Promoting Equality After Genocide

Sheri P. Rosenberg*

The value of equality has little currency after genocide and ethnic cleansing. Restoring that value is no easy feat. Paramount, though not singular, in this struggle for equality is the role of the law. A State establishes its common legal rights and duties through its legal institutions, which define the values and character of the nation. Legal institutions mediate these values and norms and through legal pronouncements provide a template for future civic engagement and social interaction. Equality and antidiscrimination jurisprudence is particularly important during the delicate period of transition after genocide, because it grounds within society the normative shift in principles underlying the cultural understanding of equality. Specifically, this Article addresses the question: what can equality mean in a postgenocidal environment that rests on ethnic inequality or domination? An analysis of the antidiscrimination jurisprudence of the quasi-national legal institutions established under the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP) provides the forum for this exploration. A review of the Constitutional Court's and the Human Rights Chamber's antidiscrimination jurisprudence reveals that each court has taken a formal approach to equality. This Article argues that a formal approach to equality is not appropriate in the context of Bosnia or other countries recovering from ethnic strife. Only a substantive approach to equality, which addresses historical inequality, will stimulate a jurisprudence that can help to heal the long-term effects of genocide. A robust development of substantive antidiscrimination jurisprudence, consciously developed to overcome the continuation of institutionalized social conflict, will ultimately fulfill equality's promise as mandated by the GFAP. Reflecting on the Bosnian experience, certain legal principles concerning equality and antidiscrimination are revealed that should be applied to countries recovering from mass atrocities based upon ethnic identity in today's world. The international community is actively engaged in rebuilding the legal systems of countries with deep ethnic divides including Iraq, Afghanistan, Kosovo, and Sudan. Like in Bosnia and Herzegovina (BiH), nationally ingrained inequality exists and must be defeated in all postconflict communities in order to create an environment where different nations can exist under one State banner.

I. INTRODUCTION 330
II. BOSNIAN INDEPENDENCE AND DESCENT INTO WAR........................ 336

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* © 2008 Sheri P. Rosenberg. Founder and Director, Human Rights and Genocide Clinic; Deputy Director Program in Holocaust and Human Rights Studies (2004-2006); Director, Program in Holocaust and Human Rights Studies (2006-present); Visiting Professor of Clinical Law, Benjamin N. Cardozo School of Law, Yeshiva University; Expert Consultant, Human Rights Chamber, Bosnia and Herzegovina (Summer 2003); Seconded by the United States Department of State as an International Lawyer to the Human Rights Chamber, Bosnia and Herzegovina (2000-2002); A.B. New York University, J.D. Benjamin N. Cardozo School of Law, LL.M. Columbia University School of Law. The author acknowledges with gratitude the comments of Professors Catherine A. MacKinnon, Julie Chi-hye-Suk, Joseph Marko, Eyal Benvenisiti, and Dina Haynes. This Article also benefited from helpful comments from the Cardozo Law School Junior Faculty workshop (Spring 2005) and from Professor Barbara Harff during a presentation at the International Association of Genocide Scholars' conference (Summer 2005). Dustin Stein, Danielle Kantor, and Christina Baker provided superb research assistance. Support for researching of this Article was provided by the National Council for Eurasian and East European Research. Of course all opinions, mistakes, or inaccuracies are my own.

A. *The Collapse of the Former SFRY's Impact on BiH* 336
B. *Ethnic Composition in Bosnia in 1991, Diametrically Opposed Views of the State, and War* 338
III. THE DAYTON PROTECTORATE 340
A. *Human Rights and Nondiscrimination in the GFAP* 343
B. *Current Ethnic Composition* 344
IV. QUASI-INTERNATIONAL COURTS SET UP UNDER THE GFAP 346
A. *Constitutional Court* 347
B. *Human Rights Chamber* 349
V. THE JURISPRUDENCE OF EQUALITY 350
A. *Property Issues* 354
1. High Representative's Law on Cessation 358
2. Discrimination: The Central Issue in *D.M. v. The Federation* 362
B. *Employment Issues* 364
1. Application of Wartime Decrees 366
2. Application of Postwar Laws 371
VI. CONSTITUENT PEOPLES CASE: TOWARD A SUBSTANTIVE THEORY OF EQUALITY 382
A. *Collective Equality* 385
B. *Individual Equality* 388
VII. CONCLUSION 391

I. INTRODUCTION

> I and the public know
> What all schoolchildren learn,
> Those to whom evil is done
> Do evil in return.
>
> —W.H. Auden[1]

For Bosnia and Herzegovina (BiH) to succeed as a self-sustaining state, it must consciously ameliorate the profound consequences of the ethnic cleansing[2] and genocide that tore apart the country from 1992-

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1. W.H. AUDEN, *September 1, 1939*, *in* ANOTHER TIME 98 (1940).

2. The term "ethnic cleansing" was coined in the early 1980s by the Serbian ultranationalist leader, Vojislav Sesselj. The term derived its current meaning during the war in BiH, where it was initially used by journalists and was subsequently adopted as part of the vocabulary of the U.N. Security Council and by other U.N. institutions. Tadeusz Mazowiecki, Special Rapporteur for the Former Yugoslavia of the Human Rights Commission defined ethnic cleansing in his report of November 17, 1992 as: "the elimination by the ethnic group exercising control over a given territory of members of other ethnic groups." Special Rapporteur of the Commission on Human Rights, *Situation of Human Rights in the Territory of the Former*

1995.[3] One necessary step in this process is to restore the value of equality among groups and between individuals whose mistrust and hatred of one another runs deep. As one would imagine, the value of equality has little currency after genocide. Restoring that value is no easy feat. What use is the notion of equality when brutal crimes against human dignity have been perpetrated based upon nothing more than one's ethnic identity?

Restoring the value of equality in any postgenocidal environment is an arduous task that requires a multifaceted approach. Paramount, though not singular, in this struggle for equality is the role of the law.[4] A State establishes common legal rights and duties through its legal institutions, which define the values and character of the nation. Equality and antidiscrimination jurisprudence is particularly important during the delicate period of transition after genocide, because it grounds within society the normative shift in principles underlying the cultural understanding of, and relationship to, equality. Of course, notions of equality are forgotten in the most brutal fashion during genocide. Instead, ethnic hatred blinds people to the very essence of what it means to be human and equal. Law alone cannot eliminate racism and ethnic hatred, but efforts to promote equality cannot succeed without the law.[5]

Legal institutions mediate values and norms within a society, including the value of equality, and through legal pronouncements provide the template for future civic engagement. Pursuing justice as part of a transition from war to peace includes pursuing equality, a component of justice. This is particularly important when a war is fueled in large part by ethnic identifications. There, the pursuit of justice

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Yugoslavia ¶ 9, *delivered to the Security Council and the General Assembly*, U.N. Doc. S/24809, A/47/666 (Nov. 17, 1992).

3. Many argue that what occurred in BiH was not only "ethnic cleansing" but, in fact, genocide. For a substantial exploration of the genocidal intentions of the Serbian government, see generally NORMAN CIGAR, GENOCIDE IN BOSNIA: THE POLICY OF "ETHNIC CLEANSING" (1995). *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. Summary of Judgment 2 (Feb. 16), http://www.icj-cij.org/docket/index.php?sum=667&code=bhy&p1=3&p2=2&case=91&k=f4&p3=5 (last visited Mar. 13, 2008) (finding that genocide occurred in Srebrenica).

4. Education, civil society development, and electoral reform also play a crucial role in building tolerance and equality. A monumental challenge requires a monumental, holistic response.

5. "In proposing a new protocol, the [European Commission Against Racism and Intolerance] recognised that the law alone cannot eliminate racism in its many forms . . . but it stressed also that efforts to promote racial justice cannot succeed without the law." Council of Europe, *Explanatory Report on Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (June 26, 2000), *available at* http://www.conventions.coe.int/Treaty/EN/Reports/Html/177.htm.

requires the pursuit of equality[6] and an understanding of how the law operates in relation to equality.[7]

To begin to fill a gap in the transitional justice literature, this Article explores how the hybrid courts established under the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP),[8] the Bosnian Constitutional Court, and the Human Rights Chamber, have attempted to shape and redefine the value of equality in postconflict BiH. Specifically, this Article addresses the question: what can equality mean in a postgenocidal environment where the very concept of the State is hotly disputed and rests on ethnic inequality or domination?

"A common characteristic of virtually all approaches to the ethics of social arrangements that has stood the test of time is to want equality of something—something that has an important place in the particular theory."[9] Yet, equality itself is a deeply contested notion.[10] Several concepts of equality present themselves as possible candidates to be the basis for antidiscrimination law. These concepts are rooted in a society's particular history. As author Jeremy Waldron has noted, "equality has the extra and important resonance of indicating the sort of heritage [a society is] struggling against."[11]

BiH struggles against a heritage of ethnic cleansing, genocide, and an unhappy marriage of competing ethnic groups, wed by the GFAP, with competing visions of the State. While dividing the polity along ethnic lines, the GFAP also demands the reversal of ethnic cleansing through the establishment of BiH as a pluralistic, liberal, and democratic society. The negotiators at Dayton recognized that ethnic cleansing and genocide were occurring during the war and capitulated to the ethnic cleansers'

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6. Legal scholars have practically ignored civil justice as a component of the transition from war to peace. Punishment seems to have captured the public imagination when it comes to seeking justice after major human rights abuses. The lasting symbols of the English and French Revolutions are the trials of King Charles I and Louis XVI. Similarly, the legacy of the defeat of the Nazis in World War II remains the Nuremberg Trials. Today, we have the International Tribunal for Crimes in the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). Criminal trials with their multiple goals—punishment, retributive justice, history making, and reconciliation—dominate our understanding of what it means to repair and bring "justice" to a society torn apart by genocide. In fact, one can argue that "transitional justice" has been almost completely appropriated by theories of criminal justice.

7. JOHN RAWLS, A THEORY OF JUSTICE, 505-512 (1971).

8. The General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75 [hereinafter GFAP].

9. AMARTYA SEN, INEQUALITY REEXAMINED, at ix (1992).

10. *Id.* Virtually all theories on the organization of society rely on some idea of equality, albeit not the same idea of equality. *Id.*

11. Jeremy Waldron, *The Substance of Equality*, 89 MICH. L. REV. 1350, 1363 (1991).

demands by dividing the country into two ethnic enclaves. Cognizance of the brutal ethnic cleansing likewise caused the negotiators at Dayton to demand both a reversal of these brutal effects as well as the creation of a liberal democratic society based upon tolerance and pluralism.[12]

To frame a theory of equality, courts must look to this heritage and below the surface of equality rhetoric to the substantive claims that carry real weight in the moral and political debate. Guidance on the claims doing the work in the equality debate in BiH can be found within the four corners of the GFAP.

Concerned that the unrepentant parties that had committed genocide and ethnic cleansing would recreate the same injustices that the peace agreement had been created to end, the drafters of the GFAP included a plethora of individual human rights protections guaranteed without discrimination, including the "right to return."[13] In fact, the right to property return is raised to a constitutionally protected right, giving refugees and displaced persons the right to have restored to them the property that was taken from them in the course of the hostilities.[14] The GFAP demands the reversal of ethnic cleansing by encouraging individuals to return to their pre-war home in order to recreate the pluralistic society that existed before the war.

What matters in this process, however, is not only return—that individuals have the legal right to have their property returned to them—but sustained return. Sustainable return requires that once individuals from the minority group that was ejected return home, they are actually

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12. Of course this conclusion drawn by the GFAP negotiators assumes that one thinks Bosnia should exist as "Bosnia," rather than as something else, such as separate states divided ethno-territorially. *See* Thomas L. Friedman, *Foreign Affairs; Not Happening*, N.Y. TIMES, Jan. 23, 2001, at A21. Some argue that it is not essential for Bosnia to stay together. Rather, the State should be left to determine for better or worse its own fate. The more commonly accepted view, however, is that "Bosnia" *must* stay together. This view is fueled in part by the belief that if Bosnia is allowed to devolve into separate States, they will be States born out of ethnic cleansing and genocide, and the "civilized world" cannot accept that. Moreover, the aim of reconstructing a multiethnic Bosnia has always been seen as key to preserving peace in the region. A multiethnic state has been "seen as a bulwark against nationalism and therefore vital for both regional and international stability." *See* DAVID CHANDLER, BOSNIA: FAKING DEMOCRACY AFTER DAYTON 66 (1999). Moreover, "nation building" in Bosnia is touted as a nation building success story; to allow it to split now would be a defeat many would not be able to tolerate. *See* Editorial, *Now Some Good News*, N.Y. TIMES, Aug. 16, 2006, at A16. Nevertheless, the courts are guided by the strictures of the GFAP.

13. By analogy, in the United States, those who were concerned that the unrepentant Southern states would recreate the same injustices that the Civil War had been waged to end passed the Fourteenth Amendment in the hope of "securing and perpetuating the victories of the battlefield." Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983) (citing Cong. Globe, 39th Cong., 1st Sess. 1181 (1866) (remarks of Sen. Pomeroy)).

14. GFAP, *supra* note 8, annexes 4, 7.

able to remain there. In other words, sustain their return by allowing them to live free from harassment and get jobs and social benefits free from discrimination. In this regard the GFAP calls on the parties immediately to undertake confidence building measures, including "the repeal of domestic legislation and administrative practices with discriminatory intent or effect."[15] The GFAP, however, is structurally flawed and unrealistic in its call for the Entities to create the conditions of return, because it relies on the same parties who engaged in ethnic cleansing to establish their homogenous mini-states to cooperate to reverse ethnic cleansing.

This is precisely why the GFAP insisted that the two highest courts of the land be comprised not only of nationals but of internationals who could assist in the implementation of human rights and most importantly nondiscrimination principles.

The GFAP demands reintegration and the reversal of ethnic cleansing, encouraging sustainable return by actively promoting equality in fact.[16] These are the sets of values underlying the equality principle in BiH. A review of antidiscrimination jurisprudence from the Constitutional Court and the Human Rights Chamber reveals that, to the extent that a normative, principled approach can be discerned, each court has taken a formal approach to equality submerging equality principles beneath the basic return principles, thereby missing the connection between return and the crucial element of sustainability.

Best articulated by Aristotle's aphorism that like cases be treated alike, formal equality is grounded in the idea that fairness requires consistent treatment and that any distinctions between individuals must be reasonable and objective.[17] It requires fidelity to race neutrality and requires one to disregard the ethnicity, race, or gender of the individual. Yet an individual's social, political, or economic situation is heavily determined by those factors. Nowhere is this more stark than in a postgenocidal environment, where one's ethnicity predetermined the most atrocious violations against human life and continues to determine

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15. *Id.* annex 7, art. I(3).

16. In the landmark *Constituent Peoples Case*, the Constitutional Court of BiH pronounced that "peaceful relations" are best produced in a "pluralist society." "[A]n overall objective of the Dayton Peace Agreement [is] to . . . re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination." Ustavni sud Bosne i Hercegovine [Constitutional Court of Bosnia and Herzegovina], Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina, Case U-5/98, Partial Decision, July 1, 2000, para. 73, *available at* http://www.ccbh.ba/eng/odluke/index.php?src=2 [hereinafter *Constituent Peoples Case*].

17. ARISTOTLE, THE POLITICS 307 (Benjamin Jowett trans., 1943).

political affiliation and participation. This Article argues that although the courts have been following the most accepted, formal model of antidiscrimination analysis, this approach is not appropriate in the Bosnian context or in any multiethnic country recovering from ethnic cleansing and/or genocide.

By employing a formal approach to equality, both courts have missed opportunities to pursue the GFAP's mandated goals of sustaining return and remedying the injustices of genocide. Only a substantive approach to equality, which addresses historical inequality and is conscious of group membership, will stimulate a jurisprudence that fosters a culture of reintegration and remedies the injustices of ethnic cleansing and genocide. Substantive equality foregrounds the work that discrimination is doing in BiH to thwart sustainable return by rooting out the insidious ways that discrimination operates. Only a robust development of antidiscrimination jurisprudence, consciously developed to overcome the continuation of institutionalized social conflict, will ultimately fulfill equality's promise of healing the long-term effects of genocide in BiH.[18]

Part II provides a brief background to the war which lasted from 1992 until the end of 1995. Part III introduces the GFAP, which formally ended the war on December 14, 1995, and discusses the inherent tension between ethnically based entities and international human rights standards found in the GFAP. Part IV sets forth the structures of the Human Rights Chamber and the Constitutional Court.

Part V explores the antidiscrimination jurisprudence of the Constitutional Court and the Human Rights Chamber in order to distill a theory of equality and to analyze the impact these courts have had in promoting it. Specifically, this Part looks at how these legal institutions ensure the right to sustainable return. The right to return literally means the right of persons who were forcibly removed from their homes to return to their prewar homes. Sustainable return, as used in this Article, refers to a person's ability, once returned to her prewar home, to live her life free of fear of ethnically motivated crimes and discrimination in employment, religious practice, and the political process. Though this refers to property rights on a basic level, on a more fundamental level, it addresses issues such as reintegration and reestablishing equality in society. This Article focuses specifically on discrimination with respect to property rights and employment rights as two important aspects of

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18. ROBERT M. HAYDEN, BLUEPRINTS FOR A HOUSE DIVIDED: THE CONSTITUTIONAL LOGIC OF THE YUGOSLAV CONFLICTS 15-16 (1999).

reversing inequality. These rights are fundamental and essential to a person's well-being because of their role in providing food and shelter.

Part V further argues that by following a formal model of equality, the courts missed important opportunities to pursue the GFAP's mandated goal of reversing ethnic cleansing through sustainable return. Only a substantive approach to equality, consciously developed to overcome the continuation of institutionalized social conflict, will ultimately fulfill equality's promise of healing the long-term effects of genocide and ethnic cleansing.

Part VI examines the Constitutional Court's landmark decision concerning "constituent peoples." This decision directly confronted the tension between collective and individual identity structures established by the GFAP in postwar BiH and illustrated a substantive, context-sensitive theory of equality. Unfortunately, this precedent has not been followed by the Constitutional Court.

Part VII concludes by setting forth basic legal principles that should be considered when evaluating legislation or claims of discrimination arising in BiH and other countries mired in severe ethnic tensions. The BiH Constitutional Court's and Human Rights Chamber's antidiscrimination juris-prudence reveals certain legal principles concerning equality that should be applied to countries recovering from conflict based upon ethnic identity or genocide in today's world. The international community is actively assisting in rebuilding the legal systems of countries with deep ethnic divides, such as Iraq, Afghanistan, Kosovo, and Sudan. As in BiH, in the aftermath of ethnic conflict, nationally ingrained inequality exists and must be defeated in all postconflict communities to create an environment where different nations can exist under one state banner.

