

IS DAYTON FALLING? REFORMING MEDIA IN BOSNIA AND HERZEGOVINA

by

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A. Introduction

After the fourth anniversary on 21 November 1999 of the signing of the Dayton Peace Accords, this article hopes to present a brief analysis of the media regulatory system in BH (Bosnia and Herzegovina) and the future of the International Community intervention into this field. It has been written that “the few successes of Dayton - the Central Bank, a common currency, common license plates, state symbols and customs reforms - are superficial and were imposed by the international community. Indeed, the only unqualified success has been the four-year absence of armed conflict”.¹ An examination of the media situation in BH, indicates how difficult it is to shape a modern pluralistic media system preventing anti-Dayton forces to win the battle to shape post-war Bosnia.

The High Representative took recent energetic actions on the media field, as the role of the media in a post-conflict zone is a critical one.² Critical not only because the media played a critical role in the destruction of both Yugoslavia and BH³, but also because of the on-going role they play in fanning the flames of ethnic hatred.⁴ So, it is no wonder the international

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¹ International Crisis Group Report, *Is Dayton Failing?: Bosnia Four Years After the Peace Agreement*, 28 October 1999, (Part 1 of 4) (www.intl-crisis-group.org/projects/bosnia/reports).

² The General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) has noted that the media has a significant role to play in the strengthening of peace and international understanding; *Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War*, U.N. Educational, Scientific and Cultural Organization, Gen. Conf. Res. 4/9.3/2, 20th Sess., arts. I & II (1978). Freeing the broadcasting sector from nationalist political parties would help significantly in achieving the stated objectives of UNESCO in BH.

³ See M. THOMPSON, FORGING WAR: THE MEDIA IN SERBIA, CROATIA AND BOSNIA-HERZEGOVINA (1994). See generally, S. L. CARRUTHERS, THE MEDIA AT WAR: COMMUNICATION AND CONFLICT IN THE TWENTIETH CENTURY (1999).

⁴ Media may also tell us when a conflict is about to emerge, See W. B. HUNT, GETTING TO WAR:

community in BH has devoted “much time, energy and money to this field.”⁵ It is also no wonder why the international community is so active in the media field in Kosovo.⁶ In Kosovo, like in BH, a professional and independent public service broadcasting service is supposed to play a vital role in promoting reconciliation, peace, law and order and the establishment of a democratic civil society. The supervision of media in Kosovo seems to be identical to the model developed in Bosnia and Herzegovina whose OSCE (Organisation for Security and Co-operation in Europe) said to have learnt the teachings.⁷ Yet the model has been much criticized.⁸ Much of the discussion is on whether the media in BH should be restructured and regulated by the international community.⁹ On the other hand, it is often argued that the international community has no coherent media strategy to help make BH a place of media pluralism. The problem is that when it comes to television and media freedom, BH seems to be years away from European practice because “at every level of government, in both entities, politicians view electronic media as body to be won by any means and to be held at any cost.”¹⁰ The conclusions of the London PIC (Peace Implementation Council) Conference¹¹ of 5 December 1996 are quite significant to the first challenges faced by the international community, when it comes to independent media and measures enabling external pluralism and internal pluralism in BH. In this Conference, the authorities mainly undertake to:

“agree a new legal framework which will enable the authorities in Bosnia and Herzegovina to facilitate the creation and operation of independent broadcasting stations and networks throughout Bosnia and Herzegovina (...)

PREDICTING INTERNATIONAL CONFLICT WITH MASS MEDIA INDICATORS (1997).

⁵ International Crisis Group Report, *Media in Bosnia and Herzegovina: How International Support Can Be More Effective*, 18 March 1997, (Part 1 of 2), at 3-4 (www.intl-crisis-group.org/projects/bosnia/reports).

⁶ Radio Television Kosovo (RTK) held its first transmission on the 19th of September 1999. This marked an important step towards establishing an independent public broadcasting service in Kosovo, even if RTK just began television broadcasting via satellite. See www.osce.org/kosovo/news/kpr-010.htm.

⁷ See F. Amalou, *L'ONU impose sa propre télévision au Kosovo*, *Le Monde*, 9 Septembre 1999.

⁸ See L. Delattre, *Les médias au cœur de la démocratisation en Bosnie*, *Le Monde*, 28 juillet 1999.

⁹ See S. Schwartz, *Europe Should Leave the Balkan Media Alone*, *The Wall Street Journal*, 27-28 August 1999.

¹⁰ S. Haselock, Deputy High Representative for Media Issues, OHR, *BiH Will Enter Europe Only When the Media is Liberated from Political Control*, DANI, 25 June 1999 (www.ohr.int/articles/a990625a.htm).

¹¹ The International Community provides guidance to the HR by the way of a Peace Implementation Council (PIC). The London Peace Implementation Conference in December 1995 established a PIC to review progress in peace implementation. The PIC includes all of the signatories to the Paris Agreement, and a Steering Board including the US, Russia, France, Germany, UK, Japan, Canada, Italy, the European Union Presidency, the European Commission and Turkey on behalf of the Organisation of Islamic Countries. See *The London Peace Implementation Conference in December 1995* (www.ohr.int/docu/d951208a.htm, Administrative Structures for Civilian Implementation para. 21).

*ensure that any laws and regulations governing the media are fully consistent with relevant international agreements, respect the right to freedom of expression and are applied in a non-discriminatory way.*¹²

Acknowledging that freedom of expression, including a free and independent media, is an essential precondition for ensuring a democratic society in BH and implementing the International Community recommendations was a step further that the authorities in BH seemed not to have been willing to take. However, as the constitutional and legal framework of BH is quite original in international law¹³, the international support for media reform can be more than a moral or a financial one. The General Framework Agreement for Peace in Bosnia and Herzegovina¹⁴ (GFAP), initialed in Dayton and signed in Paris on 14 December 1995, enables the High Representative (HR) to oversee the implementation of the Bosnian Peace Agreement. Indeed, the HR is the institution which played and plays the most important role in the necessary media reform in Bosnia and Herzegovina. The determinations of the conditions for a free and open media was often directly determined by the HR itself due to the failure of the Bosnian political actors to achieve any legal reform. As the media play a prominent role in any peace-building strategy¹⁵, the international community cannot cease to push for a reform in this area. Nevertheless, four years after the GFAP came into force, one can ask if the international intervention in the Bosnian media system was successful and if there have been any breakthroughs.

The main challenge was to agree to a new legal framework enabling BH to meet modern and democratic standards regarding freedom of media, freedom of expression and freedom of information.¹⁶ The main obstacle to any reform was that the media, since the war ended in 1995, were divided into three separate components in Republika Srpska, Bosniac-controlled Federation territory and Croat-controlled Federation territory. During the war, the three dominant nationalist parties had taken control of the major broadcast and print media in BiH.¹⁷

¹² See for the conclusions of the London PIC meeting, Independent Media, para. 1 & 2 (www.ohr.int/docu/d961205b.htm).

¹³ See P. Szasz, *Current Developments: The Protection of Human Rights through the Dayton/Paris Peace Agreement on Bosnia*, 90 Am. J. Int. L. 301, 314 (1996). The author says that accounts must be taken of the circumstance that almost none of the GFAP provisions "originated in Bosnia itself as indigenous developments of its legal system, but were advanced by outsiders attempting to suggest constitutional and legal frameworks that the warring parties were unable to construct by agreements between themselves". See also S. Yee, *The New Constitution of Bosnia and Herzegovina*, 7 EJIL (1996) 176-192.

¹⁴ www.ohr.int/gfa/gfa-home.htm.

¹⁵ See on the concept of peace-building, UN, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General, 17 June, A/47/277-S/2411 (www.un.org); D. Chandler, *Democratization in Bosnia: The Limits of Civil Society Building Strategies*, 5 *Democratization* (1998) 78-102.

¹⁶ See generally Monroe E. Price, *Comparing Broadcast Structures: Transnational Perspectives and Post-Communist Examples*, 11 *Cardozo Arts & Ent L. J.* 275 (1993) (analysis of the influence of western standards in media reform in Central and Eastern Europe).

¹⁷ The SDS (*Srpska demokratska stranka*; Serb Democratic Party) was founded by Radovan Karadzic and Momcilo Krajisnik in 1990. In the RS the party seemed to be virtually unchallenged, until 1997 when an internal rift emerged. SDS opposes the unification and multi-ethnic character of BiH. The SDA BiH (*Stranka za demokratsku akciju*; Party of Democratic Action Bosnia and Herzegovina) was founded in 1990 by its current

Thus, in the broadcast media, the Serb Democratic Party (SDS) ran Serb Radio and Television (SRT) in what is now Republika Srpska, the Bosniac-based Party of Democratic Action (SDA) controlled RTV BiH in Sarajevo, and the Croat Democratic Union (HDZ) controlled Croatian Radio and Television's (HRT) transmission in Croat-held areas.

The state of media in BH reflects all the challenges that might be expected in a post-communist, post-conflict society. It can be argued of course that it is disturbing that the international community compels action that is meant to promote democracy.¹⁸ Nevertheless, creating the conditions for political pluralism in a post-conflict society does not come without a price.¹⁹ Yet in evaluating the international community's media strategy effectiveness in BH, it is imperative to consider the critical role that the party-controlled media play in starting and sustaining war throughout the Balkans.²⁰ Through propaganda and nationalistic rhetoric, controlled access to all media outlets, economic rewards and sanctions against media outlets, the party-state rules are virtually unchallenged. In such an environment, institutions like the Office of the High Representative (OHR) may prove especially useful, for they can "impose"²¹ stricter and more balanced rules than those wished by mono-ethnic political parties. The key questions may be: What

mokratsku akciju; Party of Democratic Action Bosnia and Herzegovina) was founded in 1990 by its current leader Alija Izetbegovic. It is the leading Bosniac party because it is seen as the best defender of Bosniac rights and the Bosniac nation. SDA is also perceived as the only credible counter to the Bosnian Serb (SDS) and Bosnia Croat parties (HDZBiH). The HDZ BiH (*Hrvatska demokratska zajednica*; Croat Democratic Union Bosnia and Herzegovina) was founded in 1990 as a branch of its mother-party in Croatia, where it is led by Croatian President Franjo Tudjman. The party is perceived as the main defender of Bosnian Croat interests and has a tight grip on society in the Croat part of the Federation.

