Balkans, we can identify three examples of such minimalist states that have come into existence since 1995. BiH was recreated as a state by the Dayton Peace Agreement in November 1995. The second state was rather short lived and came about without a prior violent conflict: the State Union of Serbia and Montenegro (Srbija i Crna Gora, SCG) was formed in 2003 as a successor to the Federal Republic of Yugoslavia and came to an end only three years later after the successful referendum on independence in Montenegro in May 2006. Finally, Kosovo achieved its independence in February 2008 following the failed effort by Martti Ahtisaari to negotiate a final settlement between Serbia and Kosovo. While other countries of the Western Balkans share unconsolidated statehood with EU conditionality, such as Macedonia and Albania, as well as, to a lesser degree, Serbia and Montenegro after the dissolution of the common state, they will not be considered here. They do not qualify similarly as minimalist states and EU engagement has been directed more towards institution building and accession and less towards state building.

Both BiH and Serbia and Montenegro have been described as ‘confederations’, ‘federations’, ‘power-sharing systems’ and other forms of government. Kosovo, on the other hand, has often been labelled a ‘failed’, weak or unfinished state. All three share what can be described as a credible commitment problem: the state is contested and not based on a consensual arrangement (Zahar 2009, p. 117).

Here, we will consider these three cases as ‘minimalist states’ which barely fulfil functions generally associated with states. In doing so, this essay will seek to resolve an apparent contradiction: if the European Union has become the prime ‘state builder’ in the Western Balkans, and EU integration is a widely shared goal of populations and elites, why has state building been only modestly successful? Serbia and Montenegro dissolved after only three years, BiH is widely viewed to have entered a profound political crisis since 2006, and Kosovo has been unable to consolidate its independence in terms of international recognition and domestic support. In tracing the different trajectories of the three cases, the essay will examine EU state-building strategies, identify the weaknesses of the EU in promoting effective state structures, and seek to explain these difficulties by the inherent tensions between building minimal states—post-conflict state building—and building future EU member states—member-state building. In doing so, the essay seeks to shed light on the difficulties the EU has encountered in state building, in particular in the Western Balkans where enlargement and conflict prevention policies converge and often produce conflicting results.

Thus, in exploring the EU's role as a state builder there is a need to identify this tension between accession conditionality and efforts to end political conflict in its neighbourhood.

This text will thus argue that the European Union has not been an effective state builder. This might appear surprising at first. Unlike state building as pursued by the UN or the United States in post-conflict states elsewhere in the world, the EU is able to offer states considerably more, namely full membership. This failure is rooted in the inability to transfer accession conditionality to state building and in the disjointed and haphazard manner in which state building has been pursued by the EU. The challenge of building functional states is at the heart of the difficulty of EU integration of the Western Balkans. The 'stateness' problem—the contested nature of the borders, functions and structure of states (Linz & Stepan 1996, p. 29)—is arguably the biggest obstacle to EU integration. Albania, BiH, Kosovo, Macedonia and Serbia face varying difficulties on the road to EU membership, but share weak-state attributes and strong formal and informal challengers to the symbolic and real state power. By shifting the attention from power sharing and autonomy to the minimalist state, this text argues that it is less the institutions of the state, but rather the underpinning assumptions about the state and its contestation which shape the evolution (and failure) of post-conflict states.

The significance of focusing on the nature of the state in the Western Balkans is compounded by the EU integration process. The EU has a complex relationship towards statehood. It pools the sovereignty of member states and requires its members to accept EU decision-making, yet at the same time lacks the key functions conventionally associated with states. As Robert Keohane notes, 'Europe, the cradle of external and unitary sovereignty, now serves as the model of co-operative mutual interference' (2002, p. 749). At the same time, the EU has high requirements of state capacity to transpose EU law, particularly as this process remains challenging even to old member states (Kaeding 2006, pp. 229–53). The state and sovereignty paradox of the EU thus stands in stark contrast with post-conflict states, which have a high requirement of symbolic external sovereignty and limited or no capacity. The challenge of EU state building in the Western Balkans is thus to reconcile the EU membership requirements with the reality of minimalist states.

*Minimalist states: the seeds of future EU member states?*

Kosovo, BiH and Serbia and Montenegro were awkward states at birth. BiH's post-war institutional structure was negotiated at Dayton with the legal advice of US State Department lawyers. The State Union of Serbia and Montenegro was established by the Belgrade Agreement, which was the result of intense negotiations by the EU High Representative for the Common Foreign and Security Policy, Javier Solana. Kosovo's constitution was drafted by the team of the UN mediator Martti Ahtisaari to provide for an independent Kosovo which would, so it was hoped, receive international recognition, including by Serbia. The origin of the three states and their institutional framework is considerably different: while Dayton was negotiated under intense US pressure after three and a half years of war with over 100,000 victims, the Belgrade Agreement was a form of conflict prevention and was intended to prevent premature

discussions on the status of Kosovo. While BiH was reconstituted at Dayton with the intent to create a functional state, Serbia and Montenegro was created with an expiration date, as both members were given the right to hold a referendum on independence within three years. Kosovo became a *de facto* state in 1999 after UN resolution 1244 placed it under international administration and removed it from Serbian control (UN Sec. Council 1999). The declaration of independence in 2008 led to partial international recognition (by 75 countries within three years), but Kosovo's independence remains contested both by a significant share of the Serb community and internationally.<sup>1</sup>

Despite these differences, all three state projects share key features. First, they all constitute minimalist states and secondly, they all were, or have become, projects driven primarily by the European Union.<sup>2</sup>

