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Report

The Dayton Peace Agreement, Two Decades Later:

What was achieved and what to expect?

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Legal peculiarities of the Dayton Agreement(1)

Among the many shortcomings of the Dayton framework special attention should be devoted to its serious legal peculiarities, including several contradictory elements found in its articles. Although this issue was mostly overlooked at the time of signing, some scholars offered particularly perceptive and prescient analysis. Foremost in this regard were the extremely keen observations o f Paola Gaeta during the first year of Dayton's implementation, 1996. Gaeta stresses that, from the perspective of international law, the Dayton Agreements are characterized by several unique features that reflect the complexity of the peace process in the former Yugoslavia.

One particularly peculiar issue is the inexplicable disappearance of the word "Republic" from "Republic of Bosnia Herzegovina." Although the Federal Republic of Yugoslavia and the Republic of Bosnia Herzegovina assented to the obligation "to recognize each other as sovereign independent states within their international borders" (Article LX), the key legal notion "Republic" (in "Republic of Bosnia and Herzegovina") was mysteriously omitted in the accords' final text. This disappearance is seen in the agreement's annexes, which set the conditions for peace in "Bosnia and Herzegovina." The agreement as written is to be concluded by "Bosnia and Herzegovina" and the two entities directly involved in the conflict—the Republika Srpska and the Federation of Bosnia and Herzegovina—which, technically speaking, are not parties to the General Framework Agreement.(2) Other agreements are entered into only by the two entities (the "Agreement on Arbitration" in Annex 5 and the "Agreement on Bosnia Herzegovina Public Corporation" in Annex 9), or by each of the parties to the General Framework Agreement, of which there are many examples in the annexes and appendixes.

Another legal issue is the problematic role played by the president of Yugoslavia (Serbia and Montenegro) Slobodan Milosevic. Officially and in the media he was named as the representative—or, in more precise judicial terms, the "legal agent"—of the Bosnian Serbs at the negotiations. Three elements in the Dayton Agreements seem to confirm that he acted on behalf of a different legal subject, namely the Bosnian-Serb insurgents (the Republika Srpska). First, the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, Mr. Milutinovic, initialed all the agreements to which the Republika Srpska was a party. The Republika Srpska thus expressed its consent to be bound by the peace agreements through the organ of another state and not through its own organs. Second, the preamble to the Dayton General Framework Agreement makes reference to an agreement of 29 August 1995 that "authorized the delegation of the Federal Republic of Yugoslavia to sign, on behalf of the Republika Srpska, the parts of the peace plan concerning it, with the obligation to implement the agreement that is reached strictly and consequently." Third, Milosevic inappropriately exercised powers derived from the legal notion of international agency (detailed in Articles I and II of the Agreement on

Initialing), since they refer to “the parties and the entities that they represent.” But, in sensu stricto, Milosevic couldn’t play the role of “legal agent” because the legal status of “Republika Srpska” (along with the other side in the talks) was at that time far from clear. At Dayton, the negotiating parties took for granted that the Federation of Bosnia and Herzegovina and the Republika Srpska had international legal personality, albeit an extremely limited one. However, it may be argued that this assumption was based on effective control over a portion of territory. Unlike the Republika Srpska, the Federation of Bosnia and Herzegovina did not meet all the requirements necessary for a de facto government.(3) In Kadic et al. v. Karadzic the United States Court of Appeal for the Second District noted that for the appellants, “Karadzic’s regime satisfies the criteria for a state” since “Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its currency.” For the court, “these circumstances readily appear to satisfy the criteria for a state in all aspects of international law.” Furthermore, it should be noted that on 24 May 1992, the Bosnian Serbs, the Republic of Bosnia and Herzegovina, and the Bosnian-Croats concluded under the auspices of the International Red Cross an international agreement concerning the application of Article III to the Geneva Conventions and other norms of international humanitarian law.

All that the Federation could offer as proof of its legal status reinforced that it was in fact a fictitious entity, created in 1994 at the instigation of the United States for political reasons. Indeed, the Croatian side of the Federation was mainly under the direct control of Croatia, as confirmed by Croatia itself in its unilateral declarations referring to “personnel and organizations in Bosnia and Herzegovina… under its control.” Why then did the Federation of Bosnia and Herzegovina take part in the peace negotiations without being an international subject? The reason is political rather than legal. Unacceptable as it was, the fact that the Bosnian Croats would have never agreed to be represented by the government led by President Izetbegovic was accepted as a sufficient argument. However, their direct participation qua Bosnian Croats in the negotiations could have weakened the Republic of Bosnia and Herzegovina in respect to the Bosnian Serbs and threatened the political success of the Muslim-Croat alliance. The participation of the Federation of Bosnia and Herzegovina in the peace negotiations satisfied these two conditions, although by all standards of international law, it was essentially based on a legal fiction.

