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The rehabilitation of war-torn societies
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STATE BUILDING AND
POST-CONFLICT RECONSTRUCTION:
LESSONS FROM BOSNIA

Marcus Cox

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Marcus Cox, University of Cambridge, is senior Analyst, European Stability Initiative (www.esiweb.org) and formerly adviser to the High Representative, Bosnia and Herzegovina.

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Centre for Applied Studies in International Negotiations (CASIN),
Avenue de la Paix 7 bis
Boite postale 1340
1211 Geneva 1
Switzerland,
Telephone: +41 (0) 22 730 86 60
Telefax: + 44 (0) 22 730 86 90
e.mail: casinfo@casin.ch

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Executive summary

This paper examines the record of the international community in constructing a State of Bosnia and Herzegovina. It finds that, among the many goals of the peace mission, creating a self-sustaining constitutional order has not always been the highest priority. Only recently has the international community begun to focus explicitly on creating the domestic institutions necessary for Bosnia to become a sustainable entity.

The paper identifies three principal obstacles to the state-building mission. First, the Dayton Agreement created a highly dispersed constitutional structure, with weak central authority. Second, wartime conditions in Bosnia gave rise to local power structures with a vested interest in preserving the weak state. Third, weak governance capacity in the Bosnian state is itself a threat to the peace process, fostering conditions of economic and social insecurity.

Examining the record of the mission to date, the paper finds that there have been three phases to the international mission in Bosnia. The first focused on military stabilisation and reconstruction, and was characterised by the willingness of the international community to work directly with local power structures, often at the expense of the constitutional order. The second phase saw a dramatic evolution in the powers of the High Representative, allowing some important breakthroughs. However, the quasi-protectorate has tended to inhibit the development of domestic political processes, particularly where the international community has tried to influence electoral outcomes. The third phase, which is just getting underway, consists of a more systematic approach to state building.

The paper recommends a number of steps which will assist in the transition from an international protectorate to a sustainable Bosnian state.

- i) The international community should limit its role in the electoral process to strengthening and enforcing the rules, rather than attempting to control the outcomes. Overtly partisan action by the international community weakens its legitimacy, and undermines the constitutional order.
- ii) The High Representative should explicitly limit the use of his authority to subject matters which are essential to the peace process. This will create more political space for domestic institutions to take on governance responsibilities.
- iii) The international community should articulate a constitutional vision for the development of the Bosnian state. There should be a process of evolution, which focuses on building key economic functions at state level, rather than a re-negotiation of the Dayton Agreement.
- iv) All international dealings with Bosnia should be consistent with this constitutional vision, including directing international aid through the state to strengthen its authority.
- v) The international community should begin to articulate a vision of ‘three peoples in Bosnia’, reassuring the Croat and Serb public that the development of the Bosnian state does not represent a threat.
- vi) The international community should give careful attention to improving its institution-building techniques, developing mechanisms which will allow it to mobilise political pressure, economic conditionality, donor support and technical expertise in a strategic fashion.

State Building and Post-Conflict Reconstruction: Lessons from Bosnia

At the turn of the century, the challenge of promoting international peace and security is shifting from the traditional concern with relationships between states, towards a new preoccupation with the way states are structured internally. Of 27 major conflicts around the globe in 1999, all but two occurred within national boundaries.¹ Some of the most serious threats to international peace and security were posed by the breakdown of domestic order, with consequences such as refugee flows or economic crises which can spread well beyond the borders of the state itself. As a result, the use of international influence and authority to restore or reconfigure states that have collapsed through internal conflict is becoming an increasingly important tool for restoring international order.

The international response to civil war frequently centres on a search for new constitutional structures and political institutions. Unwilling to tolerate fragmentation of the international system through secession, the international community instead seeks to satisfy the aspirations of the warring parties by promoting settlements which allow sovereignty to be shared within existing states. International lawyers often refer to this as 'internal self-determination': the right of national groups within a multi-ethnic state to preserve their cultural, religious and linguistic identity, to participate in the national political process, and possibly to exercise a degree of self-governance or regional autonomy.² To this end, in peace initiatives around the globe, international experts bring to the negotiating table a range of tools, from ideas of 'consociational democracy'³ to electoral systems designed to promote moderate political behaviour.⁴

In practice, however, the challenge of post-conflict reconstruction is not solely, or even primarily, one of constitutional design. Whatever constitutional model is adopted, there is a significant risk that the new institutions and political processes will not take hold. As the World Bank found in a recent study, immediately after the settlement of a civil war, the risk of conflict breaking out again is around 40 percent.⁵ Even where an extensive international peace mission is deployed to prevent a return to armed conflict, the obstacles to building an effective state are substantial. The question of whether it is possible for external actors to guarantee a new constitutional order by building and supporting institutions from the outside is one which is now being tested on a large scale in Bosnia, Kosovo and East Timor.

This paper draws on international experience in Bosnia to examine the capacity of the international community to implement constitutional structures and create public institutions. The first part examines some of the obstacles to successful state building in post-conflict

¹ Collier, Paul, 'Economic causes of civil conflict and their implications for policy' (World Bank, 15 June 2000).

² See for example, Cassese, Antonio, *Self-Determination: A Legal Reappraisal* (Cambridge, 1995); Hannum, Herst (ed.), *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia, 1990).

³ 'Consociational democracy' contains a range of techniques designed to ensure that a majority ethnic group cannot exclude a minority from power, including regional autonomy, proportional representation in legislative and executive posts. For the classic statement of the theory, see Lijphardt, Arend, "Cultural diversity and theories of political integration" (1971) 4 *Canadian Jnl Pol. Sci.* 9.

⁴ For examples, see Horowitz, Donald, *Ethnic Groups in Conflict* (California, 1985).

