206. As a result, the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the GoS acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to counts 1 to 3.

207. Nevertheless, the Majority considers that, if, as a result of the ongoing Prosecution's investigation into the crimes allegedly committed by Omar Al Bashir, additional evidence on the existence of a GoS's genocidal intent is gathered, the Majority's conclusion in the present decision would not prevent the Prosecution from requesting, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir so as to include the crime of genocide.

208. In addition, the Prosecution may always request, pursuant to article 58(6) of the Statute, an amendment to the arrest warrant for Omar Al Bashir to include crimes against humanity and war crimes which are not part of the Prosecution Application, and for which the Prosecution considers that there are reasonable grounds to believe that Omar Al Bashir is criminally liable under the Statute.

B. Whether there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for the crimes mentioned above[226]

209. The Prosecution alleges that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute for committing genocide, crimes against humanity and war crimes through the "apparatus" of the State of Sudan, including the Sudanese

[226] Judge Anita Ušacka appends a partly dissenting opinion in relation to paragraphs 214, 216 and 223. See Partly Dissenting Opinion of Judge Anita Ušacka, Part IV.

Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, from March 2003 to 14 July 2008.[227]

210. At the outset, the Chamber highlights that, in the *Lubanga* and the *Katanga and Ngudjolo* cases, the Chamber has held that article 25(3)(a) of the Statute embraces the notion of control of the crime as the determining criterion to distinguish between principal and accessory liability.[228] Furthermore, as the Chamber has held in the said cases, article 25(3)(a) of the Statute also embraces the following four manifestations of the notion of control of the crime: direct perpetration, perpetration through another person or indirect perpetration, co-perpetration based on joint control and indirect co-perpetration.[229]

211. In relation to the notion of indirect perpetration, the Chamber highlighted in the decision on the confirmation of the charges in the *Katanga and Ngudjolo* case that:

> The leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders. Compliance must include the commission of any of the crimes under the jurisdiction of this Court. [230]

212. In relation to the notion of co-perpetration based on joint control, the decisions on the confirmation of the charges in the *Lubanga* and *Katanga and Ngudjolo* cases have underscored that:

> [t]he concept of co-perpetration based on joint control over the crime is rooted in the principle of division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.[231]

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[227] *The Prosecution Application*, paras. 62 and 244.
[228] ICC-01/04-01/06-803-tEN, para. 330.
[229] ICC-01/04-01/06-803-tEN, paras. 326-328.
[230] ICC-01/04-01/07-717, para. 514.
[231] ICC-01/04-01/06-803-tEN, para. 342. See also ICC-01/04-01/07-717, para. 521.

213. As the Chamber has already held, the notion of indirect co-perpetration is applicable when some or all of the co-perpetrators carry out their respective essential contributions to the common plan through another person.[232] As the Chamber has underscored, in these types of situations:

> Co-perpetration or joint commission through another person is nonetheless not possible if the suspects behaved without the concrete intent to bring about the objective elements of the crime and if there is a low and unaccepted probability that such would be a result of their activities.[233]

214. The Majority finds that there are reasonable grounds to believe that soon after the April 2003 attack on the El Fasher airport, a common plan to carry out a counter-insurgency campaign against the SLM/A, the JEM and other armed groups opposing the GoS in Darfur, was agreed upon at the highest level of the GoS, by Omar Al Bashir and other high-ranking Sudanese political and military leaders,[234] in particular [REDACTED],[235] [REDACTED],[236] [REDACTED][237] and [REDACTED].[238]

215. The Chamber also finds that there are reasonable grounds to believe that a core component of such common plan was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur.[239] Furthermore,

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[232] ICC-01/04-01/07-717, para. 522.
[233] ICC-01/04-01/07-717, para. 537.
[234] Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, para. 48.
[235] Witness Statement (Anx B4) DAR-OTP-0147-0071 at 0110-0120; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0016 para. 70; Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0013, para. 41, and at 0024, para. 88; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0024, para. 88; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, paras. 47 and 48.
[236] Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0610, para. 144; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0013, para. 41, at 0023, para. 81 and at 0029, para. 112.
[237] Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0017, para. 74; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0016-0017, para. 55, at 0025, para. 89, and at 0029, para. 112; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0025, para. 89, and at 0029, para. 112.
[238] Witness Statement (Anx J95) DAR-OTP-0095-0003 at 0025, para. 92.
[239] Witness Statement (Anx B4) DAR-OTP-0147-0071 at 0110-0120; Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0088, para. 51; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0480, para. 32. *The Prosecution Application*, paras. 9 and 240; HRW Report, *Sudan: Darfur in Flames Atrocities In Western Sudan*, April 2004 (Anx 10) DAR-OTP-0003-0185 at 0194; See also, International Crisis Group Report, *Darfur Deadline A New International Action Plan*, 23 August 2004 (Anx 11) at DAR-OTP-0004-0055 at 0057, 0059, 0061, 0064, 0065 and 0068; Information Report on Background, *Q&A* (Anx 14) DAR-OTP-0014-0213 at 0214; Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0027, 0058,

the Chamber considers that there are reasonable grounds to believe that, according to the common plan, the said civilian population was to be subjected to unlawful attacks, forcible transfers and acts of murder, extermination, rape, torture, and pillage by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.[240]

216. Furthermore, the Majority finds that there are reasonable grounds to believe that Omar Al Bashir and the other high-ranking Sudanese political and military leaders directed the branches of the "apparatus" of the State of Sudan that they led, in a coordinated manner, in order to jointly implement the common plan.

217. In particular, the Chamber finds that there are reasonable grounds to believe that the common plan was, to a very important extent, implemented through State and local Security Committees in Darfur.

218. In this regard, the Chamber considers that there are reasonable grounds to believe that Local Security Committees (i) were comprised of the head of the locality, and representatives of the Sudanese Armed Forces, the Sudanese Police Forces, and the NISS at the local level; (ii) worked together with local Janjaweed Militia leaders to implement the common plan in the relevant area; and (iii) reported to the State Governor.[241]

0030-0040; HRW Report, *If We Return, We Will Be Killed Consolidation of Ethnic Cleansing in Darfur, Sudan*, November 2004 (Anx 38) DAR-OTP-0107-1403 at 1405. Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62-63; *The Prosecution Application*, paras. 241-242; J. Flint / A. de Waal, *Darfur A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775; Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army, 3-4 September 2003 (Anx 50) DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement at DAR-OTP-0115-0563 at 0567-0638.

[240] Report of the International Commission of Inquiry on Darfur (Anx 17) DAR-OTP-0018-0010 at 0025-0026, paras. 62-63. *The Prosecution Application*, paras. 241-242; J. Flint / A. de Waal, *Darfur A Short History of a Long War*, 2005 (Anx 75) DAR-OTP-0120-0678 at 0772-0775. Peace Agreement Between the Government of the Republic of Sudan and the Sudanese Liberation Army. 3-4 September 2003 (Anx 50) DAR-OTP-0116-0433 at 0434; Darfur Peace Agreement (Anx 44) DAR-OTP-0115-0563 at 0567-0638.

[241] Witness Statement (Anx J6) DAR-OTP-0124-0196 at 0215, para. 120; *National Security Forces Act, 1999*, articles 38-40 (Anx J79) DAR-OTP-0021-0412 at 0424-0425; *The Interim National Constitution of the Republic of the Sudan 2005*, article 150 (Anx. J80) DAR-OTP-0136-0605 at 0663-0664; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0013, paras. 59-60, 64, 66 and 119-121; Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0058, paras. 40 and 62; Unofficial version of the *Armed Forces Memorandum concerning the ICC's inquiries – Military Operations Summary since January 2002*, DAR-OTP-0116-0721, para. 38.

219. The Chamber also considers that there are reasonable grounds to believe that each of the three Darfurian States had one State Security Committee, which (i) was comprised of the State Governor and representatives of the Sudanese Armed Forces, the Sudanese Police Forces and NISS at the State level;[242] (ii) worked together with regional Janjaweed Militia leaders to implement the common plan in the relevant State; and (iii) reported through the Deputy Federal Minister of the Interior [REDACTED].

220. In this regard, in the view of the Chamber, there are reasonable grounds to believe that, while in his position as Deputy Federal Minister of the Interior, Ahmad Harun, who was often in Darfur, was entrusted with the tasks of (i) supervising the three Darfurian State Security Committees, and (ii) acting as a link between the government of the three Darfurian States and the highest level of the GoS in Khartoum.[243]

221. The Chamber also finds that there are reasonable grounds to believe that Omar Al Bashir, as *de jure*[244] and *de facto*[245] President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan.[246]

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[242] *The Interim National Constitution of the Republic of the Sudan 2005*, article 150 (Anx. J80) DAR-OTP-0136-0605 at 0663-0064; *The National Security forces Act* (Anx. J79), 1999, article 17. Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 144; International Mission of Inquiry on Darfur, Mission to West Darfur, 11-17 November 2004, Compiled notes of meetings and interviews (Anx 16) DAR-00016-139 at 0171.
[243] Witnes Statement (Anx 59) DAR-OTP-0118-0002 at 0018-0019, paras. 85-86.
[244] *The Interim National Constitution of the Republic of the Sudan 2005*, articles 3, 58 (Anx. J80) DAR-OTP-0136-0605 at 0607, 0625-0626; *National Security Forces Act, 1999*, article 14 (Anx J79) DAR-OTP-0021-0412 at 0416-0417; See, ICTY, *The Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Appeals Judgment, date 20 February 2001, para. 76: "As noted by the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures" and citing *Case Concerning Certain German Interests in Polish Upper Silesia*, Merits, 25 May 1926, PICJ Rep., Series A, No. 7, p. 19. *See* also Opinion No 1 of the *Arbitration Commission of the Peace Conference on Yugoslavia*, 29 November 1991, para. 1 c, which states that "the form of internal political organisation and the constitutional provisions are mere facts".
[245] Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 132; and Witness Statement (Anx 28) at DAR-OTP-0097-0619 at 0624, para. 21. See also Amnesty International Report, *Sudan, Darfur 'Too many people killed for no reason*, 3 February 2004 (Anx 18) DAR-OTP-0020-0067 at 0099.
[246] Witness Statement (Anx 25) DAR-OTP-0095-0049 at 0057, para. 40; and at 0068-0069, paras. 94-95.

222. Furthermore, the Chamber finds that, in the alternative, there are reasonable grounds to believe that Omar Al Bashir (i) played a role that went beyond coordinating the implementation of the common plan; (ii) was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, and (iii) used such control to secure the implementation of the common plan.[247]

223. As a result, the Chamber finds that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator,[248] for those war crimes and crimes against humanity for which the Chamber has already found in the present decision that there are reasonable grounds to believe that they were directly committed, as part of the GoS counter-insurgency campaign, by members of GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC.

V. Whether the specific requirements under article 58 of the Statute for the issuance of a warrant of arrest have been met

A. The Prosecution's allegations

224. In its Application, the Prosecution requests the issuance of a warrant of arrest for Omar Al Bashir.[249]

[247] The following evidence refers to the fact that Ahmad Harun's orders came directly from Omar Al Bashir: Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0607, para. 142: Witness Statement (Anx 31) DAR-OTP-0100-0075 at 0091, para. 166. Transcript of Witness Statement (Anx 15) DAR-OTP-0016-0013 at 0013; DAR-OTP-0095-0049 at 0076, para. 128 (Anx. 25); Witness Statement (Anx J86) DAR-OTP-0128-0042 at 0052, para.55. Moreover, according to the Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, para. 47.
[248] *See* Partly Dissenting Opinion of Judge Anita Ušacka, Part IV.
[249] *The Prosecution Application*, para. 413.

225. The Prosecution Application states that Omar Al Bashir has "consistently challenged the Court's jurisdiction and categorically refused that any Sudanese citizen be surrendered to the Court",[250] and that, as a result of his position as Head of State, he is in a position to attempt to obstruct proceedings and to possibly threaten witnesses.[251]

226. Additionally, the Prosecution refers to its filing of 27 May 2008,[252] in which it reported that despite initially providing some cooperation to the Court,[253] since the issuance of the arrest warrants against Ahmad Harun and Ali Kushayb, the Government of Sudan has ceased all such cooperation. The Prosecution Application states that there has been no change to this situation since that date.[254]

B. The Chamber's evaluation according to article 58(1) of the Statute

227. As this Chamber has previously noted,[255] article 58(1) of the Statute requires the Chamber, where it is satisfied that there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court,[256] to issue a warrant of arrest for a person if it is satisfied that the arrest of the person appears necessary for one of the following reasons:

(i) to ensure the person's appearance at trial;

(ii) to ensure that the person does not obstruct or endanger the investigation or the court proceedings; or

[250] *The Prosecution Application*, para. 412.
[251] *The Prosecution Application*, para. 412.
[252] ICC-02/05-01/07-36-US-Exp and Anx1-2.
[253] ICC-02/05-01/07-36-US-Exp-Anx1, para. 22.
[254] *The Prosecution Application*, para. 411.
[255] ICC-02/05-01/07-1-Corr, para. 126.
[256] Article 58(1)(a) of the Statute.

(iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

228. The Chamber observes firstly that, according to the materials provided by the Prosecution, the GoS, presided over by Omar Al Bashir, has systematically refused any cooperation with the Court since the issuance of an arrest warrant for Ahmad Harun and Ali Kushayb on 2 May 2007.[257]

229. In particular, the Chamber notes that the embassy of the State of Sudan in The Hague, The Netherlands, refused on 2 May 2007 and 11 June 2007, to receive from an officer from the Court's Registry, the cooperation request for the arrest and surrender of Ahmad Harun and Ali Kushayb.[258] Furthermore, on 18 March 2008, the Registry submitted a report on the execution of the warrants of arrest for Ahmad Harun and Ali Kushayb, in which the Registry reported that "[REDACTED] refused to accept the documents. He indicated that following his government's instructions, he could not receive documents from the Court".[259].

230. Moreover, the Chamber is also mindful that, upon the issuance of the warrant of arrest for Ahmad Harun for his alleged responsibility, *inter alia*, for the commission of serious violations of international humanitarian law in the Darfur region, Omar Al Bashir appears to have personally maintained the suspect in his position as Federal Minister for Humanitarian Affairs.[260]

231. The Chamber also finds that the materials submitted by the Prosecution in support of the Prosecution Application do not show any change from the absolute lack of cooperation of the GoS with the Court, referred to in the Prosecution's filing

[257] *The Prosecution Application*, paras. 339-343.
[258] ICC-02/05-01/07-7-Conf and Anx. See also ICC-02/05-01/07-21-Conf, paras. 6-7 and ICC-02/05-01/07-21-Conf-AnxF.
[259] ICC-02/05-01/07-35-Conf-Exp, p. 8.
[260] *The Prosecution Application*, para. 267.

of 29 May 2008. Quite the contrary, the Chamber observes that, upon the filing of the public summary of the Prosecution Application for a warrant of arrest against Omar Al Bashir on 14 July 2008, it appears that Omar Al Bashir himself has been particularly defiant of the jurisdiction of the Court in several of his public statements.[261]

232. On this basis, the Chamber is satisfied that the arrest of Omar Al Bashir appears necessary to ensure his appearance at trial in accordance with article 58(1)(b)(i) of the Statute.

233. As the Chamber has already found, there are reasonable grounds to believe that Omar Al Bashir is in control of the "apparatus" of the State of Sudan, or at least shares such control with a few high-ranking Sudanese political and military leaders.[262] As a result, he is in a position to attempt to obstruct proceedings and to possibly threaten witnesses. In this regard, the Chamber observes with grave concern that it appears that at least one individual has been recently convicted for the crime of treason as a result of his alleged cooperation with the Court.[263]

234. The Chamber is therefore satisfied that, in accordance with article 58(1)(b)(ii) of the Statute, the arrest of Omar Al Bashir appears necessary in order to ensure that he does not obstruct or endanger the proceedings.

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[261] *The Prosecution Application*, paras. 341-343, 396 and 397. Also see *China Daily* 'Sudan reiterate rejection of ICC jurisdiction' 14 July 2008 at http://www.chinadaily.com.cn/world/2008-07/14/content_6843988.htm; McDoom, O. *International Herald Tribune* 'Thousands rally in Sudan against ICC move' 13 July 2008 at http://www.iht.com/articles/reuters/2008/07/13/africa/OUKWD-UK-SUDAN-ICC-PROTEST.php; *BBC World News* 'Sudan president defiant in Darfur' 23 July 2008 at http://news.bbc.co.uk/2/hi/africa/7520991.stm; Embassy of the Republic of the Sudan, Washington DC, Press Release 'Ocampo's Political Pursuits Jeopardize Peace' 7 November 2008 at http://search.globescope.com/sudan/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=49&cntnt01returnid=102; and *Sudan Tribune* 'Sudan accuses ICC of working to destabilize the country' 24 February 2009 at www.sudantribune.com/spip.php?article30268 - 9 uur geleden

[262] *The Prosecution Application*, paras. 250-269, 280-287; Witness Statement (Anx J86) at DAR-OTP-0128-0042 at 0052, paras. 54 and 57; Witness Statement (Anx J47) DAR-OTP-0125-0665 at 0687-0690, paras 108-112, 116, 120-121, 0698; Witness Statement (Anx J48) DAR-OTP-0016-0080 at 0089; Witness Statement (Anx J83) DAR-OTP-0060-0247 at 0255-0256, para. 53; Witness Statement (Anx J95) DAR-OTP-0095-0002 at 0006, 0019, paras 15, 66; UN Interim Report on the situation of human rights in the Sudan, 18 November 1993 (Anx 46) DAR-OTP-0115-0699 at 0715; Witness Statement (Anx J86) DAR-OTP-0128-0042 at 0050-0051; Witness Statement (Anx 23) DAR-OTP-0094-0064 at 0573; *See section B above*: Whether there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for the crimes mentioned above.