Even more striking is the fact that the Republika Srpska and the Federation of Bosnia and Herzegovina lost any international personality, either effective or fictitious, with the entry into force of the peace agreements. Namely, both entities accepted the new constitution of the Republic of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement), which entailed that the entities are subordinate members of a federal state, and thus cannot be endowed with international legal rights and powers.

These powers are reserved for the parliament and the president. (Article IV, paragraph 4(d) of the new constitution stipulates that it is for the central parliamentary organ to decide “whether to consent to the ratification of treaties,” and Article V, paragraph 3 states that it is the sole privilege of the republic’s president to “conduct foreign policy,” to appoint ambassadors and other international representatives of Bosnia and Herzegovina,” to represent the state “in international and European organizations and institutions,” to seek “membership in such organizations and institutions of which Bosnia and Herzegovina is not a member,” and to negotiate, approve, and ratify treaties.

As for the two entities, they only have the right “to establish parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina” (Article HI, paragraph 2), and may “enter into agreements with states or international organizations” only “with the consent of the Parliamentary Assembly,” which “may provide by law that certain types of agreement do not require such consent.” It should be added that under Article VI, paragraph 3 the Constitutional Court may decide “whether an entity’s decision to establish a parallel relationship with a neighboring state is consistent with the constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.”

On the ground of international law, therefore, the contention can be made that the Federation of Bosnia and Herzegovina was recognized as a subject of international law only during participation in the peace negotiations. As for the Republika Srpska, we are faced with the case of an “insurrectional government” created by means of military aggression supported by foreign country as a “third party” (namely Yugoslavia led by Milosevic), which accepted the paradoxical role to use its international personality in order to extinguish itself. That is, after acquiring international status on account of its partial military occupation of Bosnia and Herzegovina, the Republika Srpska accepted the new constitution of the state from which it had endeavored to secede; it thus accepted to downgrade itself to the status of member of a sovereign state. But even Paola Gaetea’s brilliant analysis missed a critical point which reaffirms the sovereign status of Republika Srpska. The term “Republic”—with which Republic Srpska was formally labeled—was dropped (without explanation) in exactly the same manner as the “Republic” of Bosnia and Herzegovina!

Furthermore, it should be recalled that the constitution was accepted by the parties concerned (the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska), by means of three distinct (yet similar) declarations. It is unclear whether legally speaking these three declarations should be regarded as elements of an international agreement, or whether they are instead to be viewed as separate unilateral acts. Unlike the other annexes to the General Framework Agreement, the constitution does not appear to be an international agreement. The text

of the Constitutional Charter is accompanied by the three unilateral declarations, which are not attached formally to the constitution itself. These declarations are: the declaration on behalf of the Republic of Bosnia and Herzegovina, according to which "the Republic of Bosnia and Herzegovina approves the Constitution of Bosnia Herzegovina at Annex 4 to the General Framework Agreement"; the declaration on behalf of the Federation of Bosnia and Herzegovina, stating that "the Federation of Bosnia and Herzegovina, on behalf of its constituent peoples and citizens approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement"; and the declaration on behalf the Republika Srpska, under which "the Republika Srpska approves the Constitution of Bosnia and Herzegovina at Annex 4 to the General Framework Agreement." It is an open question why only Annex 4 is bound by unilateral declarations instead of a formal international treaty.

It is beyond dispute that that the legal framework of the constitutional law-making process in the text of Dayton was anomalous. To take one example, consider the language of the preamble where it states that the "constituent peoples" are "Bosniacs, Croats, and Serbs… (along with Others), and the citizens of Bosnia and Herzegovina."

These legal anomalies can be understood if one keeps in mind that the constitution was drafted and agreed upon in an international forum and subsequently entered into force by virtue of international transactions. As pointed out above, the constitution was negotiated at the international level by the Republic of Bosnia and Herzegovina, two insurrectional groups, and a cohort of foreign governments. It is no coincidence that the constitution was drafted in English and not in the three languages of the peoples concerned. Furthermore, most of the agreements negotiated at Dayton were drafted and adopted only in English—a feature that was not explicitly mentioned at the end of the agreement. By contrast, the Agreement on Initialing states explicitly that it was drafted "in the English language," while the General Framework Agreement notes that the document has been drafted "in the Bosnian, Croatian, English, and Serbian languages, each text being equally authentic."