II. BOSNIAN INDEPENDENCE AND DESCENT INTO WAR

A. The Collapse of the Former SFRY's Impact on BiH

The profound changes in Yugoslav society in the late 1980s and early 1990s had a catastrophic effect on multiethnic BiH, where no ethnic group formed a pure majority. The free elections held during 1990 in the other Yugoslav Republics had already shown a strong trend of voting along ethnic lines. By the time BiH held its republican elections in November 1990, it had witnessed the installation of nationalist governments in Slovenia and Croatia, the outbreak of conflict between the nationalist government in Zagreb and the Serb minority, as well as increased Serb nationalism and severe repression of the Kosovar

Albanians—all of which decreased the chances of the federation structure's survival. Thus, BiH elections unfolded in an atmosphere of fear of "the other" and in a context that called into question the very survival of the republic.[19] Disagreements over whether the Socialist Federal Republic of Yugoslavia (SFRY) should be a loose federation of republics or one ruled tightly from Serbia led to SFRY's breakdown.

With Slovenia, Croatia, and Macedonia breaking away from Yugoslavia, Muslims and Croats feared becoming part of a Serb-dominated, undemocratic "rump Yugoslavia." Indeed, the creation of a Serb-dominated Yugoslavia was precisely the goal of Serbian leadership both within and outside BiH, though this goal was often veiled in the rhetoric of feared marginalization and oppression as a minority in any Bosnian state.[20]

By 1990, three nationalist parties—which are still strong today—were formed in BiH: The Party of Democratic Action (Stranka Demokratske Skcije—SDA (the Muslim party)); The Serb Democratic Party (Srpska Demokratska Stranka Bosne I Hercegovine—SDS); and The Croatian Democratic Union of Bosnia-Herzegovina (Hrvatska Demokratska Zajednica Bosne I Hercegovine—HDZ). These three nationalist parties mobilized and politicized ethnic identities. Fashioned after Yugoslavia's inefficient rotating presidency, the election to the State presidency required voters to choose seven members: two from each of the three major ethnic communities and one "Other," known as "Yugoslav."[21] The results of the election placed the country—on the State, municipal, and *opstine* (county) level—in the hands of the nationalists.[22] The three separate nationalist parties partitioned the electorate in 1990, followed by the administration, which in turn led to a war to partition the territory.

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19. STEVEN L. BURG & PAUL S. SHOUP, THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION 57 (1999).

20. For example, utterly unsubstantiated, "*Narodna armija*, the [Serbian] military weekly, claimed that the Muslims intended to create an Islamic state extending over [BiH], southern Serbia [Kosovo], Macedonia, Greece, Bulgaria, and Albania." CIGAR, *supra* note 3, at 42-43.

21. Allocating political positions on the basis of ethnic identity is not new to BiH. Within the SFRY structure, the Republic of Bosnia and Herzegovina structured its government by ethnicity, allocating political offices to the Bosniaks, Serbs, Croats, "Others," and "Yugoslavs."

22. The SDA took 86 of the 240 total seats (35.8%); the SDS took 72 of the seats (30%); and the HDZ took 44 of the seats (18.35%). The breakdown between the populations of Muslims, Serbs, and Croats were respectively, 43.7%, 31.3%, and 17.5%. "Thus, the 'democratic' election was essentially an ethnic census." HAYDEN, *supra* note 18, at 91-92.

B. *Ethnic Composition in Bosnia in 1991, Diametrically Opposed Views of the State, and War*

On the eve of war, according to the 1991 census, 43.7% of the BiH population was Muslim, 31.4% was Serb, and 17.3% was Croat.[23] In about one-third of the one hundred *opstine* (counties), no ethnic community had a strong majority or could claim a clear numerical advantage. The three ethnic communities were distributed in a pattern of disconnected ethnic majority areas that varied in character from nearly homogeneous to nearly evenly divided, resulting in what former U.S. Secretary of State Cyrus Vance called "leopard spots."[24] By 1991, forty percent of urban marriages were mixed, and over twenty percent of urban Bosnians declared themselves in censuses "Yugoslav" or "Other," thereby refusing to define themselves in ethnic terms.[25] Additionally, only thirty percent of Bosnian municipalities were ethnically homogeneous, and Islamic, Catholic, and Serbian Orthodox houses of worship faced each other on the squares of Bosnian towns.[26] Since the war, however, in almost all municipalities, the majority ethnic group has come to constitute between ninety-two and ninety-three percent of the population.[27]

In spite of this demographic composition, and the fact that ethnic homogeneity could not be secured in BiH absent mass populations shifts, local Serbs unwilling to live in a BiH separate from Serbia and Montenegro—and claiming fear of Muslim domination[28]—had begun in 1990 "to set up autonomous areas beyond the control of the Bosnian republic's government."[29] This move was followed by the creation of Croat autonomous areas. As a result, the hope for establishing a Bosnian State was slipping further away.

Diverging views on the nature of a Bosnian State, which continue to create a tension over the goals of equality, can be clearly seen in the questions put forth in the plebiscites, which took place in 1991 and 1992.

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23. *Id.*

24. BURG & SHOUP, *supra* note 19, at 117.

25. HAYDEN, *supra* note 18, at 91-92.

26. The author lived and worked in Sarajevo from 2000 until 2002 and from her apartment could see a Catholic church, Serbian Orthodox church, and a mosque.

27. In Tuzla and Sarajevo the majority population is less than ninety percent of the total population. This may be true in other municipalities such as Srebrenica, but there are no numbers to confirm this. HELSINKI COMM'N FOR HUMAN RIGHTS IN BOSN. & HERZ., REPORT ON THE STATUS OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA (ANALYSIS FOR THE PERIOD JANUARY-DECEMBER 2005) (Jan. 17, 2006), http://www.bh-hchr.org/Printreports/reportHR2005.htm.

28. There is no evidence to support the contention that the Bosniak party intended to create an Islamic state. It continuously called for a State of equal peoples.

29. CIGAR, *supra* note 3, at 43.

In November 1991, the Bosnian Serbs' main political party, the SDS, organized a Serb-only plebiscite on the question of Bosnian-Serb independence. Voters were asked to vote for or against "remain[ing] in Yugoslavia together with Serbs, of Serbia, Montenegro, Krajina, Vojvodina, and Kosovo."[30] The answer was overwhelmingly in favor of remaining in Yugoslavia, with or without the rest of the Bosnian population. Certain areas were then formally proclaimed the "Serbian Republic of Bosnia-Herzegovina" in January 1992.[31]

Left without a choice, BiH held its referendum on February 29, 1992. The question put forth was: "Are you in favor of a sovereign and independent Bosnia-Herzegovina, a state of equal citizens, constituted by the peoples of Bosnia-Herzegovina: the Muslims, Serbs, Croatians, and members of the other peoples who live there?"[32] Without the votes of the Serbian citizens of BiH, the voters said yes. On April 6, 1992, Bosnia's independence was recognized by the European Community, even though it lacked the objective features of statehood. The central government had become an essentially Bosniak government, controlling barely thirty percent of the territory.[33] It is safe to say that a significant proportion of the population did not "feel" like "Bosnian" citizens.

The moment independence was recognized, the Serb paramilitaries and Yugoslav National Army (JNA) began shelling Zvornik, a town comprised of sixty percent Muslims, which fell on April 10. The war continued in a dizzying frenzy of dislocation, starvation, rape, torture, brutality, and killing, all committed in the name of ethnic domination.[34] By the end of the purging, over half of Bosnia's prewar population of 4.4 million was forcibly displaced; an estimated 250,000 Bosnians were killed; "nearly half of the country's housing stock was damaged or destroyed; and most of [the country's] economic infrastructure was devastated."[35] The genocidal war formally ended on December 14, 1995, with the signing of the GFAP.

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30. BURG & SHOUP, *supra* note 19, at 74.
31. *Id.*
32 *Id.* at 117.
33. HAYDEN, *supra* note 18, at 96-97.
34. For an account of the atrocities committed during the war, see generally ROY GUTMAN, A WITNESS TO GENOCIDE (1993).
35. Elizabeth M. Cousens, *Making Peace in Bosnia Work*, 30 CORNELL INT'L L.J. 789, 792 (1997). The estimate of 250,000 killed is the most widely cited, although research published in 2005 by Mirsad Tokaca, head of the Sarajevo-based Research and Documentation Center, put the number at around 100,000. *Id.*

III. THE DAYTON PROTECTORATE

Only after BiH had descended deep into moral decay and genocide, the rule of law had lost all political currency, and the value of equality had become a distant memory buried under thousands of bodies and piles of rubble, did the parties finally agree that BiH would remain one country divided into two entities: Republika Srpska comprising forty-nine percent of the "negotiable" territory and the Muslim-Croat Federation (Federation) comprising fifty-one percent of the territory.[36] This agreement minimally satisfied the Serbs because they were, in a sense, given the "republic" for which they were fighting. The agreement satisfied the Muslims because it, in a sense, kept Bosnia whole. It offered little to the Croats, forcing them into an uneasy alliance with the Muslims. Nonetheless, it stopped the bloodshed by creating a compromise between contending visions of Bosnia: the first being a single State upholding the rights of citizens from a mix of nationalities and the second being an effective division into three ethno-nationally homogenous mini-states.[37]

By premising the State on a theory of "constitutional nationalism,"[38] where the constitutional and legal structure privileges members of one ethnic nation over other ethnic nations found in the State, the GFAP solidified the same ethnicity-based politics that gave rise to the genocide, thereby conceding to the demands of the "ethnic cleansers." Constitutionally recognized ethnic identification of state and society, proportional ethnic representation, and mutual veto powers exemplify ethnic power-sharing between the "constituent peoples" identified in the preamble of the Constitution, i.e., Bosniaks, Croats, and Serbs.

At the same time, while accommodating the demands of the ethno-nationalists, who were willing to engage in genocide to accomplish their goals, and partitioning BiH territorially into two entities along ethnic

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> Devolution into ethnically homogenized nations was already reflected in the Washington Agreement signed in 1994, which established the Bosniak-Croat Federation for the portions of Bosnia then under Croat and/or Muslim control, under a constitution agreed upon on March 18, 1994. The Constitutional framework formed an uneasy and fragile alliance between the Muslims and Croats. It called for a cantonalization of those portions under Croat-Muslim control into fairly autonomous provinces, with executive and legislative bodies representative of the two groups. No representation was provided for the Serbs. The Constitution explicitly recognized that the Serbian controlled areas would eventually establish their own framework for governing.

BURG & SHOUP, *supra* note 19, at 294-95.

37. Cousens, *supra* note 35, at 792; BURG & SHOUP, *supra* note 19, at 58.

38. HAYDEN, *supra* note 18, at 16.

lines, the GFAP created a mass program of returning individuals to their prewar homes, reintegration, and the institutionalization of human rights protections. In this way, the GFAP prepared for itself a major contradiction in which it has become ensnared—between the triumph of political realism and acceptance of the fact of ethnic cleansing and genocide on the one hand, and the attempt to restore the multiethnic structure of the State in 1991, for the sake of "justice," on the other hand.[39] In other words, the GFAP created the paradox of claiming to resist ethnic cleansing while at the same time capitulating to its reality in the constitutional design. The result is now a de facto divided Bosnia with a ghost of a federal government and an ineffectual law of return.

The current principles of ethnic division enshrined within the Bosnian Constitution have been the subject of scrutiny for some time.[40] In fact, on November 22, 2005, after months of negotiation, the leaders of the major political parties in BiH (Croat, Serb, and Bosniak) signed a joint statement announcing the commitment to reform the BiH Constitution by March 2006. The declaration stated: "To achieve Euro-Atlantic integration, we will need to strengthen state institutions . . . and to protect the human rights of all citizens of Bosnia and Herzegovina, regardless of ethnicity."[41] On April 26, 2006, approximately five months before the October general elections, the House of Representatives attempted to enact a series of Constitutional amendments.[42] However, it

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39. For a discussion of the political theory of cultural pluralism in the ethno-national state of BiH, see generally Joseph Marko, *"United in Diversity?" Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina*, 30 VT. L. REV. 503 (2006).

40. In March 2005, at the request of the Parliamentary Assembly of the Council of Europe, the European Commission for Democracy Through Law (Venice Commission) adopted its Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative. Venice Comm'n, *Opinion on the Constitutional Solution in Bosnia and Herzegovina and the Powers of the High Representative*, Doc. No. CDL-AD(2005)004 (Mar. 11, 2005), *available at* http://www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp. In unequivocal language, the Venice Commission asserted that the present Constitution of Bosnia and Herzegovina did not establish a functional state. The Venice Commission concluded that constitutional reform within BiH was unavoidable. Venice Comm'n, *Preliminary Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina*, Opinion 375/2006 (Apr. 7, 2006), *available at* http://www.venice.coe.int/docs/2006/CDL(2006)027-e.asp.

41. The declaration was signed by BiH Presidency Members Sulejman Tihic, Dragan Cavic, Barisa Colak, Mladen Ivanic, Safet Halilovic, Zlatko Lagumdzija, Milorad Dodik, and Mate Bandur. *See* Antonio Prlenda, *Political Commitment to BiH Constitutional Reforms Draws Mixed Reactions*, SOUTHEAST EUROPEAN TIMES, May 12, 2005, *available at* http://www.setimes.com/cocoon/setimes/xhtml/en_GE/features/setimes,features/2002/12/0; *see also* Steven R. Weisman, *U.S. Urges Bosnians to Revise Constitution*, N.Y. TIMES, Nov. 21, 2005, at A12.

42. In a June 27, 2006 session, the Parliamentary Assembly of the Council of Europe specifically commented on the failed April 26, 2006 BiH House of Representatives vote. "This means that the forthcoming elections on October 1, 2006, will be held in violation of Council of

was unable to achieve the required two-thirds majority necessary to adopt the proposed package of constitutional amendments.

Modeled after the constitutional structure of the former SFRY, and responding to the now entrenched political identification of *ethnos as demos*,[43] ethnic identity became central to the political structure of postwar BiH.[44] Attempting to counterbalance the national divide created in the political arena, human rights became central to the BiH legal system. These individual human rights guarantees were installed to provide protection for those living outside their respective ethnic entities—i.e., Muslims and Croats living in Republika Srpska and Serbs living in the Federation.[45]

Attempting to balance the disintegrative tendencies of the political structure, the GFAP contains strong human rights provisions. Safeguarding human rights is understood "not only [as] a constitutional requirement but also a prerequisite and an instrument for long-standing peace in the country."[46] The human rights provisions, which protect the rights of individuals, have a lot of work to do to compensate for the de facto ethnic divide established under the GFAP.[47] As will be explored below, the misguided notion that individual rights will solve the problems of politically recognized collective identities is similar to, and equally as untenable as, the idea that formal equality will extinguish inequality. Like the GFAP left the job of enforcing individual human rights in the

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Europe commitments, in particular Protocol No. 12 to the European Convention on Human Rights on the prohibition of discrimination, because again only Serbs, Bosniaks, and Croats will be able to stand for election." Joseph Marko, *Constitutional Reform in Bosnia and Herzegovina 2005-2006*, 5 Eur. Y.B. of Minority Issues 7 (forthcoming 2008) (on file with author); *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report*, *supra* note 5.

43. BOGDAN DENITCH, ETHNIC NATIONALISM: THE TRAGIC DEATH OF YUGOSLAVIA 51-75 (1994) (exploring the move from communism to populist nationalism).

44. The 1974 BiH Constitution listed "the Muslims, Serbs and Croats and members of other nations and nationalities as who live in it" as Bosnia's peoples, but accorded primary importance to the "working people and citizens." USTAV SOCIJALISTICKE REPUBLIKE BOSNE I HERCEGOVINE [BOSNIA AND HERZEGOVINIAN CONSTITUTION] art. 1, cl. 7, *reprinted in* GFAP, *supra* note 8, annex 4.

45. Julie Mertus, *Prospects for National Minorities Under the Dayton Accords—Lessons From History: The Inter-War Minorities Schemes and the "Yugoslav Nations,"* 23 BROOK. J. INT'L L. 793, 809-10 (1998).

46. Venice Comm'n, *Preliminary Proposal for the Restructuring of Human Rights Protection Mechanisms in Bosnia and Herzegovina*, Doc. No. CDL(1999)019fin (June 25, 1999), *available at* http://www.venice.coe.int/docs/1999/CDL(1999)019fin-e.asp.

47. The importance is underlined by the fact that the term "human rights" appears in the document at least seventy times. *See* MANFRED NOWAK, SHORTCOMINGS OF EFFECTIVE ENFORCEMENT OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA AFTER DAYTON: FROM THEORY TO PRACTICE 97 (Bendek, et al. eds., 1996). Further, both the Federation and Republika Srpska constitutions contain lengthy sections on protecting human rights.

hands of the collective identities that engaged in the ethnic cleansing in the first place, formal equality rules leave in place insidious modes of discrimination that may look neutral on their face but work only to discourage return.

A. Human Rights and Nondiscrimination in the GFAP

On paper, BiH has one of the highest standards of human rights protection in the world. The BiH Constitution declares that BiH and both Republika Srpska and the Federation shall ensure the "highest level of internationally recognized human rights and fundamental freedoms."[48] The BiH Constitution also managed to smuggle provisions from the European Convention on Human Rights (European Convention) into the normative legal system of BiH, in spite of the fact that BiH was not a member of the Council of Europe at the time. Article II(2) of the BiH Constitution, which is entirely devoted to human rights, stipulates that "[t]he rights and freedoms set forth in the [European Convention] and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."[49] Practically, this means that all of the human rights protections provided for in the European Convention as well as in the additional protocols must be directly applied by all legislative, executive, and judicial bodies of BiH and both entities as well as have priority over all other laws, including the BiH Constitution.[50] Furthermore, fifteen international and European human rights treaties are to be applied according to Annex I of the Constitution.[51] The enjoyment of these rights shall be secured to all persons without discrimination according to Article II(4) of Annex 4.

