

# Symposium: The Dayton Agreements: A Breakthrough for Peace and Justice?

## The Dayton Agreements and International Law

*Paola Gaeta\**

### I. Introduction

The agreements which put an end to the bloodiest war fought in Europe since the Second World War are, in many respects, akin to other treaties which settled serious political and military crises. The Camp David Agreements of 17 September 1978 and the Peace Treaty between Israel and Egypt of 26 March 1979, in particular, come to mind, especially considering the rôle played in both by the United States Administration in attaining peace. However, the Dayton agreements are characterized by some *unique* legal features, which reflect the complexity of the peace process in the former Yugoslavia. This paper intends to discuss briefly the original and unusual aspects of the agreements from the point of view of international law. I shall classify these aspects under the following headings: (1) the law of treaties; (2) the international personality of *de facto* governments; (3) the State's constitutional organization. Before such examination I shall however dwell on some general traits of the agreements.

### II. General Features of the Peace Agreements

The Dayton Accord consists of a set of international treaties, namely: the General Framework Agreement for Peace in Bosnia and Herzegovina, twelve Annexes (each of them constituting an international treaty) and the Agreement on Initialling, concerning the modalities of conclusion and entry into force of the other agreements.

The bulk of the General Framework Agreement, concluded by the Republic of Bosnia and Herzegovina ('Bosnia and Herzegovina'), the Republic of Croatia ('Croatia') and the Federal Republic of Yugoslavia, obliges the Parties to 'respect

\* European University Institute.

and promote fulfillment' of each annexed agreement.<sup>1</sup> The annexed Agreements set up the conditions for peace in Bosnia and Herzegovina and are concluded mainly by Bosnia and Herzegovina and the two Entities directly involved in the conflict (which are not parties to the General Framework Agreement), i.e. the Republika Srpska and the Federation of Bosnia and Herzegovina.<sup>2</sup> The General Framework Agreement is thus the instrument which guarantees the implementation of the annexed agreements from both a political and a juridical point of view.

Besides the peace agreements, some of the contracting Parties have made unilateral declarations<sup>3</sup> and 'endorsements'<sup>4</sup> while other States (not parties to any agreement) 'witnessed' the conclusion and the entry into force of the Peace Accord.<sup>5</sup> On

- 1 Articles II to VIII. Furthermore, the Parties have undertaken to 'conduct their relations in accordance with the principles set forth in the United Nation Charter, as well as the Helsinki Final Act' and, in particular, to 'fully respect the sovereign equality of one another', to 'settle disputes by peaceful means' and to 'refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and Herzegovina or any other State' (Art. I); to 'cooperate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law' (Art. IX). The Federal Republic of Yugoslavia and the Republic of Bosnia Herzegovina have also undertaken the obligation 'to recognize each other as sovereign independent States within their international borders' (Art. X). The two States concerned fulfilled this obligation in Paris, before the signature of the Dayton accord.
- 2 Agreement on Military Aspects of the Peace Settlement (Annex 1-A), Agreement on Inter-Entity 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). Other agreements are entered into only by the two Entities (i.e. the Agreement on Arbitration (Annex 5) and the Agreement on Bosnia Herzegovina Public Corporation (Annex 9)) or by each of the parties to the General Framework Agreement and NATO (i.e. the Agreement Between the Republic of Bosnia and Herzegovina and NATO Concerning the Status of NATO and its Personnel, the Agreement Between the Republic of Croatia and NATO Concerning the Status of NATO and its Personnel and the Agreement Between the Federal Republic of Yugoslavia and NATO Concerning Transit Arrangements for Peace Plan Operations (Appendix B to Annex 1-A)); or by the parties to the General Framework Agreement and the two Entities, i.e. (the Agreement on Regional Stabilization (Annex 1-B) and the Agreement on Civilian Implementation of the Peace Settlement (Annex 10)).
- 3 See the side-letters relating to the Agreement Between the Republic of Bosnia and Herzegovina and NATO addressed to the NATO Acting Secretary General by the Federal Republic of Yugoslavia, the Republic of Croatia, the Federation of Bosnia and Herzegovina and the Republika Srpska; the side-letters relating to the Agreement on Military Aspects of the Peace Settlement and the Agreement on Inter-Entity Boundary Line and Related Issues, addressed to the Federal Republic of Germany, France, Russian Federation, United Kingdom, United States by both Croatia and the Federal Republic of Yugoslavia; the side-letters relating to the Agreement on the Military Aspects of the Peace Settlement (Annex 1-A) addressed to the United Nations Secretary General and to the NATO Acting Secretary General by the Federal Republic of Yugoslavia and Croatia.
- 4 The Federal Republic of Yugoslavia and the Republic of Croatia endorsed, by virtue of their signature, two annexed agreements concluded by the Republic of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina, i.e. the Agreement on Military Aspects of the Peace Settlement (Annex 1-A) and the Agreement on Inter-Entity Boundary Line and Related Issues (Annex 2).
- 5 The conclusion and the entry into force of the General Framework Agreement was 'witnessed' by means of their signature by the European Union, the United States, the Russian Federation, the Federal Republic of Germany, the United Kingdom and the Republic of France.

the whole, the obligations set up at Dayton constitute an intricate legal web, reflecting the multi-faceted nature of the conflict, where ethnic, religious, political and military elements are closely interwoven.

