TOWARD A SUBSTANTIVE THEORY OF EQUALITY IN DAYTON’S BOSNIA: IMPLICATIONS FOR NATIONS IN TRANSITION

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ABSTRACT

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 legitimates its common legal rights and duties through its legal institutions, which define the values and character of the nation. Equality and anti-discrimination jurisprudence is particularly important at the delicate moment of transition from genocide, because it grounds within society the normative shift in principles underlying and legitimating the cultural understanding and relationship to equality. Specifically, this Article addresses the question: what can equality mean in a post-genocidal environment that rests on ethnic inequality or domination? An analysis of the anti-discrimination 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 anti-discrimination 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 Bosnian context or in the context of other countries recovering ethnic turmoil. Only a substantive approach to equality, which addresses historical inequality, will stimulate a jurisprudence that heals the lasting and long term effects of genocide. A robust development of substantive anti-discrimination jurisprudence, consciously developed to overcome the continuation of institutionalized social conflict, will ultimately fulfill equalities promise as mandated by the GFAP. Reflecting on the Bosnian experience, certain legal principles concerning equality and anti-discrimination are revealed that should be applied to countries recovering from mass atrocities based upon ethnic identity or genocide in today’s world. The international community is actively engaged in rebuilding the legal systems in countries with deep ethnic divides, for example, Iraq, Afghanistan, Kosovo and Sudan. Like in BiH, nationally ingrained inequality exist and must be defeated in all post conflict communities to create an environment where different nations can exist under one state banner.

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I. **BOSNIAN INDEPENDENCE AND DESCENT INTO WAR**
   A. The Collapse of the Former Socialist Federal Republic of Yugoslavia’s Impact on Bosnia and Herzegovina
   B. Ethnic Composition in Bosnia in 1991, Diametrically Opposed Views of the State, War

II. **THE DAYTON PROTECTORATE**
   A. Human Rights under the GFAP
   B. Current Ethnic Composition

III. **QUASI-INTERNATIONAL COURTS SET UP UNDER THE DAYTON AGREEMENT**
   A. Structures
      1. Constitutional Court
      2. Human Rights Chamber

IV. **THE JURISPRUDENCE OF EQUALITY**
   A. Property Issues
      1. Discrimination: The Central Issue in D.M. v. The Federation
   B. Employment Issues
      1. Application of Wartime Decrees
      2. Application of Post War Law

V. **CONSTITUENT PEOPLES CASE: TOWARD A SUBSTANTIVE THEORY OF EQUALITY**
   A. Collective Equality
   B. Individual Equality

VI. **CONCLUSION**
INTRODUCTION

I and the public know
What all schoolchildren learn,
Those to whom evil is done
Do evil in return.

--W.H. Auden

For Bosnia and Herzegovina (hereinafter “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 1992-1995:\(^3\) racism, inequality, and discrimination. One necessary step in this process is to restore the value of equality among groups and between individuals, whose mistrust -- if not 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. When brutal crimes against human dignity have been perpetrated ostensibly based upon nothing more than one's ethnic identity of what use is the notion of equality?

Restoring the value of equality in any post genocidal environment is an arduous task that requires a multifaceted approach. Paramount, though not singular, in this struggle for equality is the role

\(^1\) W.H. AUDEN, September 1 1939 – in ANOTHER TIME (1940).

\(^2\) Apparently, this term 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 UN Security Council and by other UN institutions. Tadeusz Mazowiecki, Special Rapporteur for the Former Yugoslavia of the Human Rights Commission defines ethnic cleansing in his report of November 17, 1992 as: “the elimination by the ethnic group exerting control over a given territory of members of other ethnic groups.” Special Rapporteur of the Commission on Human Rights, Report to the General Assembly/Security Council, U.N. Doc. A/47/666, S/24809 (Nov. 17, 1992).

of the law. A state legitimates common legal rights and duties through its legal institutions, which define the values and character of the nation. Equality and anti-discrimination jurisprudence is particularly important at the delicate moment of transition from genocide, because it grounds within society the normative shift in principles underlying and legitimating the cultural understanding and relationship to equality. Law alone cannot eliminate racism and ethnic hatred in its many forms, but efforts to promote equality cannot succeed without the law.

Legal scholars have practically ignored civil justice as a component of the transition from war to peace. In fact, one can argue that “transitional justice” has been almost completely appropriated by theories of criminal justice. A central aspect of justice, however, is equality. Pursuing justice as part of the transition from war to peace, especially a war fueled in large part by ethnic tension, therefore,

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4 To build tolerance and equality, education, civil society development, and electoral reform play a crucial role as well. A monumental challenge requires a monumental, holistic response.

5 In proposing a new protocol, ECRI (European Commission against Racism and Intolerance) recognized that law alone cannot eliminate racism in its many forms...but stressed that efforts to promote racial justice cannot succeed without the law. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, ETS No. 177 (Nov. 4, 2000), available at http://www.conventions.coe.int/Treaty/EN/Reports/Html/177.htm.

6 Punishment and trials seem to have captured the public’s imagination when it comes to seeking justice after major human rights abuses. History has shaped this perception. The lasting symbols of the English and French Revolutions are the trials of King Charles I and Louis XVI. A half a century later, the enduring legacy of the defeat of the Nazis in W.W.II remains the Nuremberg trials. More recently, Slobodan Milosevic stood trial in The Hague, Augusto Pinochet was extradited back to Chile to face trial, and a permanent international criminal court has been established and is investigating alleged war crimes in Darfur, Sudan among others of the most serious international crimes. Criminal trials with their multiple goals of punishment, criminal justice, recording history (or setting the record straight) and seeking reconciliation and healing, dominate our understanding of what it means to heal the wounds of ethnic cleansing and genocide. See also Laurel E. Fletcher and Harvey M. Weinstein, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, 24 HUMAN RIGHTS QUARTERLY 573 (2002) (exploring the limitations of criminal justice as the centerpiece of social repair after mass violence.)
requires the pursuit of equality, and an understanding of how the law operates in relation to equality.\(^7\)

To begin to fill this 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 and the Annexes thereto (together hereinafter referred to as the “GFAP”),\(^8\) the Constitutional Court and the Human Rights Chamber, have attempted to shape and redefine the value of equality in post-conflict BiH. Specifically, it addresses the question: what can equality mean in a post-genocidal environment, one 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.”\(^9\) Equality itself is a deeply contested notion, and several conceptions of equality present themselves as possible candidates to be the basis for anti-discrimination law.\(^10\) Moreover, as Jeremy Waldron notes, equality has the extra 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 with competing visions of the state. That heritage has created confusion of the intended nature of equality in BiH. While dividing the polity along ethnic lines, the GFAP also demands the reversal of ethnic cleansing in the establishment of BiH as a pluralistic, liberal, democratic society.

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\(^7\) JOHN RAWLS, A THEORY OF JUSTICE, 505-512 (1971).
\(^11\) Id.
The negotiators at Dayton recognized that ethnic cleansing and genocide were occurring during the war and capitulated to the ethnic cleanser’s demands by dividing the country in two ethnic enclaves. Cognizance of the brutal ethnic cleansing likewise caused the negotiators at Dayton to demand both a reversal of the 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 below the surface of equality rhetoric to the substantial claims that are doing the real work in the moral and political debate. In BiH, the courts should be guided in their anti-discrimination analysis on the strand of the GFAP that demands reintegration and the reversal of ethnic cleansing, actively promoting, equality, in fact, and encouraging return.13 These are the sets of values underlying the equality principle in BiH.

A review of the Constitutional Court’s and the Chamber’s anti-discrimination jurisprudence reveals that, to the extent a normative,  

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12 Of course this conclusion 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. 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, it will be a state born out of ethnic cleansing and genocide, and the ‘civilized world’ cannot accept that. Moreover, the aim of reconstructing a multi-ethnic Bosnia has always been seen as key to preserving peace in the region. A multi-ethnic 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 (2000). 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 Now Some Good News, Editorial. N.Y. TIMES, Aug. 16 2006. Nevertheless, the Courts are guided by the strictures of the GFAP.

principled approach can be discerned each court has taken a formal approach to equality. 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. 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 that in a post-genocidal environment, where one’s ethnicity predetermined the most atrocious violations against human life. This Article argues that although the courts have been following the most accepted, formal model of anti-discrimination 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 “reversing ethnic cleansing” 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 re-integration and remedies the injustices of ethnic cleansing and genocide. Only a robust development of anti-discrimination jurisprudence, consciously developed to overcome the continuation of institutionalized social conflict, will ultimately fulfill equality’s promise of healing the lasting and long-term effects of genocide in BiH.14

Part I provides a brief background to the war which lasted from 1992 until the end of 1995. Part II 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 both found in the GFAP.

Part III sets forth the structures of the Human Rights Chamber and the Constitutional Court.

Part IV explores the anti-discrimination jurisprudence of the Constitutional Court and the Human Rights Chamber to distill a theory of equality and to analyze the impact these courts have had in promoting equality. Specifically, this section looks at how these legal institutions ensure the right to return and sustainable return. The right to return literally means the right of persons who were forcibly removed from their homes to return to their pre-war homes. Though this refers to property rights on a basic level, on a more fundamental level, it addresses issues such as reintegration, and re-establishing equality in society.

Sustainable return, as used in this Article, refers to a person's ability once returned to live her life free of fear of ethnically motivated crimes, discrimination in employment, religious practice, and the political process. This Article focuses specifically on discrimination with respect to property rights and employment rights as two important aspects of reversing inequality. These rights are fundamental, essential to a person's well-being, for they provide food and shelter.

Part IV argues that by following a formal model of equality the Courts missed important opportunities to pursue the GFAP’s mandated goals of reversing ethnic cleansing. Only a substantive approach to equality, consciously developed to overcome the continuation of institutionalized social conflict, will ultimately fulfill equalities promise of healing the lasting and long-term effects of genocide and ethnic cleansing.

Part V examines the Constitutional Court’s landmark decision concerning 'constituent peoples' because this decision directly
confronts the tension between collective and individual identity structures established by the GFAP in post-war BiH and illustrates a substantive, context-sensitive theory of equality. Unfortunately, this precedent has not been followed by the Court.

Part VI concludes by setting forth basic legal principles that should be considered when evaluating claims of discrimination arising in BiH and other countries mired in severe ethnic tensions. The BiH court’s anti-discrimination jurisprudence 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 engaged in rebuilding the legal systems in countries with deep ethnic divides, such as Iraq, Afghanistan, Kosovo and Sudan. Like in BiH, in the aftermath of ethnic conflict, nationally ingrained inequality exists and must be defeated in all post conflict communities to create an environment where different nations can exist under one state banner.

