

Taking on the commanding heights

**Integration of network industries as a tool of peace building
A proposal for the Peace Implementation Council**

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The key international objectives in Bosnia and Herzegovina are building an effective state, breaking the hold of unaccountable war-time power structures, creating conditions for economic growth, and laying a basis for closer association with European institutions, in particular with the European Union.

An international focus on institution building at the commanding heights of the political economy offers an outstanding opportunity to advance each of these goals. International funding during the last years has often had the unintended effect of consolidating the ethnically divided war economies. A more sophisticated use of international influence could now ensure that the regulatory frameworks established for key industries advance the broader political and economic objectives of the peace process. Telecommunications and electricity, like coal and steel in the 1950s in Western Europe, are a natural starting point for functional integration of the Bosnian state.

Such a strategy would encompass the following projects:

1. The establishment of strong, autonomous agencies at the state level to regulate the telecommunications and energy industries. These would have power to issue licenses for the use of common networks (communications transmitters, electricity transmission grids) and to attach conditions to those licenses, including ensuring that service providers comply with the principles of a common market, and that they are financially transparent. International involvement in these regulatory agencies should go beyond mere consulting, drawing on lessons from the successful establishment of the Bosnian Central Bank and the Independent Media Commission. The institutions must be designed and developed in such a way that they are able to operate without improper political interference, and to attract and retain Bosnian and international technical expertise.
2. The structure of the Telecommunications Regulatory Agency (TRA), established in 1998 but not functional, needs to be revisited and reformed. A National Energy Regulatory Commission needs to be created with substantial powers. There should be no parallel entity regulators, and international financial and technical support should be concentrated on the state bodies.
3. International leadership is needed to accelerate the restructuring (unbundling) of these industries, splitting their functions among separate legal entities. Ambitious deadlines for

restructuring should be set down at the Peace Implementation Council. Creating autonomous public corporations to manage and operate network facilities should be further investigated.

4. Close attention should be paid to educating the industry and the general public about the nature and purpose of international efforts, with a view to building a Bosnian constituency for change. The current coincidence of high consumer charges and poor quality services offers a clear opportunity to appeal to the general public over the heads of vested interests and the nationalist parties.

Functional integration I: the case of the European Coal and Steel Community (1950)

The European Coal and Steel Community (ECSC) was the vehicle by which post-war Europe began the process of functional integration in the 1950s. It provides an extremely valuable illustration of how Economic forces can be used to overcome political divisions.

At the time when the ECSC was first announced, only five years after the Second World War, territorial issues between France and Germany (such as the Saarland) were unresolved, and the German Ruhr was still under international supervision. Jean Monnet's original concept of the ECSC was to side-step these politically charged issues, and use functional integration in two highly strategic industries to make further conflict between France and Germany impossible. Discriminatory and restrictive state practices were abolished, and Western European producers were given unrestricted access to each other's markets. Companies in each member state were obliged to disclose their prices, and could be fined heavily for cheating. A supra-national regulatory agency, the High Authority, was created to administer Europe's first strong anti-trust law, subject to appeal to the ECSC's own Court of Justice.

By pooling sovereignty in the coal and steel industries, Western Europe established the basis for the fifty year process of evolution leading to today's European Union. Once the economic benefits of the Community became apparent, the awkwardness of singling out just two sectors led members governments to broaden the co-operative arrangements. Thus began a long process of 'functional spillover', where technocratic elites perceived a benefit in progressively extending harmonisation, integration and central regulation into an ever expanding range of areas.

The lesson of European integration is that economics can provide an engine for integration where top-down constitutional engineering is doomed to fail. Jean Monnet's insight was to "concentrate all available power at a specific point in a narrow sector, then break through and spread out behind the lines", a tactic which has succeeded in changing the very notion of sovereignty in post-war Europe.

Functional Integration II: Bosnian energy and telecommunications markets (2000)

ESI recommends that a similar process of functional integration in Bosnia today could be achieved in the most prominent network industries, telecommunications (including broadcasting) and energy (electricity and gas). Focusing intensive international efforts in these areas would be a very concrete example of the notion that 'to do less is to do more'.