### III. The Law of Treaties and the Dayton Agreements

#### A. *Dayton v. Paris*: Conclusion and Entry into Force of the Peace Agreements

The war in Bosnia and Herzegovina ended with the ceremony for the signature of the peace agreements which took place in Paris on 14 December 1995 and was witnessed by the Presidents or Prime Ministers of the United States, the Russian Federation, the Federal Republic of Germany, the United Kingdom, France and by the European Union Special Negotiator. Another ceremony, for the initialling of the agreements, had been held in Dayton, on 21 November 1995, at the end of the negotiations.

What is the legal meaning of these two ceremonies? The answer is provided by the Agreement on Initialling. This is the only treaty which was signed at Dayton, and entered immediately into force.<sup>6</sup> Article II of this Agreement provides that the consent of the Parties to be bound by the peace agreements is expressed by their initialling,<sup>7</sup> while Article I provides that the agreements enter into force and have operative effect (the so-called *dies a quo*) upon signature in Paris.<sup>8</sup>

This is undoubtedly a novel and unusual way of proceeding. It is not only unusual for treaties of great political relevance to be concluded only by their mere initialling, it is also striking that agreements made in this way are subject to the suspensive condition of their signature, i.e. although they are binding upon their initialling this binding force only commences to produce the effects upon signature. Furthermore, it should be noted that the signature of the agreements in Paris amounted to the fulfillment of the obligation contained in Article I, by which the

6 Since the parties to the Agreement on Initialling, namely the Federal Republic of Yugoslavia, Croatia and the Republic of Bosnia and Herzegovina, are not parties to all the annexed agreements, reference must be made to the Concluding Statement of the Dayton negotiations in order to ascertain the legal significance given by the Federation of Bosnia and Herzegovina and the Republika Srpska to the two ceremonies at issue.

7 According to Article II: 'The initialling of each signature block of the General Framework Agreement and its Annexes today hereby expresses the consent of the Parties, and the Entities they represent, to be bound by such Agreements'. See also the Concluding Statement in which the negotiating States and Entities declared that, by virtue of initialling the Dayton Accord, they have expressed 'their consent to be bound' by it.

8 Article I provides: 'The Parties, and the Entities they represent, commit themselves to signature of these Agreements in Paris in their present form, thus establishing their entry into force and the date from which the Agreements shall have operative effects'. See also the Concluding Statement whereby the negotiating States and Entities declared to consider 'the initialled document as definitive', committed themselves 'to sign the Framework Agreement and its Annexes without delay' and agreed 'to reconvene in Paris under the auspices of the Contact Group to sign the General Framework Agreement and its annexes shortly'.

Parties committed themselves to sign the peace agreements in the form agreed upon at Dayton.<sup>9</sup> This obligation was strengthened by Security Council resolution 1022 of 22 November 1995, which provided in operative para. 1 that if the Belgrade authorities failed to sign the Agreements, the sanctions suspended by the resolution itself would be automatically reimposed 'from the fifth day following the date of (the United Nations Secretary-General's) report' notifying such a failure.

These unusual features of the agreements are the result of a political situation. The negotiating process at Dayton was conducted essentially at the instigation of, and under strong pressure from, the United States delegation. The Agreements bear the strong imprint of American leverage. At the end of the negotiations it was agreed that neither the States nor Entities of the former Yugoslavia, nor other States howsoever involved in the peace process, should be allowed to re-open the discussions. On the whole, the peace was to be a 'pax americana'. The signature ceremony principally constituted an attempt by the European leaders, especially President Chirac, to appear as contributors to the peace process and to give Europe an officially recognized role.

### **B. The Contracting Parties: the Relationship between the Federal Republic of Yugoslavia and the Republika Srpska**

Most of the mass media have portrayed the President of Serbia, Slobodan Milosevic, as the representative or, in more precise judicial terms, the 'legal agent' of the Bosnian Serbs at the peace process. Three elements in the Dayton Agreements seem to confirm that he did act on behalf of another legal subject, namely the Bosnian-Serb insurgents (the Republika Srpska). First, the Minister for Foreign Affairs of the Federal Republic of Yugoslavia, Mr. Milutinovic, initialled 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 'which 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 ...' (emphasis added). Third, that Milosevic exercised powers coming within the purview of the legal notion of international agency seems to be confirmed in Articles I and II of the Agreement on Initialling, since they refer to 'the Parties and the *Entities that they represent*' (emphasis added).

But is it correct to characterize the relationship between Republika Srpska and the Federal Republic of Yugoslavia, from a legal point of view, as international agency?<sup>10</sup> Close scrutiny of the agreement of 29 August 1995 referred to in the

9 See Article I of the Agreement on Initialling, *supra*, note 8.

10 For this notion see Sereni, 'Agency in International Law', in *AJIL*, (1940), 638.

Preamble suggests a negative answer. For, by this agreement the Republika Srpska did not authorize the *Yugoslav delegation* to conclude the peace accord on its behalf. That is, it did not confer on the Federal Republic of Yugoslavia the power to perform international legal transactions the legal effects of which should be attributed to the Republika Srpska. In actual fact, the agreement provided for the setting up of a *unified delegation*,<sup>11</sup> consisting of six persons, three for the Federal Republic of Yugoslavia and three for the Republika Srpska. The delegation, headed by the President of Serbia, Milosevic, was given the mandate to negotiate the entire peace process for Bosnia and Herzegovina and to agree upon, on behalf of the Republika Srpska, those parts of the agreements which concerned the latter. The purpose of this mandate was to harmonize the approach to the peace process advocated by the Republika Srpska leadership with the approach taken by the Federal Republic of Yugoslavia. The harmonization of the two approaches was to be carried out 'in the best interest of peace', as set out in Article 1.<sup>12</sup>