I. 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 multi-ethnic BiH, where no ethnic group formed a pure majority. The free elections held in 1990 in the other Yugoslav Republics had already shown a strong propensity for voting along ethnic lines. By the time BiH held its Republican elections in November 1990, it had witnessed the installation of nationalist, independent-minded governments in Slovenia and Croatia, the outbreak of conflict between the nationalist government in Zagreb and the Serb minority, 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.\textsuperscript{15} 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 without BiH, though this goal was often veiled in the rhetoric of feared marginalization and oppression as a minority in any Bosnian state.\textsuperscript{16}

By 1990, three nationalist parties (still strong today) were formed in BiH: The Party of Democratic Action (Stranka Demokratske Skicije – 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). The 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 “Yugoslave.”\textsuperscript{17} The results of the election placed the country – on the state, municipal, and opstine (county) level – respectively in the hands of the nationalists.\textsuperscript{18} The three separate


\textsuperscript{16} For example, utterly unsubstantiated, \textit{Narodna armija}, the Serbian military weekly, claimed that the Muslims intended to create an Islamic state extending over BiH, southern Serbia, Macedonia, Greece, Bulgaria, and Albania. CIGAR, \textit{supra} note 3, at 43.

\textsuperscript{17} Allocating political positions on the basis of ethnic identity is not new to BiH, but quite the contrary. 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 ‘Yugoslaves.’

\textsuperscript{18} The SDA took 86 of the 240 total seats (35.8 percent); the SDS took 72 of the seats (30 percent); and the HDZ took 44 of the seats (18.35 percent). The breakdown between the populations of Muslims, Serbs and Croats were respectively, 43.7, 31.3 and 17.5. Thus, the “democratic” election essentially was an ethnic census. See HAYDEN, \textit{supra} note 14, at 92.
nationalist parties partitioned the electorate in 1990, then the administration, which led to a war to partition the territory.

B. Ethnic Composition in Bosnia in 1991, Diametrically Opposed Views of the State, 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% were Croat. In about one third of the one-hundred opštine (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 Secretary of State Cyrus Vance called “leopard spots.”19 By 1991, forty percent of urban marriages were mixed, and over twenty percent of urban Bosnians declared themselves in censuses “Yugoslav” or “other” refusing to define themselves in ethnic terms. 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.20 Since the war, in almost all municipalities, the majority ethnic group constitutes between ninety-two and ninety-three percent of the population.21

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 domination22 -

19 BURG & SHOUP, supra note 15, at 117.
20 The author lived and worked in Sarajevo from 2000 until 2002, and from the apartment could see the Catholic Church, the Orthodox Church and the Mosque.
22 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.
had begun in 1991 to set up autonomous areas beyond the control of the Bosnian Republic’s government. This was followed by the creation of Croat autonomous areas. 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. 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.” 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 of 1992.

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?” 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; and it is safe to say that a significant proportion of the population did not “feel” like “Bosnian” citizens.

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23 CIGAR, supra note 3, at 43.
24 Id.
25 HAYDEN, supra note 14, at 97.
The moment independence was recognized, the Serb paramilitaries and Yugoslav National Army (hereinafter “JNA”) began shelling from outside Zvornik, 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 ostensibly in the name of ethnic domination.26 By the end of the purging, over half of Bosnia’s pre-war population of 4.4 million were forcibly displaced; between 100,000 and 250,000 Bosnians were killed; the dead or missing estimated at 279,000; nearly half of the country’s housing stock was damaged or destroyed; and most of its economic infrastructure was ruined.27 The genocidal war, which raged from 1992, when Bosnia declared its independence from the former Yugoslavia, formally ended on December 14, 1995 with the signing of the GFAP.

II. 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 (“RS”) comprising forty-nine percent of the “negotiable” territory and the Muslim-Croat Federation ("Federation") comprising fifty-one percent.28 The agreement minimally satisfied the Serbs because they

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26 For an account of the atrocities committed during the war, see Roy Gutman, A Witness to Genocide (1993).
27 Elizabeth M. Cousens, Making Peace Agreements Work: The Implementation and Enforcement of Peace Agreements Between Sovereigns and Intermediate Sovereigns, 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.
28 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
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 bloodletting by affecting a compromise between contending visions of Bosnia: the first, a single state upholding the rights of citizens from a mix of nationalities; the second an effective division into three ethno-nationally homogenous mini-states.  

By constituting the State on a theory of “constitutional nationalism,” where the constitutional and legal structure privileges members of one ethnic nation over other ethnic nations found in the state, the GFAP solidifies the same ethnicity-based politics that gave rise to the genocide, thereby conceding to the demands of the “ethnic cleansers.” Based on this 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 lines, the GFAP created a mass program of returning individuals to their pre-war homes, reintegration, and the institutionalization of human rights protections. Thus, the GFAP and the rule of law established by it reify ethnic-national identity

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29 Cousens, supra note 27, at 10; BURG & SHOUP, supra note 15, at 58.
30 HAYDEN, supra note 14, at 16.
(difference/segregation), while institutionalizing desegregation and human rights (integration/individual autonomy). In this way, it 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 multi-ethnic structure of the State of 1991, for the sake of “justice,” on the other hand. In other words, between claiming to resist ethnic cleansing while 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 a sham of return.

The current principles of ethnic division enshrined within the Constitution have been the subject of scrutiny for some time. In fact, on November 22, 2005, after months of negotiation, the leaders of the major political parties, (Croat, Serb and Bosniak) in BiH 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.”33 On April 26, 2006, approximately five

33 The declaration was signed by BiH Presidency member Sulejman Tihic, Dragan Cavic, Barisa Colak, Mladen Ivancic, Safet Halilovic, Zlatko Lagumdzija, Milorad
months before the general elections in October, the House of Representatives attempted to enact a series of Constitutional amendments. It was unable, however, to achieve the required two-thirds majority necessary to adopt the proposed package of constitutional amendments.\(^\text{34}\)

Modeled after the constitutional structure of the former SFRY, and responding to the now entrenched political identification of *ethnos as demos*,\(^\text{35}\) ethnic identity became central to the political structure of post-war BIH.\(^\text{36}\) Attempting to counter-balance the national divide created in the political arena, human rights became central to its legal system. These human (individual) rights guarantees were installed to provide protection for those living outside “their” respective Entity – *i.e.*, Muslims and Croats living in the RS and Serbs living in the Federation.\(^\text{37}\)

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 as an instrument for long-standing peace in the country. 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. 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.

A. Human Rights in the GFAP

On paper, BiH has one of the highest standards of human rights protection in the world. The Constitution declares that BiH and both Entities shall ensure the “highest level of internationally recognized human rights and fundamental freedoms.” It also managed to smuggle the European Convention on Human Rights (hereinafter “ECHR”) into the normative legal system of BiH and both Entities, in spite of the fact that BiH was not a member of the Counsel of Europe at the time. Article II (2) of the Constitution, which is entirely devoted to human rights, stipulates that “[t]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina (hereinafter “European Convention on Human Rights”). These shall have priority over all other rights.” Practically, this means that all of the human rights protections provided for in the

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39 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 RS Constitutions contain lengthy sections on protecting Human Rights.
40 GFAP, supra note 8, annex 4, art. II (1).
ECHR as well as in the additional protocols must be directly applied by all legislative, executive and judicial bodies of BiH and both Entities and have priority over all other laws, including the Constitution. Further, fifteen international and European human rights treaties are to be applied according to Annex I of the Constitution. The enjoyment of these rights shall be secured to all persons without discrimination according to Article II (4).

Moreover, article II of Annex 4 guarantees all refugees and displaced persons have the right to return freely to their home of origin and to have properly lost during the war restored to them. Annex 7 to the GFAP 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.” Moreover, paragraph 3 of Article 1 states that “[t]he Parties shall take all necessary steps to prevent activities within their territory which would hinder or impede the safe and voluntary return of refugees and displaced persons.” This requires, among other things, “the repeal of domestic legislation and administrative practices with discriminatory intent or effect.”

As a judicial enforcement mechanism, Annex 6 provides for the creation of a Human Rights Commission composed of an

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41 Nowak, supra note 39, at 97.
43 GFAP, supra note 8, annex 4, art. IX(5).
Ombudsperson and the Human Rights Chamber, which sat as an appellate court that heard human rights claims. Annex 7 established the Commission for Displaced Persons and Refugees, which resolved property claims arising out of the war. Annex 10 provides for implementation of GFAP by the appointment of the High Representative.

B. Current Ethnic Composition

In spite of the extraordinary human rights structures established under the GFAP, BiH remains ethnically homogeneous. This testifies to, among other things, the failure of the formal approach to equality. Though the rates of reclaiming property pursuant to the property laws have shown a marked increase since 2000, this figure 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.44

Local authorities suggest that actual return and resettlement is severely limited. Population statistics from municipalities in both entities, recently released through UNDP’s Rights Based Municipal Assessment and Planning Project ("RMAP"), illustrate this point well. For example, Derventa, in RS, was a mixed area before the war. 40.6% Serb, 38.9% Croat, and 12.5% Bosniak.45 In 2002, 97% of the population was Serb. Only very small minorities of Croats and Bosniaks call Derventa home. This is equally the case in Federation areas. Just like Derventa, Sanski Most was a mixed municipality. When a census was taken in 1991, the city was virtually half Bosniak

44 UNHCR acknowledges that their statistics do not represent persons who have remained.
45 Statistics from the 1991 census, as recorded in UNDP’s Rights-Based Municipal Assessment and Planning Project (UNDP RMAP) Consolidated Report, Municipality of Derventa, 5.
and half Serb with a small Croat minority.\textsuperscript{46} But in 2002, the city was 87.15\% Bosniak.\textsuperscript{47}

In Derventa, Republika Srpska, the Ministry for Refugees and IDPs believes that “at least 50\% of those who repossess their property do not remain in Derventa – meaning they have not returned.”\textsuperscript{48} 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.”\textsuperscript{49} Indicators such as advertisements in newspapers and concluded contracts on 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.\textsuperscript{50}

Moreover, discrimination and hate crimes continue. In 2006, racist incidents in the RS included shootings at a rebuilt mosque; hostile graffiti insulting Bosniaks on the walls of a sports stadium; and attacking the house of a famous Bosniak poet, Nisha Kapidzic.\textsuperscript{51} Vandals desecrated a 400 year old Muslim cemetery destroying more

\textsuperscript{46} Consolidated Report, Municipality of Sanski Most, Rights Based Municipal Assessment and Planning Project, U.N. Development Programme, (UNDP RMAP) 13 (1991). In 1991, the city was 46.65\% Bosniak, 42.06\% Serb, and 7.17\% Croat. Another 4.12\% of those surveyed self-identified as Yugoslav or “other.”
\textsuperscript{47} Id.
\textsuperscript{48} UNDP RMAP Consolidated Report, Municipality of Derventa, supra note 45, at 18.
\textsuperscript{51} Gordana Katana, Non-Serbs Targeted in Bosnian Serb Campaign, Balkan Investigative Reporting Network (Jul. 28, 2006) available at http://www.birn.eu.com/en/45/10/707/ (last visited Aug. 22, 2007). Political analysts blamed the outbreak of intimidation against non-Serbs in the RS on a divisive run-up to the national elections, which were held on October 2, 2006. The local analysts believe that Bosnian Serb politicians are to blame for whipping up ethnic intolerance and for playing on national differences to win votes.
than twenty gravestones.\textsuperscript{52} Four days in March 2004 saw incidents such as arson to the edifice of the 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 (RS); and damage to sacred objects in the Church of Saint Apostles Peter and Paul in Vagan near Glamoč.\textsuperscript{53}

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 protect only the interests of their ethnic group. Thus, there is discrimination against individuals that 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, the 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.