⁵ Collier, supra note 2, p.6.

societies. It examines the tendency of peace negotiations to produce highly decentralised constitutional structures, which provide a poor foundation for a state. It considers the nature of political power in the post-war environment, and the emergence of vested interests which are opposed to the creation of effective central institutions. It also examines the economic and social consequences of weak governance, and the way these feed the risk of renewed conflict. The second part examines the track record of the international community in building the state in Bosnia and Herzegovina. It finds that a complex peace mission involves multiple goals which may come into conflict, and that the international mission has only recently come to understand its role in terms of building the state. The third part makes some observations on institution-building technique, and the technical and organisational challenges involved. The final part of the paper offers some conclusions as to how the international community in Bosnia can initiate a process of transition from the international protectorate to a self-sustaining state.

A. Weak states and the post-conflict environment

1. Constitutional compromises

Constitutional settlements of civil conflict aim to create institutions that span the lines of division, transforming armed conflict into non-violent, political processes. In any given settlement, the principal risk is that key political actors will refuse to participate in the new political institutions, causing the new constitutional order to fail right from the outset. Peace settlements commonly seek to minimise this risk by dispersing constitutional authority across federal units or autonomous regions, with only a weak central authority. Constitutional devices that grant the right to veto or opt out of central decision-making reduce the potential risks to the parties of participating in the political life of the state. However, at the same time, by weakening the centre, they make it more difficult to create an effective state. Constitutional settlements therefore reflect a trade-off which is inherent in the strategic environment in which they are negotiated: they create weak state structures, in order to reduce the risk that the state will fail altogether.

Although the Dayton Agreement for Bosnia and Herzegovina was drafted by international experts, and negotiated against a backdrop of overwhelming international pressure on the parties, the state which it created is, even on paper, extremely weak. Power is dispersed widely across two entities, 10 Federation cantons, 149 municipalities, and since 1999, the District of Brcko. The state is granted authority only for external affairs and a limited number of inter-entity matters.⁶ The organs of the former Socialist Republic of Bosnia and Herzegovina were not incorporated into the Dayton constitution,⁷ and with no revenue of its own, the state has been unable to build significant executive capacity. In the parliament and the collective presidency, the separate ethnic groups are represented in such a way that the political organs have not been able to acquire any institutional identity of their own. Of the two entities, the Republika Srpska most closely resembles a state in its degree of centralisation. The Federation, however, is subject to power-sharing arrangements between Bosniaks and Croats which disperse public functions and revenues as widely as possible.

⁶ The state has authority for foreign policy, foreign trade, customs policy, monetary policy, immigration and asylum, international and inter-entity criminal law, communications, inter-entity transportation and air traffic control. The balance of powers go to the entities and their sub-units: Constitution of Bosnia and Herzegovina, Annex 4, Dayton Agreement.

⁷ In so far as the old republican institutions continue to exist, they have been divided between the entities, or else incorporated into the Bosniak-controlled institutions of the Federation.

Most governance functions are entrusted to the ten cantons, except where these are ethnically mixed, in which case power is further dispersed to municipal level.

The first obstacle to state building as a tool of conflict resolution is therefore one of constitutional design. In the search for a compromise formula which will encourage all parties to participate, the possibility of creating a state capable of governing its territory effectively may be lost. Bosnia will need stronger central institutions if it is ever to acquire a single economic space, or carry out the reforms needed for progressive integration with the European Union. Over the past year, there has been debate among the international community as to whether the constitutional compromises in the Dayton Agreement should be revisited in a second round of negotiations. This paper argues that any federal system is dynamic in nature, and that it is more promising to focus on evolutionary elements within the constitution that enable the development of key economic functions at state level.

2. Power structures and vested interests

Protracted conflicts give rise to an extraordinary concentration of wealth and power in the hands of the military and political elite. In order to sustain military operations and a wartime economy, the warring parties place public institutions and economic enterprises under tight political control. The conditions of war – lack of freedom of movement of people and goods, the collapse of the banking sector and the barter economy, sanctions regimes, arms embargoes and illicit arms trading, and the movement of humanitarian aid – provide the ideal environment for the growth of the black market and organised crime. To obtain revenue to sustain the war effort, political leaders become involved in illicit economic activity. Wealth becomes a vital source of political power, used both to reward supporters and to fund the intelligence and security services which suppress political opposition. The redistribution of the spoils of war, in the form of scarce public-sector employment, housing, or invalids' and veterans' benefits, can be used to buy political support from key constituencies. In the post-conflict environment, this concentration of wealth and power is the most overt obstacle to restoring a functional state.

In Bosnia and Herzegovina, five years of war gave rise to power structures within each of the ethnic groups with strong vested interests opposed to the normalisation of the political life of the state. At the time of the Dayton Agreement, these power structures were represented by three nationalist parties – the Bosniak Party for Democratic Action (SDA), the Croat Democratic Union (HDZ) and the Serbian Democratic Party (SDS). Together with their patrons in Serbia and Croatia, these parties were the main interlocutors in the Dayton peace negotiations, where they insisted on substantial regional autonomy. The three parties filled the power vacuum left by the collapse of the former League of Communists, inheriting a political tradition of direct party control over executive bodies, the military, and the management of the command economy. A key element of their power was control over public-sector appointments, allowing them to create elaborate patronage networks which gave them tight control over public institutions. These patronage systems functioned as a feudal hierarchy, in which the highest political leaders retained the loyalty of the *nomenklatura* by granting them status and opportunities for personal enrichment at lower levels.⁸

⁸ For a more detailed discussion, see European Stability Initiative, 'Bosnian Power Structures' (October 1999): www.esiweb.org.

Political power in Bosnia is not dependent on formal constitutional authority. Intelligence services, security forces and the police are under the direct control of the party, and can be directed against political opponents.⁹ Public utilities and most industrial enterprises continue to be publicly owned, with the management boards appointed by the political parties. Revenue from public utilities is used to subsidise political parties and the intelligence services. Where enterprises have been privatised, companies connected to political parties have often been the main beneficiaries.¹⁰ In many smaller towns across Bosnia, a single enterprise provides the bulk of employment, and control of the enterprises is a potent source of political power. The payments bureaux, institutions developed under communism to exercise the state monopoly over financial transfers, remain an unaccountable source of revenue and a means of control over economic activity.¹¹ Complex systems of bureaucratic licensing of private enterprise ensure that political contacts are needed for commercial success, which fosters official corruption. Pensions, war invalids' benefits and the distribution of humanitarian aid have all been subject to overt political manipulation during elections.