The delegation was therefore a collective body, made up of delegates of both the Federal Republic of Yugoslavia and the Republika Srpska. This body deliberated in plenary session by simple majority. In the case of divided votes, President Milosevic had the casting vote.<sup>13</sup> It follows that within this body each delegate had the right to one vote. Each delegate could express his individual position, since the delegates of the same State or Entity were legally entitled to cast different votes. The conclusion is thus warranted that the acts performed by the unified delegation were to be attributed either to the Federal Republic of Yugoslavia or to the Republika Srpska, depending on the matter at issue. In other words, this body could act *alternatively* as the organ of the Federal Republic of Yugoslavia or the Republika Srpska, depending

11 This wording can be found in Article 5 of the Agreement in question. This Article provides that: 'Possible changes of the composition of the unified delegation, during the work of the delegation, concerning the members from the Federal Republic of Yugoslavia (a total of 3) shall be made according the decision of President Slobodan Milosevic, while the changes of the composition of the delegation of the Republika Srpska (a total of 3) shall be decided by President Radovan Karadzic: however, such changes shall have no influence on the provisions of this Agreement'.

12 See Articles 1 and 2. The former provides that 'The Leadership of the Republika Srpska agrees to harmonize completely their approach to the peace process with the Leadership of the Federal Republic of Yugoslavia, in the best interest of peace', while the latter provides: 'Therefore, the Republika Srpska shall delegate three members into one single delegation of six members, headed by the President of the Republic of Serbia Mr Slobodan Milosevic, who will negotiate about the entire peace process for Bosnia and Hercegovina, as follows:

The President of the Republika Srpska Dr Radovan Karadzic

The President of the Parliament of the Republika Srpska Dr Momeilo Krajisnik, and

The Commander of the Supreme headquarters of the Army of the Republika Srpska, General Ratko Mladic.

The delegation is authorized to sign, on behalf of the Republika Srpska, the part of the Peace Plan concerning the Republika Srpska, with the obligation to implement the agreement that is reached strictly and consequently'.

13 Article 3 of the Agreement provides: 'The leadership of the Republika Srpska agrees by this document to adopt the binding decisions of the delegation, regarding the peace plan, in plenary session, by simple majority. In the case of divided votes, the vote of the President, Mr Slobodan Milosevic, shall be decisive'.

on whether the subject-matter under discussion concerned the former or the latter Republic.<sup>14</sup>

The above considerations should not be dismissed as mere legal quibbling. Indeed, the interpretation of the relations between the authorities of Belgrade and those of Pale, suggested above, reflects political reality and political concerns. The delegation provided for in the agreement of 29 August 1995 was most unusual. However, it was the setting up of this delegation that made it possible to overcome the obstacles that were hampering the peace negotiations. The Bosnian Government, also as a consequence of its recent military successes, refused to negotiate with the self-proclaimed Serbian Republic of Bosnia and Herzegovina. On the other hand, it was not possible to make peace without the participation of the Bosnian Serbs. The international agency between the Federal Republic of Yugoslavia and the Republika Srpska that might have been established would have been a legally viable way out of the *impasse*. Nevertheless, this solution did not appeal to the Bosnian-Serb leaders. Clearly, they were reluctant to renounce direct participation *qua* Republika Srpska in the negotiations. A compromise was found in the Agreement of 29 August 1995: the Republika Srpska was not to take part in the peace negotiations with an independent delegation, but at the same time it would not be represented by the Federal Republic of Yugoslavia. Among other things, the establishment of a relation of legal agency would not have assured acceptance by the Entity of the peace agreements made on its behalf by the authorities of Belgrade.

It was because of the forced absence of the Bosnian-Serb leaders from the peace negotiations that Milosevic was considered or perceived as 'representing' the Republika Srpska. According to the Agreement of 29 August 1995, the unified delegation would represent the Federal Republic of Yugoslavia and the Republika Srpska at the highest level, since its membership was to include President Milosevic - as the head of the delegation - and the Bosnian-Serb leaders President Karadzic, General Mladic and Mr Krajinsik for the Bosnian-Serb side.<sup>15</sup> Under the agreement, the Yugoslav side of the delegation had greater political importance, given that the Republika Srpska agreed to harmonize its approach to the peace process with that propounded by President Milosevic who, as noted above, had the casting vote in the case of a divided vote.<sup>16</sup> The international arrest warrants issued by the International Criminal Tribunal for the former Yugoslavia prevented the participation of Karadzic and Mladic in the peace negotiations. The absence of the Bosnian-Serb leaders strengthened the position of Milosevic within the delegation. As a result, the unified delegation was regarded simply as the Yugoslav delegation authorized to conclude

14 This 'delegation' is thus akin to the class of international organs which, unlike the organs of international unions of States (the so-called 'organes collectifs') are 'à la fois l'organe de deux Etats, mais par rapport à deux sphères d'activité tout à fait séparées. Tel est le cas du chef de deux Etats constituant une union personnel ou bien d'un individu accrédité par deux Etats comme agent diplomatique auprès d'un autre Etat' (Morelli, *Cours général de droit international public*, RdC (1956), I, 563).