[263] ICC-02/05-179-Anx1, paras. 21-22.

235. Finally, the Chamber takes note that the latest report issued on 23 January 2009 by the United Nations High Commissioner for Human Rights on the situation in the Sudan, entitled "Killing and injury of civilians on 25 August 2008 by governmental security forces: Kalma IDP Camp, South Darfur, Sudan", concludes that GoS forces appear to continue to commit some of the crimes within the jurisdiction of the Court for which an arrest warrant for Omar Al Bashir is issued, on the basis of the present decision.[264]

236. As a result, and given that there are reasonable grounds to believe that Omar Al Bashir is the *de jure* and *de facto* President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces, the Chamber is satisfied that his arrest appears also necessary, pursuant to article 58(1)(b)(iii) of the Statute, to prevent Omar Al Bashir from continuing to commit the above-mentioned crimes.

VI. Execution of the warrant of arrest

A. Competent organ to make and transmit the cooperation request for arrest and surrender of Omar Al Bashir

237. As the consistent case law of this Chamber has held, the Chamber is the only competent organ of the Court which may: (i) issue and amend a warrant of arrest; (ii) coordinate with the national authorities of the requested State concerning any incident which might affect the surrender of the person to the Court once the person has been arrested; and (iii) thoroughly follow up on the execution of cooperation requests for both arrest and surrender of the relevant person.[265] Hence, the Chamber, assisted by the Registry, in accordance with rules 176(2) and 184 of the Rules, must

[264] Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan. *Killing and injuring of civilians on 25 August 2008 by government security forces Kalma IDP camp, South Darfur, Sudan*, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2,
[265] ICC-01/04-520-Anx2, para. 131; ICC-02/05-01/07-1-Corr, para.135.

be regarded as the only organ of the Court competent to make and transmit a cooperation request for arrest and surrender.[266]

238. The Chamber also considers that it is necessary for the protection and privacy of witnesses and victims within the meaning of article 57(3)(c) of the Statute, that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit to the Chamber and the Registry as soon as possible, any information related to the potential risks that the transmission of the cooperation requests for the arrest and surrender of Omar Al Bashir, may cause to victims and witnesses.

239. Furthermore, the Chamber considers that it would be beneficial for the expeditious execution of the cooperation requests for arrest and surrender of Omar Al Bashir that the Prosecution, insofar as it is not prevented from doing so by its confidentiality obligations, transmit as soon as possible, to the Chamber and the Registry, any information that, in the view of the Prosecution, would facilitate the expeditious execution by national authorities of such cooperation requests for arrest and surrender.

B. Obligation of the State of Sudan to fully execute the Court's cooperation request

240. The Chamber observes that the State of Sudan is not a party to the Statute and has not made any declaration pursuant to article 12(3) of the Statute and rule 44 of the Rules.

241. Nevertheless, the Chamber emphasises that the State of Sudan has the obligation to fully cooperate with the Court.

[266] ICC-02/05-01/07-1-Corr, para. 135; ICC-02/04-01/05-1, pp. 6-7.

242. In this regard, the Chamber notes that the case against Omar Al Bashir has arisen out of the investigation into the Darfur situation, which was the subject of the United Nations Security Council's referral, pursuant to article 13 (b) of the Statute.

243. The Chamber also observes that, as provided for by article 13(b) of the Statute, the United Nations Security Council decided to refer the Darfur Situation to the Court in Resolution 1593 issued under Chapter VII of the Charter of the United Nations, on 31 March 2005.[267]

244. Furthermore, the Chamber highlights that the United Nations Security Council, after making an express determination that "the situation in Sudan continues to constitute a threat to international peace and security",[268] decided in the dispositive part of its Resolution 1593 that "the Government of Sudan and all other parties to the conflict in Darfur *shall cooperate fully with and provide any necessary assistance to the Court* and the Prosecutor pursuant to this resolution".[269]

245. In this regard, the Chamber notes that according to articles 24(1) and 25 of the United Nations Charter, the members of the United Nations, including the State of Sudan (i) "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf"; and (ii) "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

246. Furthermore, according to article 103 of the United Nations Charter, "[i] n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[267] UN Security Council Resolution, S/RES/1593 (2005), p. 1.
[268] UN Security Council Resolution, S/RES/1593 (2005), p. 1.
[269] UN Security Council Resolution, S/RES/1593 (2005), p. 1 (emphasis added).

247. As a result, the Chamber finds that the GoS's obligations, pursuant to United Nations Security Council Resolution 1593, to *cooperate fully with and provide any necessary assistance to the Court* shall prevail over any other obligation that the State of Sudan may have undertaken pursuant to "any other international agreement".

248. Moreover, the Chamber emphasises that, according to article 87(7) of the Statute, if the GoS continues failing to comply with the above-mentioned cooperation obligations to the Court, the competent Chamber "may make a finding to that effect" and decide to "refer the matter [...] to the Security Council." In this regard, the Chamber is mindful that, according to articles 41 and 42 of the United Nations Charter:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.
>
> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

249. Finally, the Chamber highlights that, in relation to States other than Sudan, as well as regional and international organisations, the dispositive part of United Nations Security Council Resolution 1593 expressly states the following in relation to their cooperation with the Court:

> While recognizing that States not party to the Rome Statute have no obligation to the Statute, [the United Nations Security Council] urges all States and concerned regional and other international organisations to cooperate fully".[270]

FOR THESE REASONS

[270] United Nations Security Council Resolution 1593, S/RES/1593 (2005), issued on 31 March 2005, p. 1.

DECIDES to issue a warrant of arrest for Omar Al Bashir for his alleged responsibility for crimes against humanity and war crimes under article 25(3)(a) of the Statute for:

i. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities as a war crime within the meaning of article 8(2)(e)(i) of the Statute;

ii. pillage as a war crime within the meaning of article 8(2)(e)(v) of the Statute;

iii. murder as a crime against humanity within the meaning of article 7(1)(a) of the Statute;

iv. extermination as a crime against humanity within the meaning of article 7(1)(b) of the Statute;

v. rape as a crime against humanity within the meaning of article 7(1)(g) of the Statute;

vi. torture as a crime against humanity within the meaning of article 7(1)(f) of the Statute;

vii. forcible transfer as a crime against humanity within the meaning of article 7(1)(d) of the Statute;

DECIDES that the warrant of arrest for Omar Al Bashir shall be included in a separate self-executing document containing the information required by article 58(3) of the Statute;

DECIDES that, as soon as practicable, the Registry: (i) shall prepare a request for cooperation seeking the arrest and surrender of Omar Al Bashir and containing the information and documents required by articles 89(1) and 91 of the Statute, and by rule 187 of the Rules; and (ii) shall transmit such request to the competent Sudanese authorities in accordance with rule 176(2) of the Rules and to the following States:

(i) All States Parties to the Statute;

(ii) All United Nations Security Council members that are not States Parties to the Statute.

DIRECTS the Registrar, as appropriate, to prepare and transmit to any other State any additional request for arrest and surrender which may be necessary for the arrest and surrender of Omar Al Bashir to the Court pursuant to articles 89 and 91 of the Statute, and if the circumstances so require, to prepare and transmit a request for provisional arrest in accordance with article 92 of the Statute;

FURTHER DIRECTS the Registrar, pursuant to article 89(3) of the Statute, to prepare and transmit to any State any request for transit which may be necessary for the surrender of Omar Al Bashir to the Court;

ORDERS the Prosecution to transmit to the Chamber and to the Registry, as far as its confidentiality obligations allow, all information available to the Prosecution that may assist in averting any risks to victims or witnesses associated with the transmission of the above-mentioned cooperation request;

INVITES the Prosecution to transmit to the Chamber and to the Registry, as far as its confidentiality obligations allow, all information available to it that, in its view, would facilitate the transmission and execution of the above-mentioned cooperation request;

RECALLS that:

(i) the obligations of the Government of Sudan, pursuant to United Nations Security Council Resolution 1593, to cooperate fully with and provide any necessary assistance to the Court, prevail over any other obligations that the State of Sudan may have undertaken pursuant to "any other international agreement"; and that

(ii) if the Government of Sudan continues to fail to comply with the above-mentioned cooperation obligations with the Court, the competent Chamber, pursuant to article 87(7) of the Statute, "may make a finding to that effect" and decide to "refer the matter [...] to the Security Council" to take appropriate measures pursuant to the United Nations Charter.

FURTHER RECALLS that, in the dispositive part of Resolution 1593, the United Nations Security Council has expressly urged all States other than Sudan, as well as regional and international organisations, to cooperate "fully" with the Court.

Done in both English and French, the English version being authoritative.

Judge Akua Kuenyehia
Presiding Judge

Judge Anita Ušacka

Judge Sylvia Steiner

Dated this Wednesday 4 March 2009

At The Hague, The Netherlands

Separate and Partly Dissenting Opinion of Judge Anita Ušacka

Table of Contents

I. Introduction

1. I agree with my colleagues as to the outcome of the decision, as I am satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible for war crimes and crimes against humanity, and that a warrant should be issued for his arrest. I disagree with the Majority, however,

as I am satisfied that there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent and is criminally responsible for genocide.

2. This difference results from a divergence of opinion regarding

(i) whether the Prosecution must demonstrate, in order to establish reasonable grounds, that the only reasonable inference available on the evidence is that of genocidal intent, and;

(ii) the conclusions drawn from the analysis of the evidence presented.

Since my divergent perspective on these issues also has implications for other aspects of the decision, including the sections on crimes against humanity and mode of liability, I will explain such effects in separate reasoning included in the following partly dissenting opinion.

3. In order to reach a conclusion regarding the existence of reasonable grounds, the Chamber has looked to the findings and jurisprudence of other legal and quasi-legal bodies which have previously considered allegations of genocide. In my view, however, since there are substantial differences between the mandate of the Pre-Trial Chamber with regard to the present Application and the mandates of these other institutions, I also consider it important to appreciate the implications of such differences in determining the relevance of their findings and jurisprudence to the matter presently before the Chamber.

4. For example, since the International Court of Justice adjudicates only inter-state disputes,[1] its examination of genocide in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* was framed by the matter of state responsibility.[2] In contrast, not only does the Statute provide solely for the criminal responsibility of natural persons,[3] but a proposal to include responsibility for legal persons, including states and corporations, was explicitly rejected during the drafting process.[4]

5. The UN Commission of Inquiry (UNCOI), which was tasked with (i) conducting a fact-finding mission in order to establish whether alleged violations of international humanitarian law and human rights law committed in Darfur amounted to genocide and (ii) identifying the perpetrators of such violations,[5] examined alleged violations only between February 2003 and mid-January 2005,[6] and made conclusions regarding the responsibility of the GoS. Upon an independent review of the facts and the receipt of additional evidence, however, the Application filed by the Prosecution covers a longer time period, from March 2003 to 14 July 2008, and focuses on the individual responsibility of Omar Al Bashir.

6. Thus, the factual findings of such bodies may be directly relevant to the Chamber's inquiry at this stage, such as where the Prosecution has referred to

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[1] Article 34 of the ICJ Statute.
[2] *See generally* Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007.
[3] Article 25(1) of the Statute.
[4] Ambos, K., *Article 25· Individual Criminal Responsibility* in *Commentary on the Rome Statute of the International Criminal Court*, (Triffterer, O.,ed.), Munich, Verlag C.H. Beck oHG, 2008, p. 746. For this reason, and as I explain below, I disagree with the Majority's assertion that it is necessary to assess the genocidal intent of the GoS instead of the individual intent of Omar Al Bashir himself. Majority Decision, para. 151. If there are reasonable grounds to believe that Omar Al Bashir shared control over the "apparatus" of the Sudanese state, it would still not be proper to analyse the intent of the government as an entity, rather than the intent of the individual members of the common plan. Accordingly, since I am satisfied that there are reasonable grounds to believe that Al Bashir is criminally responsible under article 25(3)(a) as an indirect perpetrator, I would limit my analysis of the mode of liability to this question.
[5] UN Security Council Resolution, S/RES/1564 (2004) § 12.
[6] UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at para. 11.

the UNCOI report as evidence, for example. In contrast, the factual characterisations or legal conclusions of such bodies are drawn from their different mandates, and therefore may be relevant only by analogy.[7] As another Chamber has previously acknowledged, even the jurisprudence of the ICTY and ICTR (the "*ad hoc* tribunals"), which are also vested with the competence to adjudicate individual criminal responsibility for violations of international criminal law, is not directly applicable before this Court without "detailed analysis", because of significant differences between the procedural frameworks of this Court and the *ad hoc* tribunals.[8] However, for the crime of genocide in particular, the substantive jurisprudence of these tribunals may be instructive, since, like the Statute, the genocide provisions of the *ad hoc* tribunal statutes are based on the *Convention on the Prevention and Punishment of the Crime of Genocide* ("Genocide Convention").[9] I have therefore found it useful to examine the ways in which such tribunals have considered various types of evidence in connection with allegations of genocide.

II. The evidentiary thresholds applicable at different stages of the proceedings under the Statute

[7] For example, in connection with legal proceedings regarding the disintegration of the former Yugoslavia, other courts have analysed the relevance of evidence of forced displacement to an allegation of genocidal intent. It must be observed, however, that forced displacement into Bosnian terrain may have different consequences for the displaced persons than forced displacement into Darfurian terrain. Thus, in different contexts, the same action may support different inferences. *See* discussion at part III.D.iii. *infra*. *See also* Straus, S., *The Order of Genocide*, Ithaca, Cornell University Press, 2006 at p. 7 (describing the context of the genocide in Rwanda, including the density of state institutions at the local level, the commonality of civilian mobilisation, and the resonance of the idea of state power).

[8] *The Prosecutor v Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para. 44.

[9] *Compare* article 6 of the Statute *with* article 6 of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Statute, UN Doc. S/25704, annex (1993), *reprinted in* 32 I.L.M. 1192 (1993) *and with* article 2 of the Statute of the International Criminal Tribunal for Rwanda, in S.C. Res. 955, U.N. Doc S/RES/955 (July 1, 1994); *see also* Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.

7. The framework established by the Statute provides for three distinct stages at which the Pre-Trial and Trial Chambers examine and review the evidence presented by the Prosecution to determine whether there is sufficient evidence to justify (i) the issuance of a warrant of arrest or summons to appear under article 58 of the Statute; (ii) the confirmation of the charges and committal of a person for trial under article 61 of the Statute; and (iii) the conviction of an accused person under article 66 of the Statute.

8. The Statute proscribes progressively higher evidentiary thresholds which must be met at each stage of the proceedings.[10] At the arrest warrant/summons stage, the Pre-Trial Chamber need only be "satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court".[11] In contrast, when deciding whether or not to confirm the charges, the Chamber must determine whether there is "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged".[12] Finally, the Trial Chamber must "be convinced of the guilt of the accused beyond a reasonable doubt" in order to convict an accused.[13]

9. At each stage, of course, there may be different views regarding the sufficiency of evidence required to reach the requisite threshold.[14] Yet, this Chamber has previously likened the "reasonable grounds" standard under article 58 of the Statute to the "reasonable suspicion" standard applied by the

[10] Compare articles 58(1)(a), 61(7) and 66(3) of the Statute. Further, at the confirmation of the charges stage, the Prosecution may rely on documentary or summary evidence and "need not call the witnesses expected to testify at trial". *See* article 61(5) of the Statute.
[11] Article 58(1)(a) of the Statute.
[12] Article 61(7) of the Statute.
[13] Article 66(3) of the Statute.
[14] *See, e g The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, p. 1-217; compare *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Partly Dissenting Opinion of Judge Anita Ušacka, Decision on the Confirmation of Charges, ICC-01/04-01/07-716-Conf, p. 217-227.

European Court of Human Rights,[15] which has elaborated on that standard as follows:

> With regard to the level of "suspicion", the Court would note firstly that . . . sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) does not presuppose that the [investigating authorities] should have obtained sufficient evidence to bring charges, either at the point of arrest or while [the arrested person is] in custody. Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others" (loc. cit., p. 29, para. 53). The object of questioning during detention under sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, *facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge*, which comes at the next stage of the process of criminal investigation.[16]

Applying this principle in the context of the Statute, it is clear to me that the terms of article 58 of the Statute should be construed in a manner which is consistent with the fact that the Prosecution must meet an increasingly demanding evidentiary threshold at each stage of the proceedings. In other words, when presenting evidence to support the issuance of a warrant of arrest, the Prosecution should not be required to meet an evidentiary threshold which would be also sufficient to support a conclusion beyond a reasonable doubt at trial.