Against this background, the main political actors in Bosnia and Herzegovina have no incentive to submit to new institutions which they cannot be sure of controlling. They keep the new constitutional structures weak by ensuring that political and executive authority remains localised. In some cases, most notably in the Bosnian Croat para-state of Herzeg-Bosna, political power is exercised through parallel structures with no formal constitutional status. Each of the ethnic groups maintains separate public finances, public utilities, pension funds, payments bureaux, armies and, notwithstanding some joint patrols, police forces. Each public enterprise is clearly identifiable as belonging to one of the three ethnic groups. The ethnic divisions are reinforced by the military balance of power. For every inch of Bosnian territory, it is still possible to identify which of the three armies controls it. The underlying source of opposition to the Dayton peace process is the determination of the nationalist parties to prevent their separate power structures from being subject to constitutional and democratic control.

3. Weak governance and its consequences

The combination of a weak constitutional structure and sustained resistance from the political elites has prevented the development of institutional capacity at any level of government. The Bosnian state has limited ability to respond to the twin challenges of post-war reconstruction and transition to an open economy, and it remains highly dependent on external support. Ironically, its dispersed institutional structures function best when dominated by strong political parties. Unless significant institutional development takes place, breaking the hold of the nationalist parties will not lead to better governance.

⁹ SFOR has carried out a number of operations against Bosnian Croat and Croatian intelligence services, in West Mostar in October 1999 and in Vitez in September 2000, reportedly obtaining documentary evidence of their involvement in organised crime and political activities.

¹⁰ 'Co-capitalisation' schemes in Croat parts of the Federation were used to transfer ownership of select assets to Croatian companies before the Federation privatisation law had been adopted. The system of voucher privatisation permits wealthy individuals to accumulate large concentrations of vouchers, giving them an advantage over foreign investors in the privatisation process.

¹¹ USAID, 'Payments Bureaus in Bosnia and Herzegovina: Obstacles to development and a strategy for orderly transformations', Sarajevo, 15 February 1999.

The Bosnian state is facing severe economic difficulties. Official unemployment figures remain above 40 percent,¹² and as international financial support dwindles, the trade deficit is clearly unsustainable. Without a reliable banking sector, domestic savings are insufficient to fund growth. With financial flows from the World Bank and the International Monetary Fund due to become negative in the coming period, government deficits are unsustainable, with public sector salaries and pension payments falling increasingly into arrears. The privatisation process has been poorly managed, tending to transfer control of public-sector enterprises into the hands of the political elite, attracting few foreign investors. There is little sign that any level of government has the capacity to formulate or implement the reform programmes needed to stave off economic crisis.

In common with other weak states in South Eastern Europe, one of Bosnia's most pressing problems is the poor state of its public finances. Establishing efficient revenue collection in a transition economy requires new and sophisticated institutions, and a high degree of voluntary compliance with tax laws. Weak states with disorganised or corrupt bureaucracies have difficulty collecting enough revenue to provide an adequate level of public services. Poor service delivery in turn undermines the legitimacy of the state in the eyes of the public, causing citizens to resist paying taxes wherever they can. Where unprofitable public-sector enterprises are unable to meet their pension and social security obligations, this is a further drain on the public purse.

Poor revenue collection makes it difficult for the state to sustain the public institutions required for a modern economy. Inadequate salaries result in a constant drain of qualified personnel out of the public sector. Those who remain suffer from low morale, and are likely to supplement meagre salaries through corruption. Weak institutions prevent the state from developing and implementing consistent macroeconomic policy, or creating the regulatory framework required for a modern banking sector or capital market. Where the judiciary is inefficient or subject to political control, the state cannot provide effective enforcement of property rights. In such an environment, private economic agents will have short time-horizons and little fixed capital. They will favour trade and redistributive activities over production, increasing the size of the grey economy and trapping the society in a cycle of low investment and persistent poverty.¹³ Similar problems affect all of the states of South Eastern Europe, to varying degrees. In a recent study of economic development prospects in the region, the World Bank concluded:

“Much of economic development, social inclusion and regional stability in South Eastern Europe will depend on strengthening of institutions, governance and a lowering of the level of corruption. Gradual integration with European and global structures will also require significantly more mature institutional structures... Cross-country evidence shows that South Eastern Europe has very weak institutions and governance.”¹⁴

The social and political effects of weak states are pronounced. A UN Development Program study found that low institutional capacity of states in the region is the underlying cause of a widespread lack of ‘human security’.¹⁵ Where citizens suffer from economic insecurity without an adequate social safety net, they have low levels of loyalty to the state, and become disaffected with the democratic process. In certain environments, they may be

¹² OHR Economic Newsletter, Vol. 3, No. 6, October 2000: <http://www.ohr.int/newsletter.htm>.

¹³ Douglas North, *Institutions, Institutional Change and Economic Performance*, (Cambridge, 1990), 9.

¹⁴ World Bank Report, ‘The Road to Stability and Prosperity in South Eastern Europe - A Regional Strategy Paper’, May 2000: www.seerecon.org.

¹⁵ UNDP, ‘Human Security in South-East Europe’, 1999, p. 10.

prone to radicalisation by nationalist extremists. The weak institutional capacity of the Bosnian state is therefore a major obstacle to the peace process in its own right, fostering the conditions of economic and social instability which make a return to open conflict more likely.

B. State building: the record in Bosnia

This sketch of the problem of weak institutions in post-conflict societies suggests that the challenge for international peace missions is how to make new constitutional structures take hold. In this section, the term 'state building' is used to describe the goal of building or supporting public institutions through external support. Five years after the Dayton Agreement, one would imagine that the peace-implementation mission in Bosnia would have considerable experience in state building. Yet it is surprising to note how few international programmes in Bosnia to date have been directed towards this end. In fact, aspects of the international mission in Bosnia have tended to undermine the state, or support forces hostile its development. Only in the past year has the international community in Bosnia come to see its role in terms of state building, and to think seriously about the operational challenges which this poses.