¹⁸ See Robert M. Hayden, *Bosnia: The Contradictions of "Democracy" without Consent*, 7 East European Constitutional Review (1998), (www.law.nyu.edu/eecr/vol7num2/special/bosnia.html). The authors declares that the High Representative in BH "has found it necessary to bypass the elected parliamentary assembly in matters supposedly within its competence and to remove elected officials. He now is proposing to place controls upon the press". The imposition of a *de facto* protectorate is a source of discussion; See International Crisis Group Report, *Kosovo: Let's learn from Bosnia - Models and methods of international administration*, 17 May 1999 (www.intl-crisis-group.org/projects/balkans/reports/kos21repa.htm), International Crisis Group Report, *The New Kosovo Protectorate*, 20 June 1999, (www.intl-crisis-group.org/projects/balkans/reports/kos23rep.htm).

¹⁹ See The Media Experts Commission Final Report, *Media in Elections 1998*, at 17-19 (www.oscebih.org/mecFinalReport.htm).

²⁰ For Monroe E. Price, "looking at the development of mass media law in post-Soviet Russia is like examining the wrists of a recently freed prisoner where the marks of the chains are still present", *Law, Force, and the Russian Media*, 13 Cardozo Arts & Ent. L. J. 795 (1995). The wrists of the past in BH are also related to the tradition of party-controlled media and more recently to the influence gained during the war by mono-ethnic parties. As in Russia, television has been an arena for struggle, not only political but armed.

²¹ According to Article 5 of Annex 10 to the GFAP states: "The High Representative is the final authority in theater regarding interpretation of this Agreement on the civilian implementation of the peace settlement". In addition, according to conclusions of the PIC Conference held in Bonn on December 1997, the HR can make binding decisions in order to facilitate the implementation of the GFAP throughout BH. In practice, it can be said that the HR has the powers to "impose" its views.

form should the international community support take? How is it best to undertake media reform in the volatile political environment of a post-conflict society?

It can be argued that the international community strategy is to end any legal vacuum in BH and more specifically, stripping away as much political interference as possible from mono-ethnic parties in the media.²² One paradox is that while the ethnicisation of politics has been welcomed by the international community²³, the politicisation of ethnicity in the media has been considered as an obstacle to democratisation and the Dayton process.²⁴ To serve the objectives of the international community, new laws and regulations must allow for large media pluralism, establish genuine public service broadcasting that serves all the peoples of BH, and “there must be conditions for strong commercial broadcasting to ensure the public has a full range of choices.”²⁵

The starting point of the International Community’s media strategy was that the media were largely responsible for the ethnic violence of the war and have since been a major barrier to the implementation of Dayton. The long-term goal of the International Community is not a mystery : the HR must prevent the Bosnian media from stirring up nationalist sentiments which the nationalist politicians can gain from. In BH, the clearness of such a strategy may not be seen at every step of the way. This is also the price to pay for coping with the volatile and complex political environment of BH.²⁶ A “dictatorship of virtue”²⁷ by the international community may be the sole solution because we shall not let media forge war in Bosnia one more time.

²² Not to mention the usual justifications from international intervention in the media field; a viable and independent media-sector is a mechanism crucial to government accountability, such a media-sector is useful in ensuring that the existing state media remains honest; such a media-sector safeguards freedom of the press. See USAID Document: US-Russia Media Partnerships, Post-Soviet Media L. & Pol’y Newsl., July 19, 1994, at 3, quoted by Monroe E. Price, *Law, Force, and the Russian Media*, *supra* note 20.

²³ See the Constitution of Bosnia and Herzegovina, Annex 4 of the GFAP (www.ohr.int/gfa/gfa-an4.htm) which provides for an allocation of powers on the basis of ethnicity (e.g. procedures of election of members of the Presidency, art. V.1, the composition of the Constitutional court, art. VI.1).

²⁴ D. CHANDLER, BOSNIA - FAKING DEMOCRACY AFTER DAYTON 111-113 (1999).

²⁵ S. Haselock, Deputy High Representative for Media Issues, OHR, *BiH Will Enter Europe Only When the Media is Liberated from Political Control*, *supra* note 10 (www.ohr.int/articles/a990625a.htm).

²⁶ In his book, TELEVISION: THE PUBLIC SPHERE AND NATIONAL IDENTITY (1995), Monroe E. Price makes the claim that all broadcast regulation is an effort within a society to maintain or adjust a cartel involving the dominant mix of political views and cultural attitudes. See also from the same author, *Part II The Bill and Comparative Media Law: Chapter 6; The Market for Loyalties and the Uses of Comparative Law Media Law*, 5 Cardozo J. Int’l & Comp. L. 445 (1997). As there is not a real national identity in BH and then no dominant mix of political views and cultural attitudes, legislation on this field would be impossible without the intervention of the international community. Challenges to the status quo can only be pushed by the international community, which is the only capable force of change in the divided society of BH. However, it still remains to discuss if the international community shall commit a society to reform its media when there is serious doubt about the level of commitment toward a democratic and pluralistic media in the society itself.

B. Media within the Bosnian framework

As in a classical communist system, the media in Bosnia and Herzegovina, were firmly controlled by the authorities. Nevertheless, in the Titoist traditions, the media aimed to satisfy all three of the republic's constituent peoples of BH (Bosniacs, Croats, and Serbs). This traditional picture will not survive the disintegration of Yugoslavia. Curiously, the media were not among the first concerns of the International Community. In the Dayton Peace Agreement, there is only a limited concern for media regulation of election campaigning. However, later on, the High Representative for the International Community took a more pro-active role in the media field.

I. The emergence of mono-ethnic media

The Bosnian media acquired a lease on life as Yugoslavia disintegrated. RTV Sarajevo was freed from direct government control by Act of parliament and *Oslobodjenje*, the dominant publishing house, began the privatization process. In October 1990 Sarajevo became home to *Yutel*, a would-be pan-Yugoslav television network launched by Yugoslavia's last prime minister, Ante Markovic, in an attempt to neutralize the media war then being waged between Belgrade and Zagreb.²⁸ *Yutel* leased RTV Sarajevo's second channel. "It went off the air five weeks after the outbreak of fighting in Bosnia and Herzegovina, as the Yugoslav ideal it represented disintegrated."²⁹ In the course of war, the integrated Bosnian media fell apart and split into three completely separate and antagonistic components. The structure of the media also changed. During the war, most of the trade publications folded and the circulation of newspapers and magazines collapsed. By contrast, broadcast media, which was viewed as critical to the war effort, mushroomed.³⁰

This time which saw the disappearance of any form of regulation, saw as well the raising of SRT, the increasing influence of HRT and the radicalization of RTV BiH. As a consequence of the war, the Bosnian media market was and still remains divided into three markets in Republika Srpska, Bosniac-controlled Federation territory and Croat-controlled Federation territory. If broadcast signals cross the former front lines and enable Bosnians to watch television or listen to radio originating from territory controlled by another people, the influence of mono-ethnic

²⁷ The banning of politicians and western-backed censorship of media outlets in the name of democratisation has been considered as contradictory. For R. M. Hayden, "the method selected by the HR to promote "democracy" in Bosnia is to create a dictatorship of virtue", *supra* note 18.

²⁸ See generally S. P. RAMET, *BALKAN BABEL: THE DISINTEGRATION OF YUGOSLAVIA FROM THE DEATH OF TITO TO ETHNIC WAR 63-90* (2nd ed. 1996).

²⁹ International Crisis Group Report, *Media in Bosnia and Herzegovina: How International Support Can Be More Effective*, *supra* note 5, at 3.

³⁰ According to the International Crisis Group, whereas there were 377 publications, 54 radio stations, four television stations and one news agency before the war, there are in 1997 145 print media, 92 radio stations, 29 TV stations and six news agencies, *Id.* at 4.

television in the three media markets is quite overwhelming. One additional problem is that the most important media are directed by ruling political parties.

Today, RTV BiH (Radio Television Bosnia Herzegovina), SRT (Serb Radio Television) and HRT (Croatian Radio Television) are the main broadcasters. RTV Sarajevo was created in 1945 and transformed into RTV BiH in 1991 following the secession of BiH from Yugoslavia. The Bosniac station is influenced by the ruling SDA party. RTV BiH claims to have the legal right to all transmission sites and facilities controlled by RTV Sarajevo before the war. Many of these transmission sites were seized by the Croat army during the war and remain in legal contention. There are still some negotiations going on to resolve the transmitter ownership dispute. RTV BiH's range is extensive, including approximately 85 per cent of the Federation territory and parts of Republika Srpska. SRT is the public TV and radio broadcaster of Republika Srpska and the major source of information for the population living in Republika Srpska. SRT was previously controlled by the hard-line SDS party in Pale, but transferred allegiance to the party of Biljana Plavi (SNS) in the summer of 1997, after SFOR took control of its transmitters.³¹ SRT has been known for its inflammatory language and hostility toward the international community. The station covers nearly the entire area of the RS, and approximately 30 per cent of the Federation of BiH and parts of Yugoslavia. HRT, while based in Zagreb, is rebroadcast in BiH via Erotel Mostar. Erotel controls a number of transmission sites and facilities, which were seized during the war by the Croatian Armed Forces (HVO). HRT was founded in 1991 and is owned by the Republic of Croatia or interests close to that state.³²

On the other hand, one interesting feature of the Bosnian media is that since there has been no shortage of donations, "the scale of the alternative media and the number of journalists is out of all proportion to the size of the population."³³ In this situation, it should be said that the problem faced by the non-nationalist media was not only one of political pressure but also economics. This is another dimension of the problem faced by the international community in BH. In such an environment, media pluralism was not only restrained by mono-ethnic political parties, but also because the OHR "has failed to develop an overall media strategy".³⁴ A similar situation would appear to have been created by the OSCE's financial support for political parties.³⁵

³¹ Journalists from SRT founded S-Channel on December 1997 after SFOR took control of SRT's transmitters in September 1997. The station, also known as Karadic TV, broadcast from Pale.