Moreover, Article II of Annex 4 guarantees that all refugees and displaced persons have the right to return freely to their home of origin

48. GFAP, *supra* note 8, annex 4, art. II (1).
49 *Id.* annex 4, art. II(2).
50. NOWAK, *supra* note 47, at 97.
51. The treaties listed in Annex I of the Constitution of Bosnia and Herzegovina are as follows: Convention on the Prevention and Punishment of Genocide; 1949 Geneva Conventions; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; and Framework Convention for the Protection of National Minorities. GFAP, *supra* note 8, annex 4, annex I.

and to have property lost during the war restored to them.[52] Annex 7 to the GFAP further details this general provision. Article 1 provides: "The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment . . . or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion."[53] Moreover, paragraph 3 of Article 1 states, "The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons."[54] This requires, among other things, "the repeal of domestic legislation and administrative practices with discriminatory intent *or effect*."[55]

Recognizing that the Entities made up of ethnically divided political groups would not have the will to enforce these rights, the GFAP established strong international and hybrid enforcement mechanisms. Annex 6 provides for the creation of a Human Rights Commission composed of an Ombudsperson and the Human Rights Chamber, which sits as an appellate court for human rights claims.[56] Annex 7 establishes the Commission for Displaced Persons and Refugees, which resolves property claims arising out of the war.[57] Annex 10 provides for implementation of the GFAP through the appointment of the international High Representative.[58]

B. Current Ethnic Composition

In spite of the extraordinary human rights structures, including nondiscrimination laws established under the GFAP, BiH remains ethnically homogeneous. Though the rates of reclaiming property showed a marked increase since 2000, this merely describes completed legal procedures. Not a single authority in BiH has compiled statistics on the return of people, i.e., people who reclaim their property and remain there.[59]

Local authorities suggest that actual return and resettlement is severely limited. Population statistics from municipalities in both

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52. *Id.* annex 4, art. II(5).
53. *Id.* annex 7, art. I(2).
54. *Id.* annex 7, art. I(3).
55. *Id.* annex 7, art. I(3)(a) (emphasis added).
56. *Id.* annex 6.
57. *Id.* annex 7.
58. *Id.* annex 10. Over time, the High Representative has gained significant power within BiH.
59. The United Nations High Commissioner for Refugees has acknowledged that its statistics do not represent persons who have remained.

entities, recently released through the United Nations Development Programme's (UNDP) Rights-Based Municipal Assessment and Planning Project (RMAP), illustrate this point well. For example, Derventa, in Republika Srpska, was a mixed area in 1991 before the war; 40.6% Serb, 38.9% Croat, and 12.5% Bosniak.[60] However, in 2002, 97% of the population was Serb; only very small minorities of Croats and Bosniaks call Derventa home.[61] This is equally the case in Federation areas. Like Derventa, Sanski Most was a mixed municipality. When a census was taken in 1991, Sanski Most was virtually half Bosniak and half Serb with a small Croat minority.[62] However in 2002, the city was 87.15% Bosniak.[63]

In Derventa, Republika Srpska, the Ministry for Refugees and Displaced Persons believes that "at least 50% of those who repossess their property do not remain in Derventa—meaning they have not returned."[64] And this is not a limited case. The Helsinki Committee in BiH estimates that, throughout the country, "more than 75 percent of the [returned] property is being sold."[65] Indicators such as advertisements in newspapers and concluded contracts on the sale or exchange of property strongly suggest that minority returnees tend to sell or exchange their property in the entity where they form a minority and return to their majority entity.[66]

Discrimination and hate crimes also continue. In 2006, racist incidents in Republika Srpska included shootings at a rebuilt mosque, hostile graffiti insulting Bosniaks on the walls of a sports stadium, and an attack on the house of a famous Bosniak poet, Nisha Kapidzic.[67] In addition to these acts, vandals desecrated a four-hundred-year-old

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60. U.N. DEV. PROGRAMME, RIGHTS-BASED MUNICIPAL ASSESSMENT AND PLANNING PROJECT, MUNICIPALITY OF DERVENTA: OCTOBER 2002-FEBRUARY 2003, at 5 (1991).

61. *Id.* at 12.

62. U.N. DEV. PROGRAMME, RIGHTS-BASED MUNICIPAL ASSESSMENT AND PLANNING PROJECT, MUNICIPALITY OF SANSKI MOST: APRIL-JULY 2003, at 13 (2004).

63. *Id.*

64. U.N. DEV. PROGRAMME, MUNICIPALITY OF DERVENTA, *supra* note 60, at 18.

65. HELSINKI COMM'N FOR HUMAN RIGHTS IN BOSN. & HERZ., *supra* note 27.

66. OMBUDSMEN OF THE FED'N OF BOSN. & HERZ., REPORT ON ACTIVITIES OF THE OMBUDSMEN AND SITUATION OF HUMAN RIGHTS IN THE FEDERATION OF BOSNIA AND HERZEGOVINA FOR 2002, at 12 (Mar. 2003) (on file with the author).

67. Gordana Katana, *Non-Serbs Targeted in Bosnian Serb Campaign*, BALKAN INVESTIGATIVE REPORTING NETWORK (July 28, 2006) *available at* http://www.birn.eu.com/en/45/10/707/. Political analysts blamed the outbreak of intimidation against non-Serbs in the Republika Srpska on a divisive run-up to the national elections, which were held on October 2, 2006. The local analysts believed that Bosnian Serb politicians were to blame for whipping up ethnic intolerance and for playing on national differences to win votes. *Id.*

Muslim cemetery destroying more than twenty gravestones.[68] Four days in March 2004 saw such incidents as arson to the edifice of an Orthodox Church, Birth of the Most Holy Virgin, in Bugojno; the stoning of Baba Bešir's Mosque in Mostar; a grenade attack on Tsar's Mosque in Orahova, near Gradiška, Republika Srpska; and damage to sacred objects in the Church of Saint Apostles Peter and Paul in Vagan near Glamoč, Republika Srpska.[69]

Although the human rights situation in BiH has significantly improved, intolerance and discrimination continue to permeate every level of society. Nationalist representatives of the dominant ethnic group in a given territory only protect the interests of their ethnic group. Thus, there is discrimination against individuals who are in the numerical minority in communities to which they return. Discrimination continues in the right to return, employment, freedom to practice religion, and other social benefits. In this way, nationalist politicians continue their struggle for hegemony in peacetime. Needless to say, this hinders return, and the wartime goal and military strategy of "ethnic cleansing" remains a *fait accompli*.

IV. QUASI-INTERNATIONAL COURTS SET UP UNDER THE GFAP

To ensure the implementation of human rights, the GFAP established as hybrid courts the Constitutional Court and the Human Rights Chamber. Neutralizing internationals were believed to be necessary in order to help overcome entrenched ethno-nationalist positions. In this environment of hate, distrust, and sustained nationalist dreams, the Constitutional Court and the Human Rights Chamber have played a pivotal role in determining which vision of BiH will prevail: one that accepts the reality of ethnically based mini-nation states, engaging in de facto institutionalized discrimination, or a multicultural

68. *Vandals in Bosnian-Serb Republic Desecrate 400-Year-Old Muslim Cemetery*, RADIO FREE EUROPE RFE/RL NEWSLINE, Mar. 6, 2006, *available at* http://www.rferl.org/newsline/2006/03/060306.asp.

69.

> In October and November 2004 alone, a bridge in Brčko was graffitied with "Brčko is Serb" and "Turks, convert to Christianity"; an Orthodox priest, Zoran Perkovič, was physically assaulted in Sarajevo by persons of Bosniak nationality; and in Gornji Vakuf-Uskoplje, there was a fight between pupils of Croat and Bosniak nationality, in which three pupils were injured by a knife and a baseball bat.

INT'L HELSINKI FED'N FOR HUMAN RIGHTS, HUMAN RIGHTS IN OSCE REGION: EUROPE, CENTRAL ASIA, AND NORTH AMERICA, REPORT OF 2005 (EVENTS OF 2004), *available at* http://www.bh-hchr.org/Reports/reportHR2004.htm.

state where the various ethnic groups will eventually assimilate into a common society based upon the value of equality.

The majority of human rights claims that have come before the Human Rights Chamber and the Constitutional Court have been rooted in discrimination based upon ethnicity. These courts necessarily must render decisions utilizing Bosnian and international antidiscrimination laws. Judges have been called upon to give substance to the traditional applications of equality theory and to come up with a solution to the inherent contradiction found in promoting individual human rights in a political environment where protecting rights demands confrontation with ethnic group status.

A. Constitutional Court

The Bosnian Constitution mandates the establishment of a Bosnian Constitutional Court.[70] In line with the ethnic balancing permeating BiH governmental structures, the Constitutional Court has nine justices: four selected by the Federation House of Representatives, two selected by the Republika Srpska National Assembly (RSNA), and three "neutrals" selected by the European Court of Human Rights. In practice, this means that the Constitutional Court is comprised of two Bosniaks, two Croats, two Serbs, and three foreigners. The judges' terms of office run for five years commencing from the date that the Constitutional Court was organized.

The first term expired in May of 2002; from May 2002 until June 2003, the Court did not convene because the Republika Srpska National Assembly failed to elect one of the two Serb judges to the Court.[71] The

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70. Until recently, the Constitutional Court was the only State level court. Since the domestic authorities failed to pass the relevant legislation, establishing a State Court before the elections in November 2000, the High Representative issued a Decision establishing the BiH State Court and imposed the Law on the Court of Bosnia and Herzegovina (FBiH OG 52/12, Dec. 2000). Almost two years later, on May 8, 2002, the Decision on Appointment of Judges and on the Establishment of the Court in Bosnia and Herzegovina followed. Office of the High Representative, *Decision on Appointment of Judges and on the Establishment of the Court of Bosnia & Herzegovina*, Doc. 9/5/2002 (May 8, 2002), *available at*, http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=7975.

71. All the other judges were appointed in due course within a couple of months from the end of the first mandate. It was decided, however, that they would not convene until the Serb judges were appointed. The judges thought this would be a matter of weeks. However, in January 2003, a minority of the appointed judges were in favor of resuming work without the Serb judges. The two Croat judges and one Bosniak judge were against this proposal. In May 2003, the RSNA elected one of the two missing judges. In June 2003, the judges agreed to start working, and the newly constituted Court held its first session that month. Interview with Christian Steiner, Legal Advisor to the Constitutional Court (July 30, 2003).

new Constitutional Court, once convened, decided more cases than the first Constitutional Court decided during its entire mandate.[72]

According to Article VI(3), the Constitutional Court has jurisdiction to hear cases concerning: (1) the conformity of the Entity constitutions with the State Constitution; (2) "appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina"; and (3) "issues referred by any court in Bosnia and Herzegovina concerning as to whether a law, on whose validity its decision depends, is compatible with this Constitution, with the [European Convention], or with the laws of [BiH]."[73] Thus, disputes concerning alleged human rights violations decided by any court may give rise to an appeal by the victim of the alleged human rights violation or any other party to the dispute. Additionally, the Constitutional Court has jurisdiction to resolve issues when any of the three ethnic groups block a piece of legislation by invoking the "vital interests" provision of Article IV(3)(e).[74]

Disputes arising under the Constitution include the rights and freedoms set forth in the European Convention, the catalogue of human rights protections set forth in Article II(3),[75] a specific right to return found in Article II(5), and a special reference to the right not to be discriminated against provided for in Article II of the BiH Constitution or in the international agreements listed in Annex I to the BiH Constitution.

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72. Interview with Professor David Feldman, Judge on the Constitutional Court (Oct. 15, 2004).

73. GFAP, *supra* note 8, annex 4, art. VI(3).

74. *Id.* art. IV(3)(e). According to GFAP Annex 4, Article IV, "A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates." Such a dispute shall be referred to a Joint Commission comprising three delegates, one from each of the three constituent peoples. If this Commission cannot resolve the matter it shall be submitted to the Constitutional Court for resolution. *Id.*

75.

> All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to . . . above; these include: (a) [t]he right to life. (b) [t]he right not to be subjected to torture or to inhuman or degrading treatment or punishment. (c) [t]he right not to be held in slavery or servitude or to perform forced or compulsory labor. (d) [t]he rights to liberty and security of person. (e) [t]he right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings. (f) [t]he right to private and family life, home, and correspondence. (g) [f]reedom of thought, conscience, and religion. (h) [f]reedom of expression. (i) [f]reedom of peaceful assembly and freedom of association with others. (j) [t]he right to marry and to found a family. (k) [t]he right to property. (l) [t]he right to education, and (m) the right to liberty of movement and residence.

Id. art. II.

The Court has the power not only to annul judgments, but also acts and decisions of administrative bodies on which the challenged judgment was based.[76] Although this provision does not specify whether the power of judicial review vested in the Constitutional Court goes so far that it might quash a parliamentary statute or merely declare it unconstitutional, it does mean that for any case, the court that referred the respective issue to the Constitutional Court is bound by its decision and, therefore, must not apply any law which has been found by the Constitutional Court to be incompatible with the European Convention or any other human rights provision of the BiH Constitution.

B. Human Rights Chamber

Dominated by foreign judges, the Human Rights Chamber (Chamber) was established as a court of last instance under Annex 6 to the GFAP. Annex 6 provides for direct intervention into the BiH legal system by allowing immediate remedies by way of final and binding court decisions for human rights violations and establishing legal precedents that immediately become part of domestic jurisprudence.[77] Pursuant to article XIV of Annex 6, the Chamber was to transfer to the BiH institutions five years after entry into force of the Dayton Agreement.[78] However, the Chamber's mandate was extended by agreement, and the Chamber did not transfer its power until December 31, 2003. At that point the Chamber was merged with the Constitutional Court and became known as the Human Rights Commission.[79]

The Chamber was composed of fourteen members as provided in article VII of annex 6 to the GFAP.[80] Four members were appointed by the Federation and two by Republika Srpska. The other eight members were internationals appointed by the Committee of Ministers of the Council of Europe. From the Chamber's formation in March 1996 until

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76. Constitutional Court of Bosnia and Herzegovina, Case U-14/00, May 18, 2001 (stating that the Court annulled the judgment of the Supreme Court of BiH and Cantonal Court in Bihać, as well as decisions of the Una-Sana Cantonal Ministry for Urbanism, Spatial Planning and Environment and the decision of the Housing Department of Cazin Municipality).

77. GFAP, *supra* note 8, annex 6.

78. *Id.* art. XIV.

79. On September 25, 2003, the agreement transferring the competencies of the Human Rights Chamber was signed. The Agreement on Annex 6 to the GFAP (Merger Agreement) provided that the Human Rights Commission shall operate within the BiH Constitutional Court and only has jurisdiction to decide cases received by the Chamber until December 31, 2003. It shall receive no new cases. (Merger Agreement on file with author). The mandate of the Human Rights Commission ended in December 2006. Although the special chambers continued operating after 2006, they were no longer named the Human Rights Commission.

80. GFAP, *supra* note 8, annex 6, art. VII(1).

the December 2003 merger, the Chamber decided thousands of cases involving a diverse range of alleged violations of human rights.

Pursuant to its mandate, set out in Article II of Annex 6 to the GFAP, the Chamber considers "alleged or apparent violations of human rights as provided in the [European Convention] and Protocols thereto."[81] Recognizing that ethnic identity now forms the basis upon which individuals are viewed and treated, the Chamber also is mandated to consider alleged or *apparent* discrimination in violation of the rights and freedoms provided for in the European Convention and sixteen additional international agreements listed in the Appendix to Annex 6.[82]

This additional mandate implicitly recognizes the corrective work the antidiscrimination principle must do to neutralize the de facto ethnic divide and the State structure, which recognizes citizens through their mediating ethnicity. Moreover, this mandate compensates for the rather weak antidiscrimination provision found in the European Convention, which, until very recently, stated that discrimination could only be found in conjunction with a right directly protected in the European Convention.[83] Further illustrating the importance of pursuing a vigorous prohibition on discrimination, Article VIII(2)(e) requires the Chamber to give priority to allegations of especially severe or systemic violations including those founded on alleged discrimination on prohibited grounds.

V. THE JURISPRUDENCE OF EQUALITY

The Chamber has consistently held that "the prohibition of discrimination is a central objective of the GFAP to which the Chamber must attach particular importance."[84] The Constitutional Court similarly held that nondiscrimination principles enshrined in the Bosnian Constitution are wider than those set forth in the European Convention[85]

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81. *Id.* art. II(2)(a).

82. *Id.*

83. A number of commentators have commented upon the limited capacity of the European system to confront mass violations of human rights. *See* Finnuala Ni Aolain, *The Fractured Soul of the Dayton Peace Agreement*, *in* RECONSTRUCTING MULTIETHNIC SOCIETIES, 63, 75-76 (2001); Aisling Reidy et al., *Gross Violations of Human Rights: Invoking the European Convention on Human Rights*, 15 NETH. Q. HUM. RTS. 161-73 (1997).

84. Human Rights Chamber of Bosnia and Herzegovina, Hermas v. The Fed'n of Bosn. & Herz., Decision on Admissibility and Merits of Jan. 16, 1996, Case CH/97/45, para. 82 (1998).

85. *See generally* Constitutional Court of Bosnia and Herzegovina, Case U-39/01, para. 30 (Apr. 5, 2002); Constitutional Court of Bosnia and Herzegovina, Case U-22/2001 (June 22, 2001); Constitutional Court of Bosnia and Herzegovina, Case U-10/00 (May 5, 2000).

and that all refugees and internally displaced persons have a constitutionally protected right to return home without discrimination.[86]

Nevertheless, jurisprudence of the Chamber and the Constitutional Court has not demonstrated fidelity to the articulated ideal found in the GFAP of the centrality of prohibiting discrimination. Two primary reasons emerge as the bases for this failure. The first of these is a commitment to the principle of "formal equality," which seeks to ensure a strict equality treatment (equality in law) and tends to preserve the status quo, as opposed to a substantive equality principle, which seeks to address historical and structural inequality. The second is a practice modeled on the European Court of Human Rights, which traditionally has subordinated discrimination claims to other substantive claims under the European Convention.

Two secondary reasons also contribute. First, local judges tend to decide cases on the "value" of ethnic difference rather than the value of fair treatment of individuals. Secondly, some international judges, who are steeped in their countries' legal history and culture, are unwilling or unable fully to appreciate the socio-historic context in which they are operating in BiH. Because substantive equality is predicated on historical and contextual analysis, this failure is fatal.