10. As the procedural framework is substantially different at the *ad hoc* tribunals,[17] most of the tribunals' existing public jurisprudence is drawn from the trial and appellate stages. Thus, the fact that the Pre-Trial Chamber is currently tasked with determining whether to issue an arrest warrant rather than whether to confirm the charges or convict an accused means that the

[15] *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ICC-01/04-01/06-8-Corr, para. 12.
[16] European Court of Human Rights, *Murray v United Kingdom*, 28 October 1994, para. 55 (emphasis added).
[17] *See, e.g* ICTY Rules of Procedure and Evidence, IT/32/Rev. 42, Rule 47 (Submission of Indictment by the Prosecutor); ICTR Rules of Procedure and Evidence, Rule 47 (Submission of Indictment by the Prosecutor).

evidentiary threshold espoused in these decisions is not directly applicable to the Chamber's present analysis.

11. On this basis, I will analyse the evidence presented in relation to counts 1, 2 and 3 of the Prosecutor's Application.

III. Counts 1, 2 and 3: Genocide

12. The Prosecution alleges that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 6 of the Statute for three counts of genocide:

i. Genocide by killing under article 6(a) of the Statute;

ii. Genocide by causing serious bodily or mental harm under article 6(b) of the Statute; and

iii. Genocide by deliberately inflicting conditions of life calculated to bring about the destruction of the group under article 6(c) of the Statute.[18]

13. According to the Elements of Crimes, each of these counts shares three common elements. The first, a "contextual" element, requires the Prosecution to establish reasonable grounds to believe that the genocidal conduct occurred "in the context of a manifest pattern of similar conduct" directed against a protected group, or that the conduct "could itself effect such destruction [of the group]".[19] The second common element requires the

[18] ICC-02/05-151-US-Exp-Corr-Anx2 ("Prosecution Application"), para. 62. According to the Majority, the Prosecution should have articulated the counts differently, so as to allege one count of genocide against the Fur, one count of genocide against the Masalit, and one count of genocide against the Zaghawa. I note, however, that no legal authority is cited in support of this proposition, and that taking such an approach would require proof of multiple *actus rei* within the same count. Alternatively, it could be possible for the Prosecution to allege nine counts of genocide, one for each *actus reus*, against the Fur, Masalit and Zaghawa. However, for reasons I will explain subsequently, I consider this approach unnecessary. See section III.B. *infra*.

[19] Elements of Crimes, Articles 6(a)(4), 6(b)(4) and 6(c)(5).

Prosecution to provide reasonable grounds to believe that the victims were members of a "particular national, ethnical, racial or religious group".[20]

14. Third, each count requires the Prosecution, at the arrest warrant stage, to provide sufficient evidence for the Chamber to be satisfied that there are reasonable grounds to believe that the perpetrator, Omar Al Bashir, "intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such".[21]

15. Accordingly, I will first consider the question of whether there are reasonable grounds to believe that each of the common elements is met, before turning to the issue of whether there is sufficient evidence to establish reasonable grounds of belief in relation to the *actus reus* associated with each count.

A. The common element of a manifest pattern of similar conduct

16. As the Majority acknowledges, there is a divergence of opinion concerning whether or not this contextual element is consistent with the Statutory definition of genocide,[22] as required by article 9(3) of the Statute. For the reasons outlined below, in my view, this question need not be settled by the Chamber at the instant stage.

17. First, I disagree with the Majority's contention that "the Elements of Crimes and the Rules *must* be applied unless the competent Chamber finds an *irreconcilable contradiction* between these documents, and the Statute on the other hand".[23] Although article 21(1) of the Statute states that "[t]he Court

[20] Elements of Crimes, Articles 6(a)(2), 6(b)(2) and 6(c)(2).
[21] Elements of Crimes, Articles 6(a)(3), 6(b)(3) and 6(c)(3).
[22] Majority Decision, para. 125 (citing Cryer, R. Friman, H., Robinson, D. and Wilmshurst, E., *An Introduction to International Criminal Law and Procedure*, United Kingdom, Cambridge University Press, 2007, pp. 177-179).
[23] Majority Decision, para. 128 (emphasis added).

shall apply . . . in the first place, this Statute, Elements of Crimes and its rules of Procedure and Evidence", I note that the introduction to the Elements of Crimes states that "the following Elements of Crimes *shall assist* the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute".[24] Indeed, several commentators have stated that the Elements of Crimes are not binding upon the Court.[25]

18. Moreover, in my view, article 22(2) of the Statute is not a convincing justification for the application of the contextual element, as this provision refers to the definition of the crime. The legal definitions of the crimes are espoused in the Statute alone. Since article 9(3) of the Statute requires that the Elements of Crimes be consistent with the Statute, it can be inferred that only the Statute outlines the operative definition of the crime. Again, I recall that the introduction to the Elements of Crimes state only that the Elements of Crimes "shall assist" the Court in the interpretation of the Statute.

19. Even if the application of the contextual element were required, however, it has been met in the instant case, in my view. In accordance with the *Vienna Convention on the Law of Treaties*, I consider that the plain meaning of the term "manifest pattern" refers to a systematic, clear pattern of conduct in which the alleged genocidal conduct occurs.[26] This interpretation is also consistent with

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[24] General Introduction (1), Elements of Crimes (emphasis added).

[25] Von Hebel, H., *The Making of the Elements of Crimes* in *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (Lee, R., ed), Transnational Publishers, 2001, p. 8. "It has sometimes been argued that, because of the use of the word 'shall,' the instrument has a binding effect. In light of the negotiating history, this argument is not tenable. Throughout the negotiations, there was never a Majority in favour of binding elements. Only by formulating article 9 as it now stands, specifying that the instrument is only of assistance to the Court and has to be consistent with the Statute, did the inclusion of a provision on the Elements of Crimes become acceptable to all delegations." *Ibid See also* Triffterer, O., *Can the "Elements of Crimes" narrow or broaden responsibility for criminal behaviour defined in the Rome Statute?* in *The Emerging Practice of the International Criminal Court* (Stahn, C. and Sluiter, G., eds.), Koninklijke Brill Publishers, 2009, p. 387.

[26] In this respect, I disagree with the meaning given to the term by the Majority, which interprets it to mean that "the crime of genocide is only completed when the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof." Majority Decision, at para. 124. In my view, this interpretation converts the term into a "result-based" requirement, which would then

the second introductory element of article 6 of the Statute, which states that the term "manifest" is an objective qualification.[27]

20. Recalling the findings of the Chamber regarding the existence of reasonable grounds to believe that there was a widespread and systematic attack on members of the Fur, Masalit and Zaghawa population, I consider that this element is met in the instant case, regardless of whether or not it should be applied.[28] Accordingly, I would decline to settle the question of whether or not the contextual element is consistent with the statutory definition of genocide at the present stage, as it need not be addressed here.

B. The common element of the existence of a protected group under article 6 of the Statute

21. Article 6 of the Statute, which is consistent with the Genocide Convention in this regard,[29] extends protection only to national, ethnical, racial or religious groups.[30] I therefore consider it necessary to define the contours of the protected group before analysing whether there are reasonable grounds to believe that the elements of the crime of genocide have been committed.

22. In the context of war crimes and crimes against humanity, the Majority refers to a group which it defines as "that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and the other

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duplicate the purpose of the second part of the sentence, "or was conduct that could itself effect such destruction." See Oosterveld, V., *The Context of Genocide* in *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence* (Lee, R., ed.), Transnational Publishers, 2001, p. 46.

[27] Elements of Crimes, Article 6, Introduction.

[28] Majority Decision, paras. 88-89.

[29] Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948, entered into force on 12 January 1951.

[30] Article 6 of the Statute. *Cf* the crime of persecution under article 7(1)(h) of the Statute, which – in addition to protecting national, ethnical, racial, and religious groups – also protects groups defined by political, cultural and gender characteristics, as well as by "other grounds that are universally recognized as impermissible under international law."

armed groups opposing the GoS in the ongoing armed conflict in Darfur."[31] Upon an examination of the evidence, however, I do not see any indication that the GoS targeted only a part of the Fur, Masalit and Zaghawa population which was perceived by the GoS as being close to the rebel groups. Rather, the Prosecution submits evidence demonstrating that the Fur, Masalit and Zaghawa were targeted,[32] as well as evidence tending to show that the Fur, Masalit and Zaghawa were accused of being rebels, despite a lack of evidence proving such support or membership.[33] One witness transcript even provides reasonable grounds to believe that the so-called "Zurga" were targeted outright:

> [QUESTION] ... did he [REDACTED] tell you, 'You have to fight the rebels' or did he tell you, 'You have to fight ... uhm ... whoever'? . . . [ANSWER] Uh ... no. What he said is I do not want any, one single village for the Zurgas in Darfur.[34]

Thus, for me, there are reasonable grounds to believe that the Fur, Masalit and Zaghawa population itself was targeted as the result of a perception of an affiliation between the Fur, Masalit and Zaghawa and the rebel groups.

23. In connection with the allegations regarding genocide, the Prosecution claims that three different groups have been targeted: the Fur, the Masalit and the Zaghawa.[35] According to the jurisprudence of the *ad hoc* tribunals, the existence of an ethnic group must be assessed on a case-by-case basis using

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[31] See e.g. Majority Decision, at paras. 76, 83 and 109.
[32] See evidence cited in notes 132-134, *infra*.
[33] Witness Statement, DAR-OTP-0097-0619 (Anx 21) at 0624 at para. 21 ("In April 2003, the President. Al-Bashir, went to AL FASHER and publicly gave orders to the military to eliminate the opposition and leave no survivors. . . They did not attack the opposition or rebels even though they knew where they were. These rebel bases were well-known to people in the area and the Government. They only attacked civilian villages which could not inflict damage to the military."); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 245; Physicians for Human Rights Report, 2006, DAR-OTP-0119-0635 (Anx J44) at 0644, 0688; *See also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0161 at para. 631 ("Even assuming that in all the villages they attacked there were rebels present, or at least some rebels were hiding there, or that there were persons supporting rebels - *a fact that the Commission has been unable to verify for lack of reliable evidence* - the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack.") (emphasis added).
[34] Witness Transcript, DAR-OTP-0147-0071 (Anx B4) at 0114. lines 1457-1463.
[35] Prosecution Application, para. 77.

both subjective criteria, such as the stigmatisation of the group by the perpetrators,[36] as well as objective criteria, such as "the particulars of a given social or historical context".[37]

24. Although the Fur, Masalit and Zaghawa do differ from each other, according to the Prosecution, the Fur, Masalit and Zaghawa have historically challenged "their political and economic marginalization by successive regimes in Khartoum".[38] Additionally, the Fur, Masalit and Zaghawa have each maintained separate tribal structures in order to oversee relations with other groups. Historically, these structures have also administered tribal land through a land grant system,[39] which has in turn influenced the development of social structures.[40] Finally, the Fur, Masalit and Zaghawa each speak their own language, in addition to Arabic.[41]

25. Various pieces of evidence presented by the Prosecution suggest that these populations are perceived and targeted as a unitary – though diverse – entity of "African tribes", even though neither the perceived entity nor the Fur, Masalit or Zaghawa are, in fact, racially distinct from the perceived "Arab" tribes. For example, the derogatory epithets reported by witnesses, including the terms "Zurga", "Nuba", and "black", do not distinguish between the Fur, Masalit and Zaghawa as distinct groups, but refer to a perceived unitary entity of "'African tribes".[42] Similarly, various reports describe how persons

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[36] ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 684; *see also* ICTY, *Prosecutor v Blagojević*, Case No. IT-02-60-T, *Trial Judgment*, 17 January 2005, para. 667; ICTR, *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 254.

[37] ICTR, *Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 317.

[38] Prosecution Application, para. 79.

[39] *See, e.g.* Witness Statement, DAR-OTP-0095-0151 at para.14; UNCOI Report, DAR-OTP-0018-0010 at 024, para. 54.

[40] Physicians for Human Rights, Report *Darfur Assault on Survival. A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0675-0677.

[41] *See* Prosecution Application, para. 83; UNCOI Report, DAR-OTP-0018-0010, para. 52.

[42] *See, e.g* Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21 ("When the attackers got closer to the town, they started killing people and set fire to the huts. I heard them shouting 'Nuba nuba' or 'black' as they attacked the town. *I heard them say, in Arabic, that they did not*

most affected by a perceived African-Arab polarization "have come to perceive themselves as either 'African' or 'Arab'".[43]

26. Accordingly, my view of the target of the counter-insurgency campaign differs from the Majority's. I also disagree with the Majority's analysis of the protected group in connection with genocide. I would define the protected group – and the target of the counter-insurgency campaign – as a single ethnic group of the "African tribes",[44] which is in turn comprised of smaller groups, including the Fur, Masalit and Zaghawa.[45]

C. *Mens Rea* under article 6 of the Statute

i. The legal element of genocidal *mens rea* and the requisite evidentiary threshold at the arrest warrant stage

27. It is well-recognised that the lack of direct evidence or explicit manifestations of intent by the perpetrator renders the establishment of the *dolus specialis* of genocide particularly difficult.[46] Since a well-disguised intent should not be a barrier to prosecution or to conviction, other international tribunals assigning individual responsibility for the crime of genocide have

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want any black person to survive.") (emphasis added); Witness Statement, DAR-OTP-0148-0110 at 0123, para. 60 ("The abductors called them *zurga.*"); UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 511.

[43] UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 510. *See also ibid*, paras. 60 and 511. See also Amnesty International, Sudan: Darfur: "Too Many People Killed for No Reason", DAR-OTP-002-0067 at 0078 ("The attackers portray themselves as "Arabs, the civilians being attacked are called "Blacks" or even "slaves". At the same time, the Zaghawa and the Fur claim that these are attempts to drive all "Africans" away from Darfur.").

[44] In this respect, see UNCOI Report, DAR-OTP-0018-0010 at 0133, para. 512 ("it may be considered that the tribes who were the victims of attacks and killings subjectively make up *a* protected group") (emphasis added).

[45] I would stress, however, that this term is not intended to connote a racial distinction between the ethnic "Africans" and the ethnic "Arabs".

[46] *See e.g*, ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1, Trial Judgment, 21 May 1999, para. 93; ICTR, *Prosecutor v Rutaganda*, Case No. ICTR-96-3, Appeals Judgment, 26 May 2003, para. 525.

held it permissible to infer the existence of genocidal intent from a variety of indicia.[47]

28. It is imperative to note, however, that the trial judgments of the *ad hoc* tribunals, require a chamber to conclude – beyond a reasonable doubt – that a perpetrator possessed genocidal intent and therefore an inference must be "the only reasonable [one] available on the evidence".[48] The Majority suggests (i) that the Prosecution states in its Application that this threshold is applicable at the instant stage,[49] and (ii) that such threshold is properly applicable to the Prosecution's burden to establish reasonable grounds in connection with article 58 of the Statute.[50] I disagree with both assertions.

29. The Prosecution does not suggest that the application of this standard would be appropriate at this stage. In particular, I note the text of footnote 506 of the Prosecution's Application, which states in part,

> [w]hile this is the evidentiary standard required for proof beyond reasonable doubt, the Prosecution notes that for the purposes of an Art. 58 application the lower standard of reasonable grounds will instead be applicable.

I therefore consider that Prosecution's statement in the first sentence of paragraph 366 is in fact a restatement of the law applicable at the trial stage under *ad hoc* tribunal jurisprudence. I read the second sentence of paragraph 366 as a submission with respect to the Prosecution's case as a whole, rather than with respect to the Application itself.[51]

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[47] ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 970; ICTR, *Prosecutor v Rutaganda*, Case No. ICTR-96-3, Appeals Judgment, 26 May 2003, para. 525; ICTY, *Prosecutor v. Sikirica et al*, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, 3 September 2001, para. 46.
[48] ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 970.
[49] Majority Decision, para. 158.
[50] Majority Decision, para. 159.
[51] The Prosecution states at para. 366 of its Application, "In the instant case, the Prosecution respectfully submits that AL BASHIR's intent to destroy the target groups as such in substantial part is the only available inference from a comprehensive consideration of nine factors. . . ".

30. Regardless, in my view, even if the Prosecution had suggested that this threshold was applicable at the arrest warrant stage, such a submission would not be binding on the Chamber. For the reasons set out below, I do not consider its application appropriate.

31. Firstly, I note that the trial chambers of the *ad hoc* tribunals have applied this threshold in relation to their conclusions at trial, at which point, rather than being satisfied that there are reasonable grounds, a chamber must be satisfied beyond a reasonable doubt.[52] Yet, a recent decision of the ICTR Appeals Chamber explains the link between this evidentiary threshold and the burden of proof at trial:

> It is well established that a *conclusion of guilt* can be inferred from circumstantial evidence only if it is the only reasonable conclusion available from the evidence. Whether a Trial Chamber infers the existence of a particular fact upon which the guilt of the accused depends from direct or circumstantial evidence, *it must reach such a conclusion beyond a reasonable doubt*. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the non-existence of that fact, the conclusion of *guilt beyond a reasonable doubt* cannot be drawn.[53]

Thus, in my view, requiring the Prosecution to establish that genocidal intent is the only reasonable inference available on the evidence is tantamount to requiring the Prosecution to present sufficient evidence to allow the Chamber to be convinced of genocidal intent beyond a reasonable doubt, a threshold which is not applicable at this stage, according to article 58 of the Statute.