15 Art. 2, quoted *supra* note 12.

16 Art. 1 and Art. 3, quoted *supra* note 12 and note 13 respectively.

the peace agreements on behalf of the Republika Srpska. This among other things led to an inaccurate wording of some parts of the agreements.

### C. The Inter-state Guarantees Designed to Ensure Compliance with the Peace Accord

The existence of numerous international guarantees aimed at securing the implementation of the peace agreements constitutes another *unique* feature of such agreements. Besides institutional guarantees,<sup>17</sup> hinging on such institutions as IFOR and the High Representative,<sup>18</sup> at Dayton other safeguards were agreed upon, of a different nature and operating at various levels, as far as both the guarantors and beneficiaries were concerned.

Mention should first be made of the General Framework Agreement, by which Croatia, the Federal Republic of Yugoslavia and Bosnia and Herzegovina endorsed the various annexed agreements and undertook to 'respect and promote fulfillment' of their provisions. Croatia and the Federal Republic of Yugoslavia, unlike Bosnia and Herzegovina, are third parties vis-à-vis the annexed agreements;<sup>19</sup> consequently, the bulk of the General Framework Agreement can be regarded as a treaty of guarantee whereby these two States undertake towards Bosnia and Herzegovina the obligation to ensure compliance with the various annexes, primarily concluded by Bosnia and Herzegovina, Republika Srpska and the Federation of Bosnia and Herzegovina.<sup>20</sup>

17 For the notion of 'garantie institutionnalis e' see Quoc Dinh, Dailler, Pellet, *Droit international public*, 5th ed (1994), at 223.

18 IFOR is a Multinational Implementation Force, composed by units of NATO and non-NATO Nations and created by the United Nation Security Council resolution 1031 of 15 December 1995, in accordance with the Agreement on the Military Aspects of the Peace Settlement (Annex 1-A to the General Framework Agreement). IFOR has the power to ensure the implementation of the territorial and militarily related provision of the Agreement in question. The powers granted to IFOR are extensive and all-embracing. In many respects they are not dissimilar to those of an occupying army.

The creation of the High Representative is provided for by the Agreement on Civilian Implementation of the Peace Settlement (Annex 10 to the Framework Agreement). He is the civilian authority responsible for the implementation of all the civilian aspects of the peace settlement.

19 Croatia and the Federal Republic of Yugoslavia are parties only to two Annexes, namely Annex 1-B and Annex 10. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska are also Parties to these Annexes (see *supra* note 2).

20 'The legal notion of guarantee stands for an obligation under public international law by which one or several States assume responsibility for the compliance with legal commitments entered into by a *third State*' (Ress, 'Guarantee', in 7, *EPIL*, 109, emphasis added).

Consequently, by means of the General Framework Agreement, the Republic of Bosnia and Herzegovina has undertaken the legal obligation to ensure compliance solely with the annexed treaties made by third subjects, namely the two agreements concluded only between the Republika Srpska and the Federation of Bosnia and Herzegovina (see *supra* note 1). As for all the other annexed agreements to which it is always a Party, Bosnia and Herzegovina has simply expressed vis-a-vis the other parties to the General Framework Agreement its willingness to comply with its own obligations. This does not constitute a guarantee in the legal sense of the term, but a so-called 'pseudo-guarantee' (see Frowein, 'Guarantees Treaties', *ibidem*, 117). For example, Art. VI of the General Framework Agreement provides that 'The Parties welcome and endorse the arrangements...set

Secondly, the General Framework Agreement has also been signed by third States, such as France, Germany, Russia, the United Kingdom and the United States in their capacity as 'witnesses'. This is an infrequent form of approval. A recent precedent can be found in the 1978 Camp David Agreements and 1979 Washington Peace Treaty between Egypt and Israel. These agreements were also signed by the United States, which did not however confine itself to a mere 'witnessing' of the signature, but also undertook towards Egypt and Israel the legal obligation to ensure compliance with the treaties.<sup>21</sup> It was otherwise for the General Framework Agreement for peace in Bosnia and Herzegovina. The third States in question restricted themselves to witnessing the conclusion and entry into force of the Agreement, without assuming the obligation to safeguard compliance with it. Consequently, it would seem that the signature by these States has only *political* relevance.

This situation is complicated by the fact that Croatia and the Federal Republic of Yugoslavia endorsed by their signature two of the Annexes, namely the Agreement on Military Aspects of the Peace Settlement and the Agreement on Inter-Entity Boundary Line and Related Issues, each of which was entered into by Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina. Unlike the signature by which third States 'witnessed' the conclusion and entry into force of the General Framework Agreement, in this case the signature has *legal* relevance, in that Croatia and the Federal Republic of Yugoslavia have undertaken the obligation to guarantee these two Agreements. This conclusion is borne out by the choice of the word 'endorse', that among other things can be found in the provisions of the General Framework Agreement by which the Contracting Parties obligated themselves to respect and promote fulfillment of the Annexes.