³² Another media influenced by HDZ party officials is the Croatian Radio TV Herceg Bosnia which was founded in 1993. It is owned by the municipal authorities. Radio TV HB is a network of radio and TV stations, whose footprint ranks it third among the major radio and TV broadcasters of BIH. Radio TV HB mainly reaches the population living in the Croat-dominated part of the Federation and is one of the most influential electronic broadcasters in that region.

³³ International Crisis Group Report, *Media in Bosnia and Herzegovina: How International Support Can Be More Effective*, *supra* note 5, at 5.

³⁴ *Id.*, at 3-4.

³⁵ See D. CHANDLER, *supra* note 24, at 130.

II. The media in the Dayton Peace Accord

The media reform and the involvement of the International Community in Bosnia should be analyzed in light of the current constitutional framework set up by the General Framework Agreement for Peace (GFAP)³⁶, so-called the Dayton Peace Accord. If the Constitution of Bosnia and Herzegovina, as contained in Annex 4 to the GFAP, provides for full recognition of Freedom of Expression as a fundamental human right³⁷, protected in accordance with Article 10 of the European Convention on Human Rights³⁸ and other relevant international instruments, the 1995 Dayton Peace Accord “failed to provide a formula for restructuring the press and broadcasting. In fact it failed even to mention the media.”³⁹ There is also ambiguity regarding the division of competences between BH and the Entities in the field media.

In the Dayton Peace Agreement, there was nevertheless a limited concern for media regulation of election campaigning. The Dayton Peace Agreement includes 11 annexes. Annex 3⁴⁰, the Agreement on Elections, refers explicitly to the media, but only in respect to conditions for the organization of free and fair elections. Annex 3, Article I.1 provides:

“The Parties shall ensure that conditions exist for the organization of free and fair elections, in particular a politically neutral environment; shall protect and enforce the right to vote in secret without fear and intimidation; shall ensure freedom of expression and of the press; shall allow and encourage freedom of association (including of political parties); and shall ensure freedom of movement.”

³⁶ www.ohr.int/gfa/gfa-home.htm.

³⁷ Article II.2. of the Constitution of Bosnia and Herzegovina states: “International Standards. The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.” And Article II.3. adds: “Enumeration of Rights. All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:... (h) Freedom of expression.”

³⁸ The text of Article 10 of the ECHR provides:

- (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³⁹ S. Haselock, Deputy High Representative for Media Issues, OHR, *Freeing the Media is as Vital as Clearing Mines*, The Times, 18 June 1999 (www.ohr.int/articles/a990618a.htm).

⁴⁰ www.ohr.int/gfa/gfa-an3.htm.

The attachment to Annex 3 states that Dayton signatories must ensure that “no legal or administrative obstacle stand in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process.” This language was drawn from the Second Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, Copenhagen, 1990, paragraphs 7 and 8, which is attached to Annex 3. So, as long as the OSCE⁴¹ is supervising elections, it has a mandate to help ensure freedom of expression in the media.

However, as the existence of a free and pluralistic media throughout BH is essential for the implementation of the GFAP and for the long-run development of the country, the High Representative (HR) has also an important role to play in the field of media. The HR shall be responsible for curbing abuse of the media and for determining the conditions for a free and open media and, as we shall see, for promoting the adoption of media laws which meet modern and democratic standards. More generally, the mandate of the HR is to oversee the implementation of the GFAP.⁴² As the existence of a free and pluralistic media throughout BH is essential for the implementation of the GFAP and for the long-run development of the country, the HR must play an important role in the field of media.

C. Pluralism within the Bosnian media

The international community is fighting hard for media pluralism in BH. The assumption is that media pluralism would help in creating a pluralistic civil society, which in turn would undermine the rule of mono-ethnic parties. The early quest for pluralism was not as successful as expected, and continuing concerns for media pluralism translated into international “guardians” taking a more pro-active defense of pluralism.

I. The difficult early quest for internal and external pluralism.

The International Community had some concern at first as to ensure some pluralism in order to achieve free and fair elections in BH. In fact, freedom of expression and of the media is the first condition to organize free and fair elections. To this end, the Provisional Election

⁴¹ See generally www.oscebih.org.

⁴² The primary guidance for the HR is contained in [Annex 10 \(www.ohr.int/gfa/gfa-an10.htm\)](http://www.ohr.int/gfa/gfa-an10.htm) of the Peace Agreement. The Peace Agreement directs the HR to monitor implementation of the peace settlement; maintain close contact with the Parties to promote full compliance; co-ordinate the activities of the international organisations and agencies; provide guidance as appropriate to the International Police Task Force; report periodically on progress. The HR is the final authority regarding interpretation of the Agreement on civilian implementation. According to the Agreement, the tasks of civilian implementation include: the establishment of political and constitutional institutions; economic reconstruction and the rehabilitation of infrastructure; promotion of respect for human rights; encouragement of return of displaced persons and refugees; continuation of humanitarian aid for as long as necessary; support for and assistance with the election process being supervised by OSCE. Further guidance came at the London Peace Implementation Conference in December 1995 which established a Peace Implementation Council (PIC). See generally www.ohr.int/info/info.htm.

Commission (PEC), the election rule-making and supervisory body established by the OSCE, drew up an Electoral Code of Conduct containing standards for the media and journalists and created the Media Expert Commission (MEC) to monitor compliance.⁴³ The MEC's role as the only body formally charged with monitoring and ensuring fair media treatment during elections in BH was indirectly, and only partially, initiated by the Dayton Peace Agreement, as Annex 3 only mentions briefly the media.⁴⁴ The MEC's mandate was to enforce the media's compliance with the PEC's election rules regarding the media, to monitor the fulfillment by the governments and competent authorities, and to uphold international standards of professional conduct in media activities. The PEC's media rules were drafted to ensure the electorate in BH had access to a full range of political voices and political options during the election period. In the 1996 and 1997 election campaigns, access to radio and television coverage continued however to be controlled by the three nationalist political parties: the SDS, the SDA, and the HDZ. The MEC was severely criticized during the period 1996-1997 for its ineffective response to complaints. The International Crisis Group noted that the work of the MEC was "especially disappointing."⁴⁵ The criticism was even acknowledged by the MEC itself in its 1998 Report. It is stated that the effectiveness of the MEC was limited during 1996-1997, "in large measure because of a failure to use the tools available to its greatest effect. Most significantly, the MEC consistently declined to refer cases to the EASC [Election Appeal Sub-Commission] during this period, thereby denying itself the essential mechanism of judicial enforcement. But it also failed to use its own resources fully, through lack of political will, underuse or failure to use these mechanisms adequately."⁴⁶ In fact, the powers of the MEC were quite considerable. The MEC could require any person or organisation connected to a case or complaint under investigation by the MEC, to provide any information and any materials, or require any person connected to a case or complaint under investigation by the MEC to meet with a designated MEC representative or to come to a meeting of the MEC. The MEC could also override any law, regulation or practice in BH, which conflicts with a PEC rule or regulation concerning the media.

Apart from this concern for internal pluralism during election time, the development of Open Broadcast Network (OBN) as an alternative broadcaster was also the symbol that the

⁴³ In June 1996, the PEC also established the Election Appeals Sub-Commission (EASC), an independent juridical enforcement body that ensures compliance with PEC *Rules and Regulations* and acts on election-related referrals from the MEC, political parties, candidates, and individuals.

⁴⁴ For the MEC, "this omission was a significant lapse by the international community given the key role media played in starting and perpetuating the war in BiH." See The Media Experts Commission Final Report, *Media in Elections*, 1998, at 7 (www.oscebih.org/mecFinalReport.htm).

⁴⁵ "Altogether, the MEC addressed some 30 complaints between May 3, 1996 and September 5, 1996, most of which it dispensed with by asking for additional explanations. In the few cases in which the MEC decided to take action, it merely required apologies or referred complaints to the PEC for further action". See International Crisis Group Report, *Media in Bosnia and Herzegovina: How International Support Can Be More Effective*, *supra* note 5.

⁴⁶ The Media Experts Commission Final Report, *Media in Elections*, 1998, at 10 (www.oscebih.org/mecFinalReport.htm).

international community was trying to achieve some results regarding external pluralism in BH. OBN may represent the most significant advance in the post-war nationalist environment. OBN is a TV channel which was founded in 1996 by the international community and is administered by the OHR. OBN is financed by international governments and donor organizations. It was conceived to provide an independent, cross-entity television, free from state control with a balanced editorial style. The station is independent of all political forces in BH.⁴⁷ OBN has cooperation agreements with other local television stations, which broadcast its programs and can be watched by 70 per cent of the population. Its regional affiliates in the Federation are TV Tuzla, TV Zenica, RTV Mostar and, in the RS, ATV. "It is, in fact, the only TV station that broadcasts to the whole country and has succeeded in breaking the cartel of the old state broadcasters, providing a reality check to the nationalist rhetoric."⁴⁸ This high profile and most expensive project of the OHR was nevertheless criticized. The fundamental problem was apparently a desire for quick results. OBN cost \$10.5 million to set up, and another \$7.5 million to keep it going over the past three years (1996-1999). Two questions still need to be answered: is OBN on the way to becoming self-sustaining? could OBN be a model for the region?

A major shortcoming of OBN is that it was put together by the Office of the High Representative and not by Bosnians. It is thus generally viewed as a foreign creation. It should be added that OBN can only be seen in Banja Luka in Republika Srpska only because of courtesy of a transmitter installed last year by the multinational military Implementation Force (IFOR). The international community was also involved in the development of an alternative radio station. Radio FERN (Free Elections Radio Network) was founded in 1996 with donations from the Swiss government and the OSCE to provide an unbiased, cross-entity radio station. The station focuses heavily on news programming. FERN reaches 75 percent of the country's population. According to the International Crisis Group, FERN is the media success story in Bosnia and Herzegovina. In effect, it provides a good alternative to Radio B&H, but not to Radio B&H's Serb and Croat equivalents.