Minimalist states can be defined by three criteria: the legitimacy of the state; the scope of the institutions of the state; and the strength of state functions. Legitimacy can be determined by the external legitimacy, measured in terms of international recognition and relations both with neighbouring countries and key international actors, be they major powers or international organisations. Domestic legitimacy derives from support for the state as such, and key institutions of the state, such as government, parliament and the president (Paris & Sisk 2009, pp. 14–15). In terms of the other two criteria, Francis Fukuyama notes that state strength refers to the ability of states to enforce their policies. Here both formal and informal constraints need to be considered. The scope of the state, on the other hand, describes the 'ambition' of the state in terms of the fields in which it engages (Fukuyama 2004, pp. 21–22). Minimalist states thus firmly fall into the category of weak states, both in terms of strength and scope. Unlike failed states, however, minimalist states hold minimal functions and do not have the constitutional ambition to exercise broader functions or possess greater enforcement mechanisms.<sup>3</sup>

The constitutional frameworks of BiH and Serbia and Montenegro thus institutionalised the stateness problem arising from secessionist units. Kosovo differs slightly from the other two cases in as far as its formal structure lacks the radical decentralisation of the others, but it otherwise resembles the features of a minimalist state. As the existence of the state as such was challenged prior to the agreements, a key element of these agreements was not only the governance of the state (for example, power sharing and institutional building) or the territorial organisation (for example, confederation or federation), but also the legitimacy, scope and strength of the state. A minimalist state is thus a state with limited legitimacy and a weak scope and strength of the state. Such a minimalist state might look a lot like a night-watchman state as promoted by classic liberalism and libertarianism (Hobson 2000, pp. 66–73);

<sup>1</sup>The agreement clearly stipulated the succession in the case of state dissolution, thus making Serbia the successor of SCG and FRY and transferring the commitment to autonomy of Kosovo within FRY to Serbia (Belgrade Agreement 2002).

<sup>2</sup>At first, state building in both Bosnia and Kosovo was primarily driven by the US. Gradually, the EU has taken over in both countries.

<sup>3</sup>As Susan Woodward argues, the countries of South-Eastern Europe do not qualify as fragile or failed states by any measure as their rankings, according to different measures of state fragility, do not place the countries into a particularly vulnerable category (Woodward 2009, pp. 160–62).

however, the minimalist state is not a result of ideological support for a state with minimal functions, but the consequence of a lack of consensus on endowing the state with greater competences. Putting it differently, the contestation is not over the services that citizens expect from state institutions, but from which state institutions these should be provided and whether the state in question should exist at all.<sup>4</sup>

In terms of the scope of the state, both BiH and Serbia and Montenegro have held limited competences, generally limited to foreign policy and basic human-rights policies. Serbia and Montenegro held more competences in the field of defence (at least prior to the creation of the Bosnian army and ministry of defence in 2004), while BiH has been able to establish a single currency. Neither state has achieved a unified economic space. The scope of the state in BiH has expanded considerably, especially during the more concerted state-building period of 1999–2004, including in relation to indirect taxation (through VAT), border controls, security and the monitoring of electronic media.

This expansion of state scope was exclusively the result of international intervention. Even if a number of these reforms and laws aimed at expanding the minimalist state were passed by parliament, they would not have been relocated from the two entities (the Bosniak–Croat dominated Federation and the Serb Republic (Republika Srpska, RS)) without such external intervention. Subsequently, this widened state scope has come under increasing scrutiny, culminating in a decision in May 2009 by the National Assembly of the RS declaring that 68 competences had been shifted from entity to state and only in three cases had the entity parliament been consulted, thus the National Assembly considered the transfer illegal (Narodna Skupština 2009). In Serbia and Montenegro, no such transfer ever took place, as there were no international organisations involved in ensuring the functioning of the union, beyond Javier Solana's role as the state's midwife for the 2002 Belgrade Agreement. As a result, the limited scope of the common state was weakened further in practice, as neither member state, in particular Montenegro, proved willing to transfer competences to the State Union. Montenegro thus maintained its own ministry of foreign affairs and customs regime (Bieber 2004). In Kosovo, the scope of the state is greater than either BiH or Serbia and Montenegro. The formal constitutional scope of the state is not particularly weak and differs significantly from the other two cases. While the Ahtisaari plan introduced decentralisation as a means to accommodate the Serb minority, Kosovo lacks any formal territorial autonomy. Thus, legislation and most state competences are clearly located in central institutions.<sup>5</sup>

More significant is the limited strength of the state in all three cases. The ability of Kosovo, BiH and Serbia and Montenegro to enforce their competences has been

<sup>4</sup>Ken Menkhaus aptly observed in the case of Somalia that a minimalist state might be the only viable form of state-building yet the expectations of elites (and probably also of the population) is of a more 'maximalist' state, able to provide benefits and services (and patronage) (Menkhaus 2006/2007, p. 95).

<sup>5</sup>Sherill Stroschein argues that the state structures proposed in the Ahtisaari plan constitute a form of 'dispersed control model' where the state is weakened in a non-hierarchical manner by overlapping structures of power. I would argue that institutional reality after independence and the lack of control of the state over parts of its territory is closer to the model than the institutions drafted in the Ahtisaari plan (Stroschein 2008).