Why did Croatia and the Federal Republic of Yugoslavia endorse these two Agreements while they themselves had undertaken by the General Framework Agreement to guarantee compliance with *all* the Annexes including the two at issue? To my mind the reason lies in the fact that in this way a greater number of international legal subjects are enabled to benefit from international guarantees. Indeed the General Framework Agreement is *res inter alios acta* for the Republika Srpska and the Federation of Bosnia and Herzegovina: as noted above, Croatia and the Federal Republic of Yugoslavia have undertaken to guarantee the Annexes only vis-à-vis Bosnia and Herzegovina. By the endorsement of these two Agreements and solely

forth in the Agreements at Annexes 5-9. The Parties shall fully respect and promote fulfillment of the commitments made therein'. Since the Republic of Bosnia and Herzegovina is not a party to Annex 5 and Annex 9, this provision obliges not only Croatia and the Federal Republic of Yugoslavia, but also the Republic of Bosnia Herzegovina to guarantee the Annexes in question. By contrast, since the Republic of Bosnia and Herzegovina is a party to Annex 6, Annex 7 and Annex 8, Art. VI is a 'provision of guarantee' only regarding Croatia and the Federal Republic of Yugoslavia, while it constitutes a 'pseudo-guarantee' with regard to Bosnia and Herzegovina.

21 See Le Morzellec, 'Les accords de Camp David et le Traité de Paix Israélo-Egyptien', in *AFDI* (1980), 175.

with regard to them Croatia and the Federal Republic of Yugoslavia have *also* assumed the *obligation* to ensure compliance with the two Agreements vis-à-vis the Republika Srpska and the Federation of Bosnia and Herzegovina.

Furthermore, Croatia and the Federal Republic of Yugoslavia committed themselves to guaranteeing the two Agreements at issue towards third States as well -- something which is indeed unique in international State practice. By a set of identical side-letters, addressed to the United States, Russia, Germany, France and the United Kingdom, the Federal Republic of Yugoslavia pledged to take 'all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the Republika Srpska fully respects and complies with the provisions' of the aforementioned Agreements. The same undertaking has been made by Croatia vis-à-vis the same States, with regard to 'personnel and organizations in Bosnia and Herzegovina which are under its control or with which it has influence'.<sup>22</sup>

This *hypertrophy of international guarantees* undertaken at Dayton by Croatia and the Federal Republic of Yugoslavia and strengthened by the Security Council in resolution 1022 of 22 November 1995<sup>23</sup> is striking, for normally States are reluctant to assume obligations concerning complex situations the outcome and ramifications of which are essentially beyond their control. Nevertheless, the two States in question have taken upon themselves to play the role of *guarantors* of the peace agreements, in particular by ensuring compliance by the Federation of Bosnia and Herzegovina and the Republika Srpska with the Agreements on Military Aspects and the Agreement on Inter-Entity Boundary Line. This rôle of guarantor stems, of course, from the *de facto* authority Croatia and the Federal Republic of Yugoslavia exercise over part of the Federation of Bosnia and Herzegovina and the Republika Srpska respectively.

Two further remarks seem apposite. The first, seemingly banal, remark relates to the General Framework Agreement. This Agreement, although it is essentially a treaty of guarantee, actually constitutes the main treaty, whereas those agreements which enumerate the detailed conditions for peace and were concluded by the parties directly involved in the armed conflict, have been given the simple status of

22 Since Croatia has made reference to personnel and organizations in Bosnia Herzegovina *under its control*, it can be argued that, by virtue of the letters at issue, Croatia has not only undertaken the obligation in question but has also committed itself to *comply with* agreements entered into by third States or Entities. Indeed, the personnel and organizations in Bosnia Herzegovina under Croatian control might be regarded as *de facto* organs of Croatia itself.

23 In operative para. 3 of this resolution the Security Council decided 'that if at any time, with regard to a matter within the scope of their respective mandates and after joint consultation if appropriate, either the High Representative described in the Peace Agreement, or the commander of the international force to be deployed in accordance with the Peace Agreement, on the basis of a report transmitted through the appropriate political authorities, informs the Council via the Secretary-General that the Federal Republic of Yugoslavia or the Bosnian Serb authorities are failing significantly to meet their obligations under the Peace Agreement, the suspension referred to in paragraph 1 above shall terminate on the fifth day following the Council's receipt of such a report, unless the Council decides otherwise taking into consideration the nature of the non-compliance.'

'Annexes'. From the vantage point of legal logic, the reverse would probably have been more appropriate.

However, the high legal status attributed to the General Framework Agreement reflects, once again, political realities. Plainly, without the political support of Croatia and the Federal Republic of Yugoslavia for a peace deal, the Bosnian Serbs and the Bosnian Croats would not have put an end to their fighting against the central authorities in Sarajevo. In other words, the Republic of Bosnia and Herzegovina has been able to achieve peace only by coming to terms with and relying on the support of those who had until that moment denied being the very minds behind the conflict.

