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The Dayton Accord: The Balkan Peace Agreement

Paul C. Szasz*

President William J. Clinton: "The Presidents of Bosnia, Croatia, and Serbia have made a historic and heroic choice."\(^1\)

Secretary of State Warren Christopher: "After three weeks of intensive negotiations in Dayton, the leaders of Bosnia-Herzegovina, Croatia, and Serbia have agreed to end the war in the former Yugoslavia. They have agreed that four years of destruction is enough. The time has come to build peace with justice."\(^2\)

To evaluate whether and how well the "Dayton Accord" actually works, it may be useful to start by considering the nature and structure of that agreement. The Accord consists of a uniquely complex set of instruments whose intricacy on the one hand mirrors the somewhat devious processes that led to their formulation and on the other makes it difficult to discern what is actually "working" and who is responsible if it is not.

The over-all structure of the Dayton Accord can be presented briefly as follows:\(^3\)

1. First, there is the General Framework Agreement for Peace in Bosnia and Herzegovina (GFA), an international treaty concluded between three neighboring ex-Yugoslav states, all U.N. members: Croatia, the Federal Republic of Yugoslavia (FRY) and the Republic of Bosnia and Herzegovina (BH Republic).\(^4\) This treaty, however, has almost no substantive content. It is mostly just a structure from which a dozen Annexes are suspended.

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3. For a somewhat more detailed presentation of the Accord’s structure, see P.C. Szasz, Introductory Note to Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, 35 I.L.M. 75, 77-80 (1996). The texts of the Dayton Accord itself: the GFA and its Annexes, as well as numerous related documents, are set out in volume 35 of International Legal Materials immediately following the above-cited Introductory Note.

4. Henceforth, I shall refer to these three as the “GFA Parties.”
For the most part, these Annexes are in the form of agreements between the Government of Bosnia and Herzegovina and the two "Entities" that are to constitute that state: the Republika Srpska and the BH Federation. The Annexes are of two types. Four Annexes set out transitional arrangements by Bosnia and Herzegovina (BH) and its two Entities for largely giving formal approval to NATO and other forces and authorities to carry out particular functions in the country. Eight Annexes are basically constitutional, including the new BH Constitution; the human rights regime for the new state; and the regime for the return of refugees. Many of these Annexes, including the Constitution, foresee a continuing role for the Entities per se, including a role in altering the existing agreements and in the conclusion of new ones.

Surrounding both the GFA and its Annexes (but definitely not formally part of them) is a cloud of arrangements that were negotiated before, during and immediately after Dayton between the sponsors of that conference: the United States and a number of other, mainly European states. These arrangements relate to: the Implementation Force (IFOR—later replaced by SFOR) established by NATO; the International Police Task Force (IPTF) established by the United Nations; the High Representative; an Election Commission established by OSCE; economic assistance, etc. The arrangements clearly involve states and some intergovernmental organizations. However, few if any of these arrangements are expressed as treaties. Rather they take the form of decisions of international organs: the U.N. Security Council, the NATO Council, OSCE, the Council of Europe, and the London Implementation.
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Conference of December 1995. Some but not all of these are referred to in the GFA Annexes. Neither the GFA Parties nor the BH Parties participated in any of these arrangements, even though, as will be pointed out below, these and the related understandings significantly motivated these Parties to conclude their agreements.

Finally, as is customary with modern international regimes, there has been a continuing stream of further negotiations and meetings resulting in new agreements. Thus, the aftermath of Dayton has seen agreements between: various bilateral combinations of the three GFA Parties; the three BH Parties; the two parties constituting the BH Federation; and between and among the various Sponsoring Powers. In light of all of this development, the Dayton Accord may be said to have become the Dayton Process.

Let me try to illustrate this unique construct by a fantasy analogy based on the American Civil War:

Imagine that in the Civil War the Confederation had been supported by Mexico, and the Western States, with the support of Canada, had made themselves semi-independent, though later they had entered into a loose Federation with the Northern States. This federation of Northern and Western States selected as its President the Governor of Illinois and as its Vice-President the Governor of New York. With Mexican help, General Lee wins at Gettysburg, and Washington—the capital of both the Union and of the North/West Federation—is surrounded by Confederate forces. The war drags on and there are more and more civilian casualties.