Jurists within a divided State healing from ethnic conflict and genocide must contemplate what values antidiscrimination laws should seek to promote and the type of equality the Constitution mandates. They need to understand why they are concerned with equality to determine how to formulate legal standards to evaluate claims of inequality. A juridical approach based upon substantive equality can be more effective in eradicating discrimination, which is necessary for sustainable return, than one based upon formal equality, because the former addresses the inequality implicit in hierarchical societies with historical disadvantages and seeks to eliminate that inequality.[87] Antidiscrimination theory in transitional societies with strong ethnic divides must be understood in the context of the structural inequalities

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> [A]ll refugees and displaced persons have the right freely to return to their homes of origin . . . [and Article II.5] raises this right of refugees and displaced persons to the level of constitutional rights which are, according to Article II.4 of the Constitution, secured to all persons in Bosnia and Herzegovina without discrimination on any ground.

Constitutional Court of Bosnia and Herzegovina, Case U 14/00, para. 20 (May 5, 2001).

87. For discussion of formal and substantive equality theories, see generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); CATHARINE A. MACKINNON, SEX EQUALITY (2001).

that are the result of ethnic conflict if reintegration to form a pluralist society is one of equality's goals.

Formal equality, also described as the anticlassification principle,[88] focuses on rendering certain distinctions or classifications irrelevant. It reduces the ideal of equality to the principle of equal or consistent treatment; i.e., similar people and things should be treated similarly. But to say that two individuals are similar for the purpose of a discrimination analysis necessarily requires a prescriptive judgment that they have been measured and compared against a common standard and found to be indistinguishable by reference to that standard. In this way, formal equality principles uncritically accept prevailing social and political structures. Comparability calls for this because it makes the prevailing group or structures in society "the measure of all things."[89]

Formal equality focuses on rendering irrelevant certain distinctions such as race, gender, and religion. However, an individual's social, economic, or political situation is determined heavily by those factors. In other words, if Group *X* and Group *Y* are treated in the same manner, there is no issue of equality to analyze because "consistent treatment" uncritically accepts prevailing social and political structures. It allows for differential treatment only if the State can set forth a rational basis for the distinction; if the means fit the ends.[90] This formal approach takes a narrow view of discrimination, often deciding cases on other grounds and generally excluding indirect discrimination and positive discrimination, types of discrimination that typify the inequalities in BiH.[91]

In contrast, substantive equality, also described as the antisubordination principle, is not about ill-fit, but rather about the balance between advantages and disadvantages implicit in hierarchical societies with

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88. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 21-24 (2003). *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (noting that the anticlassification principle of equality states that governments may not classify on the basis of race, while antisubordination theorists argue that law should reform practices that enforce the secondary status of socially oppressed groups).

89. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 22 (1989).

90. For example, criminal statutes distinguish between people on the basis of their conduct. A court then must examine the fit between the distinction made, the criterion upon which it was based, and the goal the distinction is meant to achieve.

91. Balkin & Siegel, *supra* note 88, at 12, 21 ("The anticlassification principle [akin to formal equality] impugned affirmative action, while legitimating facially neutral practices with a racially disparate impact, while the antisubordination principle [akin to substantive equality] impugned facially neutral practices with a racially disparate impact, while legitimating affirmative action.").

historical disadvantages built in, and seeks to root out inequality.[92] Substantive equality, which was exploited to great effect by feminist legal scholarship in the United States, concerns itself with group subordination. This is quite distinguishable from the commitment of formal equality to individuals rather than groups. In a society where group membership defines one's relations within society, then a theory of equality that recognizes group membership is a better fit than one that does not. A substantive framework more easily corresponds to BiH's societal structure and the cultural understanding of itself.

The formal equality employed by the courts in postwar BiH resulted in three particular problems. First, the courts failed to recognize indirect discrimination perpetuated by laws that appear facially neutral. Second, they failed to see the chain of discriminatory acts that perpetuated that discrimination. In most cases, the courts were asked to decide upon both the legality of the initial discriminatory act concerning property or employment and the lower courts' subsequent discriminatory failure to provide redress within a reasonable time or at all. Third, the courts subordinated discrimination claims to other substantive rights when, in reality, the discrimination was at the heart of the rights violation. The tangible result of these failures has been an impoverished nondiscrimination jurisprudence, a jurisprudence that, for the most part, does not insist that the mantles of discrimination be dismantled in order for laws and actions to be constitutionally sound.

The Chamber and the Constitutional Court eventually recognized these problems and sought to close the gap between equality's promise and performance by embracing a more substantive theory of equality. Yet, neither court has followed a theoretical framework which would recognize the purely group-based harm inflicted during the war, thus limiting their potential to impact sustainable return. Though some of their decisions may have, in fact, allowed people to retrieve their property, their decisions did little to reverse discrimination in the Entities. By failing to address discrimination issues robustly, they failed to act as mediators between society and equality norms, thereby failing to provide guidance on society's relationship to equality after the conflict. This approach can only have the further effect of diluting the individual victim's faith in the judicial process, because often her central complaint of discrimination was simply not addressed by the court.

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92. For discussions of formal versus substantive equality theories, see generally Fiss, *supra* note 87; MACKINNON, *supra* note 87.

A. Property Issues

Both courts ignored the discriminatory chain that started during the war and persisted after the war by employing a formal approach to equality. In the first significant case decided by the Chamber involving the right to property, *Kevešević v. the Federation*, the Chamber was asked to decide whether the Federation Law on Abandoned Apartments (LoAA) interfered with Kevešević's right to property.[93] Like hundreds of other complainants, Kevešević argued that he had been discriminated against in his European Convention-protected rights to home, property, a fair trial, and access to court, when he was forced to leave his home during the war because of his Croat ethnicity, and was effectively prevented from exercising his right to return.[94]

Kevešević, a citizen of BiH, was forced to leave his apartment in Vareš when fighting ensued between the Croat Army and the Army of the Republic of Bosnia in 1993.[95] In April 1996, after the war, Kevešević and his spouse returned to their apartment.[96] Shortly thereafter, their apartment was declared permanently abandoned, based upon the applicable property laws, which resulted in their eviction. In spite of numerous appeals to the relevant housing authorities, on November 28, 1996, Kevešević and his family were evicted from their home, and a Bosniak family moved in on the same day.[97] In his complaint, Kevešević alleged that only Croats were evicted in Vareš and that more than two hundred apartments were empty, to which Croat owners or occupancy right holders were prevented from returning.[98] Kevešević complained that his rights under articles 6 (right to a fair trial), 8 (right to home), 13 (right of access to court), and 14 (nondiscrimination) of the European Convention had been violated.[99]

The LoAA was enacted during the war in an attempt to give a legal face to the policy of ethnic cleansing.[100] The LoAA governed the so-

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93. Human Rights Chamber of Bosnia and Herzegovina, Kevešević v. The Fed'n of Bosn. & Herz., Case CH/97/46, para. 32 (Sept. 10, 1998).

94. *Id.* para. 33.

95. *Id.* para. 14. In November 1993, Muslim troops forced the Croats out of Vareš, one of the oldest Catholic bishoprics in the Balkans. *See* BURG & SHOUP, *supra* note 19, at 283. Prior to the war, Croats made up 40.6% of the population according to the 1991 census. *Id.*

96. *Kevešević*, Case CH/97/46, para. 15.

97. *Id.* paras. 16-17, 20.

98. *Id.*

99. *Id.* para. 32.

100. Decree with Force of Law on Abandoned Apartments, Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95, and 33/95.

called occupancy rights over apartments,[101] and provided that an occupancy right would be temporarily suspended if the apartment was abandoned by the occupancy right-holder and the members of the household after April 30, 1991 (the onset of the war).[102] It further provided for the temporary allocation of an apartment to "an active participant in the fight against the aggressor of the Republic of Bosnia and Herzegovina" or to a person who had lost her apartment due to the hostile activities.[103]

Essentially, the LoAA took apartments from disfavored ethnic groups and handed them to soldiers from the favored ethnic group. The LoAA also provided that the occupancy right-holder would lose her occupancy right (the apartment would be declared permanently abandoned) if she did not resume using her apartment within seven days (in the case of persons living within the territory of BiH) or fifteen days (in the case of persons living outside the borders of BiH), running from December 22, 1995, when the Decision on the Cessation of War was published.[104] The LoAA was not formally published in the Official Gazette until January 5, 1996.[105]

The Chamber found that the decision to declare Kevešević's apartment abandoned and his subsequent eviction interfered with his "right to respect" for his home under article 8 of the European Convention[106] and deprived him of his possession under article 1 of Protocol No. 1 to the Convention.[107] In rendering its decision, the

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101. Essentially, an occupancy right, as distinct from outright ownership, allows a person, subject to certain conditions, to occupy an apartment on a permanent basis. An occupancy right holder was, however, not free to sell or otherwise transfer the apartment. *See id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* para. 3.

106. Article 8 of the European Convention reads:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

107. Article 1 of Protocol No. 1 to the European Convention reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance

Chamber pointed out that the LoAA did not meet the requirements of the "rule of law" in a democratic society, which requires accessibility, sufficient precision to allow a citizen to regulate her conduct accordingly, and safeguards against abuse.[108] The Chamber, therefore, found that the interference with Kevešević's rights was not "lawful" and, therefore, not justified.[109]

The Chamber rested its decision on the substantive property protections afforded under the European Convention. Apparently, following the general adjudication process of the European Court of Human Rights, whenever a violation of one of the rights and freedoms provided for in the European Convention can be established, then the Chamber, like the European Court of Human Rights, is reluctant to examine the case under article 14 of the European Convention.[110]

The basic structure for analyzing a discrimination claim under article 14 of the European Convention, which is followed by the Chamber and the Constitutional Court, requires a determination of whether the applicant is being treated differently from others in the same or relevantly similar situation, and if so, whether the differential treatment pursues a legitimate aim with reasonable means.[111] Applied in postwar BiH, this formal analytical approach to nondiscrimination can lead to absurd results.

As evidence to affect this analysis, the Chamber relied on a report by the Ombudsperson, stating "that she had not been provided with any information that would substantiate [Kevešević's] allegation that he was subjected to discriminatory treatment."[112] In fact, the Ombudsperson's representative testified at the public hearing that "the Law on Abandoned

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> with the general interest or to secure the payment of taxes or other contributions or penalties.

Id. at protocol 1, art. 1.

108. For a discussion of the qualitative criteria required for a "law" to be compatible with the "rule of law," see *Malone v. United Kingdom*, (No. 82) App. No. 8691/79, Eur. Ct. H.R. (ser. A), para. 67 (Aug. 2, 1984); *Sunday Times v. United Kingdom*, (No. 30) App. No. 6538/74, 1 Eur. Ct. H.R. (ser. A), para. 49 (Apr. 26, 1979).

109. Human Rights Chamber of Bosnia and Herzegovina, Kevešević v. The Fed'n of Bosn. & Herz., Case CH/97/46, para. 99 (Sept. 10, 1998).

110. D. HARRIS, M. O'BOYLE & C. WARBLEK, LAW ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 463 (Butterworths eds., 1995); Peter Neussl, *Bosnia and Herzegovina Still Far from the Rule of Law: Basic Facts and Landmark Decisions of the Human Rights Chamber*, 20 HUM. RTS. L.J., 290, 297 (1999).

111. *See generally* Willis v. United Kingdom, App. No. 36042/97, Eur. Ct. H.R., para. 39 (June 11, 2002) (summarizing the European Court of Human Right's jurisprudence on article 14); Alexander H.E. Morawa, *The Concept of Non-Discrimination: An Introductory Comment*, 3 J. ETHNOPOLITICS & MINORITY ISSUES IN EUROPE 1 (2002).

112. *Kevešević*, Case CH/97/46, para. 90.

Apartments did not, at first sight, give the impression of being discriminatory as such and that she therefore did not carry out any investigations related to discrimination."[113] Moreover, the Ombudsperson offered, Bosniaks had not left the town; therefore, the LoAA did not apply to them.[114]

The majority of the Chamber simply recalled that article 14 "safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms under the Convention."[115] It then stated that Kevešević had "not provided the Chamber with sufficient evidence that it was his national ethnic origin that motivated the authorities [to evict him]."[116]

The analysis was stopped at the first level of interrogation because the applicant, as a member of the Croat community, was not in the same or similar situation as a member of the Bosniak community in Vareš. Therefore, the Chamber held there was no basis for comparison. On this reasoning, one must first establish that one is being treated the same or similarly as another individual in a different group or category in order to claim entitlement to equality. Applying this formal approach, the Chamber concealed the harm inflicted on the Croat community during the war where Croats, along with the Serbs, were brutally displaced, while Bosniaks were not.

The fact that the law was not applied to Bosniaks, because they did not leave, only illustrates the invidious and discriminatory intent of the legislation. Requiring a symmetrical analysis in this asymmetrical context clearly produces results that are unfair and unjust. Such analysis stymies the law's ability to provide substantive equality and redress the inequality created by the policy of ethnic cleansing. The fact that laws in BiH were created to enact discrimination based upon ethnicity, and would therefore never be applied in a similar fashion among ethnic groups, was completely ignored.

In BiH, recalcitrant legislators and individuals attempt to keep the vestiges of subjugation and discrimination alive through laws that appear neutral, but have invidious motivations or impacts. As a dissenting judge pointed out in the *Kevešević* case, the requirement that returnees come back mere days after the end of the war, even before the publication of the law, was a clear expression of indirect discrimination, intentionally pursued by the authorities to discourage minority returns and to create

113. *Id.*
114. *Id.*
115. *Id.* para. 92.
116. *Id.* para. 94.

"abandoned apartments" that could be allocated to members of the postwar ethnic majority.[117]

It is worth noting that a formal European Court approach is not required of the Chamber under the GFAP. On the contrary, the GFAP does require the explicit recognition of historical injury based upon ethnic group. This is evident by the Chamber's mandate to deliberate not only upon alleged discrimination but *apparent* discrimination, thereby relieving it of the need to analyze "comparable" groups to identify harm.[118] A principled approach, recognizing the discriminatory intent of the law and the "ethnic supremacy" enjoyed by the local ethnic majority, if employed here, would have provided the Chamber with a theoretical framework with which to review thousands of similar cases.

In BiH, the essence of effective discrimination has been the establishment of laws and circumstances that minimize the necessity for new acts of intentional discrimination[119] and legislation that appears neutral on its face, but, in fact, thwarts reintegration should not escape judicial scrutiny.

1. High Representative's Law on Cessation

In response to these insidious property laws and practices, the High Representative's Law on Cessation of the Law on Abandoned Apartments (Law on Cessation) ultimately repealed the LoAA, demanding that all decisions terminating occupancy rights on the basis of the old laws be null and void.[120] Yet, administrative and judicial authorities frequently failed to apply the Law on Cessation to minority returnees, preventing their return. As a result, many cases have come before the Chamber and the Constitutional Court. The Chamber's general approach has been to subordinate discrimination claims to the claims of the rights to home and property.[121]

117. *Id.* annex (Nowak, J., dissenting).

118. GFAP, *supra* note 8, annex 6, art. II(2)(b).

119. *See generally* Schnapper, *supra* note 13 (discussing legal responses to the perpetuation of racial discrimination in the United States).

120. Official Gazette of the Federation of Bosnia and Herzegovina 11/98 (June 24, 1998). Annex 10 to GFAP created the position of a High Representative who is responsible for civil implementation of the agreement. In 1997, the High Representative's mandate was extended by the Peace Implementation Council (PIC) so that he could intervene in the legislative process and dismiss obstructionist officials. *See* GFAP, *supra* note 8, annex 10, art. I(2).

121. *See* Human Rights Chamber of Bosnia and Herzegovina, Eraković v. The Fed'n of Bosn. & Herz., Case CH/97/42 (Jan. 15, 1999); Human Rights Chamber of Bosnia and Herzegovina, Onić v. The Fed'n of Bosn. & Herz., Case CH/97/58 (Feb. 12, 1999); Human Rights Chamber of Bosnia and Herzegovina, Tuzlić v. The Fed'n of Bosn. & Herz., Case Ch/00/3546 (Jan. 12, 2001).

The Constitutional Court has taken a similar approach to that of the Chamber, and a Constitutional Court decision rendered in November 1999 illustrates this point.[122] In that case, M.S. was the occupancy right-holder of an apartment at 10 Starine Novaka Street in Banja Luka, the capital of what is now Republika Srpska.[123] On October 17, 1995, M.L. forced M.S. to leave the apartment.[124] In April 1996, N.P., a refugee from Jajce (now in the Federation of BiH), moved into the apartment.[125] M.S. initiated proceedings against N.P. to reclaim her apartment before the Basic Court of Banja Luka. The Basic Court of Banja Luka ruled that it did not have jurisdiction to hear the claim; rather it claimed that the administrative authorities had jurisdiction over this matter.[126] The County Court of Banja Luka and the Supreme Court of Republika Srpska confirmed the Basic Court's ruling in 1998.[127]

M.S. filed an appeal with the Constitutional Court on April 2, 1999, against the judgment of the Supreme Court of Republika Srpska.[128] M.S. complained that her constitutional rights under article 8 of the European Convention (right to home) and article 1 (right to property) and article 6 (right to a fair trial) of Protocol 1 of the European Convention were violated.[129]

She further alleged that she had been the victim of discrimination, "'like all other Bosniacs and Croats in Republika Srpska,' that the courts and administrative authorities have not respected fundamental procedural principles and that this 'game could go on for decades.'"[130]

The Constitutional Court ultimately found that according to Republika Srpska law, the Court was under an obligation to decide the dispute in question.[131] In fact, in another decision issued around the same time M.S. brought her claim, the Supreme Court of Republika Srpska had found that according to article 10 of the Law on Housing Relations, "courts are, in general, competent to decide on disputes over housing relations unless otherwise provided by this law."[132] It further noted that the lower court waited for months to hear M.S.'s case and that it did so

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122. Constitutional Court of Bosnia and Herzegovina, M.S. v. N.P., Case U-7/99 (Nov. 5, 1999).
123. *Id.* para. 2.
124. *Id.*
125. *Id.*
126. *Id.* para. 3.
127. *Id.*
128. *Id.* para. 7.
129. *Id.* para. 9.
130. *Id.*
131. *Id.* para. 22.
132. *Id.* para. 20.

only *after* the apartment had been temporarily allocated by the Ministry for Refugees to N.P.[133] Therefore, the Court found a violation of M.S.'s right of access to court under article 6(1) of the European Convention.[134] Furthermore, the applicant had been unlawfully deprived of her right to her home under article 8 of the European Convention.[135]

In response to the applicant's allegation of discrimination, the Court stated:

> The Constitutional Court notes initially that neither the appeal nor the documents in the case file indicate with sufficient clarity that there has been discrimination in relation to the appellant's rights in this specific case. The Constitutional Court would only be in a position to find this part of the complaint substantiated if it were supported by sufficient evidence that the judicial proceedings had been influenced by the appellant's ethnic origin.[136]

Despite the fact that individual claimants would have an enormously difficult time documenting such discrimination, numerous sources were available in the broader public, documenting the fact that authorities at all levels in Republika Srpska stymied individuals of Bosniak and Croat descent from returning home. As the International Crisis Group showed in a 1999 report, Banja Luka was (and remains) a city that contains thousands of flats whose rightful occupants are expelled Bosniaks and Croats; many of these places are now inhabited by Serbs displaced from Federation territory and Croatia.[137] At the same time, the then mayor of Banja Luka, Djordfe Umicevic, never concealed his distaste for the returnees.[138]

In a case decided on February 5, 2001, Z.M. lodged an appeal requesting the Constitutional Court to annul the May 18, 2000, judgment of the Supreme Court of the Federation of BiH, which denied his request for him and his family to be reinstated into the apartment they were forced to flee during the war.[139] The apartment was located in Cazin, Republika Srpska, but was under the ownership of a company located in the Federation of BiH. Z.M. alleged violations of article 8 of the European Convention, article 1 of Protocol 1 to the European Convention, Article II(2) of the Constitution of BiH, and, finally, that

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133. *Id.* para. 21.
134. *Id.* para. 22.
135. *Id.* para. 27.
136. *Id.* para. 14.
137. INT'L CRISIS GROUP, IS DAYTON FAILING? BOSNIA FOUR YEARS AFTER THE PEACE AGREEMENT, ICG BALKANS REP. NO. 80, at 42-51 (Oct. 28, 1999).
138. *Id.*
139. Constitutional Court of Bosnia and Herzegovina, Case U-14/00, para. 42 (May 18, 2001).