My second remark relates to two Annexes, namely the Agreement on Military Aspects of the Peace Settlement and the Agreement on Inter-Entity Boundary Line and Related Issue. As mentioned above, these two treaties are in a sense more guaranteed than the others, by virtue of the obligations assumed by Croatia and the Federal Republic of Yugoslavia towards the States making up the Contact Group. This enhanced guarantee is accounted for by the great military importance of the two Agreements and their crucial role for the maintenance of peace in Bosnia and Herzegovina. In particular, the Agreement on Military Aspects provides for the setting up of IFOR. Bolstering the safeguards for the observance of this Agreement amounts to better safeguarding the international military forces deployed in Bosnia and Herzegovina. This higher guarantee also shows, however, that the Contact Group States did not consider sufficient the guarantee provided through the General Framework Agreement by Croatia and the Federal Republic of Yugoslavia vis-à-vis Bosnia and Herzegovina. One is therefore led to wonder why other important Annexes are not covered by international safeguards additional to those provided for in the General Framework Agreement. This in particular holds true for the new Constitution of Bosnia and Herzegovina (Annex 4). Apparently, the privileged treatment accorded to the two Agreements under discussion shows that at Dayton the Contact Group States intended to give pride of place to those agreements which are designed to ensure the cessation of hostilities, while perhaps attaching less importance to the future of Bosnia and Herzegovina as a sovereign State within its present international boundaries.

#### **D. The Authority to Issue Binding Interpretations of Some of the Agreements**

The importance attached at Dayton to the aforementioned strong international safeguards for ensuring respect for the Agreements is borne out by the clauses on interpretation included in the Agreement on Military Aspects of the Peace Settlement and the Agreement on Civilian Implementation of the Peace Settlement.

As pointed out above, these two agreements provide for, respectively, the establishment of a multinational force (IFOR) responsible for enforcing 'territorial and related military provisions of the peace settlement', and the rôle of a High Representative, who has essentially been entrusted with the task of monitoring 'the

implementation of all civilian aspects of the peace settlement'.<sup>24</sup> IFOR and the civilian structure headed by the High Representative are endowed with very extensive powers, culminating in the power of the IFOR Commander and the High Representative to be 'the final authority in theater' regarding interpretation of the Agreement on Military Aspects of the Peace Settlement and the Agreement on the Civilian Implementation of the Peace Settlement respectively.<sup>25</sup>

Once again, we are faced here with a *unique* feature of the Agreements. Normally, the power to interpret an international treaty belongs to the contracting parties. As regards authoritative and binding constructions of a treaty, they are only given by *all* parties concerned if they all agree on a specific construction (so-called authentic interpretation) or by a third entity, i.e. a judicial or arbitral body appointed by the contracting States or at any rate vested by the Parties with jurisdiction over disputes concerning the interpretation of the treaty. By contrast, in two of the Dayton Agreements such power is conferred on non-judicial entities, i.e. a military commander and a civilian official respectively, so chosen because they have been given the overriding authority to implement as well as scrutinize the implementation of the Agreements.

By their interpretation of the Agreements, the IFOR Commander and the High Representative may overrule any construction suggested by the Parties concerned. Since many provisions of the two Agreements are rather loose, particularly those concerning the attributions and role of the IFOR Commander and the High Representative, the power of these two organs to issue binding interpretations is yet another manifestation of the very broad authority they are given under the Agreements in question.

The importance of the interpretative power conferred upon the IFOR Commander and the High Representative, besides being so unusual in international transactions, should not be underestimated from either a political or jurisprudential point of view. As is well known, Carl Schmitt repeatedly emphasized that in any legal system the real power lies in the hands of those who 'decide' in a binding manner on concrete and specific legal issues. In any system of law what ultimately matters is not not so much what legal provisions proclaim, but rather what those entitled to put forward the final interpretation decide.<sup>26</sup> Admittedly, one may not share, because of

24 See Note 18.

25 See Art. XII of the Agreement on the Military Aspects of the Peace Settlement provides that 'the IFOR Commander is the final authority in theatre regarding interpretation of this Agreement on the military aspects of the peace settlement, of which the Appendices constitute an integral part'.

As for the Agreement on the Civilian Implementation of the Peace Settlement, Art. V provides: 'The High Representative is the final authority in theatre regarding interpretation of this Agreement on the Civilian Implementation of the Peace Settlement'. Mention should also be made of the United Nations Security Council resolution 1031 of 15 December, para. 27, where it 'confirms that the High Representative is the final authority in theatre regarding interpretation of Annex 10 on the civilian implementation of the Peace Agreement'.

26 See C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (1922), 2nd ed. 1134, 40-46; idem, 'Das Reichsgericht als Hüter der Verfassung', in *Verfassungsrechtliche Auf-*

its political underpinnings, C. Schmitt's dismissal of what he termed the 'myth of government of law, not of men', along with his reliance on Hobbes' proposition that 'auctoritas, non veritas facit legem'.<sup>27</sup> The fact however remains that to be vested with the authority to impose binding legal constructions of loose legal compacts means to have the final say in the political (and military) matters governed by those compacts.

#### IV. International Legal Personality

##### The International Personality of the Republika Srpska and the Federation of Bosnia and Herzegovina

The Dayton negotiations bear out what can be frequently discerned in international practice, namely that entities which exercise *de facto* control over a specific territory may be regarded as subjects of international law, even if they enjoy a limited international personality. At Dayton, the negotiating parties took for granted that the Federation of Bosnia and Herzegovina and the Republika Srpska had international personality, albeit an extremely limited one. These two Entities were regarded as entitled to conclude all the agreements annexed to the General Framework Agreement; in addition, they were allowed to undertake international obligations by means of unilateral declarations.