The European Powers, for diverse reasons wishing the United States to survive as a state, impose a blockade on Mexico and the Confederation. Finally, disgusted by the continuing slaughter of civilians and the failure to free the slaves, they intervene and under British leadership require all the local leaders to come to Manchester for a Peace Conference. Present, aside from the British Foreign Minister and ambassadorial representatives of the Continental Powers, are: President Lincoln and some members of his Cabinet representing the United States; the Governors of Illinois and New York representing the still non-functional North/West Federation; the Prime Minister of Canada; and the Governor of the largest Mexican state—the latter representing not only Mexico but also the Confederation, as both Jefferson Davis and General Lee are barred from entering England because of their support of slavery.

What emerges is the Manchester General Framework Agreement between Mexico, Canada and the United States (represented by Lincoln). Annexed thereto are a dozen other agreements concluded between the United States Government, the Confederation (represented by the Mexican Governor) and the North/West Federation. One of these agreements authorizes the military occupation of all U.S. territory by European powers. Others set out an entirely new and fatally weak Constitution for the United States—to be renamed “The Union”—and still others contain respectively the original Bill of Rights and the new 13th-15th amendments. Aside from these texts, the European Sponsoring Powers enter into a series of arrangements inter se concerning: the occupation of The Union; the overseeing of various aspects of its governance for some time;

the freeing of the slaves; and the financing of the extensive post-war reconstruction that is required.

That is a fair analogy of the structure of the Dayton Accord!

The "negotiations" in Dayton in November 1995, culminated nearly four years of efforts to counter the overwhelming centrifugal forces tending to separate Bosnia into three ethnically defined entities. These efforts began in the spring of 1992, before Bosnia and Herzegovina broke away from the already truncated former Yugoslavia. Throughout this period, the principal objectives of these parties and of the world community, particularly the Europeans, remained substantially unchanged:

♦ The Muslims desire a democratic, united, centralized BH state, which they would dominate through their numerical weight and their faster growth. They also desire that all refugees and displaced persons be allowed to return to their homes, and that war criminals be punished.

♦ The Serbs want no part of any common state with the Muslims and Croats. It is not quite agreed among them whether this implies a completely independent state or one merged with Serbia or Yugoslavia. However, Republika Srpska must have a fully connected territory and be ethnically pure, which means none of the expelled Muslims and Croats may return to it. The Serbs do not recognize international war crimes prosecution, and largely deny guilt for any war crimes.

♦ The Croatian aims have never been quite clear. Ostensibly they agree to a single state—though one that is weak and highly decentralized into three largely ethnically pure entities. In the long run they probably aim for the same solution as the Serbs, with the Croatian parts of BH to be either independent (as Herzeg Bosna) or merged into the Republic of Croatia.

♦ The world community largely has the following aims, most coherently expressed at the 1992 London Conference: peace; a single state of BH, whether centralized or federated or almost completely disassociated; no change in BH's external boundaries; return of refugees; and prosecution of war criminals. These aims largely overlap with those of the Muslims, except that the latter fought for a centralized, majority-ruled state, while the world community was willing to settle for some arrangement that would be at least marginally acceptable to the Serbs and Croats—even if the resulting structure would consequently be terminally weak and considerably undemocratic.

It was this history and these effectively irreconcilable political aims that dictated the format of the Dayton proceedings, sometimes referred to as...
as the "proximity peace talks." There were no face-to-face meetings among the BH Parties and few even among the GFA Parties. Throughout the negotiations, these delegations were kept in separate suites, with the U.S. negotiators (primarily Ambassador Richard Holbrooke) moving from party to party with texts prepared by the American team. The other Sponsoring Powers were also largely excluded from this process, though they were briefed by the U.S. delegation and also were involved in negotiating the inter se arrangements that would be required to implement the Accord that was being shaped. There was therefore no opportunity for the most directly affected participants, the BH Parties, to explore to what extent they agreed upon the meaning of the texts that were being presented separately to them. Nor could they be certain that the understandings that they individually reached with their American counterparts were the same as those reached with the other BH and GFA Parties.