The major problem is to answer the following question : are political parties or media sources creating an audience rather than responding to one ?⁴⁹ International intervention on the Bosnian media market may be ineffective if the fragmentation of the Bosnian media into three different markets is more a consequence than being a causal factor of the politics of ethnicity. The international community made the choice that "favoring" media pluralism would help in

⁴⁷ See the conclusions of the Madrid PIC in 1998: "28. The Council is encouraged by the development of the Open Broadcast Network which has expanded its geographical coverage, increased the role of BiH management and delivered informed programming free of nationalist dogma. The Council calls for continued support by donor governments to OBN, which remains the *only neutral cross-Entity broadcast network*. This support will be vital in consolidating open and pluralistic media and should be sustained until such time as public service broadcasting is legally and financially secure and firmly established."

⁴⁸ S. Haselock, Deputy High Representative for Media Issues, OHR, *Freeing the Media is as Vital as Clearing Mines*, *supra* note 39.

⁴⁹ See D. CHANDLER, *supra* note 24, at 133.

creating a pluralistic civil society and undermine the rule of mono-ethnic parties. After mainly attacking external pluralism, concerns for better internal pluralism grew stronger with the 1998 elections coming.

II. The role of the international “guardians” of pluralism.

A reinvigorated defense of internal pluralism was first due to the increasingly aggressive MEC in the 1998 elections. Incentive for the MEC to get more aggressive came from the PIC meeting in Sintra in May 1997. The declaration promoted the development and cultivation of an independent media in BiH. This PIC declaration gave the OHR the power to “curtail or suspend any media network or program whose output is in persistent and blatant contravention of either the spirit or letter of the Peace Agreement.”⁵⁰ For the 1998 elections, the PEC Rules and Regulations required the media to provide equitable access for all political parties, prohibit inflammatory or hate language, require timely rectification of inaccuracies, and obligate media outlets to present accurate and balanced information.⁵¹ The MEC also drafted specific Media Guidelines to compliment the PEC Rules and Regulations. Under those guidelines, every media outlet had to provide fair coverage and equitable access to all political parties. Television and radio stations were also required to provide free broadcast time for political party commercials. According to the MEC’s own words, the MEC “played a crucial role in improving the media climate during the 1998 general elections in Bosnia and Herzegovina (BH). For the first time, government-controlled media covered diverse political parties, broadcast commercials from opposition parties, and largely complied with internationally-accepted election rules. This, unfortunately, had not been the case in BH up to that point.”⁵² In 1999, it may be tempting to add that this optimistic point of view still needs to be qualified. Anyway, from being criticized for being inactive in the 1996 elections, the MEC was also criticized for being too restrictive on freedom of expression.⁵³ This shows how difficult it is to strike the balance between maintaining public order in a post-conflict society and protecting political discourse. However, the interpretation of freedom of expression in BH shall be guided by the ECHR, which applies directly in BH, and not by the teachings of the First Amendment.⁵⁴ Two and a half years after com-

⁵⁰ See Political Declaration from the Ministerial Meeting of the Steering Board of the PIC, May 30, 1997, Sintra, Portugal, para. 66-70 relate to the media.

⁵¹ See Appendix 6 of The Media Experts Commission Final Report Media in Elections 1998. (www.oscebih.org/mecFinalReport.htm). Chapter 9 of the PEC Rules and Regulations, specifically require fair reporting (Article 9.15); a prohibition on paid political advertising (9.20); equitable access (9.25); financial disclosure (9.30); no inflammatory or hate language (9.35); quickly rectifying inaccuracies (9.40); protecting sources (9.45); publicizing editorial policies (9.50); and, providing accurate and balanced information (9.55). Chapter 10 of the PEC Rules and Regulations prescribes the Electoral Code of Conduct for Political Parties, Coalitions, Candidates and Election Workers.

⁵² The Media Experts Commission Final Report Media in Elections 1998, at 7. (www.oscebih.org/mecFinalReport.htm).

⁵³ D. CHANDLER, *supra* note 24, at 120-122.

⁵⁴ See case-law related to article 10 and article 17 of the ECHR: e.g. *Glimmerveen & Hagenback v. Netherlands*, 18

mencing its work, the MEC's mandate in BiH ended on October 31, 1998. As a result of the Bonn PIC, the Independent Media Commission (IMC) was authorized and was to assume the MEC's important mandate and responsibilities.

In the conclusions of the PIC in Bonn in December 1997, it was decided to set up an interim Independent Media Standards and Licensing Commission which will regulate media pending the adoption of new media laws. According to Article II.8 of Annex 10 to the GFAP, the High Representative may establish civilian commissions within or outside of Bosnia and Herzegovina to facilitate the execution of his mandate. In the Conclusions of the Bonn PIC, it is stated that the authorities in BH must "establish through legislation a permanent public body to enforce internationally-recognised standards of journalism and to allocate media frequencies."⁵⁵ Media will be subject to regulation by a newly formed, interim Independent Media Standards and Licensing Commission (IMSLC). This body, which later changed its name to the Independent Media Commission (IMC) was established by the HR on 11 June 1998.⁵⁶ The IMC has regulatory and disciplinary powers. The regulatory power include the power to license all broadcasters, manage and assign spectrum for broadcasting purposes.⁵⁷ The disciplinary power allows the IMC to subject broadcasters and other media to be subject of Codes of Practice issued by the

DR 187 (1979); *Kuhnen v. FRG*, 56 DR 205 (1988); *Lehideux & Isorni v. France* (1998). Where the expression is directed at the undermining of democracy and human rights themselves, the state is not obliged to confer the same protection on it as would be the case for orthodox political speech. Article 17 allows content-based restrictions on freedom of expression. The necessity of the interference with the right of freedom of expression in the Bosnian society could be easily be sustained because of the context and the seriousness of the threat to democracy in a post-conflict society; *See a contrario, Vogt v. Germany*, A 323 (1995).

⁵⁵ Chapter V.2 "The authorities in Bosnia and Herzegovina must adopt and fully implement new media and telecommunications laws and establish through legislation a permanent public body to enforce internationally-recognised standards of journalism and to allocate media frequencies. In the meantime the media will be subject to regulation by a newly formed, interim Independent Media Standards and Licensing Commission (IMSLC) that will include a regulatory and disciplinary body that will refer the most serious breaches of media standards to the Media Support and Advisory Group (MSAG). Also, the Media Experts Commission will continue to operate in its supervisory role as established by the Provisional Election Commission until the IMSLC is fully functional. The Council invites the High Representative to report to the next Steering Board on the above-mentioned institutional arrangements." (www.ohr.int/docu/d971210a.htm)

⁵⁶ See Decision of the High Representative - Independent Media Commission (www.ohr.int/mediares/d980611a.htm).

⁵⁷ Decision, para. 5: "The Independent Media Commission shall have the function and responsibility to:

- I. license all broadcasters,
- II. draw up such Codes of Practice for broadcasters and other media as it considers appropriate,
- III. manage and assign spectrum for broadcasting purposes,
- IV. ensure adherence to license conditions and Codes of Practice,
- V. set license fees and
- VI. require the disclosure and provision of such information as is necessary for the due performance of its regulatory obligations."

IMC. Shall the broadcasters or other media not complied with the licenses and codes of practice, the IMC may require the publishing of an apology, the imposition of financial penalties, the suspension of licenses, the seizure of equipment or even the termination of license. The Enforcement Panel of the IMC considers and determines “grave and serious breaches of Codes and Licenses”. Until the time as the Telecommunications Law of BH is adopted, the management and assignment of broadcasting spectrum is the mission of the IMC.

IMC has issued a Broadcasting Code of Practice on 1 August 1998, amended on 9 June 1999, as well as a Notice to Media and a Regulation. The Notice to Media specifies the purposes, authorities, activities and structure of IMC.⁵⁸ The Code “sets out the rules and standards for program content⁵⁹ which apply to television and radio broadcast stations” in BH. The Code specifies some minimum standards requirements of crucial importance in BH. The media shall not broadcast any material which incites ethnic or religious hatred among the communities of BH⁶⁰ and shall observe general community standards of decency and civility⁶¹. Fairness and accuracy are also of importance regarding the volatile political situation in BH. So, the media

⁵⁸ The Director General, appointed by the HR, leads the work of IMC. The Director General has wide decision-making powers, leads the daily work of the organisation and reports and consults regularly with the Council of IMC, which is the supreme body of the Commission. The Director General also chairs the Enforcement Panel. The Enforcement Panel decides matters relating to serious breaches of the license conditions or codes, or other matters as the Director General may determine. Both these organs consist of representatives of the constituent peoples of Bosnia and Herzegovina as well as international representatives.

⁵⁹ The international instruments recognise that governments have the right to regulate the content of speech and expression because of other social concerns. The International Covenant on Civil and Political Rights (ICCPR, article 19), the American Convention (article 13), and the ECHR (article 10) all recognise limits for reasons of national security, the rights and reputations of others, as well as public order, morals, and health. The ICCPR (article 20) and the American Convention (article 13) also limit war propaganda and speech or expressive acts that incite national, racial, or religious hatred and that lead to discrimination, hostility, violence, or other similar illegal action. The American Convention permits the regulation of entertainment to protect children's morality and grants a “right of reply” to those “injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication.” The ECHR provides for the protection of information shared in confidence. With regard to media and telecommunications, the net effect of these provisions is that governments are entitled to regulate the transmission of these types of content and may establish and enforce broadcasting codes covering these topics. See Mark N. Templeton, *Part II The Bill and Comparative Media Law: Chapter 4; A Human Rights Perspective in the Broadcasting Bill Debate*, 5 *Cardozo J. Int'l & Comp. L.* 401, 410-413 (1997).

⁶⁰ The ECHR case-law demonstrates that in Europe, incitement to ethnic or religious hatred is often a reason to deny the protection of the Convention. Tolerance in Europe does not require that expression directed at the undermining of rights of others shall be protected. See *Jersild v. Denmark*, A 298 (1994) (while racist speech was condemned, interference with the role of the media to carry out its role as ‘public watchdog’ was considered as a breach of the Convention), *Marais v. France*, 86-A DR (1996). In the U.S., the First amendments case-law renders very difficult any infringement of the right of freedom of expression for reasons of limiting racist speech. See *R.A.V. v. Saint Paul*, 505 U.S. 377 (1992).