"neither the administrative bodies nor the courts had considered the essence of his problem and that he was therefore a victim of discrimination."[140]

The Court, citing to Article II(5) of the Constitution, stated that "all refugees and displaced persons have the right to return freely to their homes of origin, [which] raises this right of refugees and displaced persons to the level of constitutional rights which are, according to Article II4 of the Constitution, secured to all persons in Bosnia and Herzegovina without discrimination on any ground."[141] The lower courts had denied the applicant his right to return home based upon a technicality whereby Z.M. had not received a written contract from the company concerning the allocation of the apartment. The company, however, acknowledged that Z.M. had rightfully been renting the apartment and that no contracts were concluded between the company and employees to whom apartments in Z.M.'s complex were rented. Therefore, the applicant was, in fact, the lawful occupancy right-holder over the apartment. Further, the Court concluded that Z.M.'s rights to his home under article 8 of the European Convention had been interfered with because, even though five years had passed since the end of the war, Z.M. still had not been able to gain possession over his home.[142]

Regarding Z.M.'s claim of discrimination, the Court stated: "Since the appellant has not shown that he was treated differently than other persons in an identical situation, the Court did not examine the violations under Article 14 of the European Convention."[143]

Again, public sources document the discriminatory situation in Cazin, which is located in the northwestern part of BiH and was the site of intense fighting during the war. Before the war, Cazin's population was approximately ninety-seven percent Muslim.[144] The total number of minority returnees to Cazin as of June 2003 was seven.[145]

In none of the appeals brought before the Constitutional Court regarding "the right to return" did it analyze an applicant's claim of discrimination. Thus, the Court dismissed both the historical context

140. *Id.* para. 6.

141. *Id.* para. 20.

142. *Id.* paras. 24-26. A similar determination was made under article 1 of Protocol 1 to the European Convention.

143. *Id.* para. 41.

144. MLADEN KLEMENČIÁ, TERRITORIAL PROPOSALS FOR THE SETTLEMENT OF THE WAR IN BOSNIA-HERCEGOVINA 24-25 (1994); *see also* U.N. High Comm'n for Refugees, Bosniac Population in BiH; Census 1991, *available at* http://unhcr/ba/maps/02/Bos_population_Census 1991.pdf.

145. *See generally* U.N. High Comm'n for Refugees, Statistics Package (June 30, 2007), *available at* http://www.unhcr.ba/updatejuly/SP_06_2007.pdf.

which served as the impetus of the claims—ethnic cleansing and genocide—as well as the discriminatory treatment persisting after the war. If it had decided the discrimination issue early on in its jurisprudence, the Constitutional Court could have established a legal framework to which local courts could adhere in order to comply with Article II(4) of the BiH Constitution. The failure to define the term "nondiscrimination" has allowed Entity courts to continue acts of discrimination, thereby perpetuating and directly supporting ethnic homogeneity and rendering meaningless the antidiscrimination provision in the Constitution.

2. Discrimination: The Central Issue in *D.M. v. The Federation*[146]

A good example of a Human Rights Chamber decision that excavated the levels of harms being done by perpetual discrimination is found in the case of *D.M. v. the Federation*, where a Bosniak applicant owned a house in Kablići in Canton 10 of the Federation and from which he was expelled during the war.[147] The facts as described below are representative of the bulk of "repossession" cases received by the Chamber.[148]

In 1993, a police officer of Croat origin broke into and occupied D.M.'s house.[149] D.M. and her family left the country shortly thereafter and lived in Croatia, Hungary, and Switzerland before they returned to Livno in January 1998.[150] At the time of the proceedings, D.M. and her husband were forced to live apart with relatives, each spouse caring for one child.[151]

In 1997, D.M. initiated proceedings before the Livno Municipal Court and municipal authorities seeking to regain physical possession of the house.[152] From 1997 to 1998, D.M. continued to appeal to the relevant administrative and judicial bodies competent to hear claims for repossession.[153] She never received a response from the court or municipal authorities, let alone her "day in court." In the case before the

146. Human Rights Chamber of Bosnia and Herzegovina, D.M. v. The Fed'n of Bosn. & Herz., Case CH/98/756 (May 14, 1999).

147. *Id.* para. 1.

148. What appears to differ in this case in terms of the Chamber's analysis is that the Chamber held a public hearing and received information, which allowed it comfortably to make a decision on the discrimination claim. *Id.* para. 6.

149. *Id.* para 17.

150. *Id.*

151. *Id.*

152. *Id.* para. 19.

153. *Id.* paras. 19-22.

Chamber, both amicus curiae, and an assistant Ombudsman of the Federation, stated that there was a pattern of discrimination against persons of Bosniak origin concerning their rights to property and access to the courts in Canton 10.[154] Moreover, even "[t]he respondent Party . . . conceded that there [was] 'a problem' in the court system in Canton 10 'in respect of both efficiency and independence.'"[155]

The Chamber found discrimination to be the central issue.[156] It began its inquiry into the merits by looking at whether the applicant had been discriminated against in her rights to a fair hearing within a reasonable time, to equal protection of the law, to respect for her home, and to peaceful enjoyment of her possessions.[157]

Following the approach taken in *Kevešević*, the Chamber first searched for a "comparable group" and looked to determine if there was differential treatment between the comparable groups and, if so, whether this differential treatment had a reasonable and objective justification.[158] The Chamber found a pattern of discrimination consisting of a failure on the part of the Livno Municipal Court and municipal authorities to process claims for repossession of property belonging to returning Bosniaks and also failure to enforce judgments rendered in favor of such applicants against defendants of the Croat majority.[159] Such behavior formed the basis for the infringement on the applicant's right to home and possessions. In making its decision, the Chamber reminded the respondent party that their obligations under Annex 6 to the GFAP also imposed upon them a positive obligation to protect the enumerated rights.[160] The Chamber stopped short of honestly describing the nature of the ethnic discrimination in Livino by stating that it "need not determine whether this pattern of discrimination is based on an outright policy seeking to discourage the return of Bosniak refugees to Canton 10."[161]

Nonetheless, by analyzing all of the applicant's allegations under the rubric of discrimination, the Chamber placed the nondiscrimination/ equality provision at the forefront and recognized the perpetuation of the initial discriminatory act giving rise to the subsequent harm. The initial discriminatory act was "ethnic cleansing"; the subsequent harm was the court's failure to hear the applicant's claim.

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154. *Id.* para. 73.
155. *Id.*
156. *Id.* paras. 79-80.
157. *Id.* para. 80.
158. *Id.*
159. *Id.* para. 79.
160. *Id.* para. 80.
161. *Id.* para. 79.

B. Employment Issues

Access to employment is a crucial factor in the decisions of displaced persons to return to their prewar homes. Sustainable return can only occur if returnees have the means to sustain themselves upon return. In a general climate of economic despair, a decision whether to return or to remain primarily depends upon where a person can eke out a tolerable existence. Bosnia's dire economic condition maintains an unemployment rate that hovers at forty percent.[162] The economic troubles, too complex to discuss in depth here, essentially stem from its huge war losses, painful and slow transition from communism to capitalism, corruption, unreformed laws, regulations, and old habits.[163] Although the generally desperate state of the Bosnian economy and the paucity of new jobs means that returnees of all national groups, including those belonging to the majority, have trouble finding suitable employment, "minority" returnees face the added problem of institutionalized discrimination.[164] According to the Organization for Security and Co-operation in Europe Fair Employment Project Report, discrimination in employment is a human rights violation that remains prevalent throughout Bosnia.[165] In fact, employment discrimination continues to be one of the most serious obstacles to the return.[166]

More than five hundred applications pending before the Chamber alleged discriminatory termination of labor relations, primarily on the grounds of ethnic/national origin.[167] Many of the claims arose out of wartime decrees concerning employment, which, like the decrees concerning property, were created to maximize the longevity of the discriminatory impact and ingrain the effects of ethnic cleansing. The ethnic cleansing and genocide at their maximum heinousness included mass killings, concentration camps, and deportation; at a minimum, they

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162. INT'L CRISIS GROUP, THE CONTINUING CHALLENGE OF REFUGEE RETURN IN BOSNIA & HERZEGOVINA, ICG BALKANS REP. NO. 137, at 2 (Nov. 13, 2002).

163. *See generally id.*

164. HELSINKI COMM'N FOR HUMAN RIGHTS IN BOSN. & HERZ., REPORT ON THE STATE OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA (ANALYSIS FOR THE PERIOD JANUARY-DECEMBER 2002 PERIOD) (Dec. 2002), http://www.bh-hchr.org/Reports/reportHR 2002.htm.

165. ORG. FOR SEC. & CO-OPERATION IN EUR., OSCE FAIR EMPLOYMENT PROJECT REPORT (2002) (on file with author); Statement of OSCE Permanent Council to the Peace Implementation Council, Sept. 11, 2003 (on file with the author).

166. *See generally* AMNESTY INT'L, BOSNIA AND HERZEGOVINA BEHIND CLOSED GATES: ETHNIC DISCRIMINATION IN EMPLOYMENT 1-2 (Jan. 26, 2006), http://amnestyusa.org/document.php?lang=e&id=ENGEUR630012006.

167. *Id.*

included depriving people of their livelihood. Thus, if you were on the wrong ethnic side, you lost your job.[168]

Furthermore, the postwar laws pose a compromised solution to the problem of discriminatory employment loss and have created new problems in their wake. The Chamber and the Constitutional Court's jurisprudence follows the formal equality model for the most part. The Chamber only tentatively, if at all, made use of its jurisdiction to investigate cases of *apparent* discrimination.

The European Convention does not grant the right to employment. Therefore, the Chamber only had jurisdiction to hear such cases if they raised issues of discrimination in connection with the other human rights instruments annexed to the GFAP. Specifically, the Chamber has analyzed employment discrimination claims under articles 6 and 7 of the International Convention on Economic, Social, and Cultural Rights (ICESCR)[169] and article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[170]

Immediately prior to and during the war, people were terminated from their work or put on "waiting lists" (and not subsequently reinstated) because they were deemed to be "on the other side," which usually meant they were of a different ethnicity than their employer. In other circumstances, persons were terminated from their employment for failing to come to work, for example, when the war prevented them from doing so. Individuals from all ethnic groups found themselves in this predicament. Those most likely to be prevented from going to work,

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168. CIGAR, *supra* note 3, at 57. Not unlike, the "laws" promulgated during Hitler's reign in Germany, a well-oiled bureaucratic machine was established in BiH to create and implement a legal façade regulating crimes.

169. Article 6(1) reads: "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." International Convention on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Article 7 reads in relevant part: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work." *Id.* art. 7.

170. Article 5 reads:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . [t]he rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.

International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 5 I.L.M. 352, art. 5.

however, were those persecuted and who found themselves on the wrong ethnic side once their town or village fell.

1. Application of Wartime Decrees

The first employment discrimination decision issued on the merits by the Chamber was in July 1999 and concerned an applicant who claimed discrimination in relation to his employment with the Livno Bus Company.[171] Livno is located in Canton 10 of the Federation. In 1993, after war ensued between the Bosniak and Croat forces, the Croat forces eventually took control. In July 1993, an applicant, Sakib Zahirović, and fifty-one other employees of Bosniak origin were no longer allowed to come to work and were put on the so-called "waiting list."[172]

In the meantime, about forty persons of Croat origin joined the company to perform the work of those employees placed on the waiting list.[173] In June 1997, the company stopped paying all compensation.[174] The forty persons who had joined the company during the war had secured formal employment contracts with the company in 1996.

On July 20, 1997, Zahirović and his fifty-one Bosniak colleagues initiated proceedings against the Livno Bus Company at the Municipal Court in Livno, requesting reinstatement and compensation for their financial losses.[175] As of the date of the Chamber's decision, July 8, 1999, the Court had not rendered a decision. Zahirović brought his case to the Chamber alleging that "due to his ethnic origin he was removed from and not allowed back to his job, and that the court proceedings have been stalled for the same reason."[176]

In accordance with generally accepted principles of international law, the GFAP cannot be applied retroactively, and the Chamber and Constitutional Court only have jurisdiction to hear claims arising after the entrance into force of the Dayton Peace Agreement on December 14, 1995. Evidence relating to such events, however, may be considered as

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171. Human Rights Chamber of Bosnia and Herzegovina, Zahirović v. Bosnia & Herzegovina & The Fed'n of Bosn. & Herz., Case CH/97/67, Decision on Admissibility and Merits, para. 1 (July 8, 1999).

172. According to the Ombudsmen of the Federation of BiH, at the time of the Chamber's December 16, 1998 hearing, there were seven hundred cases pending before the Ombudsmen's office which may have involved a violation of the rights of Bosniaks to employment in Canton 10. Most of the alleged violations stem from the Croat-Bosniak conflict of 1993. *Id.* para. 65.

173. *Id.* para. 27.

174. *Id.*

175. *Id.*

176. *Id.* para. 1.

relevant background information framing the alleged violation.[177] This jurisdictional limitation has diluted the impact of the Courts' decisions concerning employment discrimination. Both Courts, however, in a number of cases including the *Zahirović* case, have found themselves competent to hear a claim based upon the use of the legal notion of a "continuing violation." Use of this legal tool, however, has not been applied consistently.[178]

The Chamber overcame the first hurdle of admissibility, *ratione temporis*, by establishing that although Zahirović had been placed on the "waiting list" before December 14, 1995, since he has remained on the waiting list, this constituted a continuing violation, and, therefore, the impugned discriminatory act fell within the Chamber's jurisdiction.[179] The Chamber then set out to establish whether Zahirović had been discriminated against in the enjoyment of his right to work as well as in his right to favorable conditions of employment, as guaranteed by articles 6 and 7 of the ICESCR.[180]

The manager of the company testified at the hearing before the Chamber that Bosniaks were placed on the waiting list for their own personal safety, because during the war, bus drivers were generally transporting Croat soldiers and other Croats.[181] The Chamber accepted the "personal safety" reason posited by the bus company as justification for the differential treatment of Bosniaks during the war.[182] It found, however, that there was no reasonable basis upon which to leave the

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177. Human Rights Chamber of Bosnia and Herzegovina, Eraković v. The Fed'n of Bosn. & Herz., Decision of Jan. 15, 1999, Case CH/97/42, para. 37 (1999).

178. The Chamber, simply, has not been consistent in jurisprudence concerning its jurisdiction to hear employment discrimination claims. For example, the Chamber found it had jurisdiction *ratione temporis* to hear a claim of employment discrimination where the applicant had been told during the war that she could not work because of her ethnic/national origin. The Chamber found that because the applicant had never received a procedural decision on the termination of her employment, a "continuing violation" resulted. Human Rights Chamber of Bosnia and Herzegovina, M.M. v. The Fed'n of Bosn. & Herz., Decision on Admissibility and Merits of Mar. 7, 2003, Case CH/00/3476 (2003). But in another case, an applicant claimed that at the end of 1992, she was told by the director of her company not to come to work anymore and that "not a single 'Croat or Muslim' would work at the company while he was in charge, due to the treatment at the time of Serbs in Zenica and Tuzla." A decision was issued to this effect in December 1993. In that case, the Chamber found it was not competent *ratione temporis* to hear the case because the impugned act occurred before the entry into force of the Dayton Agreement. Human Rights Chamber of Bosnia and Herzegovina, Čakrević v. Republika Srpska, Decision on Admissibility of Feb. 8, 2000, Case CH/99/1950 (2000). Apparently the impugned act is receipt of the procedural decision and not the actual termination, which in both cases continues.

179. *Zahirović*, Case CH/97/67, para. 106.

180. *Id.* para. 113. For relevant parts of article 6 and article 7, see ICESCR, *supra* note 169, art. 6-7.

181. *Zahirović*, Case CH/97/67, para. 48.

182. *Id.* para. 124.

applicant on the waiting list after the hostilities ceased, particularly in light of the fact that the workforce increased after the war.[183]

Departing from its analysis in the *D.M.* case,[184] the Chamber then chose to examine the applicant's right to a fair hearing before an independent and impartial tribunal under article 6 of the European Convention alone.[185] It did not investigate the discriminatory nature of this unfair treatment. The Chamber took note of the fact that the OSCE representative and the Ombudsman testified at the hearing that there was a pattern of discrimination against persons of Bosniak origin in Canton 10.[186] It noted that some judges had been instructed not to hear cases involving plaintiffs of Serb and Bosniak origin and that according to the OSCE's sources in the Court, "if hearings involving plaintiffs of Bosniak origin were scheduled, 'this was just a way to cover (things) up and get rid of the pressure from the international community.'"[187] Nonetheless, it found a violation of article 6 standing alone, stating that "[i]n view of these findings, which take into account the applicant's ethnic origin, it is not necessary to consider the issue of discrimination separately."[188]

Again the Chamber must have been following a strict "European Court" approach. In doing so, it missed the opportunity to entrench the jurisprudence that it had established in *D.M.* and thereby failed to address the problem of the perpetual discrimination by not recognizing that the Municipal Court's discriminatory action is what, in fact, brought the original discriminatory act to bear on the applicant.