II. QUASI-INTERNATIONAL COURTS SET UP UNDER THE GFAP

To ensure the implementation of human rights, the GFAP established the Constitutional Court and the Human Rights Chamber. 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 \textit{de facto} institutionalized discrimination or a multi-

\textsuperscript{52} \textit{Vandals in Bosnian-Serb Republic Desecrate 400-Year-Old Muslim Cemetery,} Managing Multi-ethnic Communities Project Newsletter, Open Society Institute (Mar. 6, 2006), \textit{available at} http://lgi.osi.hu/documents.php?id=1042.

\textsuperscript{53} 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 Perković, 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 knife and a baseball bat.
cultural state where the 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. Therefore, these courts necessarily must render decisions utilizing Bosnian and international anti-discrimination laws. Judges have been called upon to give substance to the traditional applications of equality theory and 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.

1. **Constitutional Court**

The Bosnian Constitution mandates the establishment of a Bosnian Constitutional Court.\(^{54}\) 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 by Republika Srpska National Assembly, and three “neutrals” by the European Court of Human Rights. In practice this means that the 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 Court was constituted. The first term expired in May of 2002. From May 2002 until June 2003 the Court did not convene because Republika Srpska National Assembly failed to elect one of the two Serb judges to the Court.\(^{55}\)

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\(^{54}\) 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 2 years later, on May 8, 2002, the Decision on Appointment of Judges and on the Establishment of the Court in BiH followed.

\(^{55}\) 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. They thought it would be a matter of weeks. In
Once constituted, the new Court has decided more cases than the first Court decided during its entire mandate.\textsuperscript{56} 

According to Article VI (3), the 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 to it by any court in BiH as to whether a law, on whose validity its decision depends, is compatible with the Constitution, ECHR, or the laws of BiH.\textsuperscript{57} 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 Court has a fourth, more atypical area of jurisdiction. The 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 the Article IV(3)(e).\textsuperscript{58} 

Disputes arising under the Constitution, include the rights and freedoms set forth in the ECHR, the catalogue of human rights protections set forth in Article II (3),\textsuperscript{59} a specific right to return found January of 2003, a minority of the constituted judges were in favor of resuming work without the Serb judges. The two Croat judges and one Bosniak judge was against this proposal. In May of 2003 the RSNA elected one of the two missing judges. In June 2003 they agreed to start working and the newly constituted Court held its first session in June of 2003. Interview with Christian Steiner, Legal Advisor to the Constitutional Court (July 30, 2003). 

\textsuperscript{56} Interview with Professor David Feldman, Judge on the Constitutional Court (October 15, 2004). 
\textsuperscript{57} GFAP, \textit{supra} note 8, art. VI (3) (b). 
\textsuperscript{58} According to Article IV, “a proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniak, Croat, or Serb people by a majority of, as appropriate, the Bosniak, 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. 
\textsuperscript{59} All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: (a) the right to life (b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment, (c) the right not to be held in slavery or servitude or to perform forced or compulsory labor, (d) the rights to liberty and security of
in Article II (5), and a special reference to the right not to be discriminated against in the rights and freedoms provided for in Article II of the Constitution or in the international agreements listed in Annex I to the BiH Constitution.

The Court has the power not only to annul a judgment but also acts and decisions of administrative bodies on which the challenged judgment was based. 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 only declare it unconstitutional, it means any case that the court, which 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 as incompatible with the ECHR or any other human rights provision of the Constitution.

2. Human Rights Chamber

Dominated by foreign judges, the Human Rights Chamber ("the Chamber") was established as a Court of last instance under Annex 6 to the GFAP. It provided for direct intervention into the legal system of BiH through providing 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. Pursuant to Article XIV of Annex 6, the continued operation of the Chamber was to transfer to the

person, (e) the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings, (f) the right to private and family life, home, and correspondence, (g) freedom of thought, conscience, and religion, (h) freedom of expression, (i) freedom of peaceful assembly and freedom of association with others, (j) the right to marry and to found a family, (k) the right to property, (l) the right to education, and (m) the right to liberty of movement and residence.

60 Decision of the Constitutional Court of Bosnia-Herzegovina, Case U 14/00 (May 4, 2001), available at http://digbig.com/4qwjp (the Court annulled the judgment of the Supreme Court of FBiH 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).
competencies of the BiH institutions five years after entry into force of the Dayton Agreement. The Chamber's mandate was extended by agreement and it did not transfer its power until December 31, 2003. At that point it was merged into the Constitutional Court and became known as the Human Rights Commission.61

The Chamber was composed of fourteen members as provided in Article VII of Annex 6 to the Dayton Agreement. Four members were appointed by the Federation and two by the RS. The other eight members were internationals and were appointed by the Committee of Ministers of the Council of Europe. Since the Chamber was first constituted in March 1996, until the merger in December 2003, the Chamber deliberated upon and 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 for in the ECHR and the Protocols thereto. 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 arising in the enjoyment of the rights and freedoms provided for in the Convention and sixteen additional international agreements listed in the Appendix to Annex 6.62

This additional mandate implicitly recognizes the corrective work the anti-discrimination principle must do to neutralize the de facto ethnic divide and the State structure, which recognizes citizens through their mediating ethnicity. Moreover, this mandate

61 On September 25, 2003, an agreement transferring the competencies of the Human Rights Chamber was signed. The Agreement on Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina (“merger agreement”) provided that the Human Rights Commission shall operate within the BiH Constitutional Court and only has jurisdiction to decide on 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 Commission ended in December 2006.

62 GFAP, supra note 8, annex 6, art. II(2)(b)
compensates for the rather weak anti-discrimination provision found in the ECHR, in which until very recently discrimination could only be found in conjunction with a right directly protected in the ECHR.\(^{63}\) Further illustrating the centrality of pursuing a vigorous prohibition on discrimination, Article VIII (2)(e) requires the Chamber to give priority to allegations of especially severe or systemic violation including those founded on alleged discrimination on prohibited grounds.

III. 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.”\(^{64}\) The Constitutional Court similarly held that non-discrimination principles enshrined in the Bosnian Constitution are wider than those set forth in the ECHR.\(^{65}\) Moreover it found that all refugees and internally displaced people have a constitutionally protected right to return home without discrimination.\(^{66}\)

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\(^{65}\) Constitutional Court of Bosnia and Herzegovina, Case U 39/01, para. 30 (Apr. 5, 2002), See also, Constitutional Court of Bosnia and Herzegovina, Case U 22/2001, (Jun. 22, 01); Constitutional Court of Bosnia and Herzegovina, Case U 10/00, (May 5, 2000), available at http://digbig.com/4qwjp.

\(^{66}\) “[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).
Nevertheless, neither the Chamber nor the Constitutional Court has demonstrated *via* its cumulative jurisprudence, fidelity to the articulated ideal found in the GFAP of the centrality of prohibiting. Two primary reasons emerge as the bases for this failure: the first 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 ECHR.

Two secondary reasons also contribute. First, local judges tend to decide cases on the value of ethnic difference rather than the value of seeking fair treatment of individuals; and second international judges, so 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. As substantive equality is predicated on historical and contextual analysis, this failure is fatal.

The people within a fledgling state healing from ethnic conflict and genocide must contemplate what values anti-discrimination laws should seek to promote, and the type of equality they desire. 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 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.67 Anti-discrimination theory in transitional societies with strong ethnic cleavages must be understood in the

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67 For discussion of formal and substantive equality theories see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY AND PUBLIC AFFAIRS 1, 1-17 (1976); CATHERINE A. MAC KINNON, SEX EQUALITY (2001).
context of the structural inequalities that are the result of ethnic conflict.

Formal equality, also described as the anti-classification principle, focuses on rendering certain distinctions or classifications irrelevant. It reduces the ideal of equality to the principle of equal or consistent treatment; 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, per se, calls for this because it makes the prevailing group or structures in society: “… the measure of all things.”

Formal equality focuses on rendering certain distinctions such as race, gender and religion, irrelevant. Yet an individual’s social, economic or political situation is heavily determined by those factors. In other words, if group and group 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 mans fit the ends. This formal approach

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68 Jack M. Balkin & Reva B. Siegel, The American Civil Rights Tradition: Antic平失 or Antisubordination?: 58 U. MIAMI L. REV. 9, at 21-24; Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown, 117 Harv. L. Rev. 1470 (2004) (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.)
70 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.
generally excludes indirect discrimination and positive discrimination and is thus ineffective in BiH.\(^7\)

Substantive equality, also described as the anti-subordination principle, on the other hand, is not about ill-fit, but rather about the balance of advantage/disadvantage implicit in hierarchical societies with historical disadvantages built in, and seeks to root out inequality.\(^7\) Substantive equality, which was exploited to great effect by feminist legal scholarship, concerns itself with group subordination. This is quite distinguishable from the commitment of formal equality to individuals rather than groups.

The formal equality employed by the judiciary in post-war BiH resulted in three particular problems. First, they 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 either at all or within a reasonable time. Third, they subordinated discrimination claims to other substantive rights when in reality the discrimination fueled the rights violation.