⁶¹ Appeal to the concept of community standards of decency and civility reminds of the U.S. case-law. See e.g. *Miller v. California*, 413 U.S. 15 (1973). In the ECHR case-law, see e.g. *Otto-Preminger-Institut v. Austria*, A 295-A (1994).

shall not promote the interests of one political party. The right of reply is required when broadcast material “unjustly places a person in an unfavorable light, or otherwise if fairness and impartiality require it”. The provisions of the Code on access to information and freedom to publish do not go into further details that requiring that the broadcaster’s freedom should conform with article 19 of the Universal Declaration of Human Rights and subject to such limitations as are set forth in article 10 of the ECHR.⁶² Broadcasters are also bound by the IMC Code on Media Rules for Elections.

A Press Code was also seen as a tool of getting BH closer to European standards. The Code is intended “as the foundation of system of self-regulation that shall be considered morally binding on reporters, editors and the owners and publishers of newspapers and periodicals”.⁶³ It is a set of ethical rules which should be protective of the professional integrity of journalism. It pursues the same goals than the IMC Broadcasting Code of Practice. Journalists shall respect and defend the principles of freedom of information and the right of fair comment and critical journalism. The press, as the broadcasters in BH shall observe generally accepted community standards of civility and respect for the diversity of Bosnia and Herzegovina. The press shall also protect the rights of the individual. “This Code is to be interpreted in light of both these considerations”.⁶⁴ The Press is also reminded not to incite or inflame hatred or inequality on grounds of ethnicity, nationality, race, religion.⁶⁵ The right of reply shall be available⁶⁶ and journalists have an obligation to protect the identity of those who provide information in confidence.⁶⁷

⁶² When a governmental body limits speech, it must act “by law”, i.e. it must respect the principle of legality. Second, freedom of speech can be restricted only for the purposes listed in the text. Restrictions may not impose on the freedom any more than necessary. Third, the restrictions must be reasonable and necessary. See D.J. HARRIS, M. O’BOYLE, C. WARBRICK, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 389-397 (1995).

⁶³ See Press Code, Preamble : www.ohr.int/mediaries/d990429a.htm. The Code was signed on 29 April 1999 by the Independent Union of Professional Journalists of BiH, the Association of Journalists of BiH, the Independent Union of Journalists of Republika Srpska, the Association of Journalists of Republika Srpska and the Syndicate of Professional Journalists of Federation BiH and adhered to by the Association of Croat Journalists in BiH.

⁶⁴ Press Code, Article 1.

⁶⁵ Article 3 : “The press shall at all times be aware of the danger that arises when media, deliberately or by inadvertence, encourages discrimination and intolerance. Mindful of this danger, the press shall do its utmost not to incite or inflame hatred or inequality on grounds of ethnicity, nationality, race, religion, gender or sexual orientation or any physical or mental illness or disability. The press shall under no circumstances incite criminal acts or violence.”

⁶⁶ Article 7 : “A right of reply shall be extended to relevant persons if the publication concerned determines that fairness and impartiality merit such a step. There shall, if at all possible, be an opportunity for immediate response in the same edition of the publication as that containing the accusation.”

⁶⁷ Article 13 : “Whenever possible, journalists should rely on open, identified sources of information. These are to be preferred to anonymous sources, whose honesty and accuracy cannot be gauged by the public. Journalists and their publications, however, have an obligation to protect the identity of those who provide

The protection of journalists was even further pushed by the HR in July 1999. Despite the exhortations of the PIC regarding media freedom and the principle of transparency in the work of governmental bodies⁶⁸, as authorities at the State and Entity levels have failed so far to adopt legislation addressing these matters, the HR has intended to remedy this situation by issuing a decision suspending the applicability of imprisonment as a sanction under the provisions concerning defamation⁶⁹, requiring the regulation of the same by new legislation, and providing the competent authorities of the State and the Entities with a deadline for the adoption of new laws on Freedom of Information.⁷⁰

Few remarks may be necessary in order to understand the difficulties of international legislative drafting in BH or in any other place with OHR-like institutions. In Central and Eastern Europe, as Monroe E. Price puts it : “new broadcasting laws may be drafted not as a reflection of internal realities, but rather of the compulsion, inducement, or idealized hopes of outside models - a mirror pointed outside toward the face of the West”⁷¹. This trend is obvious in BH, as international “experts” are the main drafting actors. Sometimes, the international “doctors of free speech” may forget how good a model could be from abroad, the greatest source for law should be internal to the country. This argument advanced by professor Prince would deserve

information in confidence, whether or not they explicitly request confidentiality.”

⁶⁸ Specifically Chapter V, para. 24 of the Madrid PIC declaration called for the “adoption of Freedom of Information legislation in BiH which would grant the public the right of access to information held by governmental authorities”. In addition, the Madrid declaration stated the necessity of the “adoption of legislation to protect journalists' freedom of expression and movement”.

⁶⁹ Decision on Freedom of Information and the Decriminalization of Libel and Defamation :

“I hereby suspend the sanction of imprisonment provided for in Articles 213- 220 of the Federation Criminal Code and Articles 80 - 87 of the Republika Srpska Criminal Code - Special Part under the Chapter “Criminal Acts Against Honor and Reputation”. These Articles allow for the criminal prosecution of defamation and insult (amongst other offenses) and the imposition of criminal sanctions. The existence and use of these criminal provisions have had a chilling effect on journalistic freedom in BiH.

I further require that both Entities, under the guidance of the Office of the High Representative, adopt the necessary legislation to create civil remedies for defamation, libel and slander in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and - upon the adoption of these civil remedies - ensure that the above referenced Articles in the criminal codes are repealed. This action must be completed no later than 30 December, 1999.

I also require that the state of Bosnia and Herzegovina and Entity governments and parliaments prepare and adopt Freedom of Information legislation, and amend existing legislation as necessary, which upholds the citizen's right to information except for narrowly defined categories. Such legislation should uphold the highest international standards and be prepared under the guidance of the Office of the High Representative, the Organization for Security and Cooperation in Europe Mission in BiH and international legal experts. This must also be completed no later than 30 December 1999”.

⁷⁰ OHR Press Release, Decisions Furthering the Implementation of the Dayton Peace Agreement in Bosnia and Herzegovina, 31 July 1999 (www.ohr.int/press/p990773a.htm).

⁷¹ Monroe E. Price, *Comparing Broadcast Structures: Transnational Perspectives and Post-Communist Examples*, 11 *Caradozo Arts & Ent L. J.* 275 (1993).

some thoughts in BH. The decision issued by the HR on Freedom of Information and the Decriminalization of Libel and Defamation is one among numerous examples of international demands which try to export idealized western models without any considerations of the local context.⁷² Sometimes, as for the demand of new laws on freedom of information, the International Community asks the BH authorities to get ahead of Europe,⁷³ whereas the administrative resources are scarce. Thus, it not a surprise that the deadline (30 December 1999) was, once more, not respected by the BH authorities. More generally, the general debate is about the efficiency of external democratization strategies in BH or in Kosovo. Post-conflict peace-building and institutions-building are not easy tasks,⁷⁴ but sometimes one can wonder as T. Carothers if “the case for democracy assistance, and in fact for foreign assistance generally, may at times depend less on specific impact of the assistance on others than on what the assistance says and means about ourselves.”⁷⁵

⁷² The provision requiring that criminal sanctions be repealed does not take into consideration that it is not a requirement of the ECHR to get rid of criminal sanctions regarding defamation (See e.g. “Hate Speech” provisions of the German Criminal Code, actions for the protection of groups identifiable on the basis of race, ethnicity, religious affiliation, gender, etc., which are based on criminal statutory provisions; actions for the protection of state officials, institutions and symbols are also criminal actions). In general, there is co-existence of civil and criminal actions (See, e.g. actions for the protection of individual reputation or self-esteem). In the United States, even some states have criminal libel laws, at least on the books. The ECHR only entails that restrictions on the exercise of free expression are not enforceable: 1. unless they are based on transparent, expressly stated, statutory provisions; and 2. unless the restrictions respect the principle of “necessity” (i.e. the proportionality principle requires that any restriction on the exercise of a fundamental freedom must bear a direct relationship in severity to the purpose that the restriction seeks to achieve). So, because defamation is often a matter of both civil and criminal law, any revisions of defamation law must take into account the fragmentary nature of its rules, which will often be found in various places and in various codes (or statutes). The possibility of consolidating defamation provisions should be considered, and the difference between American and European law on this matter should be acknowledged. Then, of course, the International Community must review the standard of liability, defenses available to defendants in defamation cases, civil remedies to be available, the “insult” category, etc.

⁷³ If the European Court on Human Rights has stated that it is important that the public be enabled to obtain access to information, The Court has not as yet interpreted the protection in Article 10 so broadly as to include a general right of access to information, but has indicated that the public has a right to receive information of public interest and significance : See e.g. *Thorgeirson v. Iceland*, A 239 (1992). The European Court of Human Rights has interpreted Article 8 (1) 1 of the Convention in relation to two cases concerning individual applications to get access to the public authorities’ information about them, the cases of *Leander v. Sweden*, A 116 (1987) and *Gaskin v. UK* A 160 (1991). Up to now, the general duty on the state is only not to obstruct access to information which is available.

⁷⁴ See United Nations, “An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping”, Report of the Secretary-General, 17 June 1992, A/47/277-S/2411 (www.un.org); CHANDLER (D.), « Democratization in Bosnia: The Limits of Civil Society Building Strategies », 5 *Democratization* 78 (1998).

⁷⁵ *Assessing Democracy Assistance : The Case of Romania*, Carnegie Endowment, Washington D.C., at 132, quoted by CHANDLER (D.), *supra* note 24, at 191.

The scope of the article is too limited to answer these questions, however, the HR attempts to consolidate the public broadcasting system pose the same questions of external interventionism efficiency in a society like BH.