severely constrained. With no state-level tax-raising capacities (in the case of BiH, until the introduction of VAT in 2006),<sup>6</sup> limited security structures, a clear dominance of the sub-state entities, and weak judicial recourse for the non-enforcement of decisions, the state institutions have often been unable to enforce decisions. Furthermore, central state institutions in all states have had limited decision-making capacities, with the sub-state units able to paralyse state-level decisions. The parliament of the State Union, for example, met only irregularly and was very passive, approving only 20 acts during a two-year period from 2003 to 2005 (European Commission 2005b, p. 6). All three states have seen decision making blocked due to extensive veto mechanisms built into the institutional structure. The extensive use of veto rights has been a feature of all three systems. In BiH, as a result of the mechanism of 'entity voting', only a third of MPs from each entity is needed to block the passing of laws. Over a period from May 2008 to December 2009, Brigitte Kunrath found that over 30% of all laws were blocked by this veto mechanism, mostly by MPs from the RS in the lower chamber of parliament. An additional 17% of laws were blocked by the higher chamber (Kunrath 2010, pp. 19–46). The inability of the state to take decisions, often deliberately encouraged by veto players, furthers informal institutional alternatives at lower levels of government. In Kosovo, the veto mechanisms are too limited for Serbs or other minorities to block the decision-making process (Weller 2009, p. 254; Lantschner 2008, pp. 475–76). As a result, the lack of state strength does not derive from the inability of the state to take decisions, but from its incomplete control of the state territory. In particular, the limited state strength is a function of the rejection of the state by many Kosovo Serbs. The state thus lacks authority in Northern Kosovo and, in a number of southern Serb populated regions, the strength of the state is curtailed. State weakness extends also to other minorities. The Gorani minority in the southernmost tip of Kosovo has partly opted to educate its children in Serb schools, rather than in Kosovan schools. Beyond the rejection of this particular state and its resulting weakness, the state is also limited by a low-level state capacity as a result of the limited tradition of statehood and a historically grounded scepticism towards the state by its population.

A third dimension that has characterised minimalist states under consideration here is their contested nature. The legitimacy of all three states has been weak throughout their existence. Both BiH and Serbia and Montenegro enjoyed widespread international legitimacy, while Kosovo has been struggling to gather sufficient support to join major international organisations and to have good bilateral relations with its neighbours. More importantly, all three have suffered from weak domestic legitimacy. In BiH, a strong majority of Serbs in the Republika Srpska support independence, whereas few Serbs support Kosovo's independence and over 80% in the Albanian majority areas of Kosovo support joining Albania (Gallup Balkan Monitor 2010). Similarly the State Union was unable to secure legitimacy over alternative state projects during its three-year existence, even though its support was greater than for either Kosovo or BiH. In Montenegro, despite some fluctuation, a majority supported independence rather than a joint state throughout the duration of the State Union

<sup>6</sup>In Bosnia, the state-level VAT has also come under pressure by the government of Republika Srpska (Parish 2011).

(CEDEM 2006a, p. 13). While the population in Serbia had a greater degree of commitment to the common state, even here only a narrow majority supported a union with Montenegro by 2005 (CeSID 2005, p. 25).

The contested nature of these states, as reflected in the scepticism of a significant share of citizens, was also visible in the symbolic sphere. For example, in BiH the contested nature of state symbols included the absence of lyrics to the internationally imposed anthem, and the Bosnian state flag, which was also internationally imposed, is not widely used anywhere outside of predominantly Bosniak-populated regions. Elsewhere in BiH the state flag is less often used than flags associated with the entities or ethnic groups, be they the flags of the Croat wartime statelet of Herceg Bosna or the Republika Srpska flag. Similarly, the State Union of Serbia and Montenegro never adopted a flag, nor could the parties agree on a national anthem (although a medley of the two states anthems was under discussion). In Kosovo, the state flag has to compete with both the Serb and Albanian flags, which respectively, often hold great symbolic weight.

The minimalist states of Serbia and Montenegro, Kosovo and BiH have either been created with the substantial input of the European Union, or at least the EU has evolved into the role of the prime international backer. In the case of Serbia and Montenegro, the EU's importance is evidenced by the role played by Javier Solana, EU High Representative for the Common Foreign and Security Policy (CFSP), as mediator between the two republics in early 2002, which resulted in the Belgrade Agreement, signed on 14 March 2002. As a consequence of his strong involvement, the State Union rapidly acquired the nickname 'Solania'. Unlike in the case of BiH, international mediation here was restricted to a limited agreement, which only briefly outlined the features of a common state, whereas the constitutional framework establishing the state was left to the negotiations between the two republics. In fact, the State Union was not established for another year, as the discussions over details dragged on (Noucheva & Huysseue 2004, pp. 10–11).

BiH, as established at Dayton, was arguably originally a product of US intervention and 'state-craft' rather than EU state-building; however, by the tenth anniversary of the Dayton Peace Accords in 1995, state building in BiH had become largely an EU affair. After the EU took over the police and military mission from the UN and NATO/SFOR, respectively, it also became the primary political actor embodied by the double-hatting<sup>7</sup> of the post of High Representative and Special Representative (EUSR) of the EU since 2002. The two offices were divided once more in 2001 and now the head of the European External Action Service (established by the Lisbon Treaty of the European Union), formerly the European Commission Delegation, and EUSR are combined.

In Kosovo, the constitution was drafted as the country was preparing for independence with active EU and US involvement (Weller 2009, p. 247). While the EU member states were unable to take a unified position regarding Kosovo's independence, the EU sought to present a unified position in Kosovo, especially with regard to EU involvement in the post-independence state-building process, including the EU rule of law mission, EULEX, and the office overseeing the implementation of

<sup>7</sup>This term is used in the context of the EU to designate a person performing two roles.



the unilaterally adopted Ahtisaari peace plan, the International Civil Office. This office is, following the Bosnian example, double-hatted with the EU Special Representative.

In addition to an extensive EU involvement in the state-building project in all three cases, the three countries under discussion aspired to EU membership. Citizens in the region strongly support EU integration. In 2006, between 60.8% of citizens in Serbia and 86.6% in Kosovo considered the EU 'a good thing'. This level of support has declined since then in Serbia, but it has remained stable or even increased elsewhere (Gallup Balkan Monitor 2010). The offer of EU membership has also been made on behalf of the EU with the beginning of the SAA process in 2000 and it was reiterated in 2003 at the Thessalonica Summit. As a consequence, the EU has become the main international organisation in terms of assistance and conditionality more broadly.<sup>8</sup> The Western Balkans, BiH, Serbia and Montenegro in particular, have thus become an area of EU state-building through accession in the form of the EU Common Foreign and Security Policy (CFSP).