To show the dynamics involved, it is helpful to divide the international mission into three phases, which are broadly chronological, although with a degree of overlap. In the first phase, from the signing of the Dayton Agreement in December 1995 until early 1998, most international efforts were directed towards containment of the threat of renewed military conflict, and physical reconstruction of war-torn infrastructure. The second phase saw the dramatic evolution of the role of the High Representative, and was marked by the increasing involvement of international actors in domestic political affairs. Only in the third phase, which is just getting underway, has the international community begun to develop a strategy for creating an effective Bosnian state.

1. Containment and reconstruction

In the first phase of the peace process, the international mission focused on containing the conflict through peace-enforcement measures. The 60,000 troops in the NATO-led Implementation Force (IFOR) were able to stabilise the security situation with impressive efficiency. IFOR deployed rapidly along the cease-fire lines, separating the three armies and creating a weapons exclusion zone at the inter-entity boundary line. In accordance with precise requirements and timetables set out in the Dayton Agreement, heavy weapons were destroyed or moved into cantonment sites, which were subject to regular inspection by international forces. The three armies were demobilised to peacetime levels, and their deployment in the field was controlled by IFOR so as to reduce tensions. The 'Train and Equip' programme, carried out by US contractors outside of the NATO chain of command, built up the Bosniak and Croat armies to achieve a balance of power with Serb forces.

Through these measures, the military mission successfully contained the risk of renewed armed conflict. It did little, however, to promote the creation of an effective state. In the Dayton Agreement, IFOR was given the authority, but not the obligation, to assist with broader civilian goals in the peace process. In the first two years of the peace process, it consistently refused to deploy its forces to prevent inter-ethnic violence, apprehend indicted war criminals or support the return of refugees and displaced persons. It also declined to take any systematic action against the array of different intelligence services active on Bosnian

territory, despite evidence that they were engaged in political activity and harassment of minorities. In fact, the military objective of physically separating the armies tended to undermine the prospects of unifying the territory. With no progress to date in merging the three armies, the division of territory into separate military zones continues to support illegal parallel structures. The very notion of an internal balance of power in Bosnia and Herzegovina runs contrary to the state-building agenda.

On the civilian side of the mission, the greater part of resources were directed into physical reconstruction, driven by urgent humanitarian considerations and the need to kick-start the economy. Jointly co-ordinated by the World Bank and the European Commission, the priority reconstruction programme attracted over US\$5 billion in international aid. At the time of the Dayton Agreement, more than 2,000 kilometres of roads, 70 bridges, half the electricity network and more than a third of the housing were destroyed. Despite the logistical difficulties, by 1999 the reconstruction programme had repaired a third of the housing, and most urban infrastructure had been restored to pre-war levels, from telephone lines to electric power generation, from water services to the number of primary schools.¹⁶

Disbursing this volume of international aid in such a short period of time was an enormous operational challenge for the international agencies involved. It required that the responsible organisations make the rapid disbursement of funds their principal objective. Given this emphasis, it is not surprising that the reconstruction programme had little political content. In the first two years, aid was withheld from Republika Srpska because of the influence of indicted war criminals on the government, and was only made available in large quantities in 1998 following the election of a new government. In the Federation, however, political and institutional considerations played little part in the reconstruction programme. The World Bank entered Bosnia on the basis of a post-natural-disaster operational policy, which explicitly excludes institution-building objectives.

In order to carry out urgent reconstruction in the post-conflict environment, the international agencies tended to bypass the new constitutional structures and deal directly with whichever local authorities had direct control over the physical infrastructure. Aid was disbursed at local level by implementing agencies, or via municipal, cantonal or entity authorities. This enabled local warlords and separate ethnic power structures to benefit from the reconstruction program – both materially, through control of construction companies and the provision of goods and services to international reconstruction agencies, and politically, by being able to nominate the beneficiaries of international aid.

So long as the distribution of financial or material assistance was involved, the ethnic power structures were willing to co-operate with the international community. However, when it came to political objectives such as minority return or implementing the new constitutional structures, international efforts met with strong resistance. As a result, international agencies focused on physical reconstruction, where results were achievable, at the expense of institution building or other political objectives. The lack of attention to institutions ultimately became an important limiting factor on the reconstruction programme. For example, the failure to establish national authorities responsible for on-going maintenance has meant that roads repaired with international funds now require a second

¹⁶ European Commission and World Bank, *1996-1998 Lessons and Accomplishments – Review of the Priority Reconstruction Program*, May 1999.

round of repairs. Although most of the rail track was repaired by 1999, the lack of central authorities to operate inter-entity transport means that the volume of rail traffic remains low.

The dilemma facing the reconstruction programme had parallels throughout the peace mission. For as long as the proper constitutional structures remained weak, international agencies with urgent programmes to conduct had little alternative but to work with whatever authorities were in place at the time. In the interests of rapid delivery of international assistance to the population, the nationalist leaders were given the benefit of enormous international assistance without being called upon to implement the constitution. During this phase, whenever the international community needed to address a political problem, it demanded action directly of the nationalist parties, ignoring the proper constitutional channels and reinforcing the parallel structures. The containment and reconstruction phase was therefore one of consolidation for the wartime regimes, with international programmes carried out in such a way that there was no financial or political cost to obstruction of the state-building process.

2. A gradual protectorate

As the goals of the peace mission broadened from physical reconstruction and containment to reintegration of the population, economic reform and a more determined effort to create central institutions, the international mission became increasingly frustrated with the political obstruction it encountered, and came to see the continuing power of the three nationalist parties as the core problem. From 1997, the international mission began to arrogate new powers to itself, in a process which led to the High Representative acquiring formally unlimited power to impose laws and dismiss public officials. This phase of the peace process was characterised by a growing willingness of international actors to engage directly in local power struggles, spurred on by disillusionment with an electoral process that was consistently returning the wartime leadership to power.

