- Dayton Agreement Signing Ceremony, Elysee Palace in Paris, December 14, 1995 - Alija Izetbegović (right), Franjo Tudman (center), Slobodan Milošević (left) and other participants.

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A CONCRETE PROPOSAL TO UPGRADE THE DAYTON PEACE AGREEMENT
Abstract

Most observers of Bosnia and Herzegovina’s political situation have focused only on the problems that the Dayton Peace Accord created for the normal functioning of this Southeastern European state, but a workable solution is yet to be proposed. The Accord achieved peace by blocking any ability for effective governing and by diminishing the Bosnian state capacity through an excessive dispersion of power with an uncommon constitutional focus on internationalism, and an erroneous type of pluralism that undermines the normal functioning of a democracy. The solution for these problems is to be found by adjusting the procedural selection of the United Nations High Representative, who is the primary actor directly responsible for the implementation of the Accord, both in terms of the letter and intent of the document, and this paper explains how that change can be made and what problems it will resolve.

Key words: Bosnia and Herzegovina, internationalism, Dayton Accord, Bosnian Constitution, UN High Representative, Security Council, Washington Agreement, Federation, “Republic of Serbska”, state capacity, democratization.
The Problem with Peace

The Bosnian War was concluded on November 21, 1995 with the Dayton Peace Accord initialled by all warring parties, the significant regional and relevant international stakeholders at the time. Most observers have focused only on the problems that the Accord created for the normal functioning of the state of Bosnia and Herzegovina (henceforth Bosnia), and there is an abundance of literature on this; however, a workable solution is yet to be proposed. The Dayton Accord did achieve peace, essentially by blocking any ability for effective governing and by diminishing Bosnia’s state capacity through an excessive dispersion of power, with an uncommon constitutional focus on internationalism and an erroneous type of pluralism that undermines the normal functioning of a democracy.

A similar dispersion of power is the foundation within the United States of America’s (henceforth United States) political system since its inception. However, within that system, through carefully constructed and incrementally increased representative democracy built upon individualism, enough power eventually became concentrated in the institution of the President, who was then able to provide balance against the power of the individual states of the United States. Over time, Presidents managed to increase the United States’ state capacity and make a diverse country function effectively. That is why the solution for the Bosnian impasse is to be found on the same level, with the institution of the United Nations High Representative, who effectively presides over Bosnia’s political system and is the primary stakeholder directly responsible for the implementation of the Dayton Accord, both in terms of the letter and spirit of the document. To move forward, primarily within the spirit of the Accord, it is necessary to democratize the process of selecting the High Representative, who serves as the appointee of the United Nations Security Council in Bosnia.

1 Article I of Dayton’s Constitution indicated a change of the official name of the country by stating that “The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be ‘Bosnia and Herzegovina.” For more, see p.45 in Szasz, Paul C. 1996. “Bosnia and Herzegovina-Croatia-Yugoslavia: General framework agreement for peace in Bosnia and Herzegovina with annexes.” International Legal Materials 35 (1): 75-169.

2 For convenience, in this article we will use the single title “Bosnia” and “Bosnian state” to include “Herzegovina” as well. For further clarification, see footnote 14, page 40 of this Magazine.
It is important to note that the Dayton Accord was not only about peace, but it was also about the redefining of a UN-recognized country, the Republic of Bosnia. The redefining was made not only by the recognition and ratification of a second and smaller entity of Bosnia, named “Republika Srpska,” but also by changing the Constitution of the Republic of Bosnia. Both of these elements of the Accord need to be highlighted so that the solution to the current political impasse provided here is further clarified.

As a result of the Dayton Accord, the Republic of Bosnia turned from a unitary into a federal system with two never previously existent constitutive units, the Federation of Bosnia and Herzegovina (“Bosnian Federation”) and “Republika Srpska.” The first previously nonexistent unit to be hammered out was the Bosniak-Croat dominated “Bosnian Federation,” which effectively divided the Republic of Bosnia and provided the foundation for the further division of the unitary state and recognition of a Serb-dominated “Republika Srpska.” The “Bosnian Federation” was forged with the March 1994 Washington Agreement signed under the auspices of the United States. The same Agreement also proposed a confederate association between the Republic of Croatia and the “Bosnian Federation,” but that idea was later abandoned. Consequently, the creation of the “Bosnian Federation” and the proposal of the Confederacy with Croatia made it politically possible for “Republika Srpska” to exist. It does not say why the suggestion of the confederation was necessary, but it was implicitly understood to be an effort to appease the Republic of Croatia, which at that time was actively fighting in the Republic of Bosnia as an aggressor, as recognized by the International Criminal Tribunal for former Yugoslavia (ICTY). That approach towards the aggressors of the internationally recognized United Nations member state of the Republic of Bosnia was then repeated with all subsequent agreements regarding the state under the auspices of the United States, the European Union, and the United Nations Security Council. Therefore, internationalism is an intricate part of the political system of Bosnia in two ways, in terms of the responsibility that the international community has towards the Bosnian state and people, and in terms of the ideals embedded within the current Bosnian constitution. Therefore, to propose a solution, Bosnian federalism and constitutional arrangements must first be addressed.