Confronted with minimalist states, the EU has thus become the key 'state builder' in the Western Balkans. The EU has been occupied with securing the implementation of agreements and constitutions which established these minimal states, and promoting a higher degree of integration of the states.

#### *The limitations of conditionality for state building*

The fundamental premise of external state building, including the cases under discussion here, is the inability or lack of capacity of domestic state building. In Kosovo, BiH and in Serbia and Montenegro, elites are often not generally adverse to state building as such,<sup>9</sup> but would rather invest in the promotion of sub-state units, which essentially constitute alternative state projects. Furthermore, the line between the lack of will and the lack of capacity is often blurred.

In response, three types of external state building have been pursued by external actors, including the EU. The first type of state building consists of direct intervention in the structure and construction of the state, through the creation of new institutions, the imposition of laws and other acts which are conventionally reserved for domestic actors. This form of state building has been characteristic of external intervention in BiH and Kosovo (and further afield in Iraq or East Timor).

The second form of external state building is conducted through coercion and close monitoring of the state builders. Here, international actors do not impose laws themselves, but pressure domestic actors to pursue a particular state-building agenda which is internationally defined. Both BiH and Kosovo have moved increasingly towards this type of state building in recent years.

Finally, the third form of state building could be called 'long-distance' state building. Here, conditionality as a mechanism of the EU's Eastern enlargement is

<sup>8</sup>NATO and the Council of Europe have also imposed pre-accession and post-accession conditions on the Western Balkans. In addition, the USA imposed conditions with regard to financial assistance, significant in the 1990s in Bosnia, and later in Serbia.

<sup>9</sup>There is, of course, a broader question to the commitment of parts of the elite to any form of institution building.

transferred to state-building projects. The logic of conditionality suggests that elites will transform the institutions of their country if rewarded by the EU with membership. Considering that the vast majority of the populations of the Western Balkans share with their Central and East European neighbours the desire to join the EU, the logic of transferring the experience of conditionality to countries like Kosovo, BiH and Serbia and Montenegro appears logical. The failure of the EU to keep Serbia and Montenegro together, despite a clear commitment of the two states to EU membership, suggests that state building through conditionality is by no means as successful as conditionality in the context of previous EU enlargement, or as more direct state building.<sup>10</sup>

Two main reasons why state building has shifted from direct intervention to conditionality are the incompatibility of direct imposition with democratic governance and rule of law (Venice Commission 2005), and the legitimacy and commitment crisis of long-term direct intervention. The legitimacy of external intervention has been particularly challenging in BiH and Kosovo. In Kosovo, the main challenger has been the non-governmental group *Vetëvendosje* (Self-Determination), which transformed itself into a political party ahead of the December 2010 parliamentary elections and became the third largest party with 12.69% of the vote. The party demands that the 'international presence in Kosova, established according to the principles and framework of colonization, nonrecognition and disdain for the country's sovereignty etc., should remove itself from the territory of the state of Kosova' (Vetëvendosje 2010) Whereas *Vetëvendosje* argues for a state building of Kosovo as an Albanian nation state and without international intervention, the legitimacy of external state-building in BiH has been challenged primarily by the Republika Srpska in opposition to Bosnian state-building. Here, the alternative is a sub-national state-building project. Parties in the RS have evoked less the principle of self-determination, but rather the argument that external intervention is inherently undemocratic.<sup>11</sup> The legitimacy of direct intervention, however, has not only been challenged by nationalist elites in the countries, but also by scholars and policy makers.<sup>12</sup>

When exploring the role of the EU in state building, one needs to distinguish between institution building and state building. Institution building has often been at the centre of EU conditionality in Central and Eastern Europe. State building similarly includes institution building, as effective institutions are essential requirements for functional states. Nevertheless, state building extends beyond a mere collection of institution-building measures: it focuses on core governing functions, and thus directly impacts on the sovereignty of a state. State building thus extends beyond institution building in terms of scope, and as it also focuses on the links between institutions and the conceptual understanding of the state, it is broader than institution building and often less easily definable.

<sup>10</sup>Arguably EU state building also failed in 2004 when it came to the efforts to unify Cyprus; however, the failure of the EU and the UN was largely due to the fact that EU accession was not conditioned on the Greek Cypriots voting in favour of the Annan Plan.

<sup>11</sup>*Nezavisne novine*, 24 February 2011.

<sup>12</sup>This has been argued particularly by the European Stability Initiative; see their reports available at: [www.esiweb.org](http://www.esiweb.org), accessed 11 July 2011.

Certain forms of conditionality can also undermine the minimalist state. A prime example of such centripetal conditions has been the EU requirement for cooperation with the ICTY. On 3 May 2006, a mere two weeks before the referendum on independence in Montenegro, the EU suspended negotiations with Serbia and Montenegro on the Stabilisation and Association Agreement.<sup>13</sup> With clear support for EU membership (81.5%) and moderate support for cooperation with the ICTY (54.8%) in Montenegro, the suspension of talks certainly buoyed supporters of Montenegrin independence. In the run-up to the referendum, high-ranking Montenegrin officials noted that the State Union delayed the EU integration of Montenegro and made it a hostage of Serbia's political difficulties.<sup>14</sup> In BiH the situation is reversed; the entity does not always comply with the ICTY and the main challenger to state authority is the same (Republika Srpska). Because the challenger is responsible for the failure of compliance with ICTY conditionality, it cannot undermine the state. This dynamic mirrors the failure of regional cooperation in Central and Eastern Europe in the process of EU accession, as countries or regions fear being disadvantaged in the EU integration process by the non-compliance of others. As a result, conditions can undermine minimalist states where the failure of the state remains an option.