Under the Dayton Agreement, the mandate of the High Representative is very limited, with no direct authority over either civilian or military actors in the international mission, and no authority within the domestic constitutional sphere. In the first two years, his role was not dissimilar to that of successive international peace negotiators during the conflict: he acted as the focus for international pressure on the parties, but could respond to political obstacles only with traditional diplomatic techniques. From 1997 onwards, the powers of the High Representative were gradually increased, initially in order to wrest control of public broadcasting from the nationalist parties. In May 1997, the Peace Implementation Council authorised the High Representative to take action “to curtail or suspend any media network or programme whose output is in persistent and blatant contravention of either the spirit or letter of the Peace Agreement.”¹⁷ In the first co-operative effort between the military and civilian sides of the mission, SFOR troops seized control of television transmitters belonging to the public broadcaster SRT in Republika Srpska. OHR then required the resignation of the management board of SRT as a condition for returning the transmission towers. Following the success of this operation, the Peace Implementation Council granted the High Representative broader powers to take ‘interim measures’ where the state institutions failed to act consistently with the Dayton Agreement, and to ‘take actions against persons... who are found by the High Representative to be in violation of legal commitments made under the

¹⁷ Declaration of the Peace Implementation Council, Sintra, May 1997.

Peace Agreement or the terms of its implementation".¹⁸ These powers, often referred to as the 'Bonn powers', are now understood as unlimited authority to impose laws at any constitutional level, and to dismiss elected representatives, political party officers and public officials.¹⁹

The High Representative's powers are now used routinely to advance international goals and to overcome sources of political obstruction. Approximately 100 laws and binding decisions have been imposed, and 57 public officials have been dismissed from their posts. Some of the most important breakthroughs in the peace process can be attributed to the use of the High Representative's powers. A series of ten laws have been passed on media reform, breaking the links between political parties and public broadcasters, restructuring the industry, and developing democratic media standards. A sustained legislative reform campaign on property rights has created a legal framework for implementing the provisions of the Dayton Agreement on refugee return. Implementation of property laws has been supported by the removal of local officials who disregarded the law, together with a concerted campaign from international agencies in the field. As a result, progress in minority return has improved dramatically over the past year.²⁰ The High Representative's powers have also been instrumental in introducing a common currency, one of the more successful economic reforms, and in introducing a common vehicle license plate and national passport, which have had a dramatic effect on improving freedom of movement. Not all of the High Representative's actions have been so successful, and there is always a risk that measures taken by the High Representative will not be implemented. In each of the successful initiatives, the High Representative's powers have been supported by a clear implementation strategy, often involving a number of different international agencies.

It is remarkable how little opposition has been offered by the nationalist parties or the Bosnian public to the new role of the High Representative. On numerous occasions, what appeared to be intractable political problems were easily bypassed by the High Representative, and soon forgotten. Not infrequently, the High Representative has intervened to pass essential legislation, not because it was caught in an insoluble political dispute, but simply because the responsible parliament was unable to adopt the measure in time. For example, when the State Council of Ministers became dysfunctional for much of 2000 following a dispute over the means of selecting its chair, the High Representative stepped in with binding executive decisions in order to prevent the customs regime from lapsing.²¹ With the legislative cycle of the Federation parliament taking more than a year, the High Representative has imposed laws that were agreed with the Federation government, but which were too urgent to wait for the usual legislative process.

Once the High Representative had begun to use his powers in this way, he came under strong pressure to continue to do so, both from the international mission and from domestic sources. The more that international authority is employed in the domestic sphere, the greater

¹⁸ Peace Implementation Council, *Bosnia and Herzegovina 1998: Self-Sustaining Structures*, Bonn, 10 December 1997, Annex, Article XI, para.2.

¹⁹ For a more detailed assessment, see European Stability Initiative, 'International power in Bosnia' (March 2000): www.esiweb.org.

²⁰ In September 1999, of 123,000 claims to repossess property, only 5% of claimants had been able to repossess their property. In September 2000, 21% of claimants in the Federation and 9% in Republika Srpska have been able to repossess their homes. Joint OHR, OSCE, UNMiBH, UNHCR and CRPC press release, Sarajevo, 28 September 2000.

²¹ See OHR, Decision extending the validity of the Council of Minister's Decision to the year 2000, 30 December 1999: <http://www.ohr.int/decisions.htm>.

the risk of a substitution effect, whereby international power inhibits the development of constitutional organs by compensating for their weakness. Nationalist politicians have often welcomed the High Representative's interventions, which relieve them of the responsibility for difficult political decisions. It is not uncommon for opposition politicians, civil society organisations and even members of the government to lobby the High Representative for legislative reform. As a result, the international community risks becoming a central pillar of the domestic constitutional structure, unable either to withdraw or to force the central institutions to function independently.

A crisis over reform of the entity pension funds in October 2000 illustrates the dilemma. Despite strong pressure from the international financial institutions, the entity governments refused to reform their pension laws to limit their pension obligations to the resources actually available to the funds. As a result, with monthly liabilities well in excess of their income, the pensions funds were sinking further into debt, and pension payments were being delayed or cancelled altogether. Reform of the pension laws was made a condition of a World Bank structural adjustment credit and an IMF stand-by agreement, such that failure to meet the conditions would have resulted in the cancellation of much of Bosnia's concessional credit over the next two years. The entity governments nonetheless made no move to comply with the condition, fearing the political costs of pension reform in the lead-up to the November election. On 12 November, the day after the election, the High Representative imposed changes to the pension laws to meet the World Bank conditions before the deadline expired. Given the consequences to the state of a loss of external financial support, he had little alternative. However, the conditions imposed by the international financial institutions were supposed to ensure that the entity governments adopted responsible budgetary policies. The High Representative's intervention simply ensured that, once again, they were spared the costs of refusing to do so. Since then, the High Representative has been subject to a barrage of criticisms from pensioners across the country, which should by rights be directed against the entity governments for their poor economic management.