32. It is, clear to me, however, that when the Prosecution alleges that the evidence submitted supports an inference of genocidal intent, in order for

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[52] Indeed, the *ad hoc* tribunal jurisprudence cited by the Majority in support in this regard consists of judgments made at the trial and appellate stages. Majority Decision at para. 160 (citing, *inter alia*, ICTY, *The Prosecutor v Stakić*, Case No. IT-97-24-A, Appeals Judgment, 22 March 2006, paras. 53-57; ICTY, *The Prosecutor v Vasiljević*, Case No IT-98-32-A, Appeals Judgment, 25 February 2004, paras. 120, and 128; and ICTY, *Prosecutor v Strugar*, Case No. IT-01-42-T, Trial Judgment, 31 January 2005, para. 333.).

[53] ICTR, *Prosecutor v Karera*, Case No. ICTR-01-74-A, Appeals Judgment, 2 February 2009, para. 34 (emphasis added).

there to be reasonable grounds to believe that such an allegation is true, the inference must indeed be a reasonable one. Yet, in light of the differing evidentiary burdens at different phases of the proceedings, the Prosecution need not demonstrate that such an inference is the *only* reasonable one at the arrest warrant stage.

33. When several reasonable inferences may be drawn from the evidence, at the arrest warrant stage, the Prosecution need not prove whether there are substantial grounds, as would be necessary if the article 58 standard was equivalent to the standard of article 61(7) of the Statute. Nor must the Prosecution prove an allegation beyond a reasonable doubt, as would be required at trial under article 66(3) of the Statute. All that is required in order to obtain an arrest warrant is for the Prosecution to establish reasonable grounds to believe that an allegation is true.

34. Thus, once sufficient evidence is presented to render an inference of genocidal intent reasonable, one can be satisfied that there are reasonable grounds to believe that genocidal intent exists, unless evidence is also presented which would render an inference of genocidal intent unreasonable. Applying this lower evidentiary threshold is, in my view, consistent with the preliminary nature of the proceedings at the arrest warrant stage, as well as with article 22(2) of the Statute, which pertains to the definition of a crime rather than to the applicable evidentiary threshold at a given stage of the proceedings.

35. Having set out the applicable standard above, I shall now consider whether the evidence presented meets this standard.

ii. Evaluation of the evidence

36. Although *ad hoc* tribunal jurisprudence is by no means binding on this Court,[54] and despite the difference between the evidentiary threshold applicable at the arrest warrant stage and that which must be met at trial, the types of evidence considered by *ad hoc* tribunal trial chambers may nevertheless be useful insofar as they indicate the types of evidence deemed relevant to the conclusions ultimately drawn at the trial stage. In particular, *ad hoc* tribunal trial chambers have used specific types of evidence in the manner described below to support conclusions that (i) an Accused possessed an *intent*, (ii) that intent consisted of the intent to *destroy* (iii) the intent was to destroy *a group or a substantial part thereof* and (iv) the intent to destroy a group consisted of the intent to destroy the group *as such* (as distinguished from an intent to destroy a group of individuals within the group or substantial part thereof). I will examine each of these different types in turn before considering some examples of evidence submitted by the Prosecution in support of its Application. I highlight, however, that the list of evidentiary examples provided below is not intended to be exhaustive.

a) The existence of *intent*

1) *Evidence emanating from or relating to the Accused*

37. Various forms of communication, including discrete words and utterances by the Accused,[55] statements of the Accused,[56] and evidence tending to show

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[54] *See, e g Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, 30 November 2007, para. 45.

[55] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment, 1 June 2001, para. 148; ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93 and 542; ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 75; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, paras. 252-3.

[56] ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 63; ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 728

that the Accused ordered attacks on the target group, are relevant to show the possible formation of intent.[57]

38. The Prosecution submits, *inter alia*, the following evidence relating to statements by Omar Al Bashir and/or evidence that Omar Al Bashir ordered attacks. Additional evidence corroborates these examples.[58] One witness reported that

> In April 2003, the President, Al-Bashir, went to AL FASHER and publicly gave orders to the military to eliminate the opposition and leave no survivors. . . . Having received orders from their chief, the military then went to African villages and left nothing behind. Together with the Janjaweed, they burned houses, killed small children and raped girls. They did not attack the opposition or rebels even though they knew where they were. These rebel bases were well-known to people in the area and the Government. They only attacked civilian villages which could not inflict damage to the military.[59]

Another witness related,

> I personally heard BASHIR say at the meeting words to the effect of: 'I have given instruction to the army to quell the rebellion and not to bring any prisoners or wounded'.[60]

According to another witness,

> The shurta and the army in Darfur were not fighting the opposition fighters but they would attack villages, kill innocent people, children and the elderly, and burn the villages. President AL-BASHIR said on national television that he gave the military a carte blanche (in Arabic "atlakto yad al-jaysh") in Darfur not to take asra (war

[57] ICTR, *Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 429; ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 542; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Judgment, 6 December 1999, para. 399; ICTR, *Prosecutor v Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment, 17 June 2004, para. 259.
[58] Witness Statement, DAR-OTP-0128-0042 (Anx J86) at 0078 at para. 242 ("I was asked if there were orders to refrain from illegal acts during an attack: No, in fact, the govt. sends some signals about what they want to happen during attacks. As an example, the President gave a speech at Al Fashir where he said that he does not recognize the concept of injured persons or prisoners. I understood this to mean that the fighting forces could do what they wanted with injured persons and they should not carry out arrests."); Witness Statement, DAR-OTP-0133-0573 (Anx J81) at 0607 at para. 130 ("The president added that he had asked HARUN to remain in Darfur to implement his orders. HARUN also made a public statement saying he performed his function based on what he was told to do as a public officer.").
[59] Witness Statement, DAR-OTP-0097-0619 (Anx 28) at 0624 at para. 21.
[60] Witness Statement, DAR-OTP-0100-0075 (Anx 31) at 0087- 0088 at para. 52.

> prisoners) or inflict injuries. I interpreted this to mean that the President instructed his military to kill and destroy without restraint.[61]

39. Evidence of the Accused's position of power or authority can be relevant to support an inference that an accused not only knew of a genocidal plan, but also that he or she shared the genocidal intent of the members of the plan.[62] I therefore consider the evidence of Omar Al Bashir's power and authority to be relevant in this connection as well.[63]

2) Evidence relating to others

40. The words and deeds of others acting with or at the behest of the Accused can also be relevant to support an inference of the formation of intent as well. For example, evidence that during attacks led by an accused against the targeted group "the attackers were chanting 'Tuba Tsemba Tsembe', which means 'Let's exterminate them', a reference to the Tutsi" has been held to support an inference of genocidal intent.[64]

41. The Prosecution submits – *inter alia*[65] – the following witness statements relating the words and/or deeds of others acting with or at the behest of Omar Al Bashir:

> When [Harun's] time came, he stated that for the sake of Darfur, *they were ready to kill 3/4 of the people in Darfur, so that ¼ could live*. . . . We understood from what he

[61] Witness Statement, DAR-OTP-0107-0473 (Anx J88) at 0480-0481 at para. 32.
[62] ICTY, *Prosecutor v. S Milošević*, Decision on Motion for Judgment of Acquittal, Case No. IT-02-54-T, 16 June 2004, para. 288.
[63] *See, e.g* evidence cited at footnote 249 of Majority Decision.
[64] ICTR, *Prosecutor v Niyitegeka*, Case No. ICTR-96-14-T, Trial Judgment, 16 May 2003, paras. 413 and 419.
[65] *See also* Witness Statement, DAR-OTP-0107-0781 (Anx J16) at 0784 at para. 12 (". . . [T]he attackers would say 'Kill them, burn them' and scream and shout. They would curse and swear at them saying 'these are animals, these are ignorant, kill them!' They would also say 'clean them from the country, they are like dirt.'...."); Witness Statement, DAR-OTP-0088-0150 (Anx H, line 48) at 0158 at paras. 45-46 ([After describing rape attack] "Those who abducted us told us that "Ibnal kelb, al arat ma-hagatkum which in Arabic means "little dog, this land is not for you"....").

> said that the ¾ signified that the Fur, Zaghawa and Masalit were going to be targeted by him.[66]
>
> During both attacks the Janjaweed insulted us and called us several names. They said that we were the wives and *mothers of Toro Bora [rebels] and called us black Nubas*.... During the second attack I remember the Janjaweed saying that they will wipe us out, and that we are of no benefit to them. . . . *They said clearly that they had permission from the government so as to wipe us out, to kill us,* to chase us away, and that we women who were there were their wives.[67]
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> The fursan said they were sent and ordered not to leave any Nuba. . . . *They also told the men that they were sent to kill every black thing* except the Laloba and Daylabe trees which are also black....[68]

Quoting a secret memorandum allegedly circulated within the National Islamic Front, a book excerpt submitted by the Prosecution explained,

> '... the Islamic Movement has overlooked this tribe and worked towards strengthening other tribes in the spirit of dividing up the elements that make up the Sultanate of Darfur (the Fur. Tanjur and others'). *The Islamic Movement will not be appeased so long as this tribe [the Fur] is not undermined or exterminated, so that the western front remains safe.'*[69]

3) *Contextual evidence*

i) *Plans, policies and preparation*

42. Although the existence of a genocidal plan or policy has not been considered a legal element of the crime of genocide under *ad hoc* tribunal jurisprudence, proof of such a plan or policy has been deemed relevant to the formation of intent.[70] A Chamber may infer the existence of such a plan or policy from a variety of indicia. Proof of governmental involvement in attacks,[71] through the involvement of public officials or soldiers in carrying

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[66] Witness Statement, DAR-OTP-0095-0049 (Anx 25) at 0076- 0077 at para. 128 (emphasis added).
[67] Witness Statement, DAR-OTP-0088-0187 (Anx 20) at para. 47 (emphasis added).
[68] Witness Statement, DAR-OTP-0088- 0219 (Anx 21) at 0230 at paras. 65-66 (emphasis added).
[69] Book: Darfur Dotting The 'i's And Crossing The 't's by Professor Sulayman Hamid Al Hajj, DAR-OTP-0150-0105 (Anx 82) at 0118 (emphasis added).
[70] ICTY, *Prosecutor v Jelisić*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001, para. 48; *see also* ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 94.
[71] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 309 – 312; ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para. 35.

out the attacks,[72] or through the provision of transportation for the attackers[73] have been considered relevant in this regard.

43. The Prosecution submits a variety of different types of evidence describing the involvement of the GoS through the presence and participation of members of the Sudanese Armed Forces in attacks,[74] through the supply of arms to the Janjaweed,[75] and through the direction of discriminatory acts by a member of the Sudanese military.[76]

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[72] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 536; ICTR, *Prosecutor v Niyitegeka*, Case No. ICTR-96-14-T, Trial Judgment, 16 May 2003, para. 414; ICTR, *Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment, 22 January 2005, para. 644.

[73] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 536

[74] Witness Statement, DAR-OTP-0084-0507 (Anx J2) at 0513 at para. 30 ("From the mountain, I could see clearly the Janjaweed with their horses and *the government troops behind them*. The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type. The army vehicles had yellow number plates as all army vehicles do have. I saw the soldiers shooting the people that could not manage to get right up the hill area, the elderly, the people who couldn't run. They were shooting with doshkas and some of them had shoulder-held guns. The army had been guarding the Janjaweed from the outside of the village while the Janjaweed attacked us. From the mountain, I saw the army's uniforms and their landcruisers. Most of the cars were the same mixture of colours as the uniforms I already described.") (emphasis added); Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21 ("At about 0900 hrs [on 15/08/2003], the Janjaweed and government soldiers attacked the town [Bendisi] from the east. I was in my house. All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them. The Janjaweed were on horseback and camelback. Some of the Janjaweed were on foot. They started firing randomly."); Witness Statement, DAR-OTP-0126-0005 (Anx 77) at para. 13 ("After the air bombing Janjaweed and soldiers entered the village. The soldiers had cars with guns on them. The Janjaweed were riding on horses and camels. The Janjaweed gathered the cattle. The soldiers shot doors open and gathered belongings like mattresses. Both Janjaweed and soldiers killed a number of people when they found them in their houses. While the Janjaweed were doing this they sang "Hail the name of Allah, our orders came from Ali Usman TAHA"."); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at para. 315 ("The destruction was targeted at the areas of habitation of African tribes, in particular the Fur, Zaghawa and Massalit. There was no military necessity for the destruction and devastation caused as a joint venture by the Janjaweed and the Government forces.").

[75] *See, e g* Witness Statement, DAR-OTP-0088-0187 (Anx 20) at 0192-0193 at paras. 20-29 ("The Janjaweed are a group of people armed by the Sudanese government comprising of Arabs, Gimir and Tama; they are not well trained. As far as I know they were trained in June and July 2003 and received their weapons from the Reserve Force.").

[76] DAR-OTP-0120-0678 (Anx H, line 818) at 0148 ("Prominent members of the Masalit community were arrested, imprisoned and tortured; Masalit civilians were disarmed, placed under curfew and restricted in their movements; Masalit youths were forcibly conscripted and sent to Southern Sudan to fight. In a three-year war, 1996-98, hundreds of civilians were killed, most of them by government-backed militias. Another 100,000 fled to Chad.... The atrocities were well planned, and *directed by the Sudanese military governor of the area.*") (emphasis added).

44. Evidence tending to show that preparations for genocide, such as the mobilisation of civil defence forces or militia groups[77] and the distribution of weapons to civilians,[78] would also support an inference that a genocidal plan existed.

45. The Prosecution submits numerous witness statements and other evidence which each describe the mobilisation and involvement of the civil defence forces in attacks.[79] Further, both the UNCOI Report and witness statements submitted by the Prosecution describe the distribution of arms by the GoS to the civilian Arab, Gimir and Tama population.[80]

46. Additionally, indicia such as (i) the existence of execution lists targeting the protected group; (ii) the dissemination of extremist ideology; and (iii) the

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[77] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 283, 284.

[78] ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 298.

[79] Witness Statement, DAR-OTP-0119-0711 (Anx 66) at 0714-0721 at para. 15; Witness Statement, DAR-OTP-0097-0639 (Anx 29) at 0643- 0645 at para. 19; Investigator's Notes, DAR-OTP-0014-0213 (Anx 14) at 0213; DAR-OTP-0116-0889 (Anx 57) at 0891.

[80] Witness Statement DAR-OTP-0088-0219 (Anx 21) at para. 15 ("Soon after . . . there was a general call to receive weapons. However, when some men went to receive their weapons they were informed that the distribution is restricted to Arabs, Tama and Gimir. . . eventually, these were the people who got the weapons."); Witness Statement, DAR-OTP-0097-0328 (Anx 27) at para. 19 ("I am aware of three cases of weapons distribution in Garsila area. In the first case I observed a gathering of Arabs, Tama and Gimir, receiving their firearms from the intelligence office in 2001. . . 20. The weapons distribution started at around 9:00am and ended around 2:00pm. From my position in the market I could see the large gathering around the intelligence office of Arabs, and a few Tama and Gimir. . . There was definitely no Fur person among the gathering."); Witness Statement, DAR-OTP-0118-0002 (Anx 59) at 0026-0027 at paras. 126 – 127 ("Before that part of the government's work was not apparent but after calling Musa HILAL to the meeting it started freely arming, recruiting and training the Arabs and coordinating with the police. MUSTAFA told me that this meeting involved Salah GOSH, Brigadier General Omar Dafaa Al SID (Director of the Society Security) and Colonel Abbas Ali KHALIFA."); Witness Statement, DAR-OTP-0156-0164 (Anx H. line 803) at 0178 at para. 58 ("The plan of the Islamic Front is to support the Arab tribes by taking the following measures: . . . We shall arm the Arab tribes in order to make them the nucleus of the Arabic, Islamic congregation."); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at n 189 ("Epithets that eyewitnesses or victims reported to the Commission include the following: "This is your end. The Government armed me."); UNCOI Material, DAR-OTP-0011-0111 at 0018-0019 ("By the government who gave them uniforms and arms. The witness knows this because the type of uniforms and weapons are only available from the government. The Janjaweed are regarded as PDF because their uniforms and arms are distributed from the PDF Headquarters north of Nyala. There are 85 OMDA's in the Nyala region. The Arab OMDA's were invited to mobilize their tribesmen as army through the PDF. Witness was told this by Arab Omda's. (The witness opinion is that GOS believe all non-Arab Omda are rebels or rebel supporters.) The Arab Omda's attended a mobilization meeting at PDF HQ and received uniforms and arms.").

screening and selection of victims on the basis of their membership in the protected group may also be relevant to show the formation of intent.[81] Moreover, the existence of a plan or project to create an ethnically homogenous state, along with evidence of an intent to exclude non-members by violence and evidence that the targeted group could not lay claim to any specific territory, has been held to support an inference that the plan contemplates the destruction of the non-member ethnic groups.[82]

47. The Prosecution submits the following evidence which would be relevant to the existence of a plan. According to one witness,

> The Government believed that the strongest rebel component was the Zaghawa tribe, and that therefore the Zaghawa tribe had to be destroyed. . . in similar fashion the Government believed that the Massalit and Fur supported the rebels and that they therefore had to be driven out of their lands. *This was a hidden agenda* which is only obvious from the effect on the ground in Darfur, as told to me by the civilian population, military colleagues and fellow detainees. . . .[83]

Another witness recalled,

> . . . the NIF issued a secret bulletin in 1992 relating to the Fur. It was entitled 'vision on the Fur for the future perspective'. After a historical introduction on the Fur the document indicated that they were to be excluded from key positions in the intelligence service, military, or the police administration and secondly, the Fur areas were to be destabilized in order to instigate the moving out of the Fur from Darfur. . . .[84]

As mentioned previously, a memorandum allegedly circulated within the National Islamic Front and submitted by the Prosecution stated,

> The Revolution has decided to bypass this tribe, [even though] it occupies a strategic place in dissemination the concepts of the Islamic Movement to Western and Central Africa. It also occupies an area considered to be the Movement's last line of defence in the event of its being cornered. . . . *The Movement will not feel*

[81] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment, 1 June 2001, para. 139.
[82] ICTY, *Prosecutor v Karadžić*, Case No. IT-95-5/IT-18-1-R-61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 94.
[83] Witness Statement, DAR-OTP-0125- 0665 (Anx J47) at 675 at paras. 55, 56 (emphasis added).
[84] Witness Statement, DAR-OTP-0095-0002 (Anx J95) at 0007 at para. 20.