If, on the other hand, the conditions are specifically designed to support the construction of a state, why should elites that are sceptical of the state comply? The emerging literature on conditionality has focused extensively on the broad question of elite compliance. Some authors have focused on the material benefits for elites in complying (Vachudova 2001), while others focus on the symbolic rewards for elites (Schimmelfennig & Sedelmeier 2005a, pp. 669–87). As Schimmelfennig and Sedelmeier have argued, the external rewards (such as membership and recognition) help elites to overcome domestic costs. This 'external incentives model' has empirical validity for Central and Eastern Europe (Schimmelfennig & Sedelmeier 2005b), but raises a number of questions in the case of the Western Balkans.

First, conditionality for Serbia and Montenegro and BiH does not only apply to EU accession itself, but to the many previous steps towards EU integration. Thus in BiH, for example, there were conditions for the beginning of SAA negotiations (the 'roadmap' 2000), the evaluation and expansion of conditions prior to SAA negotiations laid out in the EC feasibility study (2003), and finally the conditions laid out for the signing of the SAA after the conclusion of its technical negotiations. In addition, both BiH and Serbia and Montenegro have been subject to conditions by other organisations, such as NATO's Partnership for Peace programme, the post-accession conditions of the Council of Europe and cooperation with the ICTY. The plethora of conditions, all connected to governance and rule of law, are all interlinked, yet distinct and evolving, reducing the incentives for compliance. Furthermore, they offer limited rewards. As new and different conditions emerge (such as police reform) there is a sense of an open-ended process, which might be called 'pre-accession

<sup>13</sup>See Marlene Spoerri's discussion in this collection.

<sup>14</sup>The Prime Minister of Montenegro, Milo Đukanović, for example, noted on 7 May 2006 that 'Montenegro is in the position of a hostage and has to suffer the consequences for a situation it did not create' (*Pobjeda*, 8 May 2006).

conditionality'. In Kosovo, conditionality has been entirely irrelevant as an EU state-building tool. As the EU does not offer a clear membership perspective to Kosovo, based on the opposition of some members to Kosovo's independence, it lacks the leverage to reward compliance, and delays in the EU accession process cannot be attributed to Kosovo not fulfilling EU conditions. The gap between Kosovo and the other cases was apparent in the context of EU visa liberalisation. The EU offered lifting visa requirements for the countries of the Western Balkans if they engaged in a number of reforms, including border controls, passports and asylum laws. As Kosovo was not offered this prospect, the incentives for its elites to engage in such reforms did not exist.

The most extensive experience with EU state-building conditionality has been in relation to BiH, as the conditionality with regard to Serbia and Montenegro was short lived (European Commission 2005b) and in Kosovo, so far, non-existent.

As a brief discussion of EU conditionality in BiH will show, there is no clear list of state-building conditions which the country has to fulfil in order to progress towards EU membership.<sup>15</sup> The High Representative and EU Special Representative for BiH from 2007 to 2009, Miroslav Lajčák, noted that

we have to be pragmatic and focus on what is achievable at any given time. At the same time, we must tell political leaders in BiH very clearly what is required at each stage of the EU integration process. Conditions must be met and they should primarily act as a motivating factor.<sup>16</sup>

The problem of state-building conditionality is twofold: first, the EU lacks rules in the sphere of state building and has struggled to impose these and other conditions clearly (Noucheva 2007, p. 9); and second, the EU remains divided in regard to state building between different Union institutions and member states.<sup>17</sup>

The first obstacle to EU state building in the region has been the absence of clear criteria. The *acquis communautaire* is weak on the nature of the state that is required and the Copenhagen Criteria focus on democracy, market economy and human rights, but provide little guidance on the nature of the state. As Schweltnus (2005, p. 58) outlined in a study of non-discrimination conditionality, the effectiveness of conditionality is severely impaired if the EU lacks clear rules in the policy area and if clear conditions are absent.

The closest document to a list of EU conditions for state building is the European Partnership document. It contains a general list of conditions, including some which could be considered specific to state building. The short-term conditions outlined in the document are police reform, cooperation with the ICTY, reform of the public administration, the creation of a single economic space and improvements in human-rights protection. Among the more detailed political criteria, only a few could be considered relevant for state building. Here, the European Partnership document calls

<sup>15</sup>See the essay by Gülnur Aybet and Florian Bieber in this collection for a more detailed discussion.

<sup>16</sup>Lajčák: 'Reward BiH in Line with Progress on Reforms', *OHR/EUSR*, 29 March 2008, available at: [http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content\\_id=41510](http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=41510), accessed 11 July 2011.

<sup>17</sup>This has been most pronounced in the field of police reform, where the EU has insisted on a particular outcome which is not a reflection of any EU policy or even a shared EU member state pattern.

for the increased efficiency of the Parliamentary Assembly, institutionalised coordination mechanisms between the state and the entities, and changes to the constitution and electoral system to ensure that members of the presidency and of the House of People do not have to originate from the three constituent peoples only (Council of the EU 2008). These conditions hardly qualify as a developed state-building agenda. This impression is compounded by the feasibility study that the Commission issued in 2003. It notes the problems of BiH, but at the same time suggests that the 'constitution is no insuperable obstacle to reform or to European integration' (European Commission 2003). Near the end, the study identifies a list of priorities which form key EU conditions with regard to state building. First, it incorporates other conditions, namely those deriving from the Dayton Peace Agreement itself, as well as Council of Europe post-accession conditions and cooperation with the ICTY. Second, in terms of governance, the report calls for making new state-level institutions and ministries functional (for example the Ministry of Defence) and increasing the effectiveness of government and parliament. Other relevant requirements include the reform of the public administration and the judiciary.