For differing reasons, none of the BH Parties were at all eager to enter into the arrangements reflected in the BH Constitution and the related Annexes. Consequently, a good deal of arm twisting had to be dispensed, though unevenly, to each of the prospective BH and GFA Parties.

Naturally, the principal target of this arm twisting was the Republika Srpska delegation because its aims diverged most widely from those of the world community, as represented by the Sponsoring Powers. That delegation was further handicapped in that it was not headed by any Bosnian Serb (as President Karadzic had been banned from the talks as an indicted war criminal), but by President Milosevic of Serbia, who also represented the FRY (of which Serbia is the largest constituent). It is known that, as to many crucial points, Milosevic did not consult with or take the advice of the Bosnian Serb representatives. Consequently, the latter declined to initial the several instruments that emerged from Dayton, and the consent of the Republika Srpska was only obtained some days later by U.S. representatives visiting Pale and presumably exerting further pressure and perhaps making further promises.

Aside from the threats and other pressures exerted on the prospective parties (the so-called "sticks"), a number of promises were made (the "carrots"). Like the threats, the promises were also largely undocumented. They evidently concerned matters such as:

- The nature and mandate of IFOR;
- The amount and nature of the economic assistance to be provided;

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21. See, e.g., The International Conference on the Former Yugoslavia, supra note 2, at 342.
22. This arrangement had been agreed to on August 29, 1995, by an instrument that is referred to in the preamble to the GFA, but has not been published. See General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 89 (1996).
23. Annex 1A to the GFA did not specify the IFOR mandate but only stated the outer limits of the consent of the BH Parties to the occupation of their territories. The actual mandate was set later by the competent NATO organs. Military Aspects of the Peace Settlement, Annex 1A to the General Framework Agreement For Peace In Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 91 (1996).
The arrangements OSCE would make for the initial elections;  

The arming of the Muslims;  

The arrest of war criminals indicted by the Yugoslav War Crimes Tribunal. There can be little doubt that the Muslims were at least implicitly promised that this would be carried out promptly by the overwhelming forces NATO and, in part, the United Nations (IPTF) would put into the country. On the other hand, it is difficult to believe that the Serbs (even in the absence of Karadzic) would not have secured what at least they considered an effective pledge (perhaps given only by winks and nods) that there would be no arrests; except in situations of unconditional surrender, a party giving up power after a bloody conflict invariably insists on some form of amnesty or exile beyond the reach of the new authorities.

The return of refugees and displaced persons to their former homes and the restoration of their property or compensation for any that was lost or destroyed. Again, the Muslims must have received promises that this would be accomplished promptly, presumably by the use of NATO muscle, while the Serbs must somehow have been led to believe that this was not an imminent threat.

This picture is a far different one from that sketched by President Clinton and Secretary Christopher at the close of the Dayton Conference about the parties “agreeing” to conclude peace. The truth is that they were largely bludgeoned and partly bribed into putting their initials and (a few weeks later, in Paris) their signatures to texts that none of them had any significant role in developing. Despite their importance, the GFA and the annexed agreements all entered into force on signature, without ratification.

This was necessary because ratification, aside from necessarily delaying entry into force, would certainly not have been obtained from the Republika Srpska, and possibly not even from others of the BH or the GFA Parties.

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25. This was a unilateral undertaking by the United States, in opposition to the desires of most of the other Sponsoring Powers. In actually implementing this undertaking, the United States unexpectedly added another condition: that the Muslims send home a number of Iranian troops and advisers. Delays in complying with this new requirement initially delayed the flow of U.S. military assistance. Also, as the United States could not supply such assistance officially, this was done through specially established private enterprises set up by ex-military officers. Still another complication is that the United States is actually trying to strengthen all of the practically inoperative BH Federation armed forces, rather than just the Muslim component thereof.