Both Courts 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

\(^7\) Balkin & Siegel, *supra* note 68, at 21-24. “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.” Id. at 12.

purely group-based harm inflicted during the war, limiting their potential to reverse the damage done by ethnic cleansing.

A. Property Issues

By employing a formal approach to equality, the chain of discrimination that started during the war and persisted after was ignored by both courts. In the first significant case decided by the Chamber involving the right to property Kevešević v. the Federation⁷³, the Chamber was asked to decide whether the Federation Law on Abandoned Apartments interfered with Mr. Kevešević’s right to property.⁷⁴ Like hundreds of other complainants, Mr. Kevešević argued that he had been discriminated against in his right to home, property, a fair trial, and access to court protected by the ECHR, 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.

Kevešević, a citizen of BiH of Croat origin, was forced to leave his apartment in Vareš when fighting ensued between the Croat army and the Army of the Republic of Bosnia in 1993.⁷⁵ In April 1996, after the cessation of the war, the applicant and his spouse returned to the apartment. Shortly thereafter, based upon the applicable property laws, the apartment was declared permanently abandoned, and in spite of numerous appeals to the relevant housing authorities, on November 28, 1996, the applicant and his family were

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⁷⁴ Decree with Force of Law on Abandoned Apartments, Official Gazette of the Republic of Bosnia and Herzegovina (hereinafter OG RBiH) 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95.
⁷⁵ 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 15, at 283. Prior to the war, Croats made up 40.6% of the population according to the 1991 census.
evicted from their home and a Bosniak family moved in on the same day. Additionally, the applicant alleged that only Croats were evicted in Vareš and that more than 200 apartments were empty to which Croat owners or occupancy right holders were prevented from returning. Mr. Kevešević complained that his rights under Arts. 6 (right to a fair trial), 8 (right to home), 13 (right of access to court), and 14 (non-discrimination) of the ECHR had been violated.

The Law on Abandoned Apartments was enacted during the war and aided in giving a legal face to the policy of ethnic cleansing. The Law governed the so-called occupancy rights over apartments. The Law 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) and further provided for the temporary allocation of an apartment to “an active participant in the fight against the aggressor against the Republic of Bosnia and Herzegovina” or to a person who had lost her apartment due to the hostile activities.

Essentially, it took apartments from disfavored ethnic groups and handed them to soldiers from the favored ethnic group. The Law also provided that the occupancy right holder would lose her occupancy right 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. The Law on Abandoned Apartments was not formally published in the Official Gazette until January 5, 1996.

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76 Decree with Force of Law on Abandoned Apartments, supra note 74.
77 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.
78 Decree with Force of Law on Abandoned Apartments, supra note 74, at para. 3.
The Chamber found that the decision to declare the applicant’s apartment abandoned and the subsequent eviction interfered with the applicant’s rights to respect for his home under Article 8 of the European Convention and deprived him of his possession under Article 1 of Protocol No. 1 to the Convention. In rendering its decision, the Chamber pointed out that the Law on Abandoned Apartments 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. The Chamber, therefore, found that the interference with Mr. Kevešević’s rights was not “lawful” and, therefore, not justified.

The Chamber rested its decision on the substantive property protections afforded under the ECHR. Apparently, following the general adjudication process of the European Court of Human Rights, whenever a violation of one of the rights and freedoms provided in the European Convention can be established the Chamber, like the

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79 Article 8 of the European Convention reads,

Everyone has the right to respect for his private and family life, his home and his correspondence. 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 (1950).

80 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 possession 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 the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Id.

European Court, is reluctant to examine the case under Article 14 of the Convention.82

The basic structure for analyzing a discrimination claim under Article 14 of the ECHR, 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.83 Applied in post war BiH, this formal analytical approach to non-discrimination 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 the applicant’s allegation that he was subjected to discriminatory treatment. In fact, the Ombudsperson’s representative testified at the public hearing that “the Law on Abandoned 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.”84 Moreover, the Ombudsperson offered, Bosniaks had not left the town and therefore the Law did not apply to them.

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.” It then stated that the applicant had not provided the

82 LAW ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 463, (Harris, O’Boyle and Warbick, eds.) (1995); Peter Neussel, 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. 7-1, 297.
84 Keveševi v. The Federation, supra note 73, at para. 90.
Chamber with sufficient evidence to substantiate that it was his ethnic origin that motivated the authorities to evict him.85

Thus, 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 Bosniak community in Vareš. Thus, the Chamber held, there was no basis for comparison. On this reasoning one must first establish that she 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 Court conceals the harm inflicted on the Croat community during the war where they, along with the Serb community, 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-redress the inequality created by the policy of “ethnic cleansing.” 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.

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,86 thereby relieving it of the need to analyze ‘comparable’ groups to identify harm. A principled approach, recognizing the discriminatory intent of the law and the ‘ethnic supremacy’ enjoyed by the local

85 Id. at para, 92-94.
86 GFAP, supra note 8, annex 6, art. II(2)(b)
ethnic majority, if employed here, would have provided the Chamber with a theoretical framework with which to review thousands of similar cases.

In thinking about equality in post-war BiH, one can look to the United States following the Civil War. The framers of the fourteenth amendment in the United States concerned with the danger that the unrepentant Southern states would re-create 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.”87 Unfortunately, their fears proved correct as attempts to discriminate against blacks in all spheres of life continued.

The fourteenth amendment was adopted largely in response to the black codes enacted by the southern states after the Civil War,88 which were found to be nothing more than a device to continue slavery through different means. Likewise, the anti-discrimination provisions and the enshrined right to return found in the GFAP were framed to overcome the recent past and secure a multi-ethnic vision of Bosnia. Like the judiciary in BiH, the U.S. Supreme Court was required to play strong role in combating the laws, customs and practices that attempted to continue the subjugation of blacks. As Justice Douglas observed, some one-hundred years after the Civil War, in reviewing decades of Supreme Court decisions striking down discrimination in


88 Congress was particularly concerned with the black codes, which included vagrancy laws, which defined “vagrant” in a way that included virtually any adult that was not employed, and provided a punishment of up to one year of forced labor in the service of some private individual. This, among other provisions, tended to lock former slaves into the services of their old master. See Cong. Globe, 39th Cong., 1st Sess. 1160 (1866) (remarks of Rep. Windom); See also, E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 30 (1871).
schools, housing, public transportation, etc, the “[c]ases which have come to [the] Court depict a slavery unwilling to die.”

In the United States, like in BiH, recalcitrant legislators and individuals attempted to keep the vestiges of subjugation and discrimination alive through laws that appeared neutral, but had 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 “abandoned apartments” which could be allocated to members of the post-war ethnic majority.

In the post-Civil War U.S. the grandfather clauses in the late nineteenth century exempted from onerous voter registration requirements descendents of men eligible to vote before the adoption of the fifteenth amendment (guaranteeing equal suffrage for men). Likewise, voter literacy requirements were applied with special strictness to black applicants while whites were permitted to register despite their inability to pass the tests. The U.S. Supreme Court struck down both the grandfather clauses and the literacy tests (as applied) because both had the effect of freezing the effects of past discrimination against blacks. In neither case, did the Court suggest that any present discriminatory intent either existed or was a necessary basis of its decisions.

In both the U.S. and BiH, the essence of effective discrimination has been the establishment of laws and circumstances that minimize the necessity for new acts of intentional

90 Kevešević Case, supra note 73, Nowak dissenting opinion.
91 Guinn v. United States, 238 U.S. 347, 364-365, (1915) (striking down the grandfather clause); South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966) (upholding an injunction against the use of literacy tests because the tests “freeze the effect of past discrimination in favor of unqualified white registrants”).
discrimination,\textsuperscript{92} and legislation that appears neutral on its face, but, in fact, thwarts reintegration, should not escape judicial scrutiny.

In response to these insidious property laws and practices, ultimately, the High Representative’s Law on Cessation of the Law on Abandoned Apartments (hereinafter “Law on Cessation”) repealed the Law on Abandoned Apartments, demanding that all decisions terminating occupancy rights on the basis of the old laws be null and void.\textsuperscript{93} 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.\textsuperscript{94}

The Constitutional Court has taken a similar approach to that of the Chamber. A Court decision rendered in November 1999 illustrates this point.\textsuperscript{95} In that case, M.S. was the occupancy right holder of an apartment at 10 Starine Novaka Street in Banja Luka (the capitol of what is now RS). On 17 October 1995, M.L. forced her to leave the apartment. In April 1996, N.P. a refugee from Jajce (now in the Federation of BiH) moved into the apartment. In 1996, M.S. initiated proceedings against N.P. to reclaim her apartment before the Municipal Court of Banja Luka. The Municipal Court of Banja Luka

\textsuperscript{92} Schnapper, \textit{supra} note 87, at 835 (discussing legal responses to the perpetuation of racial discrimination in the United States).

\textsuperscript{93} Official Gazette of the Federation of Bosnia and Herzegovina (hereinafter “OG FBiH”) 11/98 (Jun. 24, 1998). Annex 10 to the 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, \textit{supra} note 8, annex 10.


\textsuperscript{95} Constitutional Court of BiH, Case U 7/99 (May 11, 1999).
ruled that it did not have jurisdiction to hear the claim; rather it claimed that the administrative authorities had jurisdiction over this matter. The County Court of Banja Luka and the Supreme Court of Republika Srpska confirmed the Basic Court’s ruling in 1998.

M.S. filed an appeal with the Constitutional Court on 2 April 1999 against the judgment of the Supreme Court of Republika Srpska. M.S. complained that her constitutional rights under Article 8 of the ECHR (right to home) and Article 1 of Protocol 1 of the ECHR (right to property) were violated.

Further she 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.”

The Constitutional Court ultimately found that according to RS law the Court was, in fact, under an obligation to decide the dispute in question. In fact, in another decision issued around the same time M.S brought her claim, the Supreme Court of the RS 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 law.”96 It further noted that that lower court waited for months to hear M.S.’ case and that it did so only after the apartment had been temporarily allocated by the Ministry for Refugees to N.P. Therefore, the Court found a violation of the M.S.’s right to access to court under Article 6(1) of the ECHR. Further, the applicant had been unlawfully deprived of her right to her home under Article 8 of the ECHR.

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

96 Id.
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 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.  

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 RS 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. The Banja Luka administration then was in a position of having to protect a temporary Serb population. At the same time, the then mayor of Banja Luka, Djordje Umicevic, never concealed his distaste for returns.