The criteria set out the conditions for the beginning of negotiations on the Stabilisation and Association Agreement. Negotiations began in November 2005, after the European Commission deemed progress in BiH sufficient (European Commission 2005c), and were completed in December 2006. The signing of the agreement was delayed until BiH fulfilled four conditions: police reform, cooperation with the ICTY, public broadcasting and public administration reform (European Commission 2007, p. 53). While these EU conditions suggest that BiH would not require a constitutional reform to advance towards EU accession, other international conditions appear to require constitutional reform.

In addition to the EU state-building agenda, the Office of the High Representative (OHR) pursued its own state-building project contained in the Mission Implementation Plan (MIP) and the OHR work plan. This instrument, introduced in 2003, defined the tasks for the OHR and thus set out the main obstacles towards ending the OHR mandate in BiH. It also informed the decisions of the Peace Implementation Council (PIC), which is the highest body overseeing the peace process in BiH and the institution that can end the mandate of the HR. Contrary to the EC's 2003 assessment, the PIC Steering Board noted in February 2008 that 'constitutional reform will be necessary in order to equip BiH to meet the requirements of a modern European state' (PIC 2008). Specifically, the PIC has set five requirements on the basis of the OHR's plans in order to begin the transition in BiH which would end the mandate of the HR. These requirements constitute a more modest state-building agenda and include the definition of property (including defence property) between state and entities, cantons and municipalities, the completion of the Brčko award, fiscal sustainability and advances in the rule of law.<sup>18</sup> Formally, then, constitutional reform is not a condition for the end of the OHR's mandate in BiH. Besides the signing of the SAA, one

<sup>18</sup>The municipality of Brčko was not allocated to either entity at the Dayton peace negotiations. In an international arbitration decision in 1999, Brčko was established as a district separate from the two entities.

additional condition of the PIC Steering Board, however, requires ‘a positive assessment of the situation in BiH by the PIC SB based on full compliance with the Dayton Peace Agreement’ (PIC 2008). This raises the possibility of further, yet undefined, state-building conditions. The effort of the EU, jointly with the United States, to broker constitutional reforms in BiH through the so-called Butmir process in 2009 suggests that while constitutional reform does not constitute a formal requirement for EU accession, it is viewed by EU actors as necessary. Despite the insistence that some constitutional reforms are required by the EU, it remains unclear however what changes are essential for further progress towards EU membership.<sup>19</sup> In this process we have seen a conflation of EU conditions—which do not clearly list constitutional reform—with EU support and insistence on constitutional reform of an undefined scope. The only other ‘state-building’ guidelines that outline the institutional set up of future member states are found in an unofficial working paper ‘Guide to the Main Administrative Structures Required for Implementing the Acquis’ (European Commission 2005a); however, this document is only given to countries once they enter membership negotiations, rather than during the pre-accession phase. Furthermore, the guide is generic; it is applicable to all member states and does not provide recommendations or take into account the particular challenges of minimalist states.

This lack of clarity derives from the fact that the EU gives little guidance as to what kind of states can join the EU. Beyond the aforementioned capacity to transpose EU laws and standards associated with democracy and human rights, a great range is conceivable. This, of course, reflects the fact that the current member states vary greatly in their state organisation, from highly decentralised federal states to unitary states. This in itself does not fully explain the lack of clarity of the EU in terms of state models. When it comes to human and minority rights, for example, the EU has clearly insisted on a narrower scope of state policies and higher standards than the entire variety among its member states. Although Greece and France could become members without recognising minorities, this was not an approach the EU was willing to accept during accession negotiations from future member states (Johns 2003). Unlike minority rights, state building is not only hard to measure in annual progress, but it is also new to the EU, and the three case studies here are the first examples where the EU has found itself directly confronted with the challenge of state building.

In addition, the complexity of the international presence and of the EU obscures any clear state-building conditionality. The different emphases and the declarations by the EUSR, OHR, PIC and EC delegation reduce the effectiveness of conditionality. The resulting cacophony is compounded by the contradictory positions of the member states. Lukewarm support for particular conditions has thus weakened the effectiveness of the EU. A particular problem in the case of BiH has been the parallel processes of reducing direct international intervention (for example, the closing of the OHR) and engagement with the EU (for example, expanding its accession role). While

<sup>19</sup>The main focus since December 2009 has been the constitutional reform to accommodate the ruling of the European Court of Human Rights in the *Sejdić-Finci* case that found the constitution violating human rights of communities excluded from high offices on the basis of their ethnicity (Milanović 2010).

the former might be a reward for some political actors, others have sought continued external intervention, and have thus objected to the closing of the OHR.

*Measuring the success of state building*

Considering the two minimalist states under discussion raises a larger question of what constitutes successful state building. This question cannot be satisfactorily answered simply by examining the formal establishment of the state; neither can the duration of the state over a certain period of time be a measure of success in itself.

Minimalist states are, arguably, unfinished states rather than permanent and enduring state structures. Unfinished here does not imply that the state as such is meant to disappear but rather that the institutional set up and state structure are not permanent. BiH and Serbia and Montenegro emerged from conflict management projects—at Dayton BiH was established to end the war; the State Union was created to prevent a potential conflict from emerging, even if such a conflict never appeared probable. Kosovo differs in as much as the constitution and the Ahtisaari plan, which have set the framework of the state, were intended to provide for the independence of Kosovo; however, the Ahtisaari plan did not receive consent from Serbia and the state failed to achieve broad international recognition. As a result, the state has remained incomplete.