International authority has also been used to try to influence the outcome of electoral contests. The strongest interventions have occurred in Republika Srpska, in order to exclude the SDS, the party founded by indicted war criminal Radovan Karadzic, from power, and support the government of Milorad Dodik. Following a split within the SDS in 1997 that led to the defection of Biljana Plavsic, then president of Republika Srpska, the moderate Dodik was able to achieve a slender majority in the parliament. Dodik's success was perceived as a victory for the peace process, and the preservation of his government became a key international objective. His government was offered largely unconditional budgetary support to pay public-sector salaries. During electoral campaigns, leading international officials stated publicly that continuing international aid to Republika Srpska was dependent on the re-election of the Dodik government.²² To preserve Dodik's fragile coalition, the international community used its authority to intervene in political disputes, sometimes at the expense of constitutional process. Following elections in November 1998, the new RS president Nikola Poplasen, from the extremist Serb Radical Party (SRS), refused to reappoint Dodik as prime minister, despite his parliamentary majority. The High Representative dismissed the president, appointing Dodik as caretaker prime minister, a position which he held for two years. The High Representative kept the presidency vacant in preference to allowing it to be

²² For a recent example, see Reuters, 'U.S. Said To Cut Aid To Bosnia Serb If Hardliners Win', Banja Luka, 19 October 2000.

occupied by Dodik's political opponents, in the meantime ruling that laws passed by the parliament could enter into force without a presidential signature.²³ With the presidency suspended, the parliament subject to intense international pressure, and the constitutional court marginalised, the Dodik government was left unaccountable.

Despite its strong international support, the Dodik government performed very poorly in office, delivering on few of its promises, and presiding over widespread economic and institutional decline. The Dodik government offered the same resistance to development of the central institutions as had its SDS predecessors. In the November 2000 elections, the Dodik government was comprehensively defeated, and the SDS won a renewed popular mandate. The election results showed that the Dodik government was widely perceived as incompetent and out of touch. Overt protection by the international community cost it legitimacy in the eyes of the public, particularly following last minute calls by US officials to ban the SDS from participating in the election.

Intrusive international intervention into the political process has had a distorting effect, arguably preventing Republika Srpska from benefiting from the democratic changes now taking place in Serbia. In the wake of the election, the international community is subject to an unprecedented barrage of criticism from local media in Bosnia, suggesting that its standing has been damaged by its foray into the political fray. While the international community plays an important role in setting and enforcing the rules of the electoral process in Bosnia, it cannot also play a partisan role without undermining its own legitimacy.

3. State building

It was only in May 2000 that the Peace Implementation Council laid down an agenda for building the Bosnian state in a systematic way.²⁴ For the first time, it nominated a list of core institutions which the state requires for sustainability in the long term. It gave particular attention to the flow of public revenues, calling for the state to be given its own revenue-raising capacity and to establish a treasury. It called for the restructuring of public utilities, breaking down the three ethnic monopolies and making them subject to state-level regulatory bodies. It encouraged the establishment of a professional and independent civil service at the state level, and for a first-instance state court to review executive decisions. In the economic sphere, it called for new initiatives to establish a common economic space, particularly in taxation, competition policy, standards, financial services and the banking sector, and called for all international programmes to support this objective. Critically, the PIC also proposed that international assistance be directed through a state treasury.

The state-building programme articulated by the PIC draws on the potential for development within Bosnia's dispersed constitutional model. Under the constitution, the state has authority to conduct Bosnia's foreign affairs and trade. This important power authorises the state to manage the process of European integration, and to ensure that Bosnia complies with the many international regulations governing international trade. A legal opinion issued by OHR, concerning state competence in telecommunications, illustrates how significant this power can be.

²³ OHR, 'Decision clarifying the procedure to promulgate laws adopted by the National Assembly of the RS', 25 June 1999: <http://www.ohr.int/decisions.htm>.

²⁴ 'Annex to the PIC Declaration: Required Actions', Brussels, 23-4 May 2000.

“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.”²⁵

This reasoning could apply to a range of other areas, giving the state authority to regulate industries such as transport and energy which require inter-connectivity with international networks. The constitution also requires that there be free movement of goods, services, capital and persons throughout the state, which is the legal basis for the European single market, and a prerequisite for closer trade relationships with Europe. Although the state has no direct authority to regulate commerce, a single market could only be established by central regulation.

This approach favours evolutionary development over comprehensive constitutional reform. Rather than tackling directly the difficult political and symbolic issues which new constitutional negotiations would raise, this approach relies on economic incentives to drive institutional development. For example, the proposal that international finance be directed through a state treasury has the potential to alter the relationship between the state and the entities significantly. If a state-level body such as the Council of Ministers were given responsibility for overseeing how international funds are spent, it would acquire real authority for the first time. Although the entity governments would retain responsibility for spending in their areas of competence, if the state holds the purse strings, it can require that the entities comply with constitutional obligations such as promoting a single internal market. Building state-level regulators for network industries such as telecommunications and energy is another initiative which will help strengthen the state over time. Because of the natural monopolies in network infrastructure, and the importance of connecting with international networks, central regulation could bring important economic benefits, while denying the illegal parallel structures one of their key revenue sources. The network industries could be the basis for the ‘functional integration’ of the Bosnian state, along the lines of Jean Monnet’s vision for the unification of post-war Europe through the development of the coal and steel communities.²⁶

C. Institution-building methodology

It may seem an obvious proposition to conclude that the essence of post-conflict reconstruction is institution building. Most statements issued by the international missions in Bosnia and Kosovo stress the importance of self-sustaining, domestic institutions. Yet in reality, institution building accounts for only a small proportion of international aid. Under the Stability Pact for South Eastern Europe, of 1.6 billion euros pledged at the March 2000 donors’ conference towards the ‘Quick Start Package’ of urgent projects, only 30 million euros came under the category of ‘local government and public administration’, while only

²⁵ OHR Legal Opinion 1999/3, ‘On the competence of Bosnia and Herzegovina to regulate the use of the electromagnetic spectrum for telecommunication and broadcasting’.

²⁶ For a broader discussion of this point, see ESI, ‘Taking on the commanding heights’ (May 2000): www.esiweb.org.