However, it may well be disputed that this assumption was based for *both* entities 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.<sup>28</sup> The Federation 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

sätze aus der Jahren 1924-1954, 1958, 79-82; idem, *Grundrechte und Grundpflichten* (1932), ibidem, 219; idem, *Ueber die drei Arten des rechtswissenschaftlichen Denkens* (1934), 11-29.

27 Hobbes is mentioned by C. Schmitt in *Politische Theologie*, cit., at 44 and *Ueber die drei Arten cit.*, at 27. Cf. Hobbes, *Leviathan or the Matter, Forme and Power of a Common-Wealth Ecclesiastical and Civill*, 1651, ed. by Macpherson, 1983, at 322: '(T)he Interpreters can be none but those, which the Sovereign, (to which the Subject oweth obedience) shall appoint. For else, by the craft of an Interpreter, the Law may be made to bear a sense, contrary to that the Sovereign; by which means the Interpreter becomes the Legislator'.

28 As for the Republika Srpska, see the decision of 11 October 1995, case *Kadic et al. v. Karadzic*, delivered by the United States Court of Appeal for the Second District, related to a lawsuit in application of the Alien Tort Act of 1789. The Court 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 common Art. 3 to the Geneva Conventions and other norms of international humanitarian law.

by Croatia itself in its unilateral declarations referring to 'personnel and organizations in Bosnia and Herzegovina ... *under its control*' (emphasis added).

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. The Bosnian Croats would have never agreed to be represented by the Government led by President Izebegovic. 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 it was essentially based on a legal fiction. Something similar occurred at the San Francisco conference in 1945, when Byelorussia and Ukraine were considered States although they actually were members of a federal State (the USSR) and did not possess international legal personality.

What is striking is that the Republika Srpska and the Federation of Bosnia and Herzegovina lost any international personality, be it effective or fictitious, at the end of the negotiations and the entry into force of the peace agreements. Both entities accepted the new Constitution of the Republic of Bosnia and Herzegovina (Annex 4 to the General Framework Agreement), providing that these two Entities are to be regarded as members of a federal State, the Republic of Bosnia and Herzegovina, and as such are not endowed with international legal rights and powers.<sup>29</sup>

The contention can therefore be made that the Federation of Bosnia and Herzegovina was recognized as a subject of international law only as long as it participated in the peace negotiations. As for the Republika Srpska, we are faced with the case of an insurrectional government, which 'used' its international personality to extinguish itself: after having acquired international status on account of its effective control over a part of the territory of Bosnia and Herzegovina, the Republika Srpska accepted the new Constitution of the State from which it had endeavoured to secede; it thus accepted to downgrade itself to the status of member of a sovereign State. This outcome has resulted from various factors: unfavourable military events, international isolation, the discrediting of the Bosnian-Serb leaders charged with hein-

29 Under Art. IV para. 4(d) of the new Constitution it is for the central parliamentary organ, i.e. the Parliamentary Assembly to decide 'whether to consent to the ratification of treaties', under Art. V para. 3 it is for the Republic's Presidency to 'conduct foreign policy' (litt. a), to appoint ambassadors and other international representatives of Bosnia and Herzegovina" (litt. b), to represent the State 'in international and European organizations and institutions' and seek 'membership in such organizations and institutions of which Bosnia and Herzegovina is not a member' (litt.c), to negotiate, approve and ratify treaties (litt. d). As for the two Entities they only have the right 'to establish parallel relationships with neighbouring States consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina' (Art. III, para. 2(a)), 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' (litt. d). It should be added that under Art.VI para. 3(a) the Constitutional Court may *inter alia* decide 'whether an Entity's decision to establish a parallel relationship with a neighbouring State is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.'

ous crimes by the International Criminal Tribunal of the Hague, a cooling-off of political relations with the Federal Republic of Yugoslavia (keen on the lifting of economic sanctions visited upon it by the United Nations Security Council). To sum up, the Republika Srpska was obliged to accept the United States' offer for a peaceful settlement of the war, before loosing any negotiating power and international status..

## V. States' Constitutional Organization

### The New Constitution of the Republic of Bosnia and Herzegovina

Two features of this Constitution deserve to be emphasized: its international origin and its far-reaching openness to international demands.

As for the first feature, it should be recalled that the Constitution was negotiated at Dayton and 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 declarations, which however had a similar tenor. 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.<sup>30</sup> However, it is beyond dispute that the constitutional law-making process was unmistakably anomalous.<sup>31</sup> For, in this case the constitutional Charter of an existing State 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 international level by the Republic of Bosnia and Herzegovina with on one side two insurrectional groups and on the other a group of foreign States. It is indeed no coincidence that the Constitution was drafted *in English* and not in the three languages of the peoples concerned.<sup>32</sup> In short,

30 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 three unilateral declarations, which however 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 and 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'.

One could well wonder why only in the case of Annex 4 one is faced with unilateral declarations instead of a 'formal' international treaty.

31 One can take note of the anomalies of the process at issue in the Preamble where it is stated that the Constituent peoples are: 'Bosniacs, Croats, and Serbs...(along with Others), and the citizens of Bosnia and Herzegovina'.