> *safe until this tribe [the Fur] is contained or exterminated and the Western front made secure. . . .*[85]

A book excerpt submitted by the Prosecution corroborates this report:

> The document is irrefutable evidence of the insistence by the National Islamic Front to go on with the plot despite the failings it has faced in Darfur. . . . In the same document it is stated: "For these reasons, the Islamic Movement has overlooked this tribe and worked towards strengthening other tribes in the spirit of dividing up the elements that make up the Sultanate of Darfur (the Fur, Tanjur and others"). *The Islamic Movement will not be appeased so long as this tribe is not undermined or exterminated, so that the western front remains safe.*" This is exactly what is happening in Darfur now before our very eyes: a war to completely exterminate the tribe that does not discriminate between men, women and children or the elderly or disabled. Instead, the people in the camps in Darfur and Chad, and the sick in hospitals are pursued and killed until they have been finished off. They burn the houses and the things and people inside them, obliterate the villages, markets and farms and the people there, turning it into a wasteland devoid of any Darfuris.[86]

ii) Evidence of modus operandi

48. The general context of the perpetration may also support an inference that the perpetrator had formulated intent. For example, where it is demonstrated that acts of a consistent character have been systematically directed against a protected group, such acts may support an inference that intent has been formulated.[87] Such evidence may include, in particular, evidence of killings perpetrated in a systematic manner,[88] evidence tending to show that types of

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[85] The Islamic Movement and the Fur Tribe (A secret report), DAR-OTP-0095- 0218 at 0223, English translation at DAR-OTP-0148-0101 (Anx H, line 45) at 0103- 0106.
[86] Book: Darfur Dotting The 'i's And Crossing The 't's by Professor Sulayman Hamid Al Hajj, DAR-OTP-0150-0105 (Anx 82) at 0108 and 0115- 0118 (emphasis added).
[87] ICTY, *Prosecutor v Jelisić*, Case No. IT-95-10-A, Appeals Judgment, 5 July 2001, para.47; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 523; ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, paras. 93, 289, 534, 535, 537; ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 111.
[88] ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 547. Some evidence presented in relation to this aspect may also be relevant to extermination as a crime against humanity, which requires the Prosecution to demonstrate that "the conduct constituted, or took place as part of, a mass killing of members of a civilian population." Article 7(1)(b), Elements of Crimes.

weapons and methods employed by the attackers were consistent across attacks,[89] and evidence of a consistent *modus operandi* across attacks.[90]

49. Evidence submitted by the Prosecution in relation to the contextual elements of crimes against humanity, as well as in relation to extermination, is therefore relevant here as evidence of killings perpetrated in a systematic manner.[91] Additionally, the Prosecution submits witness statements which report the use of consistent types of weaponry,[92] and are also corroborated by the UNCOI report.[93]

50. The Prosecution further submits evidence tending to show that a consistent *modus operandi*, entailing a joint attack by the GoS and Janjaweed forces accompanied or followed by air support, was used consistently. The following accounts by witnesses are representative of other witness statements submitted as well:[94]

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[89] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 537.
[90] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 535; ICTY, *Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 88.
[91] *See* Majority Decision, paras. 94 and 97; evidence cited in footnotes 111 and 115 of Majority Decision.
[92] *See, e.g.*, Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 21 ("All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them."); Witness Statement, DAR-OTP-0084- 0507 (Anx J2) at 0513 at para. 30 ("The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type.").
[93] UNCOI Report. DAR-OTP-0018-0010 (Anx 17) at 0070, 0071 at para. 253 ("Ground forces used various weapons including AK47, G3, G4 assault rifles, RPG7, machine guns, and Doshka 12,7mm machine gun mounted on vehicles.").
[94] See also Witness Statement, DAR-OTP-0084- 0507 (Anx J2) at 0513 at para. 30 ("From the mountain, I could see clearly the Janjaweed with their horses and the government troops behind them. The troops started shooting, they had Doshka guns on their cars and other big weapons -I do not know the exact type. The army vehicles had yellow number plates as all army vehicles do have. I saw the soldiers shooting the people that could not manage to get right up the hill area, the elderly, the people who couldn't run. They were shooting with doshkas and some of them had shoulder-held guns. The army had been guarding the Janjaweed from the outside of the village while the Janjaweed attacked us. From the mountain, I saw the army's uniforms and their landcruisers. Most of the cars were the same mixture of colours as the uniforms I already described."); Witness Statement, DAR-OTP-0094-0091 (Anx H, line 76) at 0100 at para. 37 ("From the mountain, I could see that Arwala was surrounded by some Janjaweed and Asakir, whilst others entered. The Asakir and Janjaweed shot at the villagers; I saw some of them running to nearby mountains and some entered into farms and sugar cane plantation. I heard the cries of people and animals. Some villagers were shot and killed and others died when they were trampled on by horses. The Janjaweed and Asakir slept in Arwala after burning it down. While

> All the government soldiers arrived in 7 camouflaged-coloured Toyota Land Cruisers. The trucks had 'Doshkas' mounted on them. The Janjaweed were on horseback and camelback. Some of the Janjaweed were on foot. They started firing randomly. At first, nobody thought it was an attack because of the message the soldiers had delivered about 'Azzakat' earlier that morning. When the attackers got closer to the town, they started killing people and set fire to the huts... 3 combat aircrafts also arrived and started bombing the town. There were 2 Antonovs and 1 Hercules.[95]

> "About an hour after hearing the shots, I saw four brown land cruisers approaching from the same direction. . . I first saw three of the four land cruisers in the market on the 14' which was a market day. ... The land cruisers which had about 40 or 50 asakir on them stopped by the high secondary school. ... The four land cruisers had weapons and ammunition tied around the trucks. ... Not long after, I saw a large number of Janjaweed on camels and horses approaching from the East. There were more than 500 of them and they started shooting randomly at people inside the town. . . . As this was going on I heard a loud sound like an explosion. My father told me that this was the sound of Dana and that we should run. . . . Around 1700 hrs I heard the sound of planes. . . I saw two planes approaching from the east of [REDACTED] . . . I know that they called Antinovs and it wasn't the first time they flew over [REDACTED]."[96]

These descriptions are also consistent with reports by NGOs.[97]

iii) Evidence of breadth and scale

51. *Ad hoc* tribunal trial chambers have also considered the breadth and scale of attacks,[98] as well as whether or not such attacks were widespread, to be relevant to an inference of the formation of intent.[99] In some instances,

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the attack was taking place. I saw two white antinovs and one black helicopter from the East, circle over Arwala and then they went to the direction of Garsila; they went back, circled again and then went to the East from where they had originally come."); Witness Statement, DAR-OTP-0094-0119 (Anx J70), at paras. 60-64: On August 15, 2003, the Kodooms were attacked. . . . the Janjaweed arrived on horses and camels, accompanied by a vehicle which carried Asakir and had a Doshka mounted on it. . . .. A group of Janjaweed then came to the forest and started shooting when they saw us. We escaped all the bullets. . . . . After that, I saw a vehicle with Doshka on it but could not tell whether there were Janjaweed or Asakir on board. The soldiers started shooting with the Doshka so we ran into a brook and stood under a tree which had many long branches hanging down. After shooting for a while, they left in the direction of Merly. . . .").

[95] Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 21.

[96] Witness Statement DAR-OTP-0088- 0187 (Anx 20) at 0192 - 0197 at paras. 23 – 46.

[97] Human Rights Watch Report "Terbeba: twenty-six killed, DAR-OTP-0003-0099 (Anx J9) at 0121-0122 ("The attack was done by some 300 Janjaweed on horses and camels, accompanied by four government cars - three Land Cruisers carrying soldiers and a Renault for logistics [ammunition].").

[98] ICTY. *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para.35; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment. 17 June 2004, para. 258; ICTR, *Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T, Trial Judgment. 22 January 2005, para. 629.

[99] ICTR. *Prosecutor v Akayesu*. Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 730; ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005. paras.

however, a particularly brutal attack targeting several thousand members of a group can indicate the existence of intent.[100] Additionally, the proportion of the group who were victims of genocidal acts may be considered in connection with the scale of the attacks.[101]

52. In addition to the evidence discussed in connection with crimes against humanity,[102] the Prosecution submits additional evidence which demonstrates the breadth and scale of the attacks. For example, a witness reported that around August 2003, more than 45 villages in the Bendisi area were attacked.[103] According to one NGO report,

> Since April 2003, many cases of killings targeting particularly the Fur tribes have been reported . . . in March 2004, 168 persons belonging to the Fur tribes were arrested in Zaray, Fairgo, Tairgo and Kaskildo and were summarily executed in Delaij, Wadi Salih province; - in April 2004, the bombing of Mahajrea village killed four civilians, belonging to the Zakhawa tribe. Most of these killings have been accompanied by looting and burning of properties. Many cases of torture directed at member of Fur tribes have also been reported, as well as cases of arbitrary arrests....[104]

Another NGO reported,

> Villagers from the Garsila area . . . woke up on March 5, 2004, to find an area encompassing thirty-two villages surrounded by government troops and Janjaweed. The government and militia forces then entered the villages and began asking men where they came from. One hundred and four individuals - most of them people who had been displaced from villages in the Zara and

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496. 498, 516; ICTR, *Prosecutor v. Ntakirutimana*, Cases No. ICTR-96-10 & ICTR-96-17-T. Trial Judgment, 21 February 2003, para. 785.

[100] ICTR, *Prosecutor v Ndindabahizi*, Case No. ICTR-2001-71-T, Trial Judgment, 15 July 2004, para. 461. Such evidence may also demonstrate that the object of the formulated intent is the destruction of the target group. *See* para. 68, *infra*.

[101] ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 974 (analysing the proportion of the group that were victims under articles 4(2)(a), 4(2)(b) and 4(2)(c) of the Statute).

[102] In this regard, the evidence discussed in connection with crimes against humanity is relevant as well. *See generally* Majority Decision Part IV.A. 2. The evidence submitted by the Prosecution and discussed above in connection with planning is also relevant here.

[103] Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0064-0072 at para. 18. See also Amnesty International report, DAR-OTP-0002-0207 (Anx J5) at 0243 ("Reports alleged that 300 villages had been attacked or burnt to the ground in the [Kabkabiya] area.").

[104] International Federation for Human Rights and SOAT Report, DAR-OTP-0090-0377 (Anx H, line 90) at 0381.

> Kaskildo areas south-east of Deleig, in the hills, and many of them sheikhs and omdas - were taken to the government jail in Deleig. That same night, according to local people, seventy-two of the 104 were loaded into army trucks by government and militia forces, and driven two kilometers to a valley where they were executed.[105]

As of 2005, at least 700 villages in Darfur had been completely or partially destroyed, resulting in as many as 1.65 million internally displaced persons, in addition to 200,000 refugees in Chad.[106]

iv) Other factors

53. Other relevant "general context" factors considered by the *ad hoc* tribunal trial chambers include, *inter alia*: whether bodily injuries were extensive, whether property belonging to members of the targeted group was targeted, and whether derogatory language was used by an accused or by others against members of the target group.[107]

54. The Prosecution submits a variety of evidence of rape as extensive bodily injury. For example, according to the UNCOI Report,

> The [...] patterns appear to indicate that rape and sexual violence have been used by the Janjaweed and Government soldiers (or at least with their complicity) as a deliberate strategy with a view to achieve certain objectives, including terrorizing the population, ensuring control over the movement of the IDP population and perpetuating its displacement. Cases like Kailek demonstrate that rape was used as a means to demoralize and humiliate the population.[108]

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[105] HRW Report, DAR-OTP-0090-0173 (Anx 22) at 0186.
[106] UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0066, at paras. 226 and 236.
[107] ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 496; ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 728.
[108] UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0095, para. 353. *See also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0090, para. 333 ("Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called "slaves" or "Tora Bora.").

One witness explained,

> See, they kill our males and then dilute our blood with rape. The Arabs want to finish us as a people, end our history. We are not wanted and here to be unwanted is a crime. . . .[109]

55. The Prosecution also submits evidence of derogatory language being used against the target group. The UNCOI reported that even though other types of derogatory language were also used,

> [i]n many cases militias attacking "African" villages tend to use derogatory epithets, such as "slaves", "blacks", Nuba", or "Zurga" . . . .[110]

One witness reported that the attackers

> would curse and swear at [the victims] saying 'these are animals, these are ignorant, kill them!' They would also say 'clean them from the country, they are like dirt.'[111]

After describing a rape attack, another witness reported that

> Those who abducted us told us that "Ibnal kelb, al arat ma-hagatkum" which in Arabic means "little dog, this land is not for you"....[112]

b) The existence of an intent *to destroy* (a group)

1) *The extent and nature of the intended destruction*

56. The distinguishing element of the *dolus specialis* of genocide is the intent to *destroy* a protected group. The extent of the destructive intent, however,

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[109] Annex to Witness Statement, Annex DAR-OTP-0112-0320 at 0322 to DAR-OTP-0116-1034 (Anx58) (quoted in Prosecution Application, para. 395).
[110] UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 511; *see also* Witness Transcript, DAR-OTP-0147-0071 at 0103 (explaining that the term 'Zurga' is a derogatory term that is meant as an insult).
[111] Witness Statement, DAR-OTP-0107-0781 (Anx J16) at 0784 at para. 12.
[112] Witness Statement, DAR-OTP-0088-0150 (Anx H, line 48) at 0158 at paras. 45-46; *see also* Amnesty International Report October 2006, DAR-OTP-0138-0006 (Anx H, line 50) at 0013 ("The Janjawid told me: 'You are a *Nuba woman, daughter of a whore*. You have no right to these cattle and they do not belong to you'") (emphasis added).

should be distinguished from the requisite intent for ethnic cleansing,[113] under which a perpetrator intends to target an ethnic group, such as by expelling the group from an area, yet lacks the intent to *destroy* that ethnic group within the area. The nature of the destructive intent can also be distinguished from the requisite intent for forced displacement as a crime against humanity. Both of the aforementioned crimes lack the element of an intent to destroy.

57. There is a divergence of jurisprudence, however, as to the evidentiary significance of forced displacement with respect to the establishment of genocidal intent. Although the genocidal *actus reus* must consist of one of the listed acts, there has been disagreement over the question of whether, for purposes of demonstrating that an accused possessed genocidal intent, it must be shown that the accused intended to cause the physical or biological destruction of the intended group. Further, there is a lack of consensus regarding what constitutes the physical destruction of the group.

58. Following the approach of the International Law Commission, some *ad hoc* tribunal trial chambers have held that evidence of the perpetrator's intent to destroy must consist of an intent to destroy the group in a biological or physical sense. According to these chambers, such intent must be distinguished from an intent to commit other forms of destruction of the group.[114]

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[113] Ethnic cleansing is often classified as persecution as a crime against humanity. *See* ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 562 and 578.

[114] *See, e.g.*, ICTY, *Prosecutor v Brđanin*, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, paras. 976-978, 981-982; ICTY, *Prosecutor v Stakić*, Case No. IT-97-24-T, Trial Judgment, 31 July 2003, paras. 553-554; ICTR, *Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 315 (citing Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May – 26 July 1996, UN GAOR International Law Commission, 51st Sess., Supp. No. 10, p. 90, UN Doc. A/51/10 (1996) ("As clearly shown by the preparatory work for the Convention, the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.")).

59. In this regard, the Prosecution submits a variety of evidence which demonstrates an intent to physically destroy. One witness reported,

> I heard them [the attackers] say, in Arabic, that they did not want any black person to survive.[115]

According to a report allegedly circulated within the National Islamic Front,

> The Revolution has decided to bypass this tribe, [even though] it occupies a strategic place in dissemination the concepts of the Islamic Movement to Western and Central Africa. It also occupies an area considered to be the Movement's last line of defence in the event of its being cornered. The Movement has thus bypassed this tribe and undertaken to reinforce other powers in the States of Greater Darfur. It has invited heavily armed Chadian tribes into Darfur as well as....promoting divide and rule amongst the elements making up the Fur Sultanate (Fur, Tunjur, etc). *The Movement will not feel safe until this tribe is contained or exterminated and the Western front made secure . . . .*[116]

Another witness corroborated this:

> In KORNOI, I heard about what was going on in the rest of the region. People said that all the Government was going to wipe out the rest of the Zaghawas who were still in the area.[117]

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[115] Witness Statement, DAR-OTP-0088-0060 (Anx J45) at 0065 at para. 21.