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

97 Id.
99 Constitutional Court of Bosnia and Herzegovina, U 14/00 (May 5, 2001).
BiH, and finally he alleged that “neither the administrative bodies nor the courts had considered the essence of his problem and that he was therefore the victim of discrimination.”

The Court citing to Article II (5) of the Constitution stated: “that all refugees and displaced persons have the right freely to return to their homes of origin, 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.”¹⁰⁰ The lower courts had denied the applicant his right to return home based upon a technicality whereby the applicant had not received a written contract from the company concerning the allocation of the apartment. The company, however, acknowledged that the applicant had rightfully been renting the apartment and that no contracts were concluded between the company and employees to whom apartments in the applicant’s complex were rented. Therefore, the applicant was, in fact, the lawful occupancy right holder over the apartment. Further, his rights to his home under Article 8 of the ECHR had been interfered with since five years after the end of the war the applicant has still not been able to gain possession over his home. A similar determination was made under Article 1 of Protocol 1 to the ECHR.

Regarding the applicant’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 Convention.”¹⁰¹

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

¹⁰⁰ Id. at para. 20.
¹⁰¹ Id. at para. 41.
population was approximately 97% Muslim. The total number of minority returnees to Cazin as of June 2003 was seven.

In not one of the appeals brought before the Court regarding “the right to return” did the Court analyze an applicant’s claim of discrimination. Thus, the Court dismissed both the historical context 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 Court could have established a legal framework adhered to by local courts in order to comply with Article II (4) of the Constitution. The failure to define “non-discrimination” has allowed Entity courts to continue acts of discrimination, perpetuating and directly supporting ethnic homogeneity and rendering meaningless the anti-discrimination provision in the Constitution.

1. Discrimination: The Central Issue in D.M. v. the Federation

A good example of a Chamber decision that excavated the 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 Kablici in Canton 10 in the Federation and was expelled during the war. The facts as described below are representative of the bulk of “repossession” cases received by the Chamber.

In 1993, D.M’s house was broken into and occupied by a police officer of Croat origin. D.M. and her family left the country shortly thereafter and lived in Croatia, Hungary and Switzerland

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103 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.

104 D.M. v. The Federation, supra note 102, at para 17.
before they returned to Livno in January 1998.\textsuperscript{105} At the time of the proceedings, D.M. and her husband had been forced to live separately with relatives, caring for one child each.\textsuperscript{106}

In 1997 D.M. initiated proceedings before the Livno Municipal court and municipal authorities seeking to regain physical possession of the house. From 1997 to 1999 D.M. continued to appeal to the relevant administrative and judicial bodies competent to hear claims for repossession. She never received a response from the courts or municipal authorities let alone, ‘her day in court.’ In the case before the Chamber, both \textit{amicus curiae},\textsuperscript{107} and an assistant Ombudsman of the Federation, stated there was a pattern of discrimination against persons of Bosniak origin concerning their rights to property and to access to the courts in Canton 10. Moreover, even the respondent Party conceded that there is ‘a problem’ in the court system in Canton 10 ‘in respect of efficiency and independence.’\textsuperscript{108}

The Chamber found discrimination to be the central issue. It began its inquiry into the merits by looking at whether the applicant had been discriminated against in her right 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.

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.\textsuperscript{109} 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 or of not enforcing judgments

\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at para. 27.
\textsuperscript{108} D.M. v. The Federation, supra note 102, at para. 73.
\textsuperscript{109} Id. at para. 80.
rendered in favor of such applicants against defendants of the Croat majority.\textsuperscript{110} Such behavior formed the bases 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 on them a positive obligation to protect the enumerated rights.\textsuperscript{111} The Chamber stopped short of calling it what is by stating that, “the Chamber 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”.\textsuperscript{112} Nonetheless, by analyzing all of the applicant’s allegations under the rubric of discrimination, the Chamber placed the non-discrimination/equality provision at the forefront, and recognized the perpetuation of the initial discriminatory act giving rise to the subsequent harm.

\textbf{B. Employment Issues}

Access to employment is a crucial factor in the decision of the displaced to return to their pre-war 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 about whether to return or remain primarily depends on where a person can eke out a tolerable existence. Bosnia’s dire economic condition maintains an unemployment rate that hovers at forty percent. 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.\textsuperscript{113} Although the generally desperate state of the Bosnian economy and the paucity of new jobs mean that returnees of all national groups,

\begin{footnotesize}
\begin{enumerate}
\item Id. at para. 79.
\item Id. at para. 80.
\item Id. at para. 79.
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including those belonging to the majority, have trouble finding suitable employment, “minority” returnees face the added problem of institutionalized discrimination.\textsuperscript{114} According to the OSCE Fair Employment Project Report, discrimination in employment is a human rights violation that remains prevalent throughout Bosnia.\textsuperscript{115} In fact, employment discrimination continues to be one of the most serious obstacles to the return.\textsuperscript{116}

More than 500 applications pending before the Chamber alleged discriminatory termination of labor relations, primarily on the grounds of ethnic/national origin. 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 engrain the effects of ethnic cleansing. The ethnic cleansing and genocide at its worst included mass killings, concentration camps, and deportation; but at a minimum it always included depriving people of their livelihood. Thus, if you were on the wrong ethnic side, you lost your job.\textsuperscript{117}

Further, the post-war laws pose a compromised solution to the problem of discriminatory employment loss and have created new problems in their wake. The Chamber’s and the Constitutional Court's jurisprudence follow the formal equality model for the most part, and the Chamber only tentatively, if at all, made use of its jurisdiction to investigate cases of \textit{apparent} discrimination.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{115} OSCE Fair Employment Project Report (2002); OSCE Permanent Council Statement to the Peace Implementation Council, September 11, 2003 (both on file with the author).
\item \textsuperscript{117} CIGAR, \textit{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 where a legal façade regulated crimes.
\end{itemize}
\end{footnotesize}
The ECHR 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 of the International Convention on Economic, Social and Cultural Rights (hereinafter “ICESCR”) and Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination (hereinafter “CERD”).

In accordance with generally accepted principles of international law, the Dayton Agreement cannot be applied retroactively and the Chamber and Constitutional Court only has jurisdiction to hear claims arising after the entrance into force of the Dayton Peace Agreement on December 14, 1995. It is outside the competence of the Courts *ratione temporis* to decide whether events occurring before December 14, 1995 gave rise to a human rights violation. Evidence relating to such events, however, may be considered as relevant background information framing the alleged

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118 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.

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.

119 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 to 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: ...the rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration...
violation. This jurisdictional limitation has diluted the impact of the Courts' decisions concerning employment discrimination. Both Courts, however, in a number of cases has found itself competent to hear a claim based upon the use of the legal notion of a “continuing violation.” Its use of this legal tool, however, has not been applied consistently.

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

121 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” obtained. Human Rights Chamber of Bosnia & Herzegovina, MM. v. the Federation, 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 & Herzegovina, Cakrevic v RS, 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.
1. **APPLICATION OF WARTIME DECREES**

The first employment discrimination decision issued on the merits by the Chamber in July of 1999 concerned an applicant who claimed discrimination in relation to his employment with the Livno Bus Company. Livno is located in Canton 10 of the Federation. In 1993 war ensued between the Bosniak and Croat forces and the Croat forces eventually took control. In July 1993, the applicant, Mr. Zahirovic, together with 51 other employees of Bosniak origin were no longer allowed to come to work and were put on the so-called “waiting list.”

In the meantime about forty persons of Croat origin joined the company to perform the work of those employees placed on the waiting list. The company continued to pay some compensation (instead of salaries) and contributions to the pension and social security funds until January 1994. In June 1997 the company stopped paying compensation. In 1996, the forty persons who joined the company during the war secured formal employment contracts with the company.

On July 20, 1997 the applicant 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. As of the date of the Chamber’s decision, July 8, 1999, the Court had not rendered a decision. The applicant brought a case to the Chamber alleging that “due to his ethnic origin

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123 According to the Ombudsmen of the Federation of BiH at the time of the Chamber’s hearing, on December 16, 1998 there were 700 cases pending before the Ombudsmen’s office which might have involved a violation of the right of Bosniaks to employment in Canton 10. Most of the alleged violations stem from the Croat-Bosniak conflict in 1993. See *Zahirovic v. Bosnia and Herzegovina*, supra note 122, at para. 65.
he was removed and not allowed back to his job, and that the court proceedings have been stalled for the same reason.”

The Chamber overcame the first hurdle of admissibility _ratione temporis_, by establishing that although Mr. Zahirovic had been placed on the “waiting list” before December 14, 1995 since he has remained on the waiting list since, this constitutes a continuing violation and the impugned discriminatory act, therefore, fell within the Chambers jurisdiction. The Chamber then set out to establish whether Mr. Zahirovic had been discriminated against in the enjoyment of his right to work as well as in the right to favorable conditions of employment, as guaranteed by Arts. 6 and 7 of ICESCR.

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. The Chamber accepted the “personal safety” reason posited by the Company as its justification for the differential treatment of Bosniaks during the war. It found, however, that there was no reasonable basis upon which to leave the applicant on the waiting list after the hostilities ceased, particularly in light of the fact that the workforce increased after the war.

Departing from its analysis in the _D.M._ case, 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 ECHR standing on its own. 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

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124 _Id._ at para. 1.
125 For relevant parts of Article 6 and Article 7 see _supra_ note 118.
Canton 10. 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 involved plaintiff of Bosniak origin were, in fact, scheduled, “this was just a way to cover up and get rid of the pressure from the international community.” Nonetheless, it found a violation of Article 6 standing alone stating that “in view of these findings, which take into account the applicant’s ethnic origin, it is not necessary to consider the issue of discrimination separately.”

Again the Chamber must have been following a strict “European Court” approach. In doing so, it missed the opportunity to entrench its jurisprudence it had laid down in D.M. and thereby failed to address the problem of the perpetual discrimination by not recognizing that the 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 manager of the Livno Bus Company 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 people’s mind the notion 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. The Chamber decided several cases concerning the wartime decrees on labor relations, which though apparently neutral were intended to solidify the war-time goals.

\[\text{126} \text{ Zahirovic v. Bosnia and Herzegovina, supra note 122, at para. 37.}\]

\[\text{127} \text{ Id. at para. 140.}\]
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 come to work earlier. In two cases the Chamber found that the application of these laws discriminated against the applicants based upon their ethnic/national origin. Oddly, in only one case did it follow the D.M. approach and analyze the right to a fair hearing in connection with discrimination.