2.4 million was allocated to judiciary and police.²⁷ By contrast, over 1 billion euros were pledged for infrastructure projects. Although the Stability Pact figures do not include all international aid to the region, they demonstrate the preference of donors for physical reconstruction over institution building. The Bosnian experience suggests that the international community is not confident that it has found the right programme methodology for building domestic institutions.

If the international community wishes to undertake large-scale, institution-building programmes in post-conflict societies, it needs to develop much more intensive methods. A number of successful initiatives in Bosnia suggest the direction in which efforts should develop. One example is the Bosnian Central Bank, operating under an international governor, which has overseen the introduction of a new currency, one of the more successful economic reforms over the past five years. At the time of the Dayton Agreement, four different currencies were in circulation in Bosnia. Despite opposition from nationalist leaders, the new currency proved more stable than its rivals, and quickly attracted widespread public support. International support for the Central Bank comprises the following elements:

- a) **Transitional international management:** Under the Dayton Agreement, the Central Bank is placed under international management for the first six years of its operations. The International Monetary Fund (IMF) appointed an international governor with the technical and managerial expertise to build up the institution. During its period of international management, the Bank's role is limited to that of a currency board, with no authority over monetary policy. The path to full autonomy will be a gradual one, but already, of some 170 staff, only 3 are foreigners.
- b) **Transitional budgetary support:** The first DM 25 million in reserve capital for the Bank was provided by the IMF, which also contributed to initial operating costs. Within a short period of time, the institution was able to meet its operating costs from regular operations.
- c) **Technical support:** The IMF has remained involved in the development of the institution, providing technical advice in the drafting of its enabling law, and helping to develop operating procedures and management systems.
- d) **Training and identity building:** Local staff in the Central Bank have been trained in such a way as to help the institution acquire a corporate identity. This has included fostering contacts with other central banks in the region. In one telling episode, the international governor refused to allow a newly elected government in Republika Srpska to change the Serb staff in the Bank, insisting that they were employed in their personal capacity. This helped to build the loyalty of the staff to the institution.
- e) **Dismantling parallel structures:** The development of the Central Bank was complemented by a concerted international campaign to dismantle extra-constitutional parallel structures. The Bosniak authorities sought to preserve the National Bank which they had established during the conflict. The IMF insisted on its liquidation as a condition to its May 1998 Stand-By Agreement, and OHR was instrumental in appointing a foreign liquidator.

²⁷ World Bank/European Commission, 'Note on the status as of June 30, 2000, of pledges to the March 2000 Regional Funding Conference for South Eastern Europe', 13 October 2000: <http://www.seecon.org/Calendar/2000/Events/RC/pledgestatus-june00.pdf>.

- f) **Introduction of the new currency:** The process of introducing a single currency, the Konvertible Mark (KM), met with intense political resistance, which manifested itself in a refusal to agree upon a common design. A concerted international campaign led by OHR was required in order to resolve these disputes, and the international community arranged and paid for the new currency to be printed in Western Europe and introduced into circulation in July 1998. Once in circulation, OHR encourage international agencies to pay their staff in KM, which made it uneconomic for traders to refuse it, and within a short period of time, it had replaced the parallel currencies in most transactions.

The striking aspect of the international approach to creating a new Central Bank was the range of different forms of pressure and support which were needed in order to ensure its success. Purely technical assistance would not have succeeded without the use of strong pressure, including economic conditionality, to clear political obstacles. By the same token, purely political pressure would not have achieved much without an intensive approach to institution building, backed by the appropriate technical and financial support.

Other cases in the Bosnian peace process also demonstrate the benefits of an intensive institution-building strategy. The European Union's Customs and Fiscal Assistance Organisation (CAFAO) has made good progress in strengthening the entity customs and tax administrations. It used experienced personnel from the EU's own customs office, seconded for extended periods, to carry out detailed needs assessments, to manage the process of institutional reform, and to train the staff in their new roles. The project has been conducted at a high level of intensity over several years, enabling it to tackle deep structural problems. A drawback of the programme so far has been its isolation from a more general plan to reorganise the taxation system and public revenue flows, although a number of recent initiatives have been announced in this area. In January 2000, the High Representative imposed a law on a state border police, which for the first time will give the state the capacity to police its borders against customs fraud. The border service is in the process of development, and could benefit from the institution-building methods adopted by CAFAO.

Another important example is the Independent Media Commission (IMC), created by decision of the High Representative as a state-level licensing authority for broadcast media. The international media reform programme began with the use of military force to take control of public broadcasting facilities in Republika Srpska away from the nationalist parties, and was followed by a comprehensive restructuring of the industry, which is still underway. The IMC is under an international chair, and its local members were chosen by OHR for their political independence and their high standing in the local community. As a licensing body, the IMC is a potentially powerful regulatory tool, which can ensure that a single market and a competitive industry operates throughout Bosnia, and can police the content of media to ensure that it meets democratic standards. An international expert has been appointed as transfer agent, responsible for unbundling the broadcast sector and developing a sustainable industry model. The IMC was originally funded entirely from international sources, but over time will become financially independent by charging license fees. The High Representative has imposed some 10 different laws on the media to establish standards in media content and technical and financial areas, in accordance with European norms and the needs of Bosnia.

The notable feature in each of these examples is the co-ordination of different forms of international assistance and pressure in a strategic fashion. It is difficult for any single

international organisation to carry out a complex institution-building strategy on its own. All too frequently, however, divisions of labour and responsibility among the international community prevent international organisations from co-operating effectively. The most important institution-building successes in Bosnia have begun with efforts to strengthen the international community's own institutional structures, so as to bring expertise, financial resources and political authority to bear on a coherent set of goals.