26. The GFA and its Annexes are less than pellucid as to this matter and even the Security Council resolutions adopted in the wake of Dayton do not provide clear directions. See Szasz, supra note 17, at 313-14.

27. See opening quotes above.

None of these Parties achieved at Dayton anything close to what they had been bloodily fighting for for years. This was not too surprising an outcome because their respective objectives were almost diametrically opposed, so that any compromise would require each of them to surrender some of their vital goals.

The Muslims achieved the maintenance of Bosnia and Herzegovina as nominally one country, but they must have realized that it was effectively ungovernable under the Dayton Constitution, whose practical implementation would require an amount of good will and cooperation among three factions that would strain even groups with normally friendly relations. Such good will and cooperation cannot realistically be expected from the murderously opposed BH Parties. Though the procedures for the return of refugees was specified in great detail in a special Annex to the GFA, the Muslims should also have realized that it was most unlikely that sufficient foreign forces would be provided to return Muslims to Banja Luka or to other Serb- (or even Croat-) occupied areas against the absolutely fierce resistance that could be expected from those two peoples against any threat to re-integrate their "ethnically cleansed" territories. However, the actual results achieved so far have been below even the probably pessimistic expectations of the Muslims.

The Serbs and Croats were forced to live in one country with each other and with the Muslims. Consequently, they would have to cooperate in a central government which neither liked, even though it was likely to be weak and ineffective because either of them could block almost all important decisions. The threat that at least some, and possibly substantial numbers of refugees would be returned to their territories must also have been considered intolerable—and, indeed, so far the Serbs and Croats have not tolerated it. Nor were these peoples content with the Accord’s numerous, though weak, references to the Yugoslav War Crimes Tribunal.

Unsurprisingly, the world community, under whose auspices the Conference was conducted, nominally achieved all of its significant aims: peace; the maintenance of a single country within its original boundaries; and the promise of the return of refugees (especially those whom some of the European states, and particularly Germany, were hosting). Of course, achieving these aims came at a price. Troops to monitor the peace had to be supplied, though nominally for only a year. Also, massive economic assistance was promised, although the totals promised always seemed to be much larger than the sum of the individual contributions actually pledged.

It is no secret that the actual implementation of the Dayton Accord has been miserable. There were two initial successes: the military confrontations and the slaughters of civilians came to a prompt halt; and, a little later, NATO troops managed to nudge the armies of the several parties to the boundaries prescribed by the Dayton Accord. The failures, however, are many: the central government of Bosnia and Herzegovina, and even

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29. For example, consider the de facto unanimity requirement of the three-member Presidency. See Constitution, supra note 8, art. V.2(b)-(c).
that of the BH Federation, is barely functioning, and then only when vigorously prodded by the High Representative or by one or more of the principal NATO governments. There are no open borders between the Entities, and even travel within the Federation is restricted. Practically no refugees or displaced persons have been able to return to their original homes, no property has been restored, nor has the machinery for paying compensation been set up; additionally, even if such a mechanism had been set up, there would be practically no resources from which to pay awards. The principal and many other war criminals are still at large, for the most part in plain sight; in spite of explicit prohibitions in the Constitution, many of these criminals are still officially or effectively running their respective fiefdoms. Finally, much of the massive international economic assistance implicitly, and to some extent even explicitly promised, has not yet arrived. This delay is at least partly due to the inability of the Bosnian parties to establish the governmental machinery necessary to permit such assistance to be used effectively. Meanwhile, a bad case of donor fatigue has set in.