Federalism in Bosnia

Most commentators of the Bosnian political situation usually emphasize the problem with the Dayton Accord’s recognition of the Serb-dominated “Republika Srpska” as a sticking point in the normal functioning of Bosnia, while overlooking and ignoring the effects of the Washington Agreement which first invented the “Bosnian Federation” to please Croats in and around the Republic of Bosnia. It should be noted that with the Washington Agreement, neighboring Croatia, which took an active role in the aggression towards the UN-recognized state of the Republic of Bosnia, was rewarded with the creation of the “Bosnian Federation,” just as Serbia and
Serbs were rewarded with the creation of the “Republika Srpska,” despite their own aggression towards the Republic of Bosnia. It should be clearly understood that the “Bosnian Federation” was the starting point for the deconstruction of the unitary Republic of Bosnia and the shaping of the Dayton Accord, which subsequently initiated the process of diminishing the capacity of the Bosnian state. The existence of the “Bosnian Federation” was also further confirmed with a separate document in the Dayton Accord signed on November 10, 1995 where it was specifically noted that the establishment of the Federation is “an essential prerequisite for peace in Bosnia and Herzegovina [and that] the responsibilities and the organization of the government of the Federation and the Government of the Republic of Bosnia and Herzegovina must be separated [and that] neither government may interfere in the exclusive competence of the other government.”

It even states, unequivocally, that the Government of “the Republic must now transfer functions to the Government of the Federation in accordance with the Federation Constitution” and not vice versa. Such direction again shows the importance of the creation of the “Bosnian Federation” with the Washington Agreement. The “Bosnian Federation” is referred to as a federation not because of its relations with the other smaller Bosnian entity, but because of its own structure composed of 10 cantons with their own governments which are united as a federation. The “Republika Srpska” on the other hand has its own unitary system, where local governments have some powers but without a system of cantons. It is important to note that for all these different levels of government - local, cantonal, entity, or national - there is no possibility for all citizens of Bosnia to vote individually and together for any officials and any government. The Bosnian citizens vote exclusively for the governments and elected officials of their own entity, but never together for any position, and that presents a problem of how to incrementally build the possibility for a common interest necessary for Bosnia to increase state capacity and move forward.

Internationalism and its Responsibility

Among the many contradictions concerning the common understanding of the rules regarding states’ sovereignty, it is important to note that the precondition set by the international community and the United Nations for the recognition of Bosnia as an independent state was a state-wide referendum by the people of that Former Yugoslav Federal unit, which was conducted in 1992. But the recognition of the “Bosnian Federation” and the legitimacy of “Republika Srpska” as “parties” of all subsequent peace agreements was provided upon aggression and war crimes committed by domestic and foreign Croatian and Serbian

3 For more see: “Republic of Bosnia and Herzegovina-Federation of Bosnia and Herzegovina: Dayton agreement on implementing the federation of Bosnia and Herzegovina, with attached agreed principles for the interim statute for the city of Mostar,” in International Legal Materials 35 (1): 170-83, 1996. p. 172.

4 Ibid.
troops as confirmed by the ICTY, in spite of globally accepted international norms against the aggressions. These contradictions point to the inconsistent and unjust treatment of Bosnia and its legitimate organs of state, and suggest that international rules and understanding of what is proper could be reorganized and adjusted to the new realities on the ground with the purpose of providing a better path forward. Such an approach to international norms also shows that the international community and stakeholders have a responsibility towards the people and the Bosnian state to play a constructive role in its recovery in the spirit of the Dayton Accord. Such a responsibility towards Bosnia should also be observed through the relationship of the citizens of Bosnia and the international community-appointed UN High Representative, who, as of now, has no institutional accountability towards the people over whom he presides, because those people have no say in the selection of the person for that office. Obviously, then, there is a complete absence of responsibility towards the people of Bosnia.