The other fundamental shortcoming is that the constitution was not the result of an internal constitution-making process. It should be also stressed that the formal deletion of the term "Republic" presents an impressive sleight of hand by which an internationally recognized state makes a contract with insurrectional groups and subsequently disappears completely and permanently.

It is no wonder that the constitution of the newly created Bosnia and Herzegovina ranks among those demonstrating the greatest degree of "friendliness to international law." (4) In other words, it is a constitution that attaches great importance to international legal rules and principles. The constitutional provisions that open Bosnia and Herzegovina's

legal order to the international legal system are: Article II, concerning Human Rights and Fundamental Freedoms; Article III, paragraph 2, by which the entities "shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms"; and Article III, paragraph 3, whereby "the general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the entities."

Another extremely unusual legal feature in the accords is Article VI, paragraph 1, according to which three of the nine members of the Constitutional Court of Bosnia and Herzegovina "shall be selected by the President of the European Court of Human Rights after consultation with the Presidency," providing that these judges "shall not be citizens of Bosnia and Herzegovina or any neighboring States." Another affront to BiH sovereignty is Article VI, paragraph 3 by which the Constitutional Court has jurisdiction over issues concerning whether a law is "compatible with…the European Convention for Human Rights and Fundamental Freedoms." Another compromise of sovereignty is found in Article DC, paragraph 1, whereby "no person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina."

The constitution has special emphasis on international standards on human rights. Thus, for instance, the preamble refers to the "purposes and principles of the United Nations" and inscribes the pledge "to ensure full respect for international humanitarian law" and to uphold international instruments on human rights. Annex I to the constitution provides for a list of human rights agreements to which, according to Article II, paragraph 7, BiH "shall remain or become a party."

The subordination of BiH to international norms is most explicitly prescribed in Article II, paragraph 2, whereby 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." Furthermore, Article II, paragraph 1, provides "Bosnia and Herzegovina and both the entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms" and, according to paragraph 8, "all competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanism established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former

Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal) and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law." The other paragraphs of Article II at issue concern the "Enumeration of Rights" (paragraph 3), "Non Discrimination" (paragraph 4), "Refugees and Displaced Persons" (paragraph 5), "Implementation" (paragraph 7) and "International Agreements" (paragraph 7). It is also worth noting that Article X, paragraph 2 renders all constitutional provisions on human rights non-amendable. According to this provision, "no amendment to this Constitution may eliminate or diminish any or the rights and freedoms referred to in Article of this Constitution or alter the present paragraph."

Perhaps of greatest significance is the constitutional obligation the duty to cooperate with the International Criminal Tribunal for the Former Yugoslavia—a unique feature in the constitutions of the world.

Conclusion

The Dayton Agreements find their basic underpinning in two political factors: the will of the parties to put an end to bloodshed and the keen desire of the United States to exercise its political leadership in a serious European crisis. The engrained hatred among the conflicting parties, as well as the inherent difficulties of creating a lasting political settlement made it necessary to strengthen the agreements by a set of international guarantees.

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References

(1) This chapter is inspired by and greatly based on Paola Gaeta's exceptional analysis of the international legal aspects of the Dayton Agreement, written nineteen years ago, during the first year of its implementation. Paola Gaeta, "The Dayton Agreements and International Law" (7 EJIL, 1996), 147-163. http://ejil.org/pdfs/7/2/1358.pdf

(2) See, in particular, Boundary Line and Related Issues (Annex 2), Agreement on Elections (Annex 3), Constitution (Annex 4), Agreement on Human Rights (Annex 6), Agreement on Refugees and Displaced Persons (Annex 7), Agreement on the Commission to Preserve National Monuments (Annex 8), Agreement on International Police Task-Force (Annex 11)

(3) As for the Republika Srpska, see the decision of 11 October 1995, Kadic et al. v. Karadzic, delivered by the United States Court of Appeal for the Second District, which offered an interpretation of the Alien Tort Act of 1789

(4) See Antonio Cassese, "Modem Constitutions and International Law" III, RdC (1985), 343, where the author, drawing on the work of German jurists, underlines that "through the medium of national constitutions" it can be ascertained whether States are "dominated by 'nationalist introversion' or rather tend to be inspired by "friendliness to international law."