Both industries are currently ethnically divided, with three party-controlled electricity companies and three telecommunications monopolies. Both industries are major revenue sources for the nationalist parties, and therefore are a key support base for illegal parallel structures. Each has the potential to attract foreign investment and to generate economic growth. Each sector is well adapted to Bosnia's natural environment: investments in wireless communication using the radio spectrum are ideally suited to the mountainous geography, while its hydro-electrical potential is one of Bosnia's most important assets. Both sectors desperately need foreign investment and know-how. Both are network industries where natural monopolies in the physical infrastructure (electricity transmission systems; mobile telephone transmitters and broadcasting infrastructure) call for state-level regulation. At the same time, only open competition will prompt the necessary changes to increase the efficiency of the companies which presently control both sectors. The need to establish interconnectivity between the ethnic groups and across international borders provides a useful hook for international influence. Given their key role in the political economy of Bosnia, the regulation of telecommunications and energy is the logical place to begin to change the nature of the Bosnian power structures.

There are numerous complex problems to be resolved before a genuinely competitive, integrated market could be established. In contrast to the ECSC case, the present Bosnian political elites would strongly resist the weakening of their monopoly control and the creation of genuinely competitive markets. An international strategy to overcome such resistance would require a sophisticated combination of international power (particularly financial power), and appealing to Bosnian commercial interests and the general public to build a consensus. This would involve international actors in an ambitious institution-building effort.

A study of the success stories of the last four years of peace implementation efforts – the creation of the Central Bank, the success in the field of customs, the media restructuring campaign and the introduction of common licence plates – suggests which elements are required to achieve a breakthrough. The most important lesson concerns the need to combine the legislative authority of the High Representative, the conditionality at the disposal of the international financial institutions, and selective budgetary support from the major donors. This must be undertaken as an inter-agency project, where different forms of international influence are brought to bear on a common set of goals. The following are some the concrete lessons learned to date:

1. Identify what resources (financial and human) the new institutions will need to function effectively. Institutions established without commensurate resources (such as the Privatisation Monitoring Commission) or the qualified staff (many cantonal privatisation agencies) never become effective.
2. Make sure the institutions have a sound design and a solid legal basis. Although extensive consultations with various interest groups will of course be appropriate, the High Representative's Bonn powers can be used to ensure that compromises which threaten to undermine the effectiveness of institutions are not tolerated, and that the enabling legislation is put in place within a limited period of time
3. Use financial power, particular through structural adjustment credits and bilateral aid, to overcome specific threshold problems encountered in restructuring the industries. It will be crucial to hold back the World Bank's promised energy loan as a bargaining chip, until the authorities accept a regulatory framework in line with these overall objectives. This may

require direct intervention by the Steering Board members with the World Bank and (for the telecommunications sector) the EBRD, to explain the political rationale.

4. Offer short-term funding of the new institutions, to get them to the point where they can become self-sustaining through license fees.
5. Secure close international supervision of and involvement in the work of the institutions during their establishment phase, to build confidence in their independence and accomplish the transfer of expertise to Bosnian staff
6. Careful selection of Bosnian staff with appropriate professional qualifications, ensuring that they are not appointees of the political parties.
7. Use training of staff and contacts with regulatory bodies in other countries to build an institutional identity separate from party politics.
8. Appeal to the general public with simple campaigns aimed at targeting the current high consumer costs and poor quality service.

Institutionalising the state

There is a very close inter-relationship between economic policy and state building. The experience of the past four years shows that it is impossible to build state institutions which have no important public functions and no control over public revenues. The ethnic elites have no incentive to participate, and by not participating, can prevent the institutions evolving in any meaningful way. This form of obstruction of the state is very easy to do, carries no political cost to the nationalist parties, and is extremely effective. Using international power to try to overcome the problem of non-participation on a case by case basis is not generally effective, tending to marginalise the institutions still further. The international community cannot build an effective Bosnian state without institutionalising it. The international approach so far has been to attempt to negotiate each individual issue directly with the leaders of the nationalist party structures, using political pressure and traditional diplomatic techniques. Each individual issue therefore ends up in a mini-Dayton process, with all the limitations that implies. Because it is not institutionalised, the process produces nothing lasting, and must be repeated with every new issue which arises, and also repeated regularly on any difficult issue to keep the process on track. It leaves initiatives dependent on consensus between the nationalist parties, giving each one an effective veto power. Results are therefore difficult to achieve, and liable to collapse if political circumstances change. The nationalist parties themselves have a clear preference for 'inter-Entity' arrangements over true state-level institutions, because it leaves the international community dependent on their continuing agreement. Perhaps most importantly, this 'personalised' approach to state building ignores the proper constitutional order, which must be developed if the state is to have any chance of success.