D. Media restructuring within the public broadcasting system

There is no doubt that broadcasting has to be regulated, as the radio spectrum is a limited natural resource. Among principles to respect, there must be independence of broadcasters and of the regulatory authority, fairness and impartiality, respect for human rights and promotion of diversity. The European Convention on Transfrontier Television, which is also open to non-members of the Council of Europe, and the resolution on public broadcasting from 1994 shall be taken into account. In addition, in Europe, there is a general agreement that there should be public broadcasting. If there is not one model that has to be followed, BH shall take into account the general standards and the importance of the principle of pluralism in a democratic society.⁷⁶ The general system shall provide a framework in which there is a role for both private and public broadcasters.⁷⁷ The HR, facing the failure of local elites, has tried to reform the public broadcasting system, keeping these preliminary remarks in mind.

I. The early agreements of broadcasting restructuring.

In 1998, there was a progressive development of public service identities through the agreements on the restructuring of SRT and RTV BiH. SRT in Banja Luka and RTV BH in Sarajevo are the two major broadcasters within BH. As public broadcasters, the international community considers that they have failed to serve the full diversity of the ethnic communities which they represent. Mono-ethnic coverage and bias toward the ruling parties were the rules more than exceptions. In this context, the OHR starts working with both broadcasters to reform them in order to develop a public service identity in BH. On 13 February 1998, the Government of the Republika Srpska had signed an agreement which established a set of interim arrangements for the restructuring of *Srpska Radio Televisija* (SRT)⁷⁸ in accordance with European standards⁷⁹ of Public Service Broadcasting. On 17 August 1998, a further Memorandum of

⁷⁶ In Europe it is now argued that the defense of pluralism in a free and democratic society limits any government willing to regulate the media. See Rachael Craufurd Smith, *Pluralism and Freedom of Expression: Constitutional Imperatives for a New Broadcast Order*, in *The Yearbook of Media and Entertainment Law 1996*, at 22 (Eric M. Barendt et al. eds., 1996).

⁷⁷ "The ideal structure seems to be one in which the government assigns frequencies to private persons, enforces antitrust laws to prevent too much concentration in the media sector, monitors the frequencies to ensure compliance with the broadcasting codes, commissions and distributes programming that the free market undersupplies, and subsidizes non-commercial speech by community organisations and private individuals", Mark N. Templeton, *Part II The Bill and Comparative Media Law: Chapter 4: A Human Rights Perspective in the Broadcasting Bill Debate*, 5 *Cardozo J. Int'l & Comp. L.* 401, at 407 (1994).

⁷⁸ See Interim Arrangements for the Management of SRT(www.ohr.int/mediare/d980213a.htm).

⁷⁹ It is quite unclear what "European standards" of public service broadcasting refer to, if anything else than the Television Without Frontiers Directive (89/552 of 3 October 1989) which covers a wide variety of top-

Understanding (MOU) was signed by the RS Government which provided a mechanism for transparent and reliable funding for SRT. The interim arrangements and MOU were to remain in force until such time as they could be embodied in a new law for SRT, which was not adopted by 31 December 1998. On 11 June 1998 another MOU was approved by the Presidency of Bosnia and Herzegovina pursuant the procedure in Article V.2.(c) of the Constitution of BH. The main element of this MOU was a commitment to the reshaping of RTV BiH in order to provide the creation of a public radio and television service for both the whole of BiH and the Federation.⁸⁰ The MOU dealt with the appointment of an interim board of governors for RTV BiH who would propose the establishment of a Public Broadcasting Corporation for BiH advocating the creation of the Federation RTV through the development and adoption of a new law. The MOU also stipulated that these new structures were to be in place by the end of 1998. As new laws were not adopted, the HR resolves to use its powers in order to provisionally bring into force a series of legislative measures.

The HR, because of “a continuing lack of clarity in the approach of the legal system of Bosnia and Herzegovina to vital matters, such as public broadcasting” and because “the political leadership thus far has been unable to realise” the objective of a comprehensive reform of the public broadcasting system⁸¹, the HR decided to use its vested authority under Annex 10 of the GFAP⁸² to remedy the situation. By issuing interim measures, the HR will bring Public Broad-

ics. The Directive creates minimum standards that must be met by every broadcasting system (See rules regarding freedom of reception, the relevant jurisdiction, the promotion of European work, access of the general public to important events, independent production, advertising, teleshopping, sponsorship, protection of minors and public order, right of reply in relation to broadcaster activity). The transmission of foreign programs that comply with these standards cannot be prohibited. On May 5, 1989, the Council of Ministers of the Council of Europe has adopted the European Convention on Transfrontier Television. This Convention deals with the same issues as the EEC Directive on Broadcasting and is intended to create similar standards. See Willem F. Korthals Altes, *European Law: A Case Study of Changes in National Broadcasting*, 11 *Cardozo Arts & Ent. L.J.* 313, (1993).

⁸⁰ See Memorandum of Understanding on the Restructuring of RTV BiH (www.ohr.int/mediares/d980610a.htm).

⁸¹ See the High Representative's Decisions on the Restructuring of the Public Broadcasting System in BiH and on Freedom of Information and Decriminalization of Libel and Defamation of 30 July 1999 (www.ohr.int/mediares/d990730a.htm).

⁸² Classically, a decision issued by the HR usually reminds the origins of its powers: “In the exercise of the powers vested in me by Article 5 of Annex 10 to the General Agreement for Peace (hereafter: GFAP), according to which the High Representative is the final authority in theater regarding interpretation of his mandate; recalling the interpretation of such a power given in paragraph XI.2 of the Conclusions of the Peace Implementation Conference held in Bonn the 10 December 1997, particularly sub-paragraph (b) thereof, in terms of which the High Representative is entitled to make binding decisions, as he judges necessary, on the adoption of measures aiming at ensuring implementation of the GFAP throughout Bosnia and Herzegovina (hereafter: BiH), including interim measures to take effect when parties are unable to reach agreement” and concluded as for the Decision of 30 July 1999 that: “Therefore, none of the above objectives have been fulfilled. This all considered, being borne in mind and noted, I hereby issue the following decision on restructuring the Public Broadcasting System in Bosnia and Herzegovina.”

casting into line with the GFAP, the commitments of the parties, the exhortations of the PIC and with international standards in general. The first set of measures, embodied in the HR's Decision on Restructuring the Public Broadcasting System in Bosnia and Herzegovina of 30 July 1999, aimed to establish a new legislative framework for the operation of a Public Radio Television of Bosnia and Herzegovina and a FBiH Radio-Television (both resulting from the liquidation of RTV BiH), as well as require the establishment of a public service broadcaster for the Republika Srpska (as a reformed version of SRT), in agreement with the GFAP and the highest international standards.

II. A public broadcasting system consisting of three public broadcasters

The Decision, designed to establish a new basic legal framework for public radio and television that will serve the needs of all citizens, created a new Public Broadcasting Service (PBS). The PBS shall provide news programming to the whole of BH based on the resources and mutual interests of both entities networks.⁸³ Cooperation among public television broadcasters is also encouraged and a country-wide public corporation should be established to deal with the joint management of transmission facilities.⁸⁴ An executive board appointed by the HR and the BH Presidency should manage the service until more comprehensive legislation is adopted. The programming and management structure will strictly respect the equality of the constituent peoples under the Dayton Peace Agreement.⁸⁵ The new PBS will succeed the existing RTV BiH as a

⁸³ Annex I, Decision on the Public Radio Television of Bosnia and Herzegovina, article 3 : "The PBS BiH shall produce and broadcast a minimum of at least one hour of current affairs programming per day on radio and television, focusing on the activities and information related to the institutions of Bosnia and Herzegovina and inter-Entity issues, among which a unified news service serving the whole country".

Article 5 : "The PBS BiH shall lead coordination among public broadcasters on the territory of Bosnia and Herzegovina on issues of mutual interest, including programming and technical development. In particular, the PBS BiH shall arrange for the purchase of broadcast rights for foreign programs, oversee the Eurovision exchange of news and sport programming through a unique technical point and organize any appropriate joint coverage of events of significant local and international events".

Article 6 : "The PBS BiH shall cooperate with the Commission on Public Corporations and with other public broadcasters in Bosnia and Herzegovina with a view to establish a joint management of public broadcasting facilities over the entire territory of Bosnia and Herzegovina".

⁸⁴ In Madrid in December 1998 PIC members called for : "21. (...) the adoption of legislation in both Entities which enshrines the principles of editorial independence, religious tolerance and financial transparency in all media sponsored by public funds. Such legislation must contain provisions designed to prevent any political party from exerting significant control over public broadcasting and to ensure public broadcasters attempt to address the interests of all the constituent peoples in current affairs programming; the establishment of a joint inter-Entity Annex 9 Public Corporation for Broadcasting and Transmission incorporating the public transmission and relay systems in both Entities."

⁸⁵ Annex I, Decision on the Public Radio Television of Bosnia and Herzegovina, Article 3 : "The principle of equality of the three languages and the two alphabets of the constituent peoples of Bosnia and Herzegovina shall apply to PBS BiH programming. The PBS BiH shall also facilitate access to its programming of persons belonging to minority national groups other than the three constituent peoples, and other citizens of Bosnia and Herzegovina".

member in international organisations. The distribution of the property of RTV BiH shall be reviewed by a team of experts over a designated period. The Founding Board of the PBS of BiH was constituted on the 17th of September at which time the Interim Board of Governors of RTV BiH ceased. The Foundation Board will take care of the establishment of public broadcasting standards and respecting the principle of equality. This body will simultaneously assume the function of managing and supervising the work of the current RTV BiH. The Board will also monitor the establishment of the RTV of the Bosnian Federation and assist in setting up a public corporation for transmission and broadcasting of RTV program in BH.

As part of the Decision, the HR has also reformed broadcasting in both entities.⁸⁶ It imposed the Law on the Radio-Television of the Federation of BH. The version imposed is based on the law forwarded by the Federation Government. The HR has added certain amendments taking into account the new state-wide service⁸⁷ and the need for international supervision.⁸⁸ The High Representative also issued a deadline of 15 August 1999 to the RS National Assembly to amend the SRT law so it respects a minimum level of public service standards. The Republika Srpska National Assembly has thus far failed to bring this law into line with European stan-

Article 7 : "The composition of the administration and editorial management of the PBS BiH , shall be generally representative of the peoples of Bosnia and Herzegovina, and include persons belonging to minority national groups other than the three constituent peoples, and other citizens of Bosnia and Herzegovina".