D. The path ahead in Bosnia

The Bosnian experience shows that complex peace missions involve divergent goals which are not easily pursued simultaneously, and may come into conflict. The presence of a large-scale international mission by no means necessarily contributes to strengthening domestic institutions or constitutional order. At the security level, keeping the peace may best be achieved by creating a balance of armed forces and tolerating ethnic separation, making it difficult to build common institutions. The efficient distribution of humanitarian and reconstruction aid may require co-operating with local warlords and extra-constitutional parallel structures, strengthening their political position. Attempts to exclude the protagonists of the war from a role in the post-war political environment may be difficult to square with building democracy. Substantive goals such as economic reform may be more efficiently carried out through direct international authority, rather than waiting for local institutions to develop to the point where they can formulate and implement their own policies. Each of these issues involves trade-offs, calling for complex strategic judgments by the international mission. The ultimate goal, however, must always be the creation of a self-sustaining state.

Five years after the Dayton Agreement, international organisations in Bosnia need to think strategically about how to move from an international protectorate to an effective state. This is not the same thing as an 'exit strategy'; setting a fixed end-point to the international mission would only undermine efforts to establish the state. Rather, it should be a process of transition, whereby the functions of the international mission are gradually passed over to competent local institutions. The intrusive political controls now employed by the international community should be progressively replaced by lighter forms of support from European institutions, through the stabilisation and association process. This may take some time to accomplish. However, precisely because it is a long-term perspective, the process of transition must be mapped out now.

There are a number of key elements to a successful transition in Bosnia. First, the international community should limit its role in the political sphere to questions of process, and avoid taking partisan positions, even if that means tolerating the continuing influence of nationalist parties. The proper role of the international community is to strengthen the electoral system, using international authority to enforce the rules until such time as domestic institutions are strong enough to do so. This applies not only to the electoral process, but more generally to the constitutional mechanisms which govern the exercise of public power. A nationalist government that is forced to operate a transparent budgetary process, for example, may provide better quality governance than a more politically moderate government with weak institutional controls. A key goal is to identify and limit extra-constitutional sources of power, such as those arising from the complex web of relationships between the political elite and publicly owned enterprises, from the political manipulation of pension funds and veterans' benefits, or from political activity by intelligence services. The appropriate international response to recent electoral successes by the nationalist parties is to focus on strengthening the institutional environment in which they will govern.

Second, international organisations, and in particular the High Representative, should begin to limit their use of international authority in certain subject areas. Given the continuing opposition to the development of the Bosnian state, it remains legitimate to use international authority to advance institution-building initiatives and strengthen constitutional processes. However, the international community must be conscious that the use of international authority in the domestic constitutional sphere can have distorting effects on the development of local institutions. To minimise these unintended effects, it would be helpful for the High Representative to articulate a list of core objectives which he is prepared to advance by means of the Bonn powers. Other areas, which are not essential to the state-building agenda, should be left entirely to domestic institutions. This would leave more political space for the democratic process to develop.

Third, building on the conclusions of the PIC in Brussels in May 2000, the international community should develop a vision for the constitutional development of the state. The excessive decentralisation and institutional duplication of the existing constitutional structure can be overcome by building a core of essential functions at state level, particularly in the economic sphere. If the state acquires more genuine authority and control over public resources, the three political structures will have a stronger incentive to participate in its work. This can best be achieved through a process of evolutionary change, rather than radical reform. In the current political climate, there is no reason to believe that reopening negotiations on basic constitutional structures would produce any better outcome than the Dayton Agreement. However, by exploiting points of flexibility within the state constitution, it may be possible to initiate a process of 'functional integration' at state level, whereby co-operation on essential state-level matters delivers economic benefits to Bosnian businesses and the general public, creating domestic constituencies in favour of the further development of the state. A key element is resolving fiscal relationships within the Bosnian state, including identifying an independent source of revenue for state institutions.

Fourth, international assistance to Bosnia should now be given in a way which is consistent with this constitutional vision. It is no longer appropriate to bypass the state and deal solely with the two entities or other local power structures. The state should be treated as though it were already effectively sovereign, with sole standing in the international system to deal with external actors. The proposal in the Brussels PIC that international funds be directed via a state treasury could be an important source of authority for the state, enabling it to attach conditions to the transfer of aid in order to create a single internal market. Likewise, the authority of the state can be strengthened by highlighting its authority to negotiate closer relations with the European Union, with a view to achieving a stabilisation and association agreement in the coming years.

Fifth, the international community needs to reassure Bosnian Croat and Serb populations that the development of a state does not represent a threat to their interests. This will require a change in rhetoric from international organisations in Bosnia. At the moment, there is a widespread perception, fed by propaganda from Croat and Serb nationalist parties, that the Bosnian state is inherently a Bosniak entity, and that strengthening the state represents a threat to the Serb and Croat communities. In the recent elections, the Bosnian Croat HDZ ran an intensely negative campaign in which it described the Bosnian state as 'Muslimania'. The typical response from international organisations is to attack nationalism as a political phenomenon. This tends only to reinforce ethnic insecurity. International rhetoric should instead present a positive vision of Bosnia, emphasising the equal status of the three peoples in the Bosnian state. To this end, the recent decision of the Constitutional

Court on 'constituent peoples'²⁸ provides an opportunity for opening a more constructive political debate. The Court stressed that the constitution guarantees each of the three peoples political and cultural rights across the entire territory of the state. Building on this notion, the international community should begin to articulate a vision of 'three peoples in Bosnia', each of which is guaranteed rights of political participation and protection of its vital interests, but whose economic welfare and ultimate integration with Europe can only be realised through the creation of an effective, modern state. With astute regional diplomacy, it should be possible to win support for this vision from the new regimes in Croatia and Serbia.

Finally, the international community needs to improve its institution-building techniques. Using the High Representative's powers to establish the legislative basis for new institutions is only effective if followed by intensive institution-building efforts. Each institution-building project must be approached in a strategic fashion, mobilising political pressure, economic conditionality, donor funding and technical expertise behind a common agenda. This involves the High Representative and other international organisations working closely with the international financial institutions and the principal donors, and where necessary paying for private-sector expertise. International donors may need to offer direct budgetary support for new institutions, provided that financial sustainability can be achieved over time.

Cambridge, December 2000

²⁸ Decision No. 5/98-I, 29 & 30 January 2000.

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