To make the Bosnian state a reality, it needs a permanent, professionalised bureaucracy. The need to create a new State Civil Service Law and new administrative structures offers the international community an opportunity to start the institution-building process from the ground up. It can influence the design and legal powers of new institutions. It can focus on recruiting staff from among Bosnian professionals, who exhibit the least loyalty to nationalist politics and how are crucial to creating institutions which can actually perform and gain

performance legitimacy. With careful management, the international community has a chance to create technocratic institutions in key sectors, which are outside the nomenklatura system, and can ultimately offer some kind of balance to the extra-legal power of the nationalist parties. To perform this function, state institutions will need independent budgetary sources.

Effective state-level regulatory structures in the key economic areas can provide a beach-head for the functional integration of Bosnian into a credible state. ESI proposes a three-stage vision for the constitutional development of the Bosnian state:

Short term:

Through the use of international power, state-level institutions are established in key areas in such a way that it is no longer viable for the ethnic elites to boycott the state.

Medium term:

Professionalised state institutions become a centre of power in their own right, providing an institutional constituency for the continuing development of the state.

Long-term:

A process of functional spillover occurs, whereby the functions of the state are extended into wider areas as part of a process of negotiation internal to Bosnia, within the context of closer ties to Europe.

ANNEX A

State building and the Dayton Constitution

It is often observed that the Dayton Constitution is decentralised to the maximum degree possible, and that this limits the possibilities for institution building at state level. However, any constitution is a dynamic system which evolves over time, and allows considerable scope for innovation. The decisions taken by the international community on issues such as economic regulatory structures have a strong influence on that process of development. The Bosnian Constitution authorises the state organs to pass laws and create institutions necessary to allow Bosnia to exist as a state within a world of states.

This issue is addressed in OHR Legal Opinion 1999/3, entitled "On the competence of Bosnia and Herzegovina to regulate the use of the electromagnetic spectrum for telecommunication and broadcasting", which held that the state had authority to establish the Independent Media Commission.

"As among the State and the entities, the State's predominance as the competent regulatory authority must be underscored. Having already established that the State is competent to regulate and operate throughout the entire telecommunication sector, the predominance of the State over the entities in this field immediately follows from the rule of constitutional supremacy laid down in Art.III.3(b), which provides that the constitution of the state supersedes inconsistent provisions of the constitutions and laws of the entities, and that the

entities must comply fully with the decisions of the institutions of the state. The supremacy of the State in this field is also consistent with practical considerations in a country as small as BiH, where it would be technically chaotic to permit multiple entity authorities, operating independently, to distribute frequencies and otherwise regulate broadcasters."

This is based on Article III of the constitution, which gives the state the competence to regulate for foreign policy and foreign trade policy, as well as for the "establishment and operation of common and international communications facilities". The argument based on foreign trade can be applied to other network industries:

"The international obligations of the State form a framework within which the State's domestic regulatory arrangements must fit. Without attempting a specific analysis of all such obligations, it suffices to note as examples that telecommunication related to air traffic control is largely governed by international agreements, and that ITU regulations establish basic parameters which circumscribe the domestic allocation of frequencies for broadcasting and other telecommunication purposes. The international obligations associated with such agreements and regulations are those of the State, and it is the responsibility of the State to ensure that its domestic regulatory system fulfils and is in conformity with those obligations."

The interconnectivity of network industries with international systems are regulated at the international level through a range of European and international agreements, arrangements and institutions. The state has the authority to become a party to any agreement and a member of any organisation, in pursuit of the goal of ensuring that Bosnian public utilities comply with international standards, and that Bosnian citizens, companies, goods and services enjoy access to international markets. Under the Constitution, this gives the state the authority to establish regulatory structures.

"Bosnia and Herzegovina shall assume responsibility for such other matters as are... necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities."

For this reason, OHR has concluded that the state is "fully competent to regulate this sector, in a manner consistent with its constitutional responsibilities and international obligations, and in so doing to establish, as the State sees fit, appropriate regulatory bodies. The state may exercise this competence completely and directly, or it may allow the entities to enter and partially occupy the field in a way regulated by it... The electromagnetic spectrum can be viewed as a strategic resource of Bosnia and Herzegovina which must be available to the state for such use and it deems appropriate for such purposes as national security or border control."

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