It is interesting to note that the Chamber received evidence that the Livno Bus Company's manager had stated that because of the new ethnic composition of the population of Canton 10, the number of Bosniak workers should be reduced to nine percent to reflect that change. This illustrates how the proportional representation scheme employed in the political institutions of the State trickles down to the population as a whole and ingrains in the people's minds the idea that ethnicity and "proportionality" should inform decisions at all levels. Such thinking necessarily looks to freeze the status quo and reflects the current mindset and the difficulty inherent in promoting equality in a politically ethnic-group-oriented State.

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183. *Id.* para. 129.
184. *See infra* Part V.A.2 (discussing the *D.M.* case).
185. *Zahirović*, Case CH/97/67, para. 136.
186. *Id.* para. 137.
187. *Id.* para. 37.
188. *Id.* para. 140.

The Chamber decided several cases concerning the wartime decrees on labor relations, which, though apparently neutral, were intended to solidify the war time goals. Articles 10 and 15 of the Law on Labor Relations provided for the termination of an employee if she stayed away from work for twenty consecutive days "without good cause," if "she took the side of the aggressor against the Republic of Bosnia and Herzegovina," or if she failed to demonstrate, within the prescribed deadline of fifteen days, that she could not have come to work earlier.[189]

In two cases, *Rajić v. The Federation* and *Mitrović v. The Federation*, the Chamber found that the application of these laws discriminated against the applicants based upon their ethnic/national origin.[190] Oddly, in only one case did it follow the *D.M.* approach and analyze the right to a fair hearing in connection with discrimination.[191] In both of these cases, the applicants were employed in the Canton of Sarajevo. Mile Mitrović, of mixed Croat and Serb origin, worked for "Elektroprivreda" a socially owned firm, before the war.[192] The second applicant, Edita Rajić, was of Croat origin and married to a person of Serb origin; before the war, Rajić worked as an art teacher in Vogošća.[193] Both applicants lived in areas controlled by Serb forces during the war. In that time, Mitrović was commander of a civil defense unit in Republika Srpska,[194] and Rajić continued teaching art in Vogošća. Immediately after the war when Vogošća was incorporated into the Federation, both applicants informed their respective employers that they wished to continue working.

In both cases, the respective employers terminated the applicants' employment retroactively. The applicants appealed their respective terminations to the courts in Sarajevo. In both cases, the Sarajevo courts relied upon article 15 of the 1992 Decree with Force of Law on Labor

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189. Decree with Force of Law on Labour Relations during the State of War and Immediate Threat of War, Official Gazette of the Federation of Bosnia and Herzegovina 21/92, arts. 10, 15 (Nov. 23, 1992), annulled by the enactment of the Federation Labour Law, Official Gazette of the Federation of Bosnia and Herzegovina 43/99, which entered into force on Nov. 5, 1999.

190. Human Rights Chamber of Bosnia and Herzegovina, Rajić v. The Fed'n of Bosn. & Herz., Case CH/97/50, para. 81(2), Apr. 7, 2000; Human Rights Chamber of Bosnia and Herzegovina, Mitrović v. The Fed'n of Bosn. & Herz., Case CH/98/948, para. 68(1), Sept. 6, 2002.

191. *See Rajić*, Case CH/97/50, para. 43.

192. *Mitrović*, Case CH/98/948, para. 1.

193. *Rajić*, Case CH/97/50, para. 1.

194. Mitrović claims that this position involved distributing humanitarian aid to the population of Grbavica. The Respondent Party disputed this presentation of facts and considered that the civil defense units were an "integral part of the Serb Army." *Mitrović*, Case CH/98/948, paras. 13-14.

Relations, which provided for termination if "he or she took the side of the aggressor against the Republic of Bosnia and Herzegovina."[195] With respect to Rajić, the court found that the applicant, by staying on territory occupied the Serb forces, "put herself on the side of the aggressor."[196] Similarly, the court found in Mitrović's case that participation in the Civil Defence Unit in Republika Srpska put him on "the side of the aggressor."[197] Under article 15 of the Decree with Force of Law on Labor Relations, this justified their respective terminations. Mitrović and Rajić brought their cases to the Chamber alleging, inter alia, discrimination in their right to work. In both cases, the Chamber glossed over the *ratione temporis* problem and simply stated that the decisions on the applicants' terminations of their employment occurred after the entry into force of the Dayton Agreement, when the decisions were delivered to the applicants in 1996.[198]

The Chamber then found that because the application of article 15 applied exclusively to persons of non-Bosniak origin, the local courts' findings in Mitrović based on article 15 were de facto discriminatory on grounds of national and ethnic origin.[199] In the case of Rajić, the Chamber found it particularly inconceivable that someone would be considered "on the side of the aggressor" if that person, like the applicant, simply remained where she lived and continued working as an art teacher.[200]

The local courts' application of article 15 is another illustration of the well-institutionalized discrimination. The Chamber concluded that the applicants had been treated differently due to their ethnic/national origin without any legitimate justifications. Therefore, it found that both applicants had been discriminated against in their right to work.[201]

In Mitrović's case, the Chamber analyzed the right to work and the right to a fair hearing using the nondiscrimination framework and found that the applicant had been discriminated against by his employer and that the local court gave the employer's discrimination a "legal" stamp of approval. In fact, the Chamber stated that "[t]he conduct of the courts

195. Decree with Force of Law on Labor Relations, *supra* note 189, art. 15.
196. *Rajić*, Case CH/97/50, para. 73.
197. *Mitrović*, Case CH/98/948, para. 54.
198. *Id.* para. 41; *Rajić*, Case CH/97/50, paras. 43-44.
199. *See Mitrović*, Case CH/98/948, paras. 50-55.
200. *Rajić*, Case CH/97/50, paras. 73-74.
201. *Mitrović*, Case CH/98/948, para. 68; *Rajić*, Case CH/97/50, para. 81.

reveals their intent to solidify the termination of the applicant's employment."[202]

In the case of Rajić, however, the court only evaluated the employment discrimination claim and evaluated her claim to an infringement of her right to a fair trial on its own. Surprisingly, in spite of the fact that Rajić was found by the local court to have "put herself on the side of the aggressor" by staying home—in a town controlled by Serb forces—and teaching art rather than leaving to work in a place controlled by Bosniak forces, the Chamber, nonetheless, concluded that Rajić had not offered adequate evidence to buttress her claim that the unfairness of the proceedings was due to her national origin.[203] Again, the Chamber utterly failed to acknowledge the difficulty for an individual to obtain such evidence, nor did it take judicial notice of the existence of many reports providing sufficient evidence of discrimination.

In many such cases, the Chamber determined that because the employment termination decision was communicated to the applicant before December 14, 1995, the Chamber did not have jurisdiction *ratione temporis* to hear the claim. It relied on procedural technicalities, refusing to explore the possibility of hearing the claims based upon the real reason for reapplication: the continuing violation of the initial discriminatory act. In only one decision did the Chamber allude to the fact that being placed on the "waiting list" or "terminated" and, therefore, having to reapply for one's job after the war, constituted discrimination because it had a disparate impact on the particular persecuted group in a particular area.[204] It was the failure to hire after reapplication that constituted the impugned act.

2. Application of Postwar Laws

The property laws imposed by the High Representative in 1998 provided for the wholesale disposal of wartime property laws regulating ethnic cleansing and provided new legislation for property return that sought to guarantee the reintegrated vision of BiH.[205] Unfortunately, the same approach was not taken with respect to employment legislation. The High Representative's Office apparently did not seriously consider

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202. *Mitrović*, Case CH/98/948, paras. 53-55 (noting that the court disregarded the employer's reason for terminating the applicant's contract for unjustified absence from work and decided the applicant's case *sua sponte* on the basis of article 15).

203. *Rajić*, Case CH/97/50, para. 74.

204. Human Rights Chamber of Bosnia and Herzegovina, Pogarčič v. The Fed'n of Bosn. & Herz., Case CH/98/1018, paras. 53-54 (Apr. 6, 2001).

205. *See infra* Part V.A (discussing the LoAA).

the sustainability issues of reintegration until much later. This is evidenced by the fact that it was not until 2001 that the international organizations (OHR, OSCE, etc.) devised what became known as a "Fair Employment Strategy"[206] and launched a Fair Employment Project in April 2002.

The labor laws throughout BiH were replaced by a new Labor Law, which entered into force on November 5, 1999, and was amended on September 7, 2000. Article 5 of the Labor Law in both Entities requires that persons seeking employment shall not be discriminated against on prohibited grounds and specifically provides for a remedy before the local courts for allegations of discrimination in employment matters.[207]

The international organizations, however, did not do anything globally to reverse the employment discrimination that occurred during the war. Reliance on "nondiscrimination" proved futile as attorneys infrequently plead it and courts generally ignore it.[208] The international actors should have declared the portions of the old labor laws, which were implemented in furtherance of ethnic cleansing, null and void and required that persons terminated from their prewar employment be given preference in employment.

Instead, overwhelmed by a significant number of claims brought by people seeking to get their jobs back, the Labor Laws in both Entities were amended in 2000 to include article 143. Article 143 essentially provides that a person "on the waiting list" (defined to include persons who were employed on December 31, 1991, did not work for another employer since that date, and who informed their former employer that they would resume work by February 5, 2000) shall be considered terminated on May 5, 2000, if not invited to work by that date.[209] Every laid off employee also has the right to statutorily prescribed severance pay.[210]

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206. *See* ORG. FOR SEC. & CO-OPERATION IN EUR., OSCE FAIR AND EQUAL EMPLOYMENT PRINCIPLES (2001) (on file with author).

207. Federation Labour Law, *supra* note 189, article 5 reads:

> A person seeking employment, as well as a person who becomes employed, shall not be discriminated against based on race, color, sex, language, political or other opinion, ethnic or social background, financial situation, birth or any other circumstances, membership or nonmembership in a political party, membership or nonmembership in a trade union, and physical or mental impairment.

208. Interview with Head of the American Rescue Committee Legal Division (Aug. 13, 2003).

209. Federation Labour Law, *supra* note 189, art. 143.

210. *Id.*

Article 143(a) sets up Cantonal Commissions for the implementation of article 143.[211] Claims for severance pay had to be filed with the relevant Cantonal Commission. The Cantonal Commission proceedings, as the Supreme Court of the Federation has held, are *sui generis* extra-judicial proceedings.[212] Apparently, judicial review of such decisions is not available. Furthermore, the Cantonal Commission only has the power to order a statutorily prescribed level of compensation and is not competent to order the applicant's reinstatement or hear claims of discrimination.

This approach apparently was taken to find a wholesale solution to the employment problems in BiH. By 2000, almost five years after the war, it would have been impossible to implement laws that required prewar applicants' reinstatement into their prior jobs. This simply would have provided claims of employment discrimination on the basis of ethnic/national grounds to persons who would lose their jobs in the process and then have a viable claim. Further, article 143 does not provide a venue for claims of discrimination, and this must have been intentional. The economic situation in BiH could not be hampered by such claims because it would have discouraged foreign investors from investing in Bosnian companies overburdened by voluminous discrimination judgments. A practical solution had to be found. Unfortunately, the decided-upon solution was one that tramples on an individual's right to equality in employment.

Typical cases decided by the Chamber and the Constitutional Court generally concern an applicant who alleges that the termination of her employment occurred because of her ethnic/national origin and who then requests remuneration and reinstatement from the local court. Almost reflexively, the courts, be they courts of first instance or appellate, simply refer the case to the Cantonal Commission, rather than decide the case on the merits. In these cases, the Chamber has generally found that the applicants have been discriminated against in their right to employment, and if discrimination has been proved, it is proved by using the *Zahirović* model (analyzing the claim of employment discrimination separately from the claim of the right to a fair trial) described above. In some cases, the Chamber has also found the applicant's right of access to court and to a fair trial within a reasonable time had been violated.[213]

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211. *Id.* art. 143(a).

212. Constitutional Court of Bosnia and Herzegovina, Case U-388/01, Dec. 12, 2001.

213. *See, e.g.*, Human Rights Chamber of Bosnia and Herzegovina, M.M. v. The Fed'n of Bosn. & Herz., Case CH/00/3476, para. 88 (Mar. 7, 2003).

In a leading case concerning the application of article 143, *Vanovac v. The Federation*, the Chamber analyzed the applicant's claim of the right of access to court (article 13 of the European Convention)[214] separately from the applicant's claim of employment discrimination and, again, did not consider the acts of the court under a discrimination analysis.[215] In this case, the applicant had received a favorable judgment from the Municipal Court concerning his employment claim for reinstatement.[216] On appeal, the Cantonal Court, however, suspended proceedings and referred the case to the Cantonal Commission for proceedings in accordance with article 143 of the Labor Law.[217] The Chamber found that the applicant's right of access to court had been violated because the Cantonal Commission did not have jurisdiction to hear the claim of employment discrimination.[218] The Cantonal Commission could only order a statutorily prescribed level of compensation, and it was not competent to order Vanovac's reinstatement or decide his discrimination claim.[219]

By not analyzing the claim of discrimination both to employment and access to court, the Chamber broke the chain, so to speak, in an artificial manner. The wartime termination started the chain, the application of wartime labor laws kept it going, and the Municipal Court hoped to be the institution that would keep the initial discrimination alive. Although, the Chamber nonetheless found a violation of the right of access to court,[220] making the connection and appreciating the continuity would go a long way to clarifying the fact that just because an act does not "appear" discriminatory on its face, but rather upholds a prior discriminatory act, does not mean it is not discriminatory.

The Constitutional Court, for its part, has issued only two decisions concerning discrimination in employment. Both cases address the issue of the postwar labor laws intended to curb the financial hardship of BiH after the war. The crux of the cases before the Constitutional Court concerned article 143 of the Federation of BiH and Republika Srpska labor laws.

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214. Human Rights Chamber of Bosnia and Herzegovina, Vanovac v. The Fed'n of Bosn. & Herz., Case CH/99/1714 (Nov. 8, 2002). Article 13 reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." European Convention, *supra* note 106, art. 13.

215. *Vanovac*, Case CH/99/1714, paras. 39-50.

216. *Id.* para. 12.

217. *Id.* para. 13.

218. *Id.* paras. 58-60.

219. *Id.*

220. *Id.* para. 58.

Case U 26/00, decided December 21, 2001, concerned the application of article 143 in concert with article 54 of the Law on Amendments to the Labor Law of the Federation of BiH.[221] Article 54 provides:

> The procedures to exercise and protect the rights of employees instituted before the entry into force of this Law shall be completed according to the regulations applicable on the territory of the Federation before the entry into force of this Law, if it is more favourable to the employee, with the exception of 143 of the Labor Law. In such case, the Court shall determine the rights of the employee in accordance with this Law.[222]

The Court received this case from the Municipal Court of Cazin, which requested a review of whether article 54 was in conformity with the Constitution of BiH. The applicant, S.D., had requested a review of article 54, urging that article 143 provided for less severance pay than previous severance pay law.[223] The applicant alleged that wholesale denial to persons with the status of "laid off" employees treated this category of persons more unfavorably than other employees.[224]

The law arose from discrimination along ethnic lines, and its impact fell almost exclusively on persons who lost their employment during the war. The discrimination naturally mirrors the lines of the conflict. People were either fired or put on the waiting list (and not subsequently reinstated) because they found themselves to be of the wrong ethnicity at the wrong time in the wrong place. After the war, employers had no interest in reinstating these people. Article 143 essentially puts an imprimatur on that conduct. What is at the heart of this complaint is discrimination based upon ethnic origin because wholesale groups of persons were prevented from working during the war based upon which ethnic group ruled any given part of the country. It truly begged the question of the constitutional infirmness of article 143 altogether.

The Constitutional Court, however, did not approach the issue before it in this manner. Established by the Court though not specifically articulated, the issue concerned whether laid off employees had a right to severance pay. The Court examined the conformity of that provision with article 1 of Protocol 1 to the European Convention, which provides

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221. Law on Amendments to the Law on Labour, Official Gazette of the Federation of Bosnia and Herzegovina 32/00, art. 54 (Sept. 7, 2000); Constitutional Court of Bosnia and Herzegovina, Case U-26/00 (Dec. 21, 2001).

222. Law on Amendments to the Law on Labour, *supra* note 221, art. 143.

223. Case U-26/00, para. 10.

224. *Id.* para. 13.

for the right to peaceful enjoyment of one's possessions.[225] If a law deprives individuals of their possessions, the legislature must establish that there is a "public interest" motivating such deprivation and that a fair balance is struck between the public interest and the interest of the individuals who are deprived of their property.

The legislature put forth, and the Constitutional Court accepted, the justification that article 143 was "of vital interest to the economy, since the heavy burden imposed on employers by the obligation to pay these amounts to former employees was in many cases beyond the capabilities of the companies and would force many companies into liquidation and bankruptcy and would thereby also further aggravate the employment situation in the country."[226] The Constitutional Court established that under labor law prior to the amendment, an employee would be entitled to 3,863 KM per employee; this figure was reduced to about 1,000 KM per employee under article 54.[227] The court reasoned that about 100,000 employees would be due severance pay under article 54 and that such a reduction "would represent the financial means by which the economic viability of the companies would be strengthened."[228] Allowing the BiH Federation a wide margin of appreciation in determining its economic and social policies and considering that "the right to severance pay was not totally eliminated," the Constitutional Court found that the legislation requiring a reduction in severance pay was "a proportionate measure taken in the public interest and that therefore it [did] not violate Article 1 of Protocol No. 1 to the European Convention."[229]

In a cursory analysis of the question of discrimination, the Constitutional Court invoked article 14 of the European Convention in connection with article 1 of Protocol 1.[230] Again, the Court initially searched for comparable groups. It found that laid-off employees were clearly in a different situation than non-laid-off employees and that laid-off employees were also in a different situation from those laid-off employees who had already obtained severance pay under the prior law.[231] The Court did not address the first comparable groups it identified, namely the employed versus the laid-off. Had it done so, it would have been forced to look back to the fact that most persons who were now laid off were laid off based upon ethnic cleansing measures. The Court

225. *Id.* paras. 20-25.
226. *Id.* para. 25.
227. *Id.* para. 26.
228. *Id.*
229. *Id.* para. 30.
230. *Id.* para. 31.
231. *Id.* para. 36.

would then have needed to unearth the entire structure of discrimination existing in BiH and explore the discriminatory impact of articles 54 and 143. It chose not to do so.