So what is the long-term goal of state-building projects? First, if driven by conflict prevention or management consideration, it might be argued that the absence of violent conflict in itself is a success of state building, even if the state itself fails. This has, in fact, been suggested for the EU project for Serbia and Montenegro. Although the state dissolved, it succeed in three objectives: it ensured a peaceful and orderly separation between Serbia and Montenegro; it prevented a conflict or deep political crisis in Montenegro between supporters and opponents of independence; and it did not prematurely force the status of Kosovo on the international political agenda (Batt 2005, pp. 30–32).

Nevertheless, it is difficult to make a case for the State Union of Serbia and Montenegro as a success for the EU. The position of the EU until 2006 was clearly in favour of a joint state. This commitment to a joint Serbian–Montenegrin state was driven by the fear of a regional domino effect and a broader argument in favour of a stability oriented *status quo* (Noucheva 2007, pp. 3–4). As Noucheva has convincingly argued, such a stability oriented argument was not persuasive for the elite in Montenegro, as it lacked the normative power (2007, pp. 25–26) and, arguably, was also plain wrong considering the peaceful dissolution of the State Union.

The State Union could, however, be considered a success in light of the fact that, after its dissolution, the stateness of the constituent units has considerably improved. Montenegro's sovereignty and ability to govern over its territory is undisputed today and its status is widely accepted by political actors in Montenegro and Serbia. It might be argued that the State Union constituted part of the construction of acceptable states from the republics. Here one can note a difference compared with BiH, where the joint state has not legitimised the constituent units. In the unlikely case that BiH would dissolve, the two entities would be neither functional nor legitimate to act as independent states. Thus, while the dissolution of Serbia and Montenegro was able to

resolve the problem of a weak state, an end to BiH would not. In Kosovo, the state-building process primarily challenged the Serb claim to the region and to a lesser degree a union with Albania.

As was suggested at the beginning of this essay, minimalist states are temporary, and they 'become' rather than just 'are'. Just as with federal arrangements, minimalist states can be centrifugal or centripetal. Serbia and Montenegro was an example of a centrifugal minimalist state, where the limited competences gave rise to even lower levels of compliance with the decisions of state institutions.

BiH in the first post-war years displayed similar features, where the institutional reality of the state was weaker than the formal constitutional shape of the state. Since the late 1990s, the dynamics of institutional development in BiH have become increasingly centripetal. It is important to note that this process, however, has been externally driven and the crisis in the Bosnian state-building project since the failure of the constitutional reform in 2006 suggests that the centripetal process is not the result of the functioning of the institutions themselves, but rather it is externally imposed. Since then, the dynamics of state building have reversed towards a centrifugal dynamic. This has meant the reversal of institutional transfer from the entities to the centre and the continuous challenge to the state by the political elite of the Serb entity. The centrifugal nature is best epitomised by the President of the Serb Republic, Milorad Dodik, who described the RS as a permanent category and noted that 'Bosnia and Herzegovina cannot survive as a country, at least not in this planned shape which the international community has imposed'.<sup>20</sup> Kosovo has developed some centripetal features. Beyond the external dimension, it has achieved some, if limited, legitimacy among its Kosovo Serb inhabitants living in regions that are not contiguous with Serbia, as evidenced by Serb voter turnout in the parliamentary elections in December 2010. The Serbian authorities had called for a boycott, seeking to undermine the legitimacy of the Kosovo state (Jovanovic 2010). Overall turnout was 45.29%, and in municipalities with a Serb majority in the south of Kosovo the turnout was even slightly higher at 45.58%, whereas in the north, turnout was only 2.33%.<sup>21</sup> These numbers suggest that the state became an accepted arena of political contestation for Serbs living in the south of Kosovo, yet it also has strong centrifugal features. Unlike the State Union of Serbia and Montenegro, it lacks the clear territorial lines of divisions, even if a potential partition remains discussed (Jenne 2009). Instead, centrifugal tendencies arise from the inability of the state to provide for an EU integration perspective and visa-free travel—unlike all its neighbours—and greater challenges in the field of the rule of law and economic development.

We thus argue that successful minimalist states lose their 'minimalist' scope and capacity and acquire additional functions. This is not to argue that the emerging states should be centralised or unitary, but that they will need to increase their scope and

<sup>20</sup>Dodik: 'BIH je zemlja apsurdna', *Blic*, 29 September 2010, available at: <http://www.blic.rs/Vesti/Politika/209379/Dodik-BIH-je-zemlja-apsurda>, accessed 11 July 2011.

<sup>21</sup>Only majority Serb municipalities in the south were included (Štrpce, Ranilug, Partoš and Gračanica). In the north, Mitrovica is excluded as the municipal boundaries encompass both Albanian and Serb populated regions. The municipalities of Leposavić, Zubin Potok and Zvečan are included (Central Election Commission 2010). (I use the term Serb to designate ethnic predominance, whereas I use Serbian to designate affiliation with the Serbian state.)



strength to be able to function as a future EU member state and to provide services to citizens that allow them to secure popular legitimacy. If they fail, centrifugal dynamics will predominate. The experience of EU external state building suggests that successful state building thus rests on three pillars: commitment; normative foundation; and institutional capacity.