[116] The Islamic Movement and the Fur Tribe (A secret report), DAR-OTP-0095- 0218 at 0223, English translation at DAR-OTP-0148-0101 (Anx H, line 45) at 0103- 0106 (emphasis added); *see also* Book: Darfur Dotting The 'i's And Crossing The 't's by Professor Sulayman Hamid Al Hajj, DAR-OTP-0150-0105 (Anx 82) at 0108 and 0115- 0118.

[117] Witness Statement, DAR-OTP-0079-0244 (Anx H, line 63) at 0253 at para. 48. See also Witness Statement, DAR-OTP-0125- 0665 (Anx J47) at 675 at paras. 55, 56 ("The Government believed that the strongest rebel component was the Zaghawa tribe, and that therefore the Zaghawa tribe had to be destroyed. . . in similar fashion the Government believed that the Massalit and Fur supported the rebels and that they therefore had to be driven out of their lands."); UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0068 at para. 245 ("In a majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. When asked why they believed they were attacked, some witnesses stated 'because they want our land and cattle' or *'they want to eliminate us from the area'*. Other witnesses referred to statements made by their aggressors during some of the attacks, such as 'you are Tora Bora, the SLA are your families', 'the Fur are slaves, we will kill them', *'we are here to eradicate blacks (nuba)*, 'we will drive you into poverty', 'this is not your land' or 'you are not from here'. When asked about the presence of armed groups within the villages, most witnesses denied the existence of rebels in their villages at the time they were attacked.") (emphasis added); Physicians for Human Rights Report, 2006, DAR-OTP-0119-0635 (Anx J44) at 0644, 0688 ("The men accused them [the group] of being rebel supporters, demanded to know where the men were, and at least one time threatened to shoot them. "One said, 'We have to kill them, '" she said. "But others said, 'Don't bother, don't waste the bullet, they've got nothing to eat and they'll die from hunger.").

60. The focus on physical destruction in relation to intent was expressly rejected by Judge Shahabuddeen, however, in his partially dissenting opinion in the *Krstić* Appeal. According to his view, while the terms of the Genocide Convention and the ICTY Statute specify that the "listed act" – or *actus reus* – of the crime of genocide must consist of an act of physical or biological destruction, it is sufficient to demonstrate that the intent with which that act was perpetrated encompassed the destruction of the group, regardless of whether such intended destruction was to be physical, biological, social or cultural.[118]

61. Another chamber later held that an intent to destroy the group through forcible transfer alone could constitute genocidal intent "when this transfer is conducted in such a way that the group can no longer reconstitute itself – particularly when it involves the separation of its members."[119]

62. In order to preserve the choice for a later Trial Chamber to determine which approach it will follow at trial, I adopt the more expansive approach outlined by Judge Shahabuddeen when considering the relevance of evidence of forced displacement in connection with determining whether or not there are reasonable grounds to believe that genocidal intent existed.

63. In addition to the evidence discussed in connection with crimes against humanity, I highlight the following evidence submitted by the Prosecution. A UN Inter-Agency Fact-Finding and Rapid Assessment Mission in Kailek, South Darfur reported that

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[118] ICTY, Partial Dissenting Opinion of Judge Shahabuddeen, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, paras. 49-50 (citation omitted). Judge Shahabuddeen explicitly stated that he was not making an argument for the recognition of cultural genocide as a genocidal actus reus, as he was drawing a distinction as to the intent of the crime only. Nevertheless, he recognised that "the destruction of culture may serve evidentially to confirm an intent, to be gathered from the circumstances to destroy the group as such." *Id* at para. 53.
[119] ICTY, *Prosecutor v Blagojević*, Case No. IT-02-60-T, Trial Judgment, 17 January 2005, para. 666.

> [t]he 23 Fur villages in the Shattaya Administrative Unit have been completely depopulated, looted and burnt to the ground (the team observed several such sites driving through the area for two days).[120]

During its investigation, the UNCOI found that

> Many reports also note that villages were burnt even after these had been abandoned by the inhabitants who fled to IDP camps in larger urban centres in Darfur, or to neighbouring Chad. This has led many observers to fear that this is a part of the policy executed through the Janjaweed to expel the population from the targeted areas and to prevent the immediate or, possibly, long-term return of the inhabitants.[121]

2) The focus of the destructive intent

64. The focus of the destructive intent required for genocide must also be distinguished from the intent to destroy rebels and sources of support for rebels to the extent that they are considered combatants. Within the framework established by customary international law, however, the suppression and targeting of rebel groups and their supporters is legal only to the extent that the targeted persons are combatants.[122] Civilians, by contrast, do not lose their protected status and become legitimate targets until they participate in hostilities to the extent that they become combatants.[123] For example, it would not be permissible to make a blanket assumption that members of a protected group are, by definition, rebels or rebel supporters and to target or seek to destroy them accordingly.

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[120] DAR-OTP-0030-066 (Anx J63) at 0068.
[121] UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0084 at para. 304; *see also* UNCOI Report, DAR-OTP-0018-0010 (Anx 17) at 0163 at para. 636 ("It is estimated that more than 1,8 million persons have been forcibly displaced from their homes, and are now hosted in IDP sites throughout Darfur, as well as in refugee camps in Chad. The Commission finds that the forced displacement of the civilian population was both systematic and widespread, and such action would amount to a crime against humanity.").
[122] Article 3(1) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
[123] Article 51(3) of the Protocol I of 10 June 1977, Additional to the Geneva Conventions of 12 August 1949 ("Additional Protocol I"); Article 13(3) of the Protocol II of 10 June 1977, Additional to the Geneva Conventions of 12 August 1949. Moreover, "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian." Article 50(1) of Additional Protocol I.

65. Indeed, throughout history, groups who were subjected to genocide were targeted on the basis of an allegation that they posed a threat to the perpetrating group. For example, during the Rwandan genocide, Hutu perpetrators accused members of the Tutsi ethnicity of supporting the RPF, a rebel group. Yet, government-authored execution lists of Tutsi who were "suspected" RPF members and supporters were considered evidence of genocidal intent,[124] rather than evidence of an intent to target rebels. Similarly, the systematic and indiscriminate targeting of Mayan civilians in Guatemala on the basis of their ethnicity and under the pretext that they were supporting rebels was found to constitute genocide, not an operation to eradicate support for rebel groups.[125]

66. Thus, even if some evidence indicates that some members of the "African tribes" were assisting rebels, as suggested by the Majority,[126] such evidence would not legitimize an estimation that the entire group of "African tribes" was a lawful target.

c) The existence of an intent to destroy a group *as such*

1) "In part": the substantial part requirement

67. When evaluating whether an Accused formulated intent to destroy a protected group "in part", such part has been required to be "substantial".[127] While it should be remembered that the *ad hoc* tribunals have held that there is no numeric threshold of victims necessary to establish genocide,[128]

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[124] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 309.
[125] *See e g* Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, para. 111.
[126] Majority Decision, para. 180.
[127] ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 586; ICTR, *Prosecutor v Bagilishema*, Case No. ICTR-95-1A-T, Trial Judgment, 7 June 2001, para. 64.
[128] ICTR, *Prosecutor v Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgment, 1 December 2003, para. 809.

substantiality is indeed defined not only in terms of numerosity,[129] but also in relation to other factors. For example, if only a part of the group is targeted, the proportion of the targeted group in relation to the protected group as a whole, as well as the prominence of the targeted group within the protected group may be relevant to a determination of substantiality.[130] The perpetrator's zone of control may also be relevant. According to the *Krstić* Appeals Chamber, for example, the destructive intent of the Nazis would be considered in the context of the extent of the Nazi regime's territorial control.[131]

68. In this regard, in order to demonstrate numerosity, the Prosecution submits evidence tending to show that (i) between 2705 and 3413 persons were killed directly in connection with nine attacks on predominantly Fur villages;[132] (ii) approximately 530 persons were killed directly in connection with three attacks on predominantly Masalit villages;[133] and (iii) approximately 925 persons were killed during five attacks on predominantly Zaghawa villages.[134]

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[129] ICTR, *Prosecutor v Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 97.
[130] ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para.12-13.
[131] ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para.12-13.
[132] *See* Prosecution Application, para. 107 (citing UNCOI Material, DAR-OTP-0011-0077 at 0078-0079; Public Source, DAR-OTP-0002-0207 at 0243; Public Source DAR-OTP-0090-0377; Witness Statement, DAR-OTP-0112-0142 at 0151-0152 paras 45-46; Witness Statement, DAR-OTP-0095-0095 at 0107-0011 paras 73-107; UNCOI Material DAR-OTP-0010-0229 at 0255; UNCOI Material DAR-OTP-0018-0010 at 0077 para. 272; UNCOI Material DAR-OTP-0055-0224 at 0229; Witness Statement, DAR-OTP-0088-0038 at 0042-0046, paras. 18-35; Witness Statement, DAR-OTP-0124-0196 at 0215 para. 116; Witness Statement, DAR-OTP-0112-0175 at 0195-0196; Witness Statement, DAR-OTP-00126-0005; UNCOI Material DAR-OTP-0010-0003 at 0036; UNCOI Material DAR-OTP-0018-0010 at 0078 para. 273; SOAT statement, DAR-OTP-0087-0327; Witness Statement, DAR-OTP-0119-0711 at 0718 para. 37; Witness Statement, DAR-OTP-0119-0711 at 0719 para. 41; Video Material, DAR-OTP-0028-0199).
[133] *See* Prosecution Application, para. 108 (citing Witness Statement, DAR-OTP-0088-0262 at 0275-0276, paras 81-82; Public Source, DAR-OTP-0138-0024, at 0026 and 0028; Public Source, DAR-OTP-0108-0562, at para. 32 Public Source, DAR-OTP-0147-0931 at 0936; Public Source DAR-OTP-0147-1230 at 1271 para 169; Public Source DAR-OTP- 0147-1125 at 1194-1195 paras 240 - 244(a)).
[134] *See* Prosecution Application, para. 109 (citing Witness Statement, DAR-OTP-0107-0473 at 0487-0488 para. 64, Public Source DAR-OTP-0121-0084; Public Source DAR-OTP-0121-0078; Public Source, DAR-OTP-0121-0086; Witness Statement, DAR-OTP-0095-0660 at 0669 paras 37, 38 and 40 and Witness Statement, DAR-OTP-0094-0668; Witness Statement, DAR-OTP- 0094-0064 at 0075-

69. In relation to the proportion of the protected group that has been targeted, the Prosecution submits its own calculation based on primary source data contained in a UNHCR report.[135] According to the Prosecution, 97% of predominantly Fur and 85% of predominantly Masalit villages within the area of three administrative units, Habila, Wadi Saleh and Mukjar, were attacked.[136]

2) *The term as such*

70. The inclusion of the term *as such* reemphasises the focus of the prohibition of genocide: the destruction of the protected group itself, rather than the destruction of its individual members. As the *Akayesu* Trial Chamber put it, "[t]he victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual".[137] As a result, in order to consider whether there are reasonable grounds to believe that an alleged perpetrator intended to destroy the group *as such*, the Prosecution must submit evidence showing that the victims were targeted by reason of their membership in the protected group.[138]

71. In this respect, the crimes of genocide and persecution as a crime against humanity can seem similar, as both contain an element of discriminatory targeting. Genocidal intent is distinguishable from persecutorial intent,

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0079; Public Source, DAR-OTP-0121-0014; Public Source, DAR-OTP 0121-0036 at 0037; Public Source, DAR-OTP-0121-0039; Public Source, DAR-OTP-0138-0024, at 0026 and 0028; Public Source, DAR-OTP-0108-0562, at para. 32. Public Source, DAR-OTP-0147-0931 at 0936; Public Source DAR-OTP-0147-1230 at 1271 para. 169; Public Source DAR-OTP-0147-1125 at 1194-1195 paras 240 - 244(a)).

[135] UNCHR Report, "Monitoring of Returns in Southern West Darfur", DAR-OTP-0145-0237 (Anx J2). In order to preserve flexibility for a future Trial Chamber to select an approach to the evidence, I follow the approach of the *Brđanin* Trial Chamber, which considered the proportion of the protected group that were victims of all genocidal acts within the scope of the ICTY Statute. See Prosecutor v. Brđanin, Case No. IT-99-36-T, Trial Judgment, 1 September 2004, para. 974.

[136] Prosecution Application, para. 94.

[137] ICTR, *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, paras. 521 – 522.

[138] ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 561.

however, because the former encompasses both an intent to target the group itself and the intent to destroy the group:

> Even though they both have discriminatory elements, some of which are common to both crimes, in the case of persecution, the perpetrator commits crimes against individuals, on political, racial or religious grounds. It is this factor that establishes a demarcation between genocide and most cases of ethnic cleansing.[139]

72. Nevertheless, the victims' membership in the protected group need not be the only reason for which they were targeted. As stated by the *Niyitegeka* Appeals Chamber, the term *as such*

> has the *effet utile* of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term "as such" clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting "as such" to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership.[140]

For example, a certain group may be targeted not solely because of its ethnicity, but also because of a perceived support for rebel groups. Such a perception, however, does not legitimize the targeting of a protected group as such.

73. Various types of evidence support an inference that an intent to destroy the group as such existed. Direct evidence could include statements by the perpetrator implying an intent to destroy,[141] while circumstantial evidence might include, *inter alia*: (i) evidence of widespread systematic violence

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[139] ICTY, *Prosecutor v. Sikirica et al*, Case No. IT-95-8-T, Judgment on Defence Motions to Acquit, 3 September 2001, para. 89; *see also* ICTY, *Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 67 – 68, 79.
[140] ICTR, *Prosecutor v Niyitegeka*, Case No. ICTR-96-14-A, Appeals Judgment, 9 July 2004, para. 53.
[141] ICTY, *Prosecutor v Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, paras. 73, 75; ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 563; ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 517.

against the targeted group;[142] (ii) evidence of a general campaign of persecution against the targeted group;[143] and (iii) evidence of members of the targeted group being separated or classified according to their membership in the targeted group prior to the commission of the crime.[144]

74. In this connection, I recall the discussion regarding the widespread and systematic pattern in the context of crimes against humanity.[145] More specifically, the following evidence demonstrates a general campaign of persecution against the targeted group. First, regarding the existence of a discriminatory document circulated within the National Islamic Front, one witness related,

> After a historical introduction on the Fur the document indicated that they were to be excluded from key positions in the intelligence service, military, or the police administration and secondly, the Fur areas were to be destabilized in order to instigate the moving out of the Fur from Darfur.[146]

Further, according to the UNCOI report,

> In a vast majority of cases, victims of the attacks belonged to African tribes, in particular the Fur, Masalit and Zaghawa tribes, who were systematically targeted on political grounds in the context of the counter-insurgency policy of the Government. The pillaging and destruction of villages, being conducted on a systematic as well as widespread basis in a discriminatory fashion appears to have been directed to bring about the destruction of livelihoods and the means of survival of these populations. The Commission also considers that the killing, displacement, torture, rape and other sexual violence against civilians was of such a discriminatory character and may constitute persecution as a crime against humanity.[147]

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[142] ICTY, *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Trial Judgment, 14 December 1999, para. 73; ICTR, *Prosecutor v Rutaganda*, Case No. ICTR-96-3, Trial Judgment, 6 December 1999, para. 400.
[143] ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 312.
[144] ICTR, *Prosecutor v Semanza*, Case No. ICTR-97-20-T, Trial Judgment, 15 May 2003, para. 429; ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Trial Judgment, 21 May 1999, para. 287; ICTR, *Prosecutor v Muhimana*, Case No. ICTR-95-1B-T, Trial Judgment, 28 April 2005, para. 515.
[145] Majority Decision at paras. 83-89.
[146] Witness Statement, DAR-OTP-0095-0002 (Anx J95) at 0007 at para. 20.
[147] DAR-OTP-0018-0010 (Anx 17) at 0163, para. 638. See also Short-Cut to Decay, The Case of the Sudan, DAR-OTP-0024-0200 (Anx H, line 41) at 0204-0205 ("The dirty war that has been imposed upon us [i.e. the Fur], began as an economic war but soon it assumed a genocidal course aiming at driving us out of our ancestral land in order to achieve certain political goals. We have followed, with dismay, all the different phases of this war from the time its took the innocent appearance of unrelated incidents of theft until it developed into armed robbery that targeted Fur individuals only. At a later

75. Additionally, the Prosecution submits some evidence of the "African tribes" being classified according to their membership in the group, prior to the commission of a crime. One witness reported,

> I had a shop in the market of New BENDISI, and the men destroyed ten barrels of oil and looted kebkebay from it. They also took sugar and tea and other things from my shop. The looting took place right in front of us, so I could see everything. When the Fursan were looting, some other people were assisting them to identify the shops which had something to loot. They had placed in advance some special marking on the shop doors to identify the ones which were not to be looted. Our shops were in one line and there was one man from the Mararit tribe whose shop had a piece of green cloth hanging from the door hinge. The shop was not looted. I saw later that all other shops which were not looted had similar signs. The collaborators were from the Mararit and the Tama tribes.[148]

76. The evidence submitted in relation to sections (a), (b) and (c) is sufficient to satisfy me that it would be reasonable to infer – among other things – that Omar Al Bashir possessed the intent to destroy the ethnic group of the "African tribes" as such.

iii. Whether any of the evidence provided by the Prosecution renders an inference of genocidal intent unreasonable

77. As outlined above, once it can be determined that the Prosecution submits sufficient evidence to render an inference of genocidal intent reasonable, the question then becomes whether any evidence submitted by the Prosecution renders such an inference unreasonable. In their review of the evidence, the Majority reached the opposite conclusion regarding the existence of

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stage it aimed at the destruction of our economic base and the lifeline of our survival by making it impossible to practise agricultural activities by the constant and brutal attacks on farmers and farming communities. We watched with the greatest degree of alarm the sinister development which aimed at full economic siege of our communities by making the movement of commodities impossible through robbing markets and isolating urban areas from the rural hinterland. At the present time we are witnessing yet another and yet more sinister phase of this dirty war: the aim is a total holocaust and no less than the complete annihilation of the Fur people and all things Fur. How are we to understand the brutal mutilation of Fur victims and the burning alive of residents of Fur villages? The message is quite clear: empty the land and do not allow any Fur survivors to come back and re-establish their villages.").