In these two cases, the applicants were employed in the Canton of Sarajevo. Mile Mitrovic, of mixed Croat and Serb origin, worked for “Elektroprivreda” a socially-owned firm, before the war. The second applicant, Edita Rajic, was of Croat origin married to a person of Serb origin and worked, before the war, as an art teacher in Vogosca. In both cases the applicants lived in areas controlled by Serb forces during the war. During the war Mr. Mitrovic was a commander in the civil defense unit in RS. Ms. Rajic continued teaching art in Vogosca. Immediately after the war, 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

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130 The applicant claims that this position involved distributing humanitarian aid to the population of Grbavica. The respondent Party disputes this presentation of facts and considers that the civil defense units were an “integral part of the Serb Army,” Mitrovic v. The Federation, Decision on Admissibility and Merits of Sept. 6, 2002, Case CH/98/948, para. 14 (2002).
Sarajevo courts relied, among other things, upon Article 15 of the 1992 Decree with Force of Law on Labor Relations, which provided for termination if “he or she took the side of the aggressor against the Republic of Bosnia and Herzegovina.” With respect to the art teacher, Ms. Rajic, the court found that the applicant by staying on territory occupied the Serb forces “put herself of the side of the aggressor.” Similarly, the court found in Mr. Mitrovic’s case that participation in the Civil Defence Unit in RS put him on “the side of the aggressor.” Under Article 15, this justified their respective terminations. Mr. Mitrovic and Mr. Rajic brought 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.

The Chamber found that since the application of Article 15 applied exclusively to persons of non-Bosniak origin, the courts’ findings under Article 15 were _de facto_ discriminatory on grounds of national and ethnic origin. Particularly, in the case of the art teacher, the Chamber found it 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. 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 national/ethnic origin without any legitimate justifications. Therefore, it found that both applicants had been discriminated against in their right to work.

In Mr. Mitrovic’s case the Chamber analyzed the right to work and the right to a fair hearing using the non-discrimination framework.

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131 OG RBiH no. 21/92, _supra_ note 128.
and found that the applicant had been discriminated against by his employer and that the court gave the employer’s discrimination a “legal” stamp of approval. In fact the Chamber stated, “the conduct of the court reveals their intent to solidify the termination of the applicant's employment…” In the case of Ms. Rajic, however, the Court only evaluated the employment discrimination claim. It evaluated her claim to an infringement of her right to a fair trial on its own. Surprisingly, in spite of the fact that Ms. Rajic was found by the court to have “put herself on the side of the aggressor” because she stayed at home –(in a town controlled by Serb forces) – and did not go to work (in a place controlled by Bosniak forces). The Chamber nonetheless concluded that “the applicant has not presented sufficient evidence to support the allegation that the unfairness of the proceedings was due to her national origin.” Again, the Chamber utterly failed to acknowledge both the difficulty of an individual obtaining such evidence or take judicial notice of the existence of many reports providing sufficient evidence of discrimination.

In many such cases, the Chamber found 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 having to reapply for one’s job after the war, constituted discrimination because it had a disparate impact on the

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132 Mitrovic v. The Federation, supra note 130, at para. 54 (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 [side of the aggressor]).

133 Rajic v. The Federation, supra note 129, at para. 74.
particular persecuted group in a particular area. It was the failure to hire after re-application that constituted the impugned act.\textsuperscript{134}

In other cases, the Chamber merely found that because a decision to terminate employment was communicated to the applicant before December 14, 1995, the Chamber did not have jurisdiction \textit{ratione temporis} to hear the claim. It did not explore the possibility of hearing the claim based upon the fact that only reason the applicant had to re-apply was because of the continuing violation of the initial discriminatory act.

2. \textbf{Application of Post-War Laws}

The property laws imposed by the High Representative in 1998 provided for wholesale disposal of the wartime property laws regulating ethnic cleansing, and provided new legislation for property return that sought to guarantee the re-integrated vision of BiH.\textsuperscript{135} Unfortunately, the same approach was not taken with respect to employment legislation. The international community apparently did not seriously take into consideration the sustainability issues of re-integration until much later in the day. This is evidenced by the fact that it was not until 2001 that the international community, (OHR, OSCE etc.) devised what became known as a “Fair Employment Strategy”\textsuperscript{136} 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. This Law was subsequently amended, the amendments entering into force on September 7, 2000. Article 5 of the Labor Laws 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.\footnote{137}

The international community, however, did not do anything globally to reverse the employment discrimination that occurred during the war. Reliance on “non-discrimination” proved futile as attorneys infrequently plead it, and courts generally ignore it.\footnote{138} The international community 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 pre-war employment be given preference in employment. This would have also minimized the popular misunderstanding of and call for “proportional representation.”

Instead, overwhelmed by a significant number of claims brought by people seeking to get their jobs back, in 2000 the Labor Laws in both Entities were amended to include Article 143. Article 143 provides, essentially, 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 addressed their former employer to resume work by 5 February 2000) shall be considered terminated on May 5, 2000, if not invited to work by that date. Every laid off employee has the right to statutorily prescribed severance pay.\footnote{139}

Article 143(a) sets up Cantonal Commissions for the implementation of Article 143. The statement of claim for severance

\footnote{137} Federation Labour Law (OG FBiH 43/99, 32/00), \textit{supra} note 128, 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 non-membership in a political party, membership or non-membership in a trade union, and physical or mental impairment.

\footnote{138} Interview with Head of the American Rescue Committee Legal Division (August 13, 2003).

\footnote{139} Federation Labour Law, OG FBiH 43/99, \textit{supra} note 128.
pay shall be filed with the relevant Cantonal Commission. The Commission proceedings, as the Supreme Court of the Federation has held are *sui generis*, extra-judicial proceedings. Apparently, judicial review of such decisions is not available.\(^{140}\) 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 discriminations.

This approach apparently was taken to find a wholesale solution to the employment problems in Bosnia. By 2000, it would have been impossible to implement laws that required pre-war applicant’s reinstatement into their prior jobs. This simply would have provided claims of employment discrimination on the basis of ethnic/national grounds to the persons who would lose their jobs in the process, and a viable claim it would be. Further, to the extent Article 143 does not provide a venue for claims of discrimination this must have been intentional. The economic situation in Bosnia cannot be hampered by such claims as it would discourage foreign investors from investing in companies over-burdened by many, many discrimination judgments. A practical solution had to be found. Unfortunately, it is one that tramples wholesale on a person’s right to “equality” in employment.

Typical cases decided by the Chamber and the Constitutional Court concern an applicant who alleges that the termination of her employment occurred because of her ethnic/national origin and she requested from the local court remuneration and re-instatement. Almost reflexively, the courts, be they courts of first instance or appellate, simply refer the case to the 143 Commission, rather than decide the case on the merits. In these cases, the Chamber has found, generally, that the applicants have been discriminated against in their right to employment, if such discrimination has been proved, using the

\(^{140}\) Constitutional Court of Bosnia and Herzegovina, Case U 388/01 (Dec. 12, 2001).
Zahirovic model (analyzing the claim of employment discrimination separate from the claim of the right to a fair trial) model described above. In some cases, it has also found the applicant’s right to access to court and to a fair trial within a reasonable time had been violated.\textsuperscript{141}

In a leading case concerning the application of Article 143,\textsuperscript{142} the Chamber analyzed the applicant’s claim of the right of access to court (Article 13 of the ECHR)\textsuperscript{143} separate from the applicant’s claim of employment discrimination, and again did not consider the acts of the court under a discrimination analysis. In this case, the applicant in this case had received a favorable judgment from the Municipal Court II concerning his employment claim for re-instatement. 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. The Chamber found that the applicant’s right to access to court had been violated because the Cantonal Commission does not have jurisdiction to hear the claim of employment discrimination. Rather, it can only order a statutorily prescribed level of compensation, is not competent to order the applicant’s reinstatement, and cannot decide on his discrimination claim.\textsuperscript{144}

By not analyzing the claim of discrimination both as to employment and access to court, the Chamber breaks the chain so to speak in an artificial manner. The wartime termination started the

\textsuperscript{141} See, e.g., Human Rights Chamber of Bosnia and Herzegovina, \textit{M.M. v. the Federation}, Decision on Admissibility and Merits of Mar. 7, 2003, Case CH/00/3476 (Collection of Decisions on Admissibility and Merits (January-July 2003)).

\textsuperscript{142} Human Rights Chamber of Bosnia and Herzegovina, \textit{Vanovac v. The Federation} Decision on Admissibility and Merits of Nov. 8, 2002, Case CH/99/1714 (Collection of Decisions on Admissibility and Merits (July-December 2002)).

\textsuperscript{143} 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 an official capacity.

\textsuperscript{144} \textit{Vanovac v. The Federation}, supra note 142, para. 58-60.
chain, the application of war-time labor laws kept it going, and the court hoped to be the institution that would keep the initial discrimination alive. Though, the Chamber nonetheless found a violation of the right of access to court, making the connection, 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 discrimination.

The Constitutional Court, for its part, has issued only two decisions concerning discrimination in employment. Both cases address the issue of the post-war labor laws intended to curb the financial hardship of BiH after the war. The crux of the cases before the Court concerned Article 143 of the FBiH and RS labor laws.

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 FBiH.145 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.*

The Court received this case from the Municipal Court of Cazin, which requested a review of whether Article 54 is in conformity with the Constitution of BiH. In a case pending before it, the applicant, S.D. had requested the review of Article 54 urging that Article 143 provides for less severance pay than previously applied severance pay law. Wholesale denial to persons with the status of “laid off”

\[\text{Law on Amendments to the Law on Labour, OG FBiH 32/00 (Sept. 7, 2000).}\]
employees treats this category of persons in a more unfavorable manner than other employees.

The impact of this law falls almost exclusively on persons who were lost their employment during the war and arose from discrimination along ethnic lines or the “ethnic cleansing.” The discrimination naturally mirrors the lines of the conflict. People were either fired or put on the waiting list (and not subsequently re-instated) 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 them. 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 143 all together.

The Court, however, did not approach the issue before it in this manner. Though not specifically articulated, the Court established that 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 ECHR, which provides for the right to peaceful enjoyment of one’s possessions. If a law deprives individuals of their possessions, the legislatures must establish that 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 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 further aggravate the employment situation in the country.\textsuperscript{146} The Court established that under labor law prior to the amendment, an employee would be entitled to 3,863 KM per employee, such number being reduced to about 1,000 KM per employee under Article 54. The court reasoned that about 100,000 employees would be due severance pay under Article 54 and such reduction “would represent the financial means by which the economic viability of the companies would be strengthened.”\textsuperscript{147} Allowing the FBiH 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 Court found that the legislation requiring a reduction in severance pay is proportionate measure taken in the public interest and therefore does not violate Article 1 of Protocol 1 to the ECHR.