Rather, the Constitutional Court looked into the second set of comparable groups, namely those who received severance pay prior to the new law and those who sought severance pay after the entry of the new law. It found that these two groups could not be considered analogous. The court reasoned that distinctions always flow from a change in legislation, and the distinctions that arise between those to whom the old law applied and those whose rights were regulated by the new law could not be considered of a discriminatory nature.[232] That settled the discrimination claim for the Court.

Two years later, in 2003, the newly constituted Court once again examined article 143. This time it reached a very different conclusion. While not striking down article 143 as unconstitutional wholesale, it went some distance toward that. In the case, S.B. from Livno appealed a lower court judgment which denied her request to be reinstated to her job.[233] S.B. had been pursuing her employment claims before the lower courts since 1998 until the case ended in 2003 with the Municipal Court in Livno transferring the case to a Cantonal Commission established under article 143. The lower court established that S.B. had the status of a "laid-off employee," and, therefore, her case was sent to the Cantonal Commission pursuant to the Federation of BiH Labor Law.[234] The Cantonal Commission determined that the appellant fulfilled the requirements under article 143 and, therefore, was only entitled to severance pay as stipulated in article 143.[235]

Before the Constitutional Court, S.B. alleged that the court wrongfully applied article 143 and that her right to a fair hearing under Article II(3)(e) of the BiH Constitution and article 6 of the European Convention had been violated. S.B. also alleged that her right not to be discriminated against in her right to work was protected under Article II(4) of the BiH Constitution and that the ICESCR and the CERD had been violated. To illustrate how the lower courts manipulate article 143, the entire facts of the case are set forth.

S.B. had been employed since 1979 as Director of Technical Assistance for the Housing Fund Livno. On September 21, 1993, S.B. was sent on "unpaid leave" by her employer and was to "report for duty

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232. *Id.*
233. Constitutional Court of Bosnia and Herzegovina, Case U-38/02 (Dec. 19, 2003).
234. *Id.* para. 19.
235. *Id.*

when summoned by the Director of the Housing Fund Livno."[236] The Housing Fund did not give a specific reason for its action. In February 1998, S.B. requested that her employer quash the ruling on unpaid leave, reinstate her to her previous position, and grant her compensation for lost income. She contended that she had not requested unpaid leave but was forced to leave her position "because of her first and last name" and as a consequence of "undemocratic" acts which violated basic human rights and the law of BiH.[237]

S.B.'s employer did not respond to her request. One month later in April 1998, S.B. filed a claim with the Municipal Court in Livno. In March 1999, the Municipal Court ruled that S.B.'s employment had been suspended rather than terminated, and that the rest of her claim was premature.[238] The Cantonal Court in Livno, in a September 16, 1999 ruling, quashed the Municipal Court's judgment, insofar as it found the request to be premature, and referred the case back to the Municipal Court for renewed proceedings. On November 5, 1999, the new Labor Law entered into force. Based upon this law, the Municipal Court in Livno ordered S.B.'s employer to reinstate S.B. to her previous position or to a similar position within fifteen days from the effective date of the judgment. On June 28, 2000, the Cantonal Court in Livno, upon the employer's appeal, quashed the Municipal Court's judgment and once again referred the case back to the court of first instance.[239] The Cantonal Court held that the Municipal Court's judgment disregarded article 143 of the Labor Law, wherein a laid-off employee would remain laid-off for six months at most, starting from the effective date of the Labor Law, unless the employer reinstated prior to the expiration of that time limit.[240] On September 7, 2000, additional amendments to the Federation of BiH Labor Law entered into force. According to article 51 of the Labor Law, all complaints related to article 143 shall be referred to a commission for implementation.[241]

On December 21, 2000, the Municipal Court of Livno decided to interrupt the proceedings and refer the case, Appeal of S.B., to the Cantonal Commission. In January 2001, S.B. challenged the ruling of the Municipal Court. S.B. argued that the Municipal Court wrongfully applied article 143 to her case. Furthermore, S.B. emphasized that her

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236. *Id.* para. 13.
237. *Id.* para. 14.
238. *Id.* para. 16.
239. *Id.* para. 19.
240. *Id.*; *see* Law on Amendments to the Law on Labour, *supra* note 221, art. 143.
241. Law on Amendments to the Law on Labour, *supra* note 221, art. 51.

position had been filled by another person "of appropriate nationality," which was in violation of article 143(8).[242] Labor Law article 143(8) prevents an employer from hiring someone other than the laid off employee for the year after the laid off employee has been terminated.[243] The Cantonal Court upheld the Municipal Court's decision. On June 11, 2003, the Cantonal Commission confirmed that article 143 applied and ordered the statutorily prescribed severance pay.[244]

The Constitutional Court found that it had jurisdiction to hear S.B.'s case to the extent that the acts and judgments were taken subsequent to the entry into force of the BiH Constitution.[245] With regard to the initial act that set the wheels in motion, namely the act of forcing S.B. into "unpaid leave," the Constitutional Court noted that it did not have jurisdiction *ratione temporis*.[246] However, the Constitutional Court determined that it could decide on such acts if "it [could] be demonstrated that they [were] of a continuing character subsequent to the entry into force of the Constitution of [BiH]."[247] S.B. continued to be prevented from working, and her employment was only legally terminated six months after the entry into force of the new Labor Law.

On the merits, the Constitutional Court first analyzed S.B.'s claim that her right to a fair trial had been violated. The Court found that the right of access to court was implicit in article 6 of the European Convention.[248] The European Court of Human Rights has established that article 6 secures the right to have any claim relating to civil rights and obligations brought before a competent court or tribunal.[249] The Constitutional Court found that the current legal framework concerning labor disputes does not fulfill article 6 standards.[250] In this case, the lower courts ultimately refused to hear S.B.'s case. In accordance with the amended Labor Law, the case was referred to the Cantonal Commission. However, the Court pointed out that the Cantonal Commission does not have a mandate to order reinstatement or decide claims of discrimination; the Cantonal Commission was limited to reviewing whether S.B. should

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242. Case U-38/02, para. 21.
243. Law on Amendments to the Law on Labour, *supra* note 221, art. 143(8).
244. Case U-38/02, para. 24.
245. *Id.* para. 36.
246. *Id.*
247. *Id.*
248. *See* Golder v. United Kingdom, (No. 1) 1 Eur. Ct. H.R. 524 (ser. A), para. 36 (Feb. 21, 1975).
249. *Id.* para. 1.
250. *Id.* para. 33.

be considered a laid-off employee under article 143.[251] Furthermore, Cantonal Commission decisions are final and not suitable for judicial review. Thus, the Constitutional Court found that procedure before the competent Cantonal Commission "is lengthy and cumbersome but it is ambiguous and it does not guarantee a determination of the appellant's civil right. The current procedure thus makes the appellant subject to an endless proceeding without the foreseeable possibility of having her claim for reinstatement decided upon."[252]

The Constitutional Court then turned to the claim of discrimination. In a marked contrast to its jurisprudence up to this point, cursorily dismissing discrimination claims, in this case, the Court began to set forth a model of analysis for discrimination cases under the BiH Constitution. From the outset of its analysis, the Court referred to S.B.'s case in the context of what happened on the ground in Livno during the war. "The situation of the appellant is not unique. Many non-Croats were dismissed or suspended from their employment in Livno during the conflict and not requested by their employer to return once the conflict was over."[253]

The Court analyzed the claim under Article II(4) of the Constitution, read in conjunction with the ICESCR and the CERD, which establishes layers of rights not to be discriminated against in the field of employment. The Court acknowledged that article 143 of the Labor Law does not differentiate in its wording between persons or groups of persons, and, therefore, article 143 is not prima facie discriminatory. The Court invoked European Convention jurisprudence which establishes that there are several ways a law can be discriminatory, including when it has a disparate impact on particular groups. In this case, it was clear that due to the fact that virtually every non-Croat was laid-off or dismissed during the war in Livno, the impact of article 143 of the Labor Law fell disproportionately on the non-Croat population. The effect of the application of article 143 of the Labor Law resulted in different treatment of the non-Croat population as compared to the Croat population in Livno. In fact, applying article 143 in a general manner to all wartime-laid-off employees, thereby terminating their employment,

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251. Case U-38/02; *see also* Constitutional Court of Bosnia and Herzegovina, Case U-44/01 (Sept. 22, 2004) (noting that the Court renamed all cities in the territory of Republika Srpska which had received—in the course of ethnic cleansing during the war—Serb names); Constitutional Court of Bosnia and Herzegovina, Case U-2/04 (May 28, 2004); Constitutional Court of Bosnia and Herzegovina, Case U-8/04 (June 25, 2004) (ruling on "vital national interests" blocking the parliamentary legislative process).

252. Case U-38/02, para. 50.

253. *Id.* para. 53.

overwhelmingly affected persons of specific ethnic groups solely because of their membership in ethnic groups throughout the country.

Then the Court took an interesting turn. It claimed that it was restricting itself to "examining whether any of the constitutionally protected human rights and fundamental freedoms [had] been violated by the courts when applying article 143" of the Labor Law.[254] It found that such rights had been violated. Though it claimed that it was limiting itself to the application of the law in this case, the Court warned against applying article 143 in a general manner to all wartime-laid-off employees. Also, the Court specifically referenced the employer's role in continuing the discrimination when it refused to reinstate S.B., thereby diverging from the Court's jurisprudence set forth in case U-26/00 discussed above. The Court recognized the economic hardships suffered by many companies in the country and the unfeasibility of reinstating all employees. It stated, however, that this could not give way to automatic terminations of employment contracts at the discretion of employers and without stated reasons. Further, it tied in the Court by establishing that wanton application of article 143 also denied groups of people due process guarantees in the determination of their civil rights.[255]

Thus, in one decision the Constitutional Court excavated several levels of discriminatory acts heretofore buried. First, it drew attention to the myriad ways discrimination operates in society, recognizing the insidious effects that seemingly neutral laws can have on groups of people. Second, it placed the individual complaint squarely in its "groupness" where it belongs and did not ignore the reality of ethnic cleansing that initially instigated the continuing violation. And finally, the Court made the connection between employers' discrimination and its continuation by the courts. It is unclear what the full impact of this decision will be. On some level, it appears to set down a rule that requires a more stringent analysis of what the term "laid-off employee" means, and it requires courts to look more carefully at that category of persons before sending a case to the Cantonal Commission. On the other hand, it does not lay down specific guidelines as to how that determination should be made. It is likely that courts have simply continued to refer cases to the Cantonal Commission.

The above cases illustrate how abstractions, such as whether one is treated differently or the same as another "comparable" group, may lead to superficial analysis and prevent the courts from establishing the sort of

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254. *Id.* para. 66.
255. *Id.* para. 67.

substantive equality required to reintegrate BiH. Perhaps recognizing this fact and due to persistence on the part of judges of the Constitutional Court with a different view, the Constitutional Court and the Chamber ultimately began to take a somewhat more substantive approach, although continuing to use the formal equality structure of analysis.

VI. CONSTITUENT PEOPLES CASE: TOWARD A SUBSTANTIVE THEORY OF EQUALITY

Any discussion of equality in BiH after the war would be incomplete without exploring a landmark decision handed down by the Constitutional Court in July of 2000. In the "Constituent Peoples" decision, the Constitutional Court required the harmonization of the constitutions of Republika Srpska and the Federation with that of the Constitution of BiH. In this decision the Court concluded that certain provisions of the Republika Srpska Constitution and the Federation Constitution, which granted special rights to Serbs in Republika Srpska and to the Bosniaks and Croats in the Federation, were unconstitutional.[256]

This decision is one of the most important contributions the Constitutional Court has made to a theory of equality that responds to institutionalized inequality existing in BiH as a result of the ethnic cleansing and genocide. There are three important legacies of this decision. First, the Court resolved (in theory at least) the fundamental contradiction in the GFAP, which combined the recognition of ethnically defined units with a commitment to the return of refugees and demanded equal political participation. Second, the Court recognized the need to protect not only individual rights, but also group rights in a country where there is strong political representation of groups and weak protection of group rights. Third, the Court set forth a substantive theory of equality explicitly recognizing structural inequalities in BiH society. This theory has had at least some impact on the jurisprudence of the Constitutional Court.[257]

The preamble to the State Constitution invokes and enumerates both the "constituent" nations (including "Others") and individual citizens as the sources of this political act: "Bosniacs, Croats, and Serbs, as

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256. Constitutional Court of Bosnia and Herzegovina, Constituent Peoples Case, Case U-5/98, Partial Decision (July 1, 2000).

257. Case U-38/02; *see also* Constitutional Court of Bosnia and Herzegovina, Case U-44/01 (Sept. 22, 2004); Constitutional Court of Bosnia and Herzegovina, Case U-2/04 (May 28, 2004); Constitutional Court of Bosnia and Herzegovina, Case U-8/04 (June 25, 2004) (ruling on "vital national interests" blocking the parliamentary legislative process).

constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows . . . ."[258] Not surprisingly, the Entities of BiH seized upon the ethnic basis for power distribution found in the State Constitution to entrench themselves as homogenous mini-states by directly linking ethnicity to citizenship and political rights within the Entities. Indeed, putting aside the name of the Entity itself, *Republika Srpska*, the Republika Srpska Constitution begins with an unequivocal invocation of its ethnic origin and character. The preamble of the constitution refers to the "inalienable and untransferable right of the Serb people to self-determination," to the "centuries-long struggle of the Serb people for freedom and State independence," and to the "will and determination of the Serb people from Republika Srpska to link its State completely and tightly with other States of the Serb people."[259] The constitution also specifies Serbian as the official language and elevates the Orthodox Church to the official status of Entity church.[260]

The Federation constitution provides for the cantonization of this Entity. All but two of the ten administrative units are either predominately Croat or predominately Bosniak and controlled by their major ethnic group. The Federation government also allocates representation according to its constituent groups, Bosniaks, Croats, and "Others." The Federation has a House of Peoples, consisting of thirty Bosniaks, thirty Croats, and an unspecified number of "Other Delegates." Likewise, the Federation presidency mirrors the national presidency, and there is a bipartite presidency with one Croat and one Bosniak.

In 1998, Alija Izetbegović, the then Bosniak chair of the State presidency and leader of the SDA, brought a case before the Constitutional Court arguing that fourteen provisions of the Republika Srpska Constitution and five provisions of the Federation Constitution violated the BiH Constitution. Among these, the most far-reaching and potentially explosive challenge related to the status of BiH's constituent peoples in both Entity constitutions. The case before the Constitutional Court alleged that parts of the Federation Constitution denied equality to the Serbs, while parts of the Republika Srpska Constitution discriminated against Bosniaks and Croats. After much delay, the Constitutional Court ruled on the constituent people's issues in July 2000. This was the third

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258. CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA pmbl.

259. CONSTITUTION OF THE REPUBLIC OF SRPSKA pmbl. as amended by Amendments XXVI and LIV (2001).

260. *Id.* arts. 7, 28.

of four opinions striking down institutionalized discrimination in the Entities. A five-to-four majority comprising the two Bosniak judges and the three international judges struck down institutionalized discrimination, while the Serb and Croat judges dissented.[261]

In its decision, the Constitutional Court took a bold step toward establishing a theory of equality in the context of postethnic conflict nation-building by recognizing the rights of the individual as well as the groups to which those individuals belong. The crux of the matter before the Court was whether the list of Bosnia's constituent peoples (Serbs, Croats, and Bosniaks) in the preamble to the State Constitution meant that all three nations (and the "Others") were "constituent" throughout BiH, or whether they were "equal" only at the level of the State.[262]

Essentially, the Constitutional Court held that the Constitution requires that all ethnic groups—Bosniaks, Croats, Serbs and "Others" are "constituent peoples," and equal across the entire territory of BiH, regardless of where they reside. In so doing, the Court's decision effectively curtailed the practice of assigning political power and representation across territorial/ethnic lines only. The answer to this question had far-reaching implications. If the constituent peoples are equal throughout BiH, then the political structures which gave preference to the Serbs in Republika Srpska and to the Bosniaks and Croats in the Federation would need to be amended in order to be consistent with the State Constitution.

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261. *See generally* Constituent Peoples Case, Case U-5/98, Partial Decision (Jan. 3, 2000); *id.* Partial Decision (Feb. 19, 2000); *id.* Partial Decision (July 1, 2000); *id.* Partial Decision (Aug. 19, 2000).

262. In the SFRY—and in the understanding today—to be a "constituent people" (*narod*) amounted essentially to being a "state creating" people and not to being a national minority (*narodnost*, literally nationality). Dayton jettisoned the terms *narod* and *narodnost*, employing instead the term "constituent people." But it has the same meaning. It should be mentioned that in 1974, the BiH Constitution listed the Muslims, Serbs, and Croats, and members of other nations (*naroda*) and nationalities (*narodnosti*) who lived in BiH as Bosnia's people. CONSTITUTION OF BOSNIA AND HERZEGOVINA pt. I, art. I (1974). The salience of these distinctions and the popular fear of being relegated to "minority status" were heightened during the war. Milan Lukic (subsequently indicted for war crimes by the ICTY) told BBC journalist Alan Little that during the expulsion of Bosniaks from Visegrad in 1992, the aim was to drive the non-Serb population down below five percent, because a people who fell below five percent could not be "*narod*" or "constituent" according to Yugoslav law. INT'L CRISIS GROUP, EUROPE REPORT NO. 128, IMPLEMENTING EQUALITY: THE "CONSTITUENT PEOPLES" DECISION IN BOSNIA & HERZEGOVINA 2 n. 5 (Apr. 16, 2002), http://www.crisisgroup.org/home/index.cfm?=1&id=1498.

A. Collective Equality

The contested Article 1 of the Republika Srpska Constitution read: "Republika Srpska shall be the State of the Serb people and of all its citizens."[263] The challenged provision of the Federation of BiH Constitution read: "Bosniacs and Croats as constituent peoples together with others, and the citizens of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, transform the internal structure."[264] In a lengthy discussion, the Constitutional Court found that Article 1 of the Republika Srpska Constitution, in connection with other provisions such as the rules on the official language and Article 28 which declares the Serbian Orthodox Church as the official Entity Church, all of which serve to give the Serb people a dominant position over the collective rights of the Bosniaks and Croats, violated the BiH Constitution because they enshrined inequality among groups and discrimination against individuals based on ethnicity. The Court established that the BiH Constitution requires "collective equality" among the constituent groups of BiH.[265] In so doing, it wisely balanced the strong group identities found among citizens in BiH with notions of equality, interpreting the BiH Constitution as one that respects collective identity provided that it does not morph into collective domination by any one group in any part of BiH.