States are often contested projects and can be easily challenged in contexts where alternative state projects exist as ideas or as an embryonic reality. Commitment by state builders to one project over others is often essential in securing their success. In the case of Serbia and Montenegro, the alternative to the State Union was enshrined in the Belgrade Agreement: Montenegro attained the right to hold a referendum on independence after three years. As there was no challenge to the right of the republics to become independent, the State Union had to compete with an internationally legitimate state project from its creation. In BiH, on the other hand, the alternative enjoys no international legitimacy, as exemplified by Baroness Ashton's comment in an interview for a Bosnian daily in 2010: the EU is 'fully dedicated to the territorial integrity and sovereignty of Bosnia & Hercegovina . . . . The EU and our international partners will never accept dissolution of Bosnia & Hercegovina' (Lazović 2010). Commitment to the state-building project in Kosovo has been weaker than in BiH. First, as mentioned earlier, not all EU member states have recognised Kosovo. Although all EU members have accepted the EU mission in Kosovo, including EULEX, the mission has had an ambivalent relationship with the state-building project. Although originally designed to shore up the creation of an independent police and judiciary, the EU concluded an agreement with Belgrade on the deployment of EULEX which marginalised Kosovo institutions and forced the organisation to remain 'status-neutral' (Džihic & Kramer 2009, pp. 18–19). The decision of the EU to shift the bulk of negotiations with Serbia and Montenegro from the State Union to the member states through the twin track approach in 2004, suggests an even more limited commitment to state. It furthermore appeared to confirm the argument of the Montenegrin leadership that the joint state did not facilitate the process of EU accession. Similarly, the financial commitment of the EU to the state was limited. In 2005, the European Agency for Reconstruction had a budget of €147 million for Serbia and €20.5 million for Montenegro, but only €7 million for the State Union (EAR 2006).<sup>22</sup>

The normative case for the state is a further key consideration. Not only does it shape the international commitment to the state and the state-building project, but it can also help persuade political elites to buy into the state-building process. As Noucheva has argued, the normative foundation of the State Union has been regional stability, rather than any intrinsic values for the citizens or the elites of the state (Noucheva 2007). As a result, elites from both Serbia and Montenegro have challenged the State Union for economic inefficiency, lack of fairness and lack of tangible benefits in terms of regional stability.

The normative case for BiH derives from the war and the ethnic cleansing which undermines the legitimacy of any ethnically based entity in BiH. The problem of this

<sup>22</sup>During the other years (2003, 2004 and 2006) no separate data for funding of the State Union institutions were available.

argument is, of course, that this normative case is not universally shared by the elite in BiH. This asymmetry is compounded by the fact that this is a case against the entities (or cantons), rather than for the state *per se*. The second future-oriented normative argument in favour of the state is the promise of EU integration, which is not offered to the sub-state units. It is clear that unlike Montenegro, Republika Srpska would not have international legitimacy and an EU perspective were it to declare independence. Kosovo can be located between these two cases. The territorial division of Kosovo along the division between the Serb populated north and the remainder of Kosovo has been rejected repeatedly, but it has received greater international support, even if implicit, than the disintegration of BiH (International Crisis Group 2010). The main normative reason for not dismantling Kosovo has been the fact that a majority of Serbs live not in the north, but in enclaves within the remainder of Kosovo, and have, as noted earlier, largely accepted living in an independent Kosovo. A partition would make these communities particularly vulnerable. The second normative reason against partition is the concern of external actors that the dissolution of Kosovo would encourage other (potential) self-determination disputes and lead to a large-scale redrawing of borders in the region, not least in BiH itself.

The need for institutional capacity of minimalist states runs the risk of evolving into a circular argument. Functioning institutions are able to provide services and goods which, in turn, secure a centrifugal dynamic in terms of domestic legitimacy. Minimalist states require the ability to meet the dual challenge of managing society's expectations of the role of a state, and acquire the ability to engage in the processes which have become measures of the success of states in Europe, namely effective membership of the European Union and other regional organisations, such as NATO. Considering the high expectations of the state by society in the Western Balkans with regard to welfare provision, and the equally high expectations of the EU in terms of state capacity, the bar for state success in the Western Balkans is considerably higher than in other regions of the world. Minimalist states are not only under pressure from this aspect of institutional capacity, but also from below. The capacity of minimalist states is largely a function of the willingness of ethno-national elites to compromise and accept the decision-making process at state level; however, this interest might be severely reduced, especially as these elites often are only superficially committed to EU integration and have interest in proving the dysfunctional nature of the minimalist states.<sup>23</sup>

### *Conclusion*

The record of EU state building in Kosovo, Serbia and Montenegro and BiH indicates the organisation's limited capacity in this field. First, the tension between state building as EU foreign and security policy and EU member state-building can obscure the clarity of the purpose and legitimacy of external state-building. The clarity of conditionality is further clouded by 'enlargement fatigue' within the EU. Second, the institutions and state structures set up in order to manage a conflict are often incompatible with those of a future EU member state. This gap does not only

<sup>23</sup>See Vedran Džihic and Angela Wieser's discussion of this dynamic in this collection.

undermine the legitimacy of the state-building project, as demonstrated in the case of Serbia and Montenegro; it also short-changes long-term stabilisation for short-term stability. Third, the lack of clarity in the conditions for state building, and discrepancies between broad declarative conditions and specific requirements undermine the effectiveness of state building. Fourth, conventional EU accession in Central and Eastern Europe has focused on institution building and capacity building. In the Western Balkans, there has been a tendency to replicate this process as part of the preparation for accession; however, as noted earlier, institution and state building are linked, but not identical, processes. State building is more than the sum of different institution-building processes.

EU state-building in the Western Balkans has highlighted the void between the highly technical EU accession process on one hand, and the security-driven EU state-building on the other. Filling this conceptual and policy gap appears to be the main challenge for EU state-building in the foreseeable future. The restructuring of the EU foreign policy following the ratification of the Lisbon Treaty includes the creation of a unified European External Action Service with the potential to reduce the structural frictions that have impeded EU state-building; however, these appear to be the least of all the obstacles for the EU in transforming minimalist states into member states. At a conceptual level, a profound dilemma in the enlargement of the European Union remains: how to define standards for a potential EU member state in terms of state capacity and values and which give the states the capacity to achieve membership without losing the state along the way.

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