[148] Witness Statement, DAR-OTP-0119-0503 (Anx 65) at 0520 -0523 at paras. 76- 87.

reasonable grounds to believe that Omar Al Bashir possessed genocidal intent. I will therefore examine their analysis in order to determine whether an inference of genocidal intent is unreasonable.

78. The Majority notes that in the majority of attacks on villages inhabited by the "African" tribes, the "large majority" of inhabitants were neither killed nor injured. Yet, the means of genocidal destruction need not be the most efficient,[149] and the Majority does not consider the proportion of villagers who were forced to flee into the harsh, Darfurian terrain.[150]

79. The Majority also relies on the fact that the Prosecution does not claim that the GoS established long-lasting detention camps in Darfur.[151] While the existence of such camps would certainly be relevant to support an inference of genocidal intent, proof of such camps is not a required element of any of the counts of genocide alleged.[152] Furthermore, the Prosecution alleges and provided evidence of the existence of detention centres, at which there are reasonable grounds to believe that victims were detained under the apparent custody and control of GoS forces.[153]

80. The Majority suggests that the evidence submitted by the Prosecution reflects a significantly different reality than that outlined in the Prosecution Application regarding the alleged GoS' hindrance of medical and humanitarian assistance to persons in IDP camps. While the Prosecution's

[149] ICTY, *Prosecutor v Krstić*, Case No. IT-98-33-A, Appeals Judgment, 19 April 2004, para. 32.
[150] *See* discussion at paras. 97-102, *infra*.
[151] Majority Decision, para. 197.
[152] Elements of Crimes, Articles 6(a), 6(b) and 6(c).
[153] *See, e g* Prosecution Application, para. 146 ("In its Final Report to the Security Council, the UNCOI found that 'torture has been carried out on such a large scale and in such widespread and systematic manner not only during attacks on the civilian population, where it was inextricably linked with these attacks, *but also in detention centres under the authority of the NISS and the Military Intelligence*.") (emphasis added); Witness Statement, DAR-OTP-0097-0292 (Anx J36) at 0295-0300, paras. 20-31; Witness Statement, DAR-OTP-0094-0423 (Anx24) at 0434, paras. 46-51.

allegations indeed focus on the role of Omar Al Bashir and the GoS,[154] and the evidence cited by the Majority indeed illuminates the effect of additional factors on the situation, in my view, the presence of such additional factors does not negate the role of Omar Al Bashir and the GoS.

81. Moreover, the Majority suggests that the evidence submitted by the Prosecution reflects a significantly different reality than that outlined in the Prosecution Application regarding the conditions of life within the IDP camps. As an example, the Majority refers to a report by the United Nations High Commissioner for Human Rights, which suggests, *inter alia*, that (i) rebel supporters may live within the camp and (ii) that there may be criminal elements operating within the camps.[155] I note that such allegations are unproven; indeed, a search warrant issued on suspicion of unlawful possession of weapons did not name specific individuals, but rather, "appeared to be a blanket warrant to search the entire camp".[156] According to the same report, information regarding the presence of light and heavy arms within the camps remains unverified by UNAMID.[157] However, even if such allegations were true, such assistance or criminality would not justify targeting the entire camp on the basis of its ethnic affiliation by preventing the distribution of humanitarian assistance.

82. Finally, I note that the Majority has taken into consideration the fact that the Prosecution now suggests that certain evidence, which was also submitted in connection with the case against Ahmad Harun, is indicative of genocidal intent in connection with the present Application, even though it did not so

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[154] *See generally* Prosecution Application, paras. 185-198.
[155] Eleventh periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan. ***Killing and injuring of civilians on 25 August 2008 by government security forces. Kalma IDP camp, South Darfur, Sudan***, issued on 23 January 2009 by the Office of the High Commissioner for Human Rights in cooperation with the United Nations African Union, ICC-02-05-179-Conf-Exp-Anx2, section on "Background and Context", pp. 3-5.
[156] *Id.*
[157] *Id.*

suggest in its application for an arrest warrant for Ahmad Harun himself. In my view, this fact has no effect upon the significance of such evidence, as there are significant differences between this case and the case against Ahmad Harun. For example, in contrast to the Application for an arrest warrant for Ahmad Harun, the present Application covers a time period between 2003 and 2008. The Prosecution also explains that, in examining whether there was sufficient evidence to include allegations of genocidal intent, the Prosecution placed particular emphasis on the implications of evidence of forcible displacement into harsh terrain, on evidence of conditions in the IDP camps and on evidence of efforts by the GoS to block humanitarian assistance.[158] Accordingly, I do not consider the different characterisation of such evidence to be relevant to its probative value.

83. For these reasons, I do not consider that any evidence submitted by the Prosecution renders an inference of genocidal intent unreasonable.

iv. Whether or not there are reasonable grounds to believe that the mental element of the crime of genocide has been fulfilled

84. In my view, the evidence discussed above demonstrates that the possession of genocidal intent is one reasonable inference to be drawn from the available evidence. As previously explained, this inference need not be the only reasonable one at this stage. Indeed, as noted by the Majority, there are also reasonable grounds to believe that the evidence presented supports various alternative conclusions.[159]

85. Indeed, it is possible that, at a later stage, evidence might be presented such that the Chamber could later determine that there are not substantial

[158] ICC-02/05-T-2-Conf-Exp-Eng, page 20, lines 5-14. Additionally, [REDACTED]. ICC-02/05-T-2-Conf-Exp-Eng, page 21, lines 5-9.
[159] Majority Decision, para. 205.

grounds to believe that Omar Al Bashir possessed genocidal intent. A Trial Chamber might later conclude that some evidence would not permit it to find, beyond a reasonable doubt, that Omar Al Bashir possessed genocidal intent. However, this is not the task of the Pre Trial Chamber at the arrest warrant stage.

86. Rather, once there is sufficient evidence to support *a* reasonable inference that genocidal intent exists, the Chamber need only examine whether there is also evidence that would conclusively disprove the existence of genocidal intent. In my view, no evidence presented by the Prosecution conclusively precludes the reasonable inference that Omar Al Bashir possessed genocidal intent. Thus, I am satisfied that there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent.

D. *Actus Reus*

87. Having examined whether there are reasonable grounds to believe that Omar Al Bashir possessed genocidal intent, I will now turn to the question of whether the Prosecution submitted sufficient evidence to establish reasonable grounds to believe that the *actus reus* element of the crime of genocide is also fulfilled. I note that because the Majority did not find sufficient evidence to establish reasonable grounds to infer genocidal intent, the Majority did not reach the question of whether the Prosecution provides sufficient evidence to establish the *actus reus* elements of counts 1, 2, and 3.

88. The Prosecution's Application contains allegations supporting three counts of genocide:

(i) genocide by killing under article 6(a) of the Statute;

(ii) genocide by causing serious bodily or mental harm under article 6(b) of the Statute; and

(iii) genocide by deliberate infliction on each target group conditions of life calculated to bring about the physical destruction of the group under article 6(c) of the Statute.[160]

89. Once again, I note that a perpetrator may employ various means in the course of implementing a genocidal plan. For example, in one area, there may be many killings, while in another, there may be massive forced displacement into inhospitable terrain. Particularly in a context like Darfur, where causing persons to flee their villages may result in an acute lack of access to water supply and therefore almost certain death, it will be for future trial chambers to determine whether such acts of forced displacement fall under article 6(a) or article 6(c) of the Statute.

90. I will now examine the allegations and evidence submitted by the Prosecution with respect to each count in turn.

i. Genocide by killing – Article 6(a) of the Statute

91. Read together, the terms of article 58 and article 6(a) of the Statute require the Prosecution to provide sufficient evidence to demonstrate that there are reasonable grounds to believe that members of the "African tribes" were killed.[161]

92. As described by the Majority, the Chamber is of the view that there are reasonable grounds to believe that mass killings took place in the context of a widespread and systematic attack on the Fur, Masalit and Zaghawa of

[160] Prosecution Application, paras. 104, 119, 172.
[161] Elements of Crimes, article 6(a)(1).

Darfur.[162] The Chamber has also found that there are reasonable grounds to believe that murders took place in the context of the same widespread and systematic attack.[163]

93. On the basis of this evidence, as well as the evidence discussed *supra* in connection with the targeting of the "African tribes",[164] I am satisfied that there are reasonable grounds to believe that members of the "African tribes" were killed as part of the manifest pattern of conduct outlined in the Majority Decision within the meaning of article 6(a) of the Statute.[165]

ii. Genocide by causing serious bodily or mental harm – Article 6(b) of the Statute

94. In its Application, the Prosecution alleges that members of the target group were subjected to serious bodily or mental harm,[166] including acts of rape,[167] torture[168] and forcible displacement[169] that have occurred within the same context of the manifest pattern of conduct. The Prosecution also states that the jurisprudence of the *ad hoc* tribunals reveals that cruel treatment, torture, rape and forcible deportation may constitute serious bodily or mental harm,[170] although such harm "must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a

[162] Majority Decision, para. 97.
[163] Majority Decision, para. 94.
[164] See discussion at Part III.B, *supra*.
[165] See discussion at Part III.A, *supra*.
[166] Prosecution Application, para. 119.
[167] Prosecution Application, para. 121.
[168] Prosecution Application, para. 146.
[169] Prosecution Application, para. 156.
[170] ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 September 1998, para. 504.

grave and long term disadvantage to a person's ability to lead a normal and constructive life."[171]

95. In this regard, I note that the Chamber has held that there are reasonable grounds to believe that acts of torture,[172] forcible transfer,[173] and rape occurred in the context of a widespread and systematic attack on the Fur, Masalit and Zaghawa of Darfur.[174]

96. On the basis of this evidence, as well as that discussed supra in connection with the targeting of "African tribes", I am satisfied that there are reasonable grounds to believe that members of the "African tribes" were subjected to serious bodily and mental harm as a part of the manifest pattern of conduct outlined in the Majority Decision within the meaning of article 6(b) of the Statute.

iii. Genocide by deliberate infliction on the group conditions of life calculated to bring about the physical destruction of the group – Article 6(c) of the Statute

97. The Prosecution further alleges that a substantial part of the target group was systematically expelled from their land and displaced into inhospitable terrain, where some members succumbed to dehydration, thirst and disease.[175] The Application states that the group's means of survival, including food and water supplies, as well as shelter from the inhospitable Darfurian terrain, were systematically destroyed.[176] According to the Prosecution, while some members found their way to IDP camps, the GoS

[171] Prosecution Application, para. 119 (citing Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, 2 August 2001, para. 513).
[172] Majority Decision, para. 104.
[173] Majority Decision, para. 100.
[174] Majority Decision, para. 108.
[175] Prosecution Application, para. 172.
[176] Prosecution Application, para. 174.

denied and hindered the delivery of medical and humanitarian assistance which were necessary to survive in the camps.[177]

98. First, in my view, such an allegation must be analysed in the context of Darfur's harsh terrain, in which water and food sources are naturally scarce, and shelter is of utmost importance.[178] Second, I note that, in contrast to the Majority's characterisation thereof,[179] the Prosecution's allegations refer not only to the destruction of water sources, but more generally to the destruction of "means of survival", which includes food supplies, food sources, and shelter, in addition to water supplies and sources.[180]

99. Moreover, in my view, the same NGO report cited by the Majority adequately corroborates the allegations made by the Prosecution with respect to the destruction of the victims' means of survival.[181] The report explains that many families depended on farming as a major food source, yet photographs of areas attacked by the Janjaweed revealed burned tree stumps and "no visible signs of vegetation".[182] Further, the report states that, "villagers interviewed by [the NGO] reported witnessing widespread destruction of

[177] Prosecution Application, paras. 185 to 198.
[178] Physicians for Human Rights, Report *Darfur: Assault on Survival. A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0644 ("It is also important to understand that outside of village life, Darfur is an extremely difficult place to survive. At the foot of the expanding Sahara desert, it is known for its searing heat, recurrent drought and minimal infrastructure. While Darfurians have developed complex coping mechanisms enabling them to thrive within their villages, when people are herded from their homes and chased into a land that offers little shelter from the forbidding sun and penetrating winds, no potable water and no animals for food, milk and transport, they succumb to starvation, dehydration and disease.").
[179] Majority Decision, para. 93.
[180] See Prosecution Application, paras. 174-176. Accordingly, in my view, the Majority's characterisation results in a misconstruction of the evidence. See Majority Decision, para. 93 (finding that "there are no reasonable grounds to believe that such a contamination [of the water sources] was a core feature" of the attacks).
[181] This report was written on the basis of field research carried out during three separate trips to the region over a 15 month period, which included interviews with survivors of attacks on three villages and surrounding areas with a total population of 30.000 to 40.000 persons. Physicians for Human Rights, Report *Darfur Assault on Survival. A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0644.
[182] Physicians for Human Rights, Report *Darfur. Assault on Survival. A call for Security. Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0675.

water sources",[183] and notes that generally, attackers torched family compounds, thereby destroying the shelter provided.[184] Especially in light of the harshness of the surrounding terrain, I am satisfied that this evidence provides reasonable grounds to believe that the group's means of survival were systematically destroyed.

100. The harshness of the terrain also informs my view of the significance of the alleged GoS obstruction of access for humanitarian aid workers. The Prosecution submits that those displaced by the attacks on their villages cannot survive without assistance, and that Omar Al Bashir has significantly hindered humanitarian access to the region.[185] Thus, even if the level of obstruction differed over time, as suggested by the Majority,[186] the periods during which the obstruction was high would have significant consequences on the ability of the population to survive.

101. Even though, as the Majority implies, instability and fighting between GoS and rebel forces may also affect the degree to which certain areas are accessible to humanitarian workers, according to an NGO report, humanitarian agencies have faced obstruction even in secure areas, despite the introduction of special administrative procedures aimed at facilitating access in 2004.[187] According to this report, in 2006, the GoS passed a new law further regulating the operation of non-governmental organisations.[188] Indeed, a November 2007 report of the Human Rights Council stated that even though an agreement to allow access for humanitarian aid workers had

[183] Physicians for Human Rights, Report *Darfur. Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0679.
[184] Physicians for Human Rights, Report *Darfur Assault on Survival, A call for Security, Justice and Restitution* (Anx J44) DAR-OTP-0119-0635 at 0678.
[185] ICC-02/05-T-2-Conf-Exp-Eng at p. 5, lines 2-3.
[186] Majority Decision, para. 189.
[187] HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1077.
[188] HRW Report, *Darfur Humanitarian Aid under Siege*, May 2006 (Anx J55) DAR-OTP-0107-1076 at 1077.

been signed between Sudanese officials and the United Nations in March 2007, the UN received complaints alleging that the letter and spirit of the agreement had been violated.[189] The same report detailed a number of instances in which officials of the GoS denied access to certain areas to humanitarian aid workers.[190]

102. On the basis of this evidence, as well as that discussed *supra* in connection with the targeting of "African tribes", I am satisfied that there are reasonable grounds to believe that members of the "African tribes" were subjected to conditions calculated to bring about the destruction of the group.