⁸⁶ As part of the will of the international community to restrain the nationalistic political forces in BH, the HR made additional stipulations in order to rationalize and legalize the activities of foreign radio/television broadcasters on the territory of Bosnia and Herzegovina, with particular focus on the present activities of Croatian Radio Television (HRT). Indeed, of the major broadcasters transmitting in BH, two are based outside the country: HRT and Radio Television Serbia (RTS). The legality of both stations broadcasting into BH is currently in question.

⁸⁷ Annex II, Law on the Radio-Television of the Federation of Bosnia and Herzegovina, article 6 : "The activities with which the RTV FBiH fulfils the tasks from Article 3, paragraph 1 of this Law, shall be: 1. Preparation, production, reproduction, broadcast and transmission of its own radio and television programmes intended for the public within the Federation, Bosnia and Herzegovina and the world. 2. Transmission and broadcast of radio and television programmes of other in-country and world's radio-television stations for the public within the FBiH. 3. Participation in the joint programmes of the radio and television stations within Bosnia and Herzegovina and the world, in co-operation with the BiH Radio-Television (...)".

⁸⁸ Annex II, Law on the Radio-Television of the Federation of Bosnia and Herzegovina, article 14 : "RTV FBiH shall conduct no broadcast operations except as provided in a license or licenses granted by the Independent Media Commission or its successor (...) RTV FBiH shall be required to make such periodic disclosures and other submissions as may be requested by the IMC in furtherance of its responsibilities in connection with the licensing of RTV FBiH or otherwise arising under this Law. Conformity with the provisions of this law by RTV FBiH shall be a necessary condition to the granting or continuation of a broadcast license to RTV FBiH by the IMC. The RTV FBiH shall be bound to ensure a high quality, diverse and balanced programs for constituent peoples together with the Others, and for the citizens of Bosnia and Herzegovina from within the territory of the Federation of Bosnia and Herzegovina, including a correct share of separate program contents for different minority groups, in compliance with the enactments of the RTV FBiH. (...) Certain program contents shall be broadcast in the languages of minorities who live within the FBiH, and they may be broadcast in foreign languages too, in accordance with the RTV FBiH Statutes".

dards.⁸⁹ As it is crucial that European standards on public broadcasting shall apply equally to both Entities, and due to the fact that Republika Srpska is lagging behind the Federation in this respect, following the introduction of the Law on Radio-Television of Federation BiH, the reform of SRT had to be completed.⁹⁰ The HR issued a new decision on Tuesday, 31 August 1999.⁹¹ The decision, which completed the Public Broadcasting Reform package issued on 30 July, is hoped to bring Republika Srpska closer to European standards on public broadcasting. The amendments delete provisions of the SRT law, establishing Republika Srpska authority over frequency allocations and content discipline.⁹² The decision brings the provisions SRT law on public broadcasting into line with the Interim Arrangements which should have been adopted in February 1998. The amendments uphold the principles of editorial independence,⁹³ financial transparency⁹⁴ and cultural pluralism.⁹⁵ The amendments also eliminate all Serb-exclusive refer-

⁸⁹ OHR Press Release, Decisions Furthering the Implementation of the Dayton Peace Agreement in Bosnia and Herzegovina, 31 July 1999 (www.ohr.int/press/p990773a.htm).

⁹⁰ OHR Press Release, Decision on RS Radio-Television, 1 September 1999 (www.ohr.int/press/p990901a.htm).

⁹¹ See The High Representative's Decision on Amending the Law on Radio-Television of Republika Srpska: www.ohr.int/mediares/d990831a.htm

⁹² Decision on Amending the Law on Radio-Television of Republika Srpska, Article 2 : "Chapter I of the Law [the Law on Radio-Television of Republika Srpska of 7 April 1996], including Articles 1 to 17, is hereby repealed in its entirety".

Article 4 : "Article 18 is hereby repealed in its entirety, and is replaced by the following: "The Public Company Radio Television of Republika Srpska Banja Luka with full liability, is founded for performing the radio-diffuse activity of the interest for Republika Srpska (...)The Radio Television of Republika Srpska shall perform its activities in line with the laws of Bosnia and Herzegovina and such regulations as made by the Independent Media Commission or its successor, as well as with the laws of Republika Srpska".

⁹³ See e.g. Article 8 : "A new Article 21 bis is hereby added after Article 21 of the Law: "While performing its activities, the Radio Television of Republika Srpska shall create a programming which with its timely, unbiased, professional and truthful informing of the citizens, shall contribute satisfying their educational, cultural, and other needs and interests, free informing of audience opinions, and initiate creativity in all areas of social life (...)".

Article 14 : "Article 25 of the Law is repealed in its entirety, and is replaced by the following: "The organs of the Radio Television of Republika Srpska shall be the Board of Governors and Director General.

The members of the Board of Governors and the Director General shall not hold any other elected or appointed office.

The Statute of the Radio Television of Republika Srpska shall define the necessary editorial and management structure".

⁹⁴ Article 17 : "Article 33 of the Law is repealed in its entirety, and is replaced as follows: "The Radio Television of Republika Srpska shall establish the manner of paying and collect the compensation for the usage of the radio and television receivers, shall keep records on usage of the radio and television receivers.

The Board of Governors of the Radio Television of Republika Srpska, with the previously obtained opinion of the Government of Republika Srpska, shall determine the amount of compensation referred to in

ences, and change the name “Srpska Radio Television” to “Radio Television of Republika Srpska.” The general goal of the Decision is to ensure that radio-television funded with public funds serves the interests of the citizens of Republika Srpska without political bias or interference. As the HR is willing to leave a certain leeway to Republika Srpska authorities, the HR is issuing a deadline of February 29 for them to show their commitment to public service broadcasting standards and to produce themselves a law going beyond the minimalist interim solution imposed by the HR. However, despite previous appeals, the National Assembly had so far failed to act on this matter for the past 18 months.

The decision of 30 July 1999 opens the path to a new constitutional interpretation regarding the division of competences in BH. The Ministry of Information of Republika Srpska criticized recently the “continuation of the process of unitarization and centralization of the media in BH.”⁹⁶

III. A changing interpretation of the constitutional framework

The international community was not willing at first to argue for any competence of the central government in BH in the media. There was a general consensus, more for political than for constitutional reasons, for a restrictive constitutional interpretation. The London PIC of 1996 simply agreed that there shall be a new legal framework which shall facilitate the creation and operation of independent broadcasting stations and networks throughout BH. Licences shall be issued in a non-discriminatory fashion “whether they are granted at National, Entity or Cantonal level.” The question of the division of competences in media matters was then left unresolved. Indeed, as the existence itself of the Bosnian State has been put into question⁹⁷, it is

the previous Paragraph.

Subject to the authority of the Independent Media Commission or its successor, the Government is obliged to provide, on a monthly basis, the Radio Television of Republika Srpska with the difference in the resources between the collected subscription fees and total amount that is to be provided in the following three ways (...)

The Radio Television of Republika Srpska shall submit a report to the Government on the inflow of the subscription fees resources by the third of each month.

The Government of Republika Srpska shall provide the difference of the necessary resources by the tenth day of each month.

The general settlement for the previous year shall be carried out by January 31 of each year”.

⁹⁵ Article 11 : “Article 22 of the Law is repealed in its entirety and replaced by the following: The Radio Television of Republika Srpska shall:

- prepare and realize news, cultural, educational, scientific, entertainment and other programs with the aim to inform the citizens truthfully, timely, professionally and impartially and to contribute to free establishing and expressing of opinions of listeners and viewers;

- contribute to the affirmation of the national values of all the citizens of Republika Srpska; (...).”

⁹⁶ *Nezavisne novine*, 31 August 1999.

⁹⁷ See Robert M. Hayden, *The State as Legal Fiction*, 7 East European Constitutional Review 83 (1998)

no wonder that it was argued that the Constitution of BH grants authority over media policy to the Entities. In the Federation of BH, there is even a tendency to devolve media law to the Cantonal level. Article III.1.h⁹⁸ of the Constitution of BH, which provides that common and international communications facilities as being within the responsibilities of BH, could give some basis for certain elements of media and communication related legislation to be on State level. However, it was advocated that media issues were not mentioned as such in the enumeration of powers of the common institutions and that consequently, in accordance with Article III.3.a.⁹⁹, media falls within the competence of the Entities or their subdivisions. In the Federation, for example, frequencies is a Federation matter and communication and infrastructure are shared between the Federation and the Cantons. In addition, policy on radio and television is a cantonal competence, even if it is always possible for Cantons to transfer competence to the Federation. The constitutional interpretation implies that State institutions could only be responsible for the regulation of the technical aspects of telecommunications, while media broadcasting is a competence of the Entities.¹⁰⁰

(www.law.nyu.edu/eecr/vol7.html).

⁹⁸ Article III.1.: "Responsibilities of the Institutions of Bosnia and Herzegovina. The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

Foreign policy.

Foreign trade policy.

Customs policy.

Monetary policy as provided in Article VII.

Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

Immigration, refugee, and asylum policy and regulation.

International and inter-Entity criminal law enforcement, including relations with Interpol.

Establishment and operation of common and international communications facilities.

Regulation of inter-Entity transportation.

Air traffic control.

⁹⁹ "All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities".