Clearly, the Dayton Accord is not being carried out in good faith by anyone, including the BH and the GFA Parties on the one hand, and the Sponsoring Powers on the other. To turn first to the failures of the latter, because at least in part these deficiencies explain, even if they do not justify, the failures of the former, the principal dereliction of the Sponsoring Powers is the refusal—for essentially domestic political reasons—to utilize the power of the NATO troops for anything except the maintenance of the peace. While NATO troops have stood by, the borders of the entities have not been opened, refugees have not been allowed to return, indicted war criminals have not been arrested, and the OSCE certified the September 1996 election, which was one of the keystones of the Dayton arrangements, in spite of indications of massive fraud. The technical responses of the Sponsoring Powers to those charges are: first, it is primarily the responsibility of the BH Parties to open their borders, to welcome back the refugees and to deliver the war criminals to The Hague; second, NATO had never undertaken to do those things, and indeed the actual mandate of its forces does not require, or even permit them to do so.

But these excuses fudge the reality. No one genuinely expected the BH Parties or even the GFA Parties to carry out these obligations on their own. Had they ever been willing to do so, they would not have fought their bloody war! And, even though the NATO mandate may indeed be restricted (the actual restrictions are not a matter of public knowledge), those limitations are simply decisions of the competent NATO organs and of the governments represented therein. They do not reflect any corresponding restrictions in the Dayton Accord by which the BH Parties authorized NATO to occupy their country.32 Also, these restrictions run counter to at least the implicit promises made at Dayton to the Muslims, who certainly expected a more proactive IFOR than materialized.

Naturally, the BH and GFA Parties are not blameless either. Indeed, substantively, the performance by most of them most of the time has been entirely inadequate and indeed often distinctly negative. To what might this be attributed?

Certainly, one major excuse has always been the lack of performance by the others of their obligations under the various agreements. In effect, each is blaming the others for sufficient material breaches to justify the termination or suspension of the operation of the Dayton Accord or of the Annexes thereto. Truly, it is practically impossible to disentangle these conflicting claims, or to determine which was the original breach and which the arguably permitted responses thereto.

Another excuse has been the lack of performance by the Sponsoring Powers. These, of course, are not parties to the GFA or its Annexes but, as suggested above, their promises probably constituted more powerful inducement to those Parties to enter into the agreements than the expectation that the other BH Parties would fulfill their promises. Whether, from a strictly legal perspective, such failures in the external inducements can justify a breach of the inter se agreements between the BH Parties is an interesting question, unlikely ever to be considered by a court of law.

Finally comes the question whether the BH Parties, and especially some of them, ever honestly expected to fulfill their Dayton treaty obligations? Was there actually a genuine meeting of the minds between parties whose representatives did not officially meet at Dayton until the moment when they were directed to initial the texts (which one party, the Serbs, refused to do at that time and place)? Was there the "free consent" that is referred to in the preamble to the Vienna Convention on the Law of Treaties? Indeed, could one argue that the conclusion of the Dayton Accord had "been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations," and was therefore void?

The last of these queries can safely be answered in the negative, for to the extent that threats to use force were made, these threats had, in effect, been sanctioned by the Security Council in resolutions before and after the Dayton Conference. These resolutions had as their objective the maintenance or restoration of peace in the region—a goal that plainly could not have been attained without the threat or use of force. Once this major charge falls away, the other queries in the previous paragraph largely lose their force. Pressure in treaty negotiations is not by itself either unlawful nor does it invalidate the agreements reached. The general "good faith" requirement of international law does not permit the initialling and signing

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34. Id. art. 52.
of treaties with crossed fingers; that is, no effect can be given to any mental reservations that a treaty (even if entered into merely to propitiate some other country) is not to be observed.

This having been said, it must be realized that even though, from a strictly legal point of view, the circumstances under which the Dayton Accord was concluded do not justify its repudiation by the parties, the *ab initio* lack of genuine consent to its terms goes far toward explaining the observed lack of compliance.

In conclusion, the Dayton Accord, in spite of the fine words spoken at the end of the proceedings and quoted above, was probably predestined to fail. This is not because the Accord was concluded in part by "intermediate sovereigns," but because it was imposed by massive pressures on parties that at best consented imperfectly and thus were unlikely to implement its terms in good faith in spite of their legal obligations to do so and because those that exerted the pressure to initial and sign the Dayton Accord did not, and probably never intended to, apply the massive, continuing and long-term force necessary to make the Dayton Accord work.