In a cursory analysis of the question of discrimination, the Court invoked Article 14 of the ECHR in connection with Article 1 of Protocol 1 to the ECHR. 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 they were also in a different situation from those laid off employees who had already obtained severance pay under the prior law. The Court did not address the first comparable groups it identified, namely employed versus 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. It 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, it looked into the second set of comparable groups, namely those who received severance pay prior to the new law and

\textsuperscript{146} Id.
\textsuperscript{147} Id. at para. 56.
those who sought severance after the entry of the new law. It found that these two groups could not be considered analogous. It reasoned that distinctions always flow from a change in legislation and the distinctions that arise between those to whom the old law applies and those whose rights are regulated by the new law could not be considered of a discriminatory nature. 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 different conclusion. While not striking down Article 143 as unconstitutional wholesale, it went a ways towards that. In that case, S.B. from Livno appealed a lower court judgment which denied her request to be reinstated to her job. 148 S.B. had been pursuing her employment claims before the lower courts from 1998 until 2003 when the case ended 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 Article of the FBiH Labor Law. The Cantonal Commission decided that the appellant fulfils the requirements under 143 and therefore is only entitled to severance pay as stipulated thereby.

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 Constitution of BiH and Article 6 of the ECHR had been violated. She also alleged that her right not to be discriminated against in her right to work was protected under Article II (4) of the Constitution of BiH and that ICESCR and CERD had been violated. To illustrate the manipulation of Article 143 by the lower courts the entire procedural history is set forth.

148 Constitutional Court of Bosnia and Herzegovina, Case U 38/02 (Dec. 19, 2003).
S.B. had been employed since 1979 as Director of Technical Assistance for the Housing Fund Livno. On September 21, 1993, in a ruling by the employer, S.B. was sent on “unpaid leave” and was to “report for duty when summoned by the Director of the Housing Fund Livno.” The Housing Fund did not give a specific reason for its action. In February 1998, S.B. requested the employer to quash the Ruling on Unpaid Leave, to reinstate her into her previous position and to 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.

The employer did not respond to her request. Therefore, 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 the applicant’s employment had been suspended but not terminated, but that the rest of her claim was premature. The Cantonal Court in Livno, in a ruling of September 16, 1999, 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 the employer to reinstate S.B. to her previous position or 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 referred the case once again back to the court of first instance. It held that the Municipal Court’s judgment disregarded Article 143 of the Labor Law, according to which a laid-off employee would remain laid-off for six months at most, starting from the effective date of the Law, unless the employer reinstated prior to the expiration of that time limit. On September 7,
2000, additional amendments to the FBiH Labor Law entered into force. According to Article 51, all complaints related to Article 143 shall be referred to a Commission for implementation.

The Municipal Court of Livno on December 21, 2000, decided to interrupt the proceedings and refer the case to the Cantonal Commission. In January 2001, S.B. challenged the ruling of the Municipal Court. She argued that the Court wrongfully applied Article 143 to her case. Further, she emphasized that her position had been filled by another person “of appropriate nationality,” which is in violation of Article 143(8). Article 143(8) prevents an employer from hiring someone other than the laid off employee for one year after the laid off employee has been terminated. The Cantonal Court upheld the Municipal Court’s decision. On June 11, 2003 the Cantonal Commission confirmed that Article 143 applies and ordered the statutorily prescribed severance pay.

The Constitutional Court found that it had jurisdiction to hear the case to the extent that the acts and judgments were taken subsequent to the entry into force of the Constitution of BiH. With regard to the initial act, which set the wheels in motion, namely the act of forcing S.B. into “unpaid leave,” the Court noted that it did not have jurisdiction *ratione temporis*. However, the Court found it could decide on such acts if “it can be demonstrated that they are of a continuing character subsequent to the entry into force of the Constitution of BiH.” Further, S.B. continues 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 Court first analyzed S.B.’s claim that her right to a fair trial had been violated. The Court found that implicit in Article 6 of the ECHR is the right of access to court. 149 The European Court of Human Rights has established that Article 6 secures the right

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to have any claim relating to civil rights and obligations brought before a competent court or tribunal. The Court found that the current legal framework concerning labor disputes does not fulfill Article 6 standards. 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 on claims of discrimination, but is limited to reviewing whether S.B. should be considered a laid off employee under Article 143.\textsuperscript{150} Further, Commission decisions are final and not suitable for judicial review. Thus, the Court found that procedure before the competent 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.”\textsuperscript{151}

The Court then turned to the claim of discrimination. In marked contrast to its jurisprudence up to this point, where the Court cursorily dismissed discrimination claims, in this case it began to set forth a model of analysis for discrimination cases under the Constitution of BiH. 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.”\textsuperscript{152}

\textsuperscript{150} Case U 38/02, \textit{supra} note 148, at 48, \textit{see also} Case U 44/01 (Sept. 22, 2004) (the Court renamed all cities on the territory of RS which had got – in the course of ethnic cleansing during the war – Serb names, Case U 2/04 (Jun. 25, 2004), Case U 8/04 (Jun. 25, 2004) (ruling on ‘vital national interests’ blocking the parliamentary legislative process).

\textsuperscript{151} \textit{Id.} at 50.

\textsuperscript{152} \textit{Id.} at 53.
The Court analyzed the claim under Article II(4) of the Constitution, read in conjunction with ICESCR and 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 in its wording differentiate between persons or groups of persons, and is therefore not *prima facie* discriminatory. But, it invoked ECHR 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 is 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 falls disproportionately on the non-Croat population. The effect of the application of Article 143 of the Labor Law results 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 war-time-laid-off employees, thereby terminating their employment, overwhelmingly affects persons of specific ethnic groups solely because of their membership in ethnic groups throughout the country.

Then the Court takes an interesting turn. It claimed that it was restricting itself to “examining whether any of the constitutionally protected human rights and fundamental freedoms have been violated by the courts when applying Article 143 of the Labor Law.”153 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, it warned against applying Article 143 in a general manner to all war time-laid-off employees. Also, the Court specifically referenced the employers’ role in continuing the discrimination when it refused to reinstate S.B., diverging from its jurisprudence set forth in case U-26/00 discussed above. The court recognized the economic hardships suffered by many

153 *Id.* at 66.
companies in the country and the unfeasibility of reinstating all employees. It stated, however, that this cannot give way to automatic terminations of employment contracts at the discretion of employers and without stated reasons. Further, it ties in the Court by establishing that wanton application of Article 143 also denies groups of people due process guarantees in the determination of their civil rights.

Thus, in one decision the Court excavates several levels of discriminatory actions, heretofore, buried. First, it draws 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 places the individual complaint squarely in its “groupness” where it belongs and does not ignore the reality of ethnic cleansing that initially instigated the continuing violation. And finally, it makes the link between the employer’s discrimination and its continuation by the courts, the arbiter of justice. 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 requires courts to look more carefully at that category of persons before sending a case to the 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 Commissions.

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 substantive equality required to reintegrate BiH. Perhaps recognizing this fact, and due to persistence on the part of judges of the Court with a different view, the Constitutional Court and the Chamber ultimately began to take a somewhat more substantive approach, though continuing to use the formal equality structure of analysis.
VII. 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 Court required the harmonization of the constitutions of RS and the Federation with that of the Constitution of BiH. In the decision the Court concluded that certain provisions of the RS Constitution and the Federation Constitution, which grant special rights to Serbs in RS and to the Bosniaks and Croats in the Federation were unconstitutional.

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 case: First, the Court resolved (in theory at least) the fundamental contradiction in the Dayton Agreement, 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 that has had at least some impact on the jurisprudence of the Constitutional Court.154

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: “Bosnians, Croats, and Serbs as constituent peoples (along with Others), and citizens of

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154 Case U 38/02, supra note 148.
Bosnia and Herzegovina … hereby determine the Constitution of Bosnia and Herzegovina is as follows…” 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 RS 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 “will and determination of the Serb people form Republika Srpska to its State completely and tightly with other States of the Serb people.”

The constitution also specifies Serbian as the official language and elevates the Orthodox Church to the official status of state church.

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 one bi-partite presidency; one Croat and one Bosniak.

In 1998, Alija Izetbegovic, 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 RS

155 CONSTITUTION OF THE REPUBLIC OF SRPSKA, Preamble as amended by Amendments XXVI and LIV.
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 RS constitution discriminate against Bosniaks and Croats. After much delay, the Constitutional Court ruled on the constituent people’s issues in July 2000. This was the third of four opinions striking down institutionalized discrimination in the entities. There was a five-to-four majority comprising the two Bosniak judges and the three international judges, while the Serb and Croat judges dissented.\footnote{Constituent Peoples Decision, Case U 5/98, \textit{supra} note 13, Partial Decision (Jan. 3, 2000), Partial Decision (Feb. 19, 2000), Partial Decision (July 1, 2000), Partial Decision (Aug. 19, 2000), available at http://ccbh.ba/decisions.case.asp?ul=5&u2=98.}

In its decision the Court took a bold step towards establishing a theory of equality in the context of post-ethnic-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.\footnote{In SFRY – and in the understanding today – to be a “constituent people” (\emph{narod}) amounts essentially to be a ‘state creating’ people and to not being a national minority (\emph{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 the 1974 BiH constitution listed the Muslims, Serbs and Croats, and members of other nations (naroda) and nationalities (narodnosti) who live in it as Bosnia’s people. \textit{Ustav Socijalisticke Republike Bosne i Hercegovine} [Constitution] (1974), part I, art. I. 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 International Criminal Tribunal for the Former Yugoslavia) told BBC journalist Alan Little during the expulsion of Bosniaks from Visegrad in 1992, that the aim was to drive the non-Serb population down below five percent, since a people who fell}
Essentially, the 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, irregardless 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 than the political structures which gave preference to the Serbs in the RS and to the Bosniaks and Croats in the Federation would need to be amended in order to be consistent with the State Constitution.