The Court looked to what it called the "constitutional doctrine of democratic states" to frame its analysis.[266] According to this doctrine:

> [T]he Court must be guided by the values and principles essential to a free and democratic society which embodies, *inter alia*, respect for the inherent dignity of the human person, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political

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263. CONSTITUTION OF THE REPUBLIC OF SRPSKA, art. 1 (2001).

264. The text of Article 1 of the Republika Srpska Constitution reads: "Republika Srpska shall be the State of Serb people and of all its citizens." *Id.* The text of Article 1 of the BiH Constitution originally read:

> Bosniacs and Croats as constituent peoples, along with Others, and citizens of Bosnia and Herzegovina from the territories of the Federation of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform the internal structure of the Federation territories, . . . defined by Annex II to the General Framework Agreement, so that the Federation of Bosnia and Herzegovina is now composed of federal units with equal rights and responsibilities.

CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA art. 1 n.4 (2003), *available at* http://ohr.int/ohr-dept/legal/oth-legist/doc/fbih-constitution.doc (noting that the quoted language was amended by AM. XXVIII).

265. *Constituent Peoples Case*, Case U-5/98, para. 59 (July 1, 2000).

266. *Id.* para. 56.

> institutions which enhance the participation of individuals and groups in society. . . . The question thus raised, in terms of constitutional law and doctrine, is what concept of a multi-ethnic state is pursued by the Constitution of BiH in the context of the entire GFAP and, in particular, whether the Dayton Agreement with its territorial delimitation through the establishment of two Entities also recognized a territorial separation of the constituent peoples as argued by [Republika Srpska]?[267]

Having thus framed the issue, the Constitutional Court employed a "functional interpretation," reading the BiH Constitution in the light of the entire GFAP of which the BiH Constitution is a part. Referring to annex VII of the Dayton Agreement, which regulates the return of displaced persons to their prewar homes, and the Preamble of the BiH Constitution, which pronounces that "peaceful relations" are best produced in a "pluralist society," it found "that it is an overall objective of the Dayton Peace Agreement . . . to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination."[268]

The Court then concluded that "under the circumstances of a multi-ethnic state[,] representation and participation in governmental structures—not only as a right of individuals belonging to certain ethnic groups, but also of ethnic groups as such in terms of collective rights—does not violate the underlying assumptions of a democratic state."[269] However, the accommodation of ethnic group rights prohibits any form of ethnic segregation or domination. Rather, the extent of collective ethnic rights are permissible only to the limit that institutionalization of such group rights is based upon the notion of equity among all groups. "[T]he constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation."[270]

The Court, however, limited these "special" group rights to representation and participation in the institutions of BiH. The Court explicitly stated that these "special collective rights" cannot be applied to other institutions and procedures. To the extent that these rights conflict with individual rights, they are legitimized only by their constitutional

267. *Id.* paras. 53, 55.
268. *Id.* para. 73.
269. *Id.* para. 56.
270. *Id.* at 60.

rank and must be narrowly construed.[271] This is a very important point. As will be recalled in the *Zahirović* case decided by the Chamber,[272] the Respondent Party argued that it was not discriminating against members of the minority group, because in making employment decisions it was attempting to dole out jobs in an "equitable" manner based upon the current numerical calculation of individuals from each ethnicity. In this one sentence, the Constitutional Court set forth that such procedures violate the BiH Constitution.

Showing significant sensitivity to the historical and political reality of BiH, the Court legitimized positive, collective group rights. Further, it clarified to those attempting to utilize the notion of collective group rights as a weapon to subjugate other groups that "[e]ven if the constituent peoples are, in actual fact, in a majority or minority position in the Entities, the express recognition of Bosniacs, Croats, and Serbs as constituent peoples by the Constitution of BiH can only mean that none of them is constitutionally recognized as a majority or, in other words, that they enjoy equality as groups."[273]

The Court recognized that a society with collective goals can be liberal and democratic. This can only be maintained, however, if it is also capable of respecting diversity and adequately safeguarding fundamental, individual rights. In other words, the Court recognized collective rights but only to the extent that such collective rights do not infringe upon individual rights across the entire territory of BiH.

This was a bold and necessary move, given the individual rights bias found in liberal democracies, which champions individual rights as the best, if not the only, mediator of law and equality.[274] Liberalism strongly advocates that moral principles and/or "rights" inhere in the individual, not the collective, and that recognition of groups as the owners of rights flouts cherished principles and may even contribute to,

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271. *Id.* para. 68.

272. *See infra* Part V.B.1 (discussing the *Zahirović* case).

273. *Constituent Peoples Case*, Case U-5/98, para. 59.

274. Accommodating collective rights in this context is to some an especially bitter pill to swallow. What has come through loud and clear is that it is axiomatic for the Republika Srpska government that the preservation of the culture of the "Serb people" is a good that must be preserved. The problem with their claim and where it differs from similar calls by groups such as the Quebequois in Canada, is that they have shown no respect for other cultures. This is not simply a question of how liberalism should respect illiberal cultures; rather, they have shown that inherent to their notion of Serb survival is Serb domination at all costs. It is within this context that the values implicit in individual or group rights must be balanced. This is the problem. This is where the international community is justified in stepping in, particularly with the principle that multicultural societies keep the peace. For a discussion of the challenges of multiculturalism in divided societies, see CHARLES TAYLOR, MULTICULTURALISM AND THE POLITICS OF RECOGNITION, AN ESSAY BY CHARLES TAYLOR 59 (1992).

rather than prevent, ethnic conflict.[275] There must, however, be a place in the conception of the State where intermediate groups play a role and have a voice. This is especially necessary in societies that have for a long time essentially entered into a social contract between "constituent" groups and the State, not simply between the individual and the State.

In order to understand how best to promote equality in societies with the collective experiences of ethnic cleansing and genocide (which only solidifies group consciousness), it is necessary to appreciate that group identity is dialogical; that it depends on social interaction, including legal and political interaction; and that it is located in culture and history.[276] This is particularly salient in Bosnia, where geographical location and historical development have made it the crossroads of many cultures, religions, and empires.

B. *Individual Equality*

The "constituent peoples" decision is most often analyzed and praised for the balancing act it performed in using the BiH Constitution to soften the hard edges of consociationalism and for making it clear that collective rights must be administered without prejudice.[277] Equally as important is the contextual and substantive approach it took to antidiscrimination laws in BiH. The Court recognized both the need to square ethnic entities with the right of minority return and recognized individuals sua individuals and in relation to their group identity.

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275. *See e.g.*, Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J. L. REFORM 751, 751-57 (1992) (arguing that communitarian theory does not respond to the "real world" where community *should be*, and is, inherently defined globally in a way that transcends national and ethnic boundaries); Fernando R. Tesón, *Ethnicity, Human Rights, and Self-Determination*, *in* INTERNATIONAL LAW AND ETHNIC CONFLICT 86 (David Wippman ed., 1998) (arguing that groups defined by traits such as race, language, religion, or shared history should not enjoy prerogatives "merely by virtue of the fact that they possess some common ethnic trait"); *cf.* BURG & SHOUP, *supra* note 19, at 11 (recognizing that an abstract devotion to liberal principles cannot simply lead to condemnation of nationalist states).

276. Victor Segesvary, *Group Rights: The Definition of Group Rights in the Contemporary Legal Debate on Socio-cultural Analysis*, 3 INT'L J. GROUP RTS. 89, 92 (1995).

277. Implementation of the decision resulted in amendments to both the Republika Srpska and Federation Constitutions imposed by the High Representative in its decision of April 19, 2002, *available at* http://www.ohr.int/print/?content_id=7474 and http://www.ohr.int/print/?content_id=7475. Unlike other decisions imposed by the High Representative, this decision was based on an earlier agreement by the key political parties. This gives at least some legitimacy and ownership to the constitutional changes. Essentially, the amendments put Serbs on par with Croats and Bosniaks in the Federation and established greater parity between Bosniaks, Croats, and Serbs in the Republika Srpska. Some argue these amendments created an even more rigid system of proportional representation, further imperiling the individual rights nondiscrimination aspect of the Court's decision.

The Constitutional Court used strong language to deny those who wanted to interpret the GFAP in a manner that rejects integration. The Court revealed that the substantial principles doing the work in the political and moral debate over equality in BiH concern desegregation, undoing the injustice pursued during the war, and ultimately building a pluralist and integrated society. The Court pronounced:

> It is beyond doubt that the Federation of Bosnia and Herzegovina and Republika Srpska were—in the words of the Dayton Agreement on Implementing the Federation, signed in Dayton on 10 November 1995—recognized as "constituent Entities" of Bosnia and Herzegovina by the GFAP . . . . But this recognition does not give them *carte blanche*! Hence, despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimacy for ethnic domination, national homogenisation, or a right to uphold the effects of ethnic cleansing.[278]

The Court did not have to reach the issue of individual rights. Resolving the issue of collective rights arguably would have addressed the claims made by the applicant. To its credit it chose to specifically address the claim under Article II(4) of the Constitution. In this way, the Court responded to the cynical argument of the Republika Srpska representatives, who, during the proceedings, championed the virtues of a citizen-based democracy when faced with the demand to assure equal collective rights to non-Serbs in the Republika Srpska by examining the impact of the challenged Republika Srpska constitutional provisions on the individual rights of non-Serbs.

The Republika Srpska representative attempted to establish that even if the Serb language is deemed the official language, and the Serbian Orthodox Church is the Entity Church (thereby creating a constitutional formula of identification of Serb "state," people, and church), there is no inequality because equality among individuals is guaranteed by a number of provisions in the Republika Srpska Constitution which prohibit discrimination. By utilizing this argument to promote Serb hegemony, the Republika Srpska representative displayed exactly how and why rules of formal equality are often not the best mediator and stymie the law's ability to promote equality in fact in BiH. In the Republika Srpska Constitution, apart from the Preamble, no constitutional provision established any privilege or advantage in favor of the Serb majority. Nevertheless, this seemingly neutral and citizen-based

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278. *Constituent Peoples Case*, Case U-5/98, para. 61.

constitution and legislation gave rise in practice to massive, systematic discrimination against non-Serbs.[279]

To respond to this convoluted argument, the Constitutional Court was forced to confront the dual nature of the GFAP and could not withdraw into the world of formal equality to reach its conclusion. The Republika Srpska representative's manipulation of liberal democracy's reliance on individual rights pushed the Court to confront the highly individualist approach of formal equality in a society where group identity dominates. The Republika Srpska arguments display a clever manipulation of liberal democratic principles deployed to protect national homogeny under the banner of the liberal love for individual rights. Even adversaries of extending equal rights to non-Serbs in the Republika Srpska found some pretext consistent with universalism.

The Court discussed specifically whether Article 1 of the Republika Srpska Constitution and the Preamble of the BiH Constitution result in discrimination in the enjoyment of individual rights. In other words, does the recognition of the Serb people as the constituent people of the Republika Srpska and the Bosniak and Croats as the constituent peoples of the Federation deprive individuals of other ethnic groups their guaranteed constitutional rights? In particular, does it discriminate against refugees and displaced peoples?

Again, utilizing a European Convention article 14 approach, the Court looked at all of the international instruments in Annex I to the Constitution, which shall be secured without discrimination, as well as the special protections provided in the BiH Constitution to refugees and displaced persons to return freely to their homes of origin. It then went on to state that the nondiscrimination provision can be violated when, among other things, "the effects of past *de jure* discrimination are upheld by respective public authorities at all state levels, not only by their actions but also through their inaction."[280] In this way, the nondiscrimination provision, in the Court's opinion, is not restricted to purely negative individual rights not to be discriminated against, but also includes positive obligations to take action. This is highlighted by the obligations of the entities to create conditions conducive to return.[281]

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279. J.C. Scholsem, Venice Comm'n, *Comments to the Implementation of Decision U 5/98 of the Constitutional Court of Bosnia and Herzegovina by the Amendments to the Constitution of the Republika Srpska*, Doc. No. CDL(2002)127, at 2-3 (Oct. 1, 2002), *available at* http//www.venice.coe.int/docs/2002/CDL(2002)127-e.pdf.

280. *Constituent Peoples Case*, Case U-5/98, para. 79(d).

281. GFAP, *supra* note 8, annex 7, art II(1).

Thereafter, the Court looked to the reality in Republika Srpska and the Federation to establish whether the impugned Articles in each constitution indicate that past *de jure* discrimination, in particular ethnic cleansing, was upheld by the authorities and if the provisions provided the constitutional basis for discriminatory legislation. Comparing population figures before and after the war and linking those figures with the Serb-dominated institutional structures of Republika Srpska authorities, the Court found that "this part of the provision of Article 1 with the wording 'The Republika Srpska is the state of the Serb people' must be taken verbatim and provides the necessary link with a purposeful discriminatory practice of the authorities with the effect of upholding the results of past ethnic cleansing."[282] With respect to the Federation, the Court found that designation of Bosniaks and Croats as constituent peoples in fact has discriminatory effects.

The Court gave a robust interpretation to antidiscrimination law in BiH in this case, one that recognized positive obligations on the part of the authorities to promote return and to undo ethnic cleansing. Absent fulfillment of these obligations, the Entity or the State runs afoul of its constitutionally enshrined obligations. It is unfortunate that the reasoning of this decision was not appreciated and imported to other issues of equality and nondiscrimination that came before the Court until at least 2004—almost ten years after the end of the war. Nonetheless, toward the end of 2004 the impact of this reasoning could be seen in subsequent cases heard by the Constitutional Court. The evidentiary basis upon which the Court found a violation of the nondiscrimination clause, referencing particularly high levels of ethnic homogenization, requires reforms that encompass those municipal and cantonal acts and laws that have served discriminatory ends—heretofore breaking the discrimination chain.

VII. CONCLUSION

Deeply concerned with the injustice perpetuated during the war, the framers of the GFAP gave the hybrid, quasi-international courts, the Human Rights Chamber and the Constitutional Court, extraordinary tools to eliminate the perpetuation of past discrimination. An application of the Chamber's jurisdiction under the "apparent discrimination" clause of Article II(2)(b) of Annex 6 and the Constitutional Court's jurisdiction under Article II(4) of Annex 4 gave these courts an opportunity to go beyond the formal equality standards set out under article 14 of the

282. *Constituent Peoples Case*, Case U-5/98, para. 95.

European Convention. It appears from the review above that the Human Rights Chamber, which was the foremost human rights court in its time, went some way toward utilizing these extraordinary antidiscrimination tools, but never really stepped out of the formal equality box.

The Preamble of the BiH Constitution pronounces that peaceful relations are best produced in a pluralist society. To recreate a pluralist society after genocide and ethnic cleansing in BiH the GFAP's overall objective has been to reestablish the multiethnic society that had existed before the war. To do this, the GFAP emphasized the right to return free from discrimination. To make return sustainable minority returnees must be guaranteed freedom from discrimination.

It is striking, therefore, that the Chamber missed the opportunity from its very beginnings to implement the reintegrative goal of the GFAP by rooting out instances of the perpetuation of discrimination. The same applies to the Constitutional Court, with the exception of the Constituent Peoples decision, which has had somewhat of an influence on subsequent jurisprudence. By no means, however, has this decision, which clearly set forth a framework for substantive equality by recognizing indirect discrimination, disparate impact, and positive obligations, been wholeheartedly adopted.

Reflecting upon the jurisprudence of these courts, several normative principles surface with respect to the goals of antidiscrimination laws in postconflict BiH. In fact, it becomes apparent that similar normative principles apply with equal force in other countries undergoing transition after (or during) ethnic conflict, genocide, or ethnic cleansing (such as Iraq, Afghanistan, Kosovo, and Sudan, to name only a few).[283] The international community is quite engaged in aiding these societies in their transition from ethnic strife to "liberal democracies" and should be guided by prior experience.

From policy, advocacy, and juridical perspectives, several mediating principles for evaluating equality appear when we seek to answer the question, "what does equality mean in a society torn apart by ethnic cleansing and/or genocide?" The mediating principles are found in liberalism's insistence on pluralism and multiculturalism as the basis of democracy. When crafting claims of discrimination before regional or international courts or assisting in drafting new antidiscrimination legislation in societies transitioning from ethnic strife, several concrete principles should drive the articulated legal standards.

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283. Thom Shanker, *Divided They Stand, but on Graves*, N.Y. TIMES, Aug. 19, 2007, at WK1 (analogizing the GFAP structure of BiH with a potential solution to Iraq's current sectarian violence).

First, the legal standard articulating a vision of equality should apprehend that discrimination in countries transitioning from ethnic strife is based upon historical injury and ethnic domination. Similarly, the legal standard should recognize that ethnic conflict created asymmetrical situations, and it should not strain to find symmetry. Second, the law should push for recognition of the fact that actions that perpetuate the consequences of past discriminatory acts suffer the same infirmity as actions that simply perpetuate the past discriminatory decisions themselves. Third, it should stress the positive obligation on the part of the government to dismantle discriminatory realities for which it is responsible, and provide conditions for return, keeping in mind the way the perennial violations continually work new harms and injure new victims. Fourth, depending on the circumstances, the law may need to recognize collective rights, but only to the extent that such collective rights do not infringe upon individual rights. This is especially necessary for societies that historically have entered into a social contract between groups and the State, rather than, or in addition to, individuals and the State. Finally, it should seek to establish a leveling principle to create remedies that result in the least harm to innocent individuals.

In summary, lawyers and legislators should argue for, and courts should apply, a substantive, context-sensitive test that would push legal institutions such as the European Court of Human Rights, the Constitutional Court of BiH, the Constitutional Court of Kosovo, and others to insist that laws and policies must promote equality in order to be found constitutional.[284] This would achieve the goals that equality is meant to achieve in deeply divided societies recovering from conflict. As in many countries currently recovering from ethnic violence, inequality should be understood as a pervasive social fact. Law should be interpreted with an aim to neutralizing that fact. Only through this approach can the hopes and aspirations of equality start to be realized for Bosnian citizens and other individuals living in societies with deep ethnic cleavages.

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284. MACKINNON, *supra* note 92, at 25 (discussing the implications of the Canadian Supreme Court's decision in *Andrews v. Law Society of British Columbia*).