The Dayton Accord as Bosnian Constitutional Ideals

As noted, the Dayton Accord also constructed a new constitution for Bosnia. Read as a whole, like many other Constitutions, this one, provided through the Accord, also sets a framework for a political system built upon big ideas and ideals. However, even for a document that should contain such high principles and ideals for which a society is to strive, it is unusual to read so much praise of internationalism through acceptance of all and any international norms regardless of local dynamics and cultures. That level of internationalism might be appropriate considering the tri-national nature of Bosnia, yet the lack of attention to the individual citizenry makes liberal democracy difficult to function properly there. The Bosnian Constitution is now full of acknowledgments and acceptances of every human right of all international institutions that have proposed any norm as a human right. So much so, that there are only a few civil rights that the citizens of Bosnia can enjoy apart from anyone else. With so much emphasis on the human rights conventions and agreements in the Constitution, the Dayton Accord’s Constitution establishes a clear preference for a model of a welfare state, which is to provide the possibility of the enjoyment of all such rights. Yet, there is no mechanism to increase the state’s capacity so it can provide what is expected from it.

Therefore, there is no mechanism to increase the state’s capacity so it can provide the enjoyment of such rights. Furthermore, since the Accord’s Constitution mimics the United States’ Constitution, a fundamental difference should be noted, where the latter emphasizes only negative rights where the state is only a guard, not a provider of rights, while the former constitutes a system upon positive rights, where the state is to provide those rights. Although the United States’ system is built upon the principles of pluralism, the competition is imagined to be between interest groups or ad-hoc factions made by persons pursuing individual interests. Yet, in Bosnia, the constitutive groups envisioned by the Accord’s Constitution are
permanent and unambiguous, while the individual citizen is almost irrelevant. In the United States’ system, an individual is to pursue happiness on their own and there is no guarantee of any group rights, while the Dayton Accord’s Constitution for Bosnia specifically spells out constitutive group rights and expectations that the state should take an active role in providing for the well-being and enjoyment of happiness of the individuals and the constitutive peoples as a group. Such an arrangement invites the problem of ethnic outbidding known to destabilize democracy, and creates democratic paradoxes where small groups often get overrepresented at various government institutions based on their power at any one time, and where the democratic principle of “one person one vote” essentially does not occur. To avoid the problem of ethnic outbidding, which is common for such constitutional arrangements, and to live up to that spirit of the Accord’s Constitution, Bosnia’s state capacity should be increased and an effective democratic mechanism needs to be found to do that.

The dispersion of the powers that have prevented the tyranny of the majority that the Dayton Accord’s constitution effectively managed to accomplish was instrumental for peace at the time it was made, but it did not provide any mechanism for balancing constitutive groups and individual rights nor any tools to increase Bosnia’s state capacity to fulfill its constitutional responsibilities. It is time to resolve these inconsistencies and contradictions of the Dayton Accord’s political arrangements that have now stalled the progress of both the peace process and the development of Bosnia’s state capacity, in order to benefit all of its citizens and provide a chance to fulfill the intent of the Accord in regards to the high principles of the Constitution. The best way to do that is through a new procedural approach to re-establish and support the value of the individual citizen of Bosnia as an important factor for any type of democracy, direct or representative, without compromising the existent power arrangements within the country.

A Possible Solution

Just as both the Washington Agreement and the Dayton Accord were “creative” and “innovative” in terms of resolving the multilevel Bosnian war, it is necessary now to be creative and innovative in trying to resolve the impasse that the Dayton Accord has caused. Changing a constitution is a very stressful process for any state, and therefore the solution must be accomplished without such a difficult political step. The adjustment should only be made on the international level, using the existing elements of internationalism within the Bosnian system. Since the High Representative is provided by the United Nations Security Council as the highest authority directly responsible for the implementation of the Dayton Peace Accord in its entirety, the people of Bosnia, and not only the members of the Security Council, should have a say in who gets selected to carry that function. The proposal here is to keep the Dayton Accord Constitution as is and only change the procedure regarding the selection of United Nations High Representative by
democratizing the process of the selection, and build the possibility for the eventual transfer of the High Representative’s responsibilities and powers. The Annex 10.2 invites the Security Council to appoint a single High Representative for Bosnia. To democratize that process and increase the Representative’s democratic legitimacy, the Security Council should instead offer two candidates for the position and elect one, through a process of voting, to serve for two years, where all citizens of Bosnia will, in a state-wide election, vote for their preferred candidate. The Bosnian election winner will have four electoral votes, while each member of United Nations Security Council will have one. Bosnia’s electoral vote should then incrementally increase through the subsequent five election cycles, after which the citizens of Bosnia alone will select the United Nations High Representative from among the candidates proposed by the United Nations Security Council. Such a process will create an environment of equality in voting for all citizens of Bosnia with a “one-person-one-vote” situation, regardless of a person’s other associations, which is the bedrock for pluralism and the liberal democracy intended by the Dayton Accord’s Constitution of Bosnia, and at the same time incrementally increase the state’s capacity by providing more power and democratic legitimacy to the High Representative in Bosnia. Finally, it is also necessary to think about the possibility and the time when the citizens of Bosnia themselves can be considered for the position of the High Representative as well.
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