A. Collective Equality

The contested Article of the RS Constitution read: “Republika Srpska shall be the State of the Serb people and of all its citizens.” 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 …” In a lengthy discussion, the Court found that the regulations of Article 1 of the RS Constitution, in connection with other provisions such as the rules on the official language and Article 28 which declares the Serb Orthodox Church as the official Entity Church, all of which serve to give the


158 The text of Article 1 of the RS constitution reads: “Republika Srpska shall be the State of the Serb people and of all its citizens.” The text of Article 1 of the FBiH constitution reads: “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 of the territory of the Federation of Bosnia and Herzegovina, defined by Annex II of the General Framework Agreement, so that the Federation of Bosnia and Herzegovina consists of federal entities with equal rights and responsibilities.”
Serb people a dominant position over the collective rights of the Bosniaks and Croats, violates the BiH Constitution in that 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. 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 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. According to this doctrine:

The 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 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-national state is pursued by the Constitution of BiH in the context of the entire Dayton Agreement and, in particular, whether the Dayton Agreement with its territorial delimitation through the establishment of the two Entities also recognized a territorial separation of the constituent peoples as argued by the RS?\(^{159}\)

Having thus framed the issue, the Court employed a “functional interpretation” reading the Constitution in the light of the entire GFAP of which the BiH Constitution is a part. Referring to

\(^{159}\) Constituent Peoples Decision, U 5/98, *supra* note 13, at para. 43.
Annex VII of the Dayton Agreement, which regulates the return of displaced persons to their pre-war homes and to 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 which had existed before the war without any territorial separation with ethnic inclination.”160

The Court then concluded that “under the circumstances of a multi-ethnic state, … representation and participation in government structures – [is] not only 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.” 161 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. “The constitutional principle of collective equality of constituent peoples following from the designation of Bosniaks, 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 homogenization through segregation based on territorial separation.”162

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 in many circumstances they are legitimizied only by their constitutional rank and must be narrowly

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160 Id. at para. 73.
161 Id. at para. 54.
162 Id. at 60.
This is a very important point. As will be recalled in the Zahirovic case decided by the Chamber 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 Court set forth that such procedures violate the Constitution.

Showing significant understanding of 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 “even if constituent peoples are, in actual fact, in a majority or minority position in the Entities, the express recognition of Bosniaks, Croats and Serbs as constituent peoples in the Constitution of BiH can only have one meaning that none of them is constitutionally recognized as a majority, or, in other words that they enjoy equality as groups.”

The Court recognized that a society with collective goals can be liberal and democratic. This can only maintain, 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 only, mediator of law and equality. Liberalism

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163 Id. at para. 68.
165 Accommodating collective rights in this context to some is an especially bitter pill to swallow. What has come through loud and clear is that it is axiomatic for the RS 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, let’s say, the Quebeckers in Canada, is that they have shown no respect for other cultures. This is not simply a question of how liberalism should...
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, rather than prevent ethnic conflict.\textsuperscript{166} 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, which 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 solidified group consciousness, it is necessary to appreciate that group identity is dialogical, that it depends on social interaction, including legal and political interaction and is located in culture and history.\textsuperscript{167} This is particularly salient in Bosnia where its geographical location and historical development has made it the crossroad of many cultures, religions and empires.

\begin{itemize}
\item respect illiberal cultures, rather than 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 groups rights must be balanced. This is the problem. This is where the international community is justified to step in, particularly with the principle that multicultural societies keep the peace. For a discussion of the challenges of multiculturalism in divided societies see, MULTICULTURALISM AND THE POLITICS OF RECOGNITION, AN ESSAY BY CHARLES TAYLOR, 59 (1992).
\item See e.g., Jeremy Waldron, Minority Cultures and the Cosmopolitan Alternative, 25 U. Mich. J.L. Reform 751 (1992), reprinted in THE RIGHTS OF MINORITY CULTURES 93, 102 (Will Kymlica ed., 1997) (arguing that communitarian theory does not respond to the “real world” where community should, and is, inherently defined globally in a way that transcends national and ethnic boundaries); Fernando R. Tesón, \textit{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); \textit{cf.}, BURG & SHOUP, supra note 15, at 11 (recognizing that an abstract devotion to liberal principles cannot simply lead to condemnation of nationalist states).
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B. Individual Equality

The Constituent Peoples decision is most often analyzed and praised for the balancing act it performed in using the Constitution to soften the hard edges of consociationalism and for making clear that collective rights must be administered without prejudice.\(^{168}\) 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 qua individuals and through group identity.

The 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 that are 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 that:

> 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 10 November 1995 – recognized as “constituent Entities” of Bosnia and Herzegovina by the GFAP...But this recognition does not give them a carte blanche! Hence, despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the Entities, this territorial delimitation cannot serve as a constitutional legitimation for ethnic domination,

\(^{168}\) Implementation of the decision resulted in Amendments to both Entity Constitutions imposed by the High Representative in its decision of April 19, 2002, available at http://www.ohr.int/print/?content_id=7474 and 7475. Unlike other decisions imposed by the High Representative, this decision was based on an earlier agreement of 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 establish greater parity between Bosniaks, Croats and Serbs in the RS. Some argue these amendments created an even more rigid system of proportional representation, further imperiling the individual rights non-discrimination aspect of the Court's decision.
national homogenization or a right to uphold the effects of ethnic cleansing.\textsuperscript{169}

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 also specifically to address the claim under Article II.4 of the Constitution. In this way, the Court responded to the cynical argument of the RS 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 RS, by examining the impact of the challenged RS constitutional provisions on the individual rights of non-Serbs.

The RS representative attempted to establish that even if the Serb language is deemed the official language and the Serb 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 RS constitution which prohibit discrimination. By utilizing this argument to promote Serb hegemony, the RS representative displays exactly how and why rules of formal equality are not always the best mediator and often stymie the law’s ability to promote equality. In the Serb 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 constitution and legislation gave rise in practice to massive, systematic discrimination against non-Serbs.\textsuperscript{170}

\textsuperscript{169} Constituent Peoples Decision, Case U 5/98, \textit{supra} note 13, at para. 61.
\textsuperscript{170} Venice Commission, Comments to the Implementation of Decision U 5/98 (“Constituent Peoples”) of the Constitutional Court of Bosnia and Herzegovina by the Amendments to the Constitution of the Republika Srpska by Mr. J.C. Scholsem (Member, Belgium) (Oct. 1, 2002), \textit{available at} http://www.venice.coe.int/docs/2002/CDL-AD(2002)024-e.html
To respond to this convoluted argument, the 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 RS representative’s manipulation of liberal democracy’s reliance on the individual rights pushed the Court to confront the highly individualist approach of formal equality in a society where group identity dominates. The RS 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 RS found some pretext consistent with universalism.

The Court discussed specifically whether Article 1 of the RS 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 RS and the Bosniak and Croats as the constituent peoples of the Federation deprive individuals of other ethnic groups of their guaranteed constitutional rights? In particular does it discriminate against refugees and displaced peoples?

Again, utilizing an ECHR 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 freely to return to their homes of origin. It then went on to state that the non-discrimination provision can be violated when, among other things, “the effects of past de jure discrimination are upheld by the respective public authorities on all state levels, not only by their inaction but also through their action.”\footnote{Constituent Peoples Case, U 5/98, supra note 13, at partial decision III, para. 79.} In this way, the non-discrimination provision, in its opinion, is not restricted to

\footnotetext{\textsuperscript{171} Constituent Peoples Case, U 5/98, \textit{supra} note 13, at partial decision III, para. 79.}
purely negative individual rights not to be discriminated against, but also includes positive obligations to take action. This is highlighted by the obligations on the Entities to create the conditions conducive to return.\textsuperscript{172}

Thereafter, the Court looked to the reality in RS and the Federation to establish whether the impugned Articles in each Constitution indicate that past \textit{de jure} discrimination, in particular ethnic cleansing, was upheld by the authorities; 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 RS authorities, the Court found that “this part of the provisions of Article 1 with the wording ‘the RS is the state of the Serb people’ has to be taken literally and provides the necessary link with the purposeful discriminatory practice of the authorities with the effect of upholding the results of past ethnic cleansing.”\textsuperscript{173} 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 on anti-discrimination law in BiH in this case, one that recognized positive obligations on the part of the authorities to promote return and undo ethnic cleansing. Absent fulfillment of these obligations, the Entity or the State runs afoul of it constitutionally enshrined obligations. It is unfortunate that the reasoning of this decision was not appreciated and imported to other issues of equality and non-discrimination 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 can be seen in subsequent cases heard by the Constitutional Court.\textsuperscript{174} The

\begin{itemize}
  \item \textsuperscript{172} GFAP, \textit{supra} note 8, at annex 7, art II (1).
  \item \textsuperscript{173} Constituent Peoples Case, U 5/98, \textit{supra} note 13, at Para. 95.
  \item \textsuperscript{174} \textit{Supra} note 150.
\end{itemize}
evidentiary bases upon which the Court found a violation of the non-
discrimination 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.

VIII. CONCLUSION

Deeply concerned with the injustice perpetuated during the
war, the framers of the GFAP gave the 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 the Courts an opportunity to go beyond the formal
equality standards set out under Article 14 of the ECHR. 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 anti-discrimination tools, but never really
stepped out of the formal equality box. It is striking that the Chamber
missed the opportunity from the very beginning to implement the re-
integrative goal of the GFAP and root 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, recognizing indirect discrimination and disparate
impact, been wholeheartedly adopted.

Reflecting upon the jurisprudence of these Courts, several
normative principles surface with respect to the goals of anti-
discrimination laws in post-conflict 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. 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 judicial perspectives, several mediating principles of 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 the European Court, domestic courts, and the Constitutional Court of BiH, or assisting in drafting new anti-discrimination legislation in societies transitioning from ethnic strife, several concrete principles should drive the articulated legal standards.

First, the legal standard articulating a vision of equality should apprehend that discrimination in BiH is based upon historical injury and ethnic domination. Similarly, the legal standard should recognize that the war 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 decision 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. Finally, it should seek to establish a leveling principle to create remedies that create the least harm to innocent individuals.

175 Divided They Stand, but on Graves, N.Y. TIMES, Aug. 19, 2007 (analogizing the GFAP structure of BiH with a potential solution to Iraq’s current sectarian violence.)
In summary, lawyers should argue for, and courts should apply a substantive, context-sensitive test, which would push the Constitutional Court and the European Court to insist that laws and policies must promote equality in order to be found constitutional. This would achieve the goals that equality is meant to achieve in BiH. Like in other 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.

176 MacKinnon, supra note 72, at 25 (discussing the implications of the Canadian Supreme Court’s decision in Andrews v. Law Society of British Columbia (1989) 1 S.C.R., [Can]).