¹⁰⁰ This constitutional interpretation is reminiscent of the regulatory framework in Germany. Since the 1961 "Television I" decision, the Federal Constitutional Court has prevented the Bund from establishing a Federal broadcaster. Television broadcasting would not fall under the definition of "telecommunications" as entrusted to the competence of the Federal Government by article 73.7 of the Basic Law, as such an activity is to be considered as a predominantly cultural matter entrusted to the Länder as a residual responsibility. The Federal competence for "telecommunications" would include general spectrum management decisions (general allocation of frequencies according to their possible use and allocation to federal authorities for purposes other than broadcasting, technical transmission of television programs), with all aspects related to radio and television broadcasting left to individual Länder. As a result, the federated units are recognized exclusive responsibility for the establishment of public broadcasters, the competence for licensing private broadcasters, content regulation and discipline. As technological improvements brought the electronic me-

Another constitutional reading was also possible. One can argue that general spectrum management, allocation of frequencies and licensing of broadcasters, content regulation and discipline in the field of electronic media are all dealt with at the state level¹⁰¹. Article III.1.h of the Constitution of BH provides that common and international communications facilities as being within the responsibilities of BH. The expression “communication facilities” can include all facilities proper of mass communications media, among which electronic apparatus for radio and television broadcasting are obviously included. However, Annex 9 provides for cooperation between the Federation of BH and the Republika Srpska in the field of “communications facilities”. They can establish a public corporation to operate joint public facilities¹⁰². As the expression “communications facilities” is exactly identical to the one used by article III.1.h, the key in determining the differences between State and Entity competences is if the communications facilities have a “common and international” character. As the term “common” should be intended in the sense of “common to all citizens”, it results that the State competence under article III.1.h is to be understood as limited to the direct establishment and operation of State broadcasting facilities and to participation in the establishment and operation of international ones.

The decision of 30 July 1999 argues in favor of principles of media law consistent and uniform throughout both Entities, and a statewide media policy. It is an accepted principle that, due to the limited availability of spectrum frequencies, the public monopoly over their allocation for broadcasting purposes is the key for providing the widest possible number of opinions to be represented in the broadcasting media. In BH, such a monopoly was judged to be one of the central authorities of the State, regulated by the Telecommunications Law of BH passed by the BiH Parliamentary Assembly. Articles 1.(2), 4.(1).(c), and 6.(2).(c) of this law explicitly provide for the allocation of frequencies for broadcasting purposes and the power of the BiH Telecommunications Agency to set the relevant conditions. Pending the establishment of the Telecommunications Agency, this role is presently carried out by the IMC. It is argued that Article III.1.(h) of the Constitution of BH “clearly” authorizes the institutions of BiH to establish and operate common and international communication facilities, including radio/television broadcasting facilities. As for the Entities, Article 3 of Annex 9 to the GFAP, in establishing the pos-

dia market far beyond Land borders, Inter-State agreements among the Länder have to be concluded in order to deal with the matter, e.g. the “Agreement on Broadcasting among the Federated States in United Germany”.

¹⁰¹ Centralized regulatory models exist. In the U.S., if such a model has not resulted in the establishment of a Federal country-wide public broadcaster, the Public Broadcasting Act of 1967 established a Corporation for Public Broadcasting. The Corporation has to deal with the distribution of federal grants for the production and transmission of public interest programs, as well as discipline on the content of the beneficiaries programming as far as “objectivity and balance” are concerned.

¹⁰² Article III, Annex 9 of the GFAP, Agreement on Establishment of Bosnia and Herzegovina Public Corporations provides : “The parties may decide, upon recommendation of the Commission, to use establishment of the Transportation Corporation as a model for the establishment of other joint corporations, such as for the operation of utility, energy, postal and communication facilities”.

sibility for the institutions of both BH and the Entities to establish and operate communication facilities, recognizes them the possibility to establish and operate, separately or jointly, their own radio/television stations, subject to licensing by the competent authorities of BH (presently the IMC). The reinterpretation of the constitutional division of competences in BH regarding media questions does not imply “a return to a large, expensive, centralized state-wide broadcaster.” However, “a modest state-level organization will need to be established to serve as a coordinating body for entity television networks and which could produce current affairs programming based primarily on the resources of the entity networks.”¹⁰³

There are currently some negotiations as to organize a functioning regulatory and technical system for broadcasting and telecommunications issues in BH. The Telecommunications Regulatory Agency (TRA) shall not regulate any aspect of the provision of broadcasting services apart from access to, and use of, frequencies or any other type of transmission. As far as the licensing issue is concerned, regulation of licensing can be divided in two: frequency licensing and other matters (ownership structure, content, etc.). For the future, the TRA will deal with the frequency (technical) aspect of licensing in accordance with the Telecommunications Law of BH.¹⁰⁴ This law sets out the division of competence between the State¹⁰⁵ and Entities.¹⁰⁶ Other

¹⁰³ S. Haselock, Deputy High Representative for Media Issues, OHR, *BiH Will Enter Europe Only When the Media is Liberated from Political Control*, *supra* note 10 (www.ohr.int/articles/a990625a.htm).

¹⁰⁴ Article 6. :

1. The functions of the Agency in relation to Telecommunications shall include:
 - a) to establish the terms and conditions for the provision of inter-entity and international telecommunication services that will be included in any licence to be granted to a Telecommunication Operator, subject to regulations to be adopted;
 - b) to ensure that international telecommunication services are provided in accordance with the terms and conditions of licences issued to Telecommunication Operators;
 - c) to define technical standards that ensure the interoperability of public telecommunication networks and services;
 - d) in co-operation with the Entities, to specify standards for the connection of Terminal Equipment to any network used to provide a Public Telecommunication Service in Bosnia and Herzegovina;
 - e) to regulate telecommunications between Bosnia and Herzegovina and any other country by means of a Private Network;
 - f) to issue regulations with regard to Common Facilities; and
 - g) such other functions as may be assigned to it under this Law or by the Council of Ministers.
2. The functions of the Agency in relation to radio communications shall include:
 - a) to maintain and publish a table of frequency allocations for the whole of Bosnia and Herzegovina;
 - b) to establish and maintain the Frequency Data Base;
 - c) to establish the terms and conditions of use of the frequencies required for the provision of inter-entity and international services and of any other frequency the use of which requires international coordination;

aspects of licensing are now dealt with to a certain extent by Entity Ministries, although only the IMC has a proper regulatory role. The successor agency of the IMC, dealing with broadcasting aspects of licensing, will need to have a close working relationship with the TRA.¹⁰⁷ Moreover, it is anticipated that the TRA will take over some of the functions now handled by the IMC. The establishment of a joint structure for the TRA and the IMC could establish a centralised regulatory framework for telecommunications and broadcasting issues. Then, the OHR would have produced a regulatory framework far more coherent than what we could have expected from a literal reading of the Dayton Agreement.

E. Conclusion

The media reform in BH is part of a more general problem that the international community faces in the Balkans. The international administration of a “sovereign” country, in order to facilitate the political transition in a post-conflict society is a difficult exercise. If an intermediary

d) to monitor the use of radio frequencies, to ensure the avoidance of international or inter-entity harmful interference and to make regulations regarding the inspection of radio equipment;

e) to identify the cases for which the efficient use of radio frequency spectrum can only be ensured by organising a public tender for the issuing of the relevant permit;

f) such other functions as are assigned to it under this Law or by the Council of Ministers.

3. Any disagreement among the members of the Management Board as to the powers of the Agency in relation to any matter regarding Telecommunications shall be referred to the Council of Ministers for determination.

¹⁰⁵ Article 4. 1. In conformity with the Constitution of Bosnia and Herzegovina, the competence of the Common Institutions of Bosnia and Herzegovina in the field of telecommunications includes:

a) to define the basic conditions for the provision of international telecommunication services;

b) to regulate Common Facilities;

c) to allocate, plan and coordinate the use of the radio spectrum;

d) to ensure the technical compatibility of networks used for the provision of Public Telecommunication Services;

e) to promote the harmonisation of Public Telecommunication Services; and

f) to determine the representation of Bosnia and Herzegovina in international fora concerned with telecommunications.

¹⁰⁶ Article 10: Regulation of other Telecommunication matters

1. If so requested by an Entity, the Agency may undertake any regulatory activity in the field of telecommunications within the competence of that Entity.

2. An authorisation or regulation made by the Agency under this Article shall not apply in the territory of an Entity unless that Entity has given its assent.

¹⁰⁷ Madrid, the PIC “affirms the IMC's responsibility for the organisation of the frequency spectrum, including the assignment of broadcast frequencies, and the need for the bodies set up under the Telecommunications Law to co-operate with it” (para. 24).

international intervention seems essential to establish and sustain democratic institutions, no one can guess when the international administration in BH will feel that it is not necessary to set the policy agenda anymore. International intervention was considered necessary to break the link between media and the nationalist parties. However, the difficulties involved in imposing democracy from outside were underestimated. There is no doubt that the international community is forcing a western-based system of media regulation on unwilling elected political authorities in BH, but not necessarily on an unwilling media community.

The practices of disproportionately favoring the ruling parties of its respective ethnic group would be hard to erase. Without direct external regulation and the pressure this brings, the gains made by the international community in BH may be lost. Bosnia could serve as both a lesson and a model for the treatment of media in Kosovo and other post-conflict situations. A common paradox is the one of compelling any action that is meant to promote democracy.¹⁰⁸ Also, many of the same media conditions exist in Yugoslavia that were present in BiH. As in post-war BiH, the Serbian media is largely state-controlled and party-controlled; both political opposition and divergent viewpoints are actively repressed. These are the conditions in which the international community had to think of a regulatory strategy.

In evaluating the international community's effectiveness in BH as well as its applicability to other post-conflict situations, it is imperative to consider the critical role that the party-controlled media play in starting and sustaining war throughout the Balkans. In such an environment, mechanisms such as the HR's powers may prove useful. A "dictatorship of virtue" may be a short-term solution as the conditions in the Balkans are not like those found in advanced democratic societies, where basic freedoms, protections, and responsibilities are inculcated fully and effectively throughout the society. In post-conflict societies, media often play a pernicious role. OHR-like bodies may prove to be powerful tools in the earliest efforts to move from conflict-filled societies to stable, democratic societies.

¹⁰⁸ Another paradox is to hold that free and fair elections alone, provides no guarantee that a democratic system will become firmly established and capable of resisting challenges by anti-democratic actors. The question thus arises of how far the International Community may go in order to preserve peace without relinquishing the claim of being democratic. See G.H. Fox & G. Nolte, *Intolerant Democracies*, 36 Harv. Int'l. J. 1 (1995). The International Community seems to favor now a "protectorate" style model, which holds that the long-term peace-building efforts outweighs short-term deprivation of political rights to nationalist actors in BH. See International Crisis Group Report, *Is Dayton Failing?: Bosnia Four Years After the Peace Agreement*, 28 October 1999 (www.intl-crisis-group.org/projects/bosnia/reports).