32 Most of the agreements negotiated at Dayton were drafted and adopted in English only, without, however, this being explicitly mentioned, at the end of the Agreement. By contrast, the Agreement on Initialling provides explicitly that it was done 'in the English language', while the Gene-

the Constitution is not the outcome of an 'internal' constitution-making process. Nor has it been the upshot of a totally 'external' process either, as is often the case with those States that have forfeited their sovereign rights following *debellatio* as well as with many colonial countries acceding to independence: unlike these last cases, the new Constitution originates from a law-making process in which the authorities of the Republic of Bosnia and Herzegovina did participate. Nor can the hammering out of the Constitution at issue be equated with the conclusion of an international treaty setting out the Constitution of a federal State. Indeed, in the past some constitutional documents have resulted from an agreement among a number of sovereign States. By contrast, in the case of the Republic of Bosnia and Herzegovina we are faced with a compact made by an existing and internationally recognized State with insurrectional groups wielding *de facto* control over part of the territory of that State.

The new Constitution of the Republic of Bosnia and Herzegovina is also interesting in a second respect, namely from the viewpoint of its openness towards the international legal system. It is a Constitution ranking among those showing a great degree of what has been termed 'friendliness to international law'.<sup>33</sup> In other words, it is a Constitution attaching great importance to international legal rules and principles,<sup>34</sup> with special emphasis on international standards on human rights. Thus, for instance, the Preamble refers to the 'purposes and principles of the United Nations' and lays down the pledge 'to ensure full respect for international humanitarian law' and to uphold international instruments on human rights.<sup>35</sup>

ral Framework Agreement provides *in fine* that it has been done 'in the Bosnian, Croatian, English and Serbian languages, each text being equally authentic'.

33 See Cassese, 'Modern Constitutions and International Law', III, *RdC* (1985), 343, where the author, relying upon notions suggested by some 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'.

34 The constitutional provisions 'opening' Bosnia and Herzegovina's legal order to the international legal system are: Art. II, concerning Human Rights and Fundamental Freedoms (see *infra* note 36) ; Art. III, para. 2., litt. (c), 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 referred to in Article II above', and para. 3, litt. (b), whereby: 'The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities'; Art. VI, para. 1, litt. (a), 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', and litt. (b), providing that: 'The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or any neighboring States'; Art. VI, para. 3, litt. (c), 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'; and, finally, Art. IX, para. 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'.

35 These include: the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic and Cultural Rights, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 'as well as other human rights instruments'.

Among the various constitutional provisions proclaiming respect for internationally recognized human rights, attention should in particular be drawn to Article II, para. 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'.<sup>36</sup> It is also notable that Article X, para. 2, makes all the constitutional provisions on human rights non-amendable by constitutional process.<sup>37</sup> In addition, no one can question the significance of the provisions elevating to a constitutional obligation the duty to cooperate with the International Criminal Tribunal for the Former Yugoslavia.<sup>38</sup>

### Concluding remarks

By way of conclusion I would make four points.

First, the Dayton Agreements undoubtedly find their basic underpinning in two political factors: on the one side, the will of all the parties concerned to put an end to bloodshed and devastation and, on the other side, the keen desire of the United States Government to exercise its political leadership in a serious European crisis thus achieving a resounding diplomatic success.

Second, the engrained hatred among the conflicting parties, as well as the inherent difficulties of a lasting political settlement made it necessary to strengthen the agreements concluded at Dayton by a set of international guarantees, operating at various levels: those pledged by Croatia and the Federal Republic of Yugoslavia, the military enforcement mechanisms provided by the presence of IFOR, the whole apparatus for civilian implementation headed by the High Representative, the sanctionary mechanism contemplated in Security Council resolution 1022. These various 'layers' of guarantees should ensure actual observance of the whole web of substantive provisions making up the Dayton Agreements.

It should be added that Annex I to the Constitution provides for a list of human rights agreements to which, according to Art. II, para. 7, Bosnia and Herzegovina 'shall remain or become a party'.

36 Furthermore, Art. II, para. 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 para. 8 of this Article, '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 the Article at issue concern the 'Enumeration of Rights' (para. 3), 'Non-Discrimination' (para. 4), 'Refugees and Displaced Persons' (para. 5), 'Implementation' (para. 7) and 'International Agreements' (para. 7).

37 According to this provision 'No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph'.

38 Art. II, para. 8, and Art. IX, para. 1, quoted *supra*, notes 36 and 34 respectively.

Third, the political factors and practical difficulties just mentioned have found their reflection at the legal level. As I have tried to show above, the agreements exhibit unique legal features: these include the modalities of making of the Agreements and of their entering into force, the special relation between the Federal Republic of Yugoslavia and the Republika Srpska at the stage of treaty-making, the authority in the area of treaty interpretation, the legal personality of insurgents, and the constitutional law-making process.

Fourth, the setting up of a complex web of treaty engagements and enforcement mechanisms does not however entail that a lasting peaceful settlement has been achieved. In the final analysis, the success or failure of the Dayton Accord turns on a number of factors: the political will of Bosnian Croats and Muslims actually to build up the envisaged Federation, the readiness of Bosnian Serbs to accept submission to the central authorities of Bosnia and Herzegovina and to remain part of a sovereign State, the degree to which Croatia and the Federal Republic of Yugoslavia are prepared to exercise their political influence over the various factions in Bosnia and Herzegovina, and the extent to which the IFOR Commander and the High Representative are willing to exercise the sweeping powers with which they have been endowed. The Dayton Accord has put a whole 'legal weaponry' at the disposal of the parties concerned; it now falls to them to translate all these legal potentialities into reality.