IV. Mode of liability: co-perpetration under article 25(3)(a) of the Statute

103. In addition, I respectfully disagree with the Majority's assessment of the evidence submitted by the Prosecution in connection with the mode of liability.[191] As the Majority acknowledges, in order to substantiate an allegation that a crime was committed through co-perpetration under article 25(3)(a) of the Statute, the Prosecution must demonstrate that the co-perpetrators shared control over the crime; and each co-perpetrator must have played an essential role in the commission of the crime.[192]

104. In my review of the evidence, I agree that there is sufficient evidence to establish reasonable grounds to believe that there was a common plan,[193] although in my view, the objective of the plan was to target the "African tribes", who were perceived by the GoS as being close to rebel groups, such as

[189] Human Rights Council, Human Rights Situations that Require the Council's Attention (Anx 76), DAR-OTP-0138-0116 at 0193.
[190] Human Rights Council, Human Rights Situations that Require the Council's Attention (Anx 76), DAR-OTP-0138-0116 at 0193-0194.
[191] See footnotes 229-242 in Majority Decision.
[192] ICC-01/04-01/06-803-tEN, para. 342. See also ICC-01/04-01/07-717, para. 521.
[193] Majority Decision, paras. 214-215.

the SLM/A and the JEM. I also agree that the Prosecution has submitted evidence demonstrating the official capacity of various individuals within the government,[194] and that some members of the government sometimes acted with Omar Al Bashir.[195] I also agree that it can be inferred that, as members of the highest level of the GoS, these persons played an essential role in the commission of the crime. However, I do not find any evidence which addresses the issue of the locus of control; it is unclear whether such control indeed rested fully with Omar Al Bashir, or whether it was shared by others such that each person had the power to frustrate the commission of the crime.[196] For this reason, I would decline to find reasonable grounds to believe that Omar Al Bashir was responsible through co-perpetration and instead issue an arrest warrant based only on the mode of liability alleged by the Prosecution, indirect perpetration.

V. Conclusion

105. On the basis of the foregoing evidence, I am satisfied that there are reasonable grounds to issue an arrest warrant on the basis of the existence of reasonable grounds to believe that Omar Al Bashir has committed the crime of genocide. Accordingly, I respectfully dissent from the Majority's decision not to issue an arrest warrant on the basis of genocide.

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[194] Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0016-0017, para. 55; and at 0024, para. 88; at 0025, paras. 89 and 92; and at 0029, para. 112; Witness Statement (Anx 59) DAR-OTP-0118-0002 at 0016-0017, paras. 70-74; Witness Statement (Anx J81) DAR-OTP-0133-0573 at 0610, para. 144

[195] Witness Statement (Anx. J95) DAR-OTP-0095-0002 at 0013, para. 41; Witness Statement (Anx J88) DAR-OTP-0107-0473 at 0484, paras. 47 and 48.

[196] See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-716-Conf, para. 525. In fact, [REDACTED]. ICC-02/05-T-2-Conf-Exp-Eng at p. 61, lines 6-10.

106. Additionally, I respectfully dissent from the Majority's finding that there are reasonable grounds to believe that Omar Al Bashir is responsible as a co-perpetrator under article 25(3)(a) of the Statute.

Done in both English and French, the English version being authoritative.

Judge Anita Ušacka

Dated this Wednesday 4 March 2009

At The Hague, The Netherlands

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Note and Comment

*99 RESPONSIBILITY TO PROTECT: POLITICAL RHETORIC OR EMERGING LEGAL NORM?

Carsten Stahn [FNa1]

The history of the concept of "responsibility to protect" [FN1] sounds almost like a fairy tale. The International Commission on Intervention and State Sovereignty developed this concept in its 2001 report The Responsibility to Protect. The central theme was "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe--from mass murder and rape, from starvation--but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states." [FN2]

In December 2004, this idea was taken up in the context of the debate on United Nations reform. Pointing to international responses to the "successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan," the High-Level Panel on Threats, Challenges and Change stated in its report A More Secure World: Our Shared Responsibility that

> there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider international *100 community--with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies. [FN3]

The UN high-level panel even went so far as to speak of an "emerging norm of a collective international responsibility to protect," which encompasses not only "the 'right to intervene' of any State, but the 'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe." [FN4]

In March 2005, this finding was endorsed by the report of the UN secretary-general entitled "In Larger Freedom: Towards Development, Security and Human Rights for All," which fostered the idea that the security of states and that of humanity are indivisible and that threats facing humanity can be solved only through collective action. [FN5] In this report, the secretary-general made express reference to a paragraph of the High-Level Panel Report that refers to an emerging norm of a collective responsibility to protect, and reaffirmed that the idea of a "responsibility to protect" must be "embrace[d]," and, "when necessary, ... act[ed] on." [FN6]

In September 2005, the concept of the responsibility to protect was incorporated into the outcome document of the high-level meeting of the General Assembly (Outcome Document). [FN7] The Outcome Document contains two paragraphs (paras. 138 and 139) on the responsibility to protect. The assembled heads of state and government recognized the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, [FN8] including the responsibility of each individual state to protect its populations from such crimes, and a corresponding responsibility of the international community. [FN9] This document was subsequently adopted by the General Assembly in its Resolution 60/1, 2005 World Summit Outcome.

The Security Council made its first express reference to the concept in Resolution 1674 on the protection of civilians in armed conflict. [FN10] Not long ago, the notion of "responsibility to protect" was added as a key word to the Wikipedia Free Encyclopedia, where it is defined as a recently developed concept in international relations that aims at "provid[ing] a legal and ethical basis for 'humanitarian intervention."' [FN11]

The articulation of the concept of responsibility to protect is a remarkable achievement. The inclusion of the concept in the Outcome Document not only marks one of the most important results of the 2005 World Summit, but is testimony to a broader systemic shift in international *101 law, namely, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of "human security." [FN12] Under the concept of responsibility to protect, matters affecting the life of the citizens and subjects of a state are no longer exclusively subject to the discretion of the domestic ruler but are perceived as issues of concern to the broader international community (e.g., third states, multilateral institutions, and nonstate actors). This development is part and parcel of a growing transformation of international law from a state-and governing-elite-based system of rules into a normative framework designed to protect certain human and community interests.

Yet the quick rise of the concept of responsibility to protect from an idea

into an alleged emerging legal norm raises some suspicions from a positivist perspective. How can a concept that is labeled as a "new approach" [FN13] and a "re-characterization" of sovereignty [FN14] in 2001 turn into an emerging legal norm within the course of four years, and into an organizing principle for peace and security in the UN system one year later? None of the four main documents in which responsibility to protect has been treated in depth can be regarded as generating binding international law under the classic sources of international law set forth in Article 38 of the Statute of the International Court of Justice (ICJ) (e.g., "international conventions," "international custom, as evidence of a general practice accepted as law," and "general principles of law"). [FN15] Contemporary understanding lends some weight to resolutions adopted by the General Assembly [FN16] and occasionally even to reports issued by the UN secretary-general and certain expert bodies, in particular when combined with more traditional sources (treaties or state practice). [FN17] However, even this broader conception of the formation of law, which takes into account the provenance and conditions of adoption of certain documents (e.g., adoption by consensus, the composition of the respective body), fails to offer conclusive guidance in this regard. A closer study of the relevant reports and documents reveals considerable divergences in opinion. Different bodies have employed the same notion to describe partly different paradigms. The text of the Outcome Document of the World Summit, which is arguably the most authoritative of the four documents in terms of its legal value, [FN18] leaves considerable doubt concerning whether and to what extent states intended to create a legal norm.

*102 These findings suggest that something is wrong here. Either the concept of responsibility to protect is actually not so new and innovative as portrayed, [FN19] or the qualification is wrong. Maybe the notion itself is so indeterminate that it does not yet meet the requirements of a legal norm.

This essay seeks to clarify the current status of the law and to identify its possible future directions. It argues in part I that the concept of responsibility to protect should be understood partly as a political catchword that gained quick acceptance because it could be interpreted by different actors in different ways, and partly as "old wine in new bottles." Some of the propositions are not novel, but grounded in established concepts of international law. [FN20] Other aspects of the concept are seen in part II as deserving of further clarification. It is thus fair to conclude that the concept currently encompasses a spectrum of different normative propositions that vary considerably in their status and degree of legal support.

I. INTERPRETIVE AND NORMATIVE DIVIDES: DIFFERENT BODIES, DIFFERENT MEANINGS

The concept of responsibility to protect is treated differently in the four documents associated with its genesis, namely, the report of the Commission on State Sovereignty and Intervention, the High-Level Panel Report, the Report of the Secretary-General, and the Outcome Document of the 2005 World Summit.

The Approach of the Commission on State Sovereignty and Intervention

The most comprehensive treatment of the concept was offered by the Commission on State Sovereignty and Intervention. The commission essentially developed the concept of responsibility to protect to solve the legal and policy dilemmas of humanitarian interventions. The commission focused on the relationship between sovereignty and intervention, specifically on how the international community should "respond to a Rwanda, to a Srebrenica--to gross and systematic

violations of human rights that [offend] every precept of our common humanity" if "humanitarian intervention is, indeed, an unacceptable assault on sovereignty." [FN21]

The commission proposed dealing with this problem by recharacterizing sovereignty, that is, by conceiving of sovereignty as responsibility rather than control. [FN22] The commission thus used a rhetorical trick: [FN23] it flipped the coin, shifting the emphasis from a politically and legally undesirable right to intervene for humanitarian purposes to the less confrontational idea of a responsibility to protect. [FN24]

*103 The commission tried to distinguish the idea of responsibility to protect from the concept of humanitarian intervention [FN25] in three ways. [FN26] The report emphasized, first of all, that responsibility to protect looks at intervention from a different perspective than the doctrine of humanitarian intervention. The commission stressed that responsibility to protect addresses the dilemma of intervention from the perspective of the needs of those who seek or need support (e.g., communities in need of protection from genocide, mass killings, ethnic cleansing, rape, or mass starvation), [FN27] rather than from the interests and perspectives of those who carry out such action (entities asserting the "right to intervene"). [FN28]

Second, the commission sought to bridge the gap between intervention and sovereignty by introducing a complementary concept of responsibility, under which responsibility is shared by the national state and the broader international community. The commission recognized that the main (the primary) responsibility to protect resides with the state whose people are directly affected by conflict or massive human rights abuses, [FN29] and "that it is only if the state is unable or unwilling to fulfill this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place." [FN30]

Third, the commission expanded the conceptual parameters of the notion of intervention, declaring that an effective response to mass atrocities requires not only reaction, but ongoing engagement to prevent conflict and rebuild after the event. The commission developed a multiphased conception of responsibility, based on a distinction between responsibility to prevent and react and responsibility to rebuild. This conception of responsibility "means that if military intervention action is taken--because of a breakdown or abdication of a state's own capacity and authority in discharging its 'responsibility to protect'--there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development." [FN31]

*104 The move from a right to intervene to a responsibility to protect was justified by the commission on the basis of a distinction between a state's internal and external responsibility. The commission recognized that states' authorities are responsible for the safety, life, and welfare of their citizens, and that they are also responsible to citizens internally. [FN32] However, the commission stressed that at the same time states bear an external responsibility with regard to the international community through the United Nations. [FN33] The commission acknowledged that violations of this dual responsibility could ultimately require "action ... by the broader community of states to support populations that are in jeopardy or under serious threat." [FN34] It identified three circumstances in which this "residual responsibility" of the broader community of states is activated:

-- "when a particular state is clearly either unwilling or

unable to fulfill its responsibility to protect";

-- "when a particular state ... is itself the actual perpetrator of crimes or atrocities"; or

-- "where people living outside a particular state are directly threatened by actions taking place there." [FN35]

The report of the commission managed to gather broad support because it avoided taking a final stance on the question of the legality/legitimacy of unauthorized interventions. The invention of the notion of responsibility to protect assisted in this effort by leaving flexible the choice of means (e.g., humanitarian assistance, economic assistance, military engagement) to exercise that responsibility. The commission made it clear that the "Security Council should be the first port of call on any matter relating to military intervention for human protection purposes," [FN36] but it did not categorically exclude the possibility that the responsibility to protect might ultimately be assumed by the General Assembly, regional organizations, or coalitions of states if the Security Council fails to act. The commission left open whether and under what circumstances an "intervention not authorized by the Security Council or [the] General Assembly" would be valid in legal terms. [FN37] Nevertheless, it advised that when the Council fails to discharge what the commission would regard as its responsibility to protect, a balancing assessment should be made as to where the most harm lies: "in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered." [FN38] Moreover, the commission developed five criteria of legitimacy for interventions, which were deemed to apply to "both the Security Council and [UN] member states," [FN39] namely, just cause, right intention, last resort, proportionality of means, and a reasonable prospect of success. [FN40]

*105 The High-Level Panel Report

The debate about the concept of responsibility to protect took a new turn in the High-Level Panel Report, where it was directly related to institutional reform of the United Nations. The high-level panel saw the idea of responsibility to protect as a means to strengthen the collective security system under the Charter.

The panel treated the concept in two parts of its report. It mentioned the nexus between sovereignty and responsibility in the opening pages [FN41] and subsequently developed the contours of the concept in the context of the "use of force," in a section entitled "Chapter VII of the Charter of the United Nations, internal threats and the responsibility to protect." [FN42]

The purported scope of the responsibility to protect remained unclear in the panel's report. Although the panel recognized that each individual state has a special duty vis-a-vis its citizens, [FN43] it spoke at the same time of a (collective) "'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe--mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease." [FN44] The reference to the responsibility of "every State" left room for different interpretations. It could be read as a simple reminder of the erga omnes nature of the international obligations (e.g., in cases of genocide, torture, and grave breaches of the Geneva Conventions) that give rise to the responsibility to protect. [FN45] However, the text also allowed for a broader reading that endorsed a wider concept of "responsibility" under which the responsibility of the host

state shifts to every other state in cases where the former is unable or unwilling to act. [FN46] This reading would significantly extend the existing parameters of the law of state responsibility. It would detach the idea of responsibility of a sovereign from the traditional criteria of nationality or territoriality and establish a multilayered system of responsibility, in which the primary responsibility of the state vis-a-vis its citizens is complemented by a residual responsibility of all sovereign governments vis-a-vis human catastrophes.

One of the particularities of the High-Level Panel Report is the linkage of the panel's vision of shared responsibility directly to the United Nations. The idea of responsibility to protect became part and parcel of the vocabulary of UN reform. The panel associated the concept of collective responsibility, in particular, with action by the Security Council. It reiterated that *106 the Security Council has not only the authority, but also a certain responsibility to take action to combat humanitarian crises. The report stated that the Security Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective responsibility to protect, the Council "can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a 'threat to international peace and security'." [FN47] This passage was meant as an incentive for the Council to act responsibly by giving the UN collective security system the wherewithal to work effectively in all cases of humanitarian crises. [FN48] The panel combined this appeal to responsibility with a plea for a more transparent and responsible use of the right of veto by the five permanent members of the Security Council. The panel urged the permanent members, in particular, "to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses." [FN49] Both statements reflect the panel's intention to make the Council both a vehicle for, and an addressee of, the concept of responsibility to protect.

This goal was accompanied by an express effort to channel international intervention through the Security Council. [FN50] The panel took the position that UN members must resort to the collective security system in all cases of military intervention, including operations carried out by regional organizations. [FN51] Unlike the Commission on State Sovereignty and Intervention, the panel did not envisage that an international responsibility to protect could be invoked by coalitions of the able and willing or regional organizations in the absence of Security Council authorization. [FN52] The report stressed that the "emerging norm" of a "collective international responsibility to protect" was only "exercisable by the Security Council" and only if military intervention was at stake. This approach was guided by the ambition of the drafters of the report to reinforce the UN system after the 2003 intervention in Iraq. [FN53]

The panel's treatment of collective security culminated in the identification of "five basic criteria of legitimacy" for the use of force (seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences). [FN54] Interestingly, in establishing these legitimacy criteria, the panel did not contemplate solving the impasse of unauthorized interventions, but intended to enhance "the effectiveness of the global collective security system." [FN55] The *107 criteria were primarily addressed to the Security Council and formulated to guide the Council in its decision "whether to authorize or endorse the use of military force." [FN56] The panel only hinted at the option of a broader application of these criteria by states, noting that "it would be valuable if individual Member States, whether or not they are members of the Security Council, subscribed to them." [FN57]

The Report of the Secretary-General

The tensions inherent in the notion of responsibility to protect are reflected in the subsequent report of the secretary-general on larger freedom. The secretary-general did not simply endorse the findings of an emerging norm of a collective responsibility to protect, but stressed that he was "aware of the sensitivities involved in this issue." [FN58] The concept was removed from the section on the use of force and placed in the section dealing with freedom to live in dignity, so as to detach the idea of responsibility from an automatic equation to armed force. Accordingly, the thematic focus of the concept changed. Responsibility to protect was no longer exclusively viewed as a surrogate for humanitarian intervention but as a strategy to promote the commitment of all nations to the rule of law and human security. [FN59] This focus was in line with the general theme of the secretary-general's report, which sought to combine the "imperative of collective action" with a "shared vision of development." [FN60]

Consequently, the secretary-general placed stronger emphasis on the need to implement the responsibility to protect through peaceful means. In the report, the international community's residual responsibility to protect became a responsibility to "use diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations." [FN61] Use of force was described as an ultima ratio measure that, if taken, ought to be carried out by the Security Council. [FN62] The notion of responsibility to protect was used to constrain, rather than to enable, the use of force. When associated with armed force, however, the concept of responsibility to protect was not viewed as a means to establish alternatives to the Security Council but as an instrument "to make it work better." [FN63] Moreover, the report referred to the five criteria of legitimacy for the use of force mentioned in the High-Level Panel Report as exclusively directed to the Council. [FN64]

Thus, from a legal point of view there was no substantive change with respect to the treatment of humanitarian interventions. The Report of the Secretary-General did not expressly rule out the possibility of unilateral action in any circumstances (e.g., where the veto is used to block action in a case of genocide). Nevertheless, the general focus of the report on the Council and the silence of the secretary-general on alternative means of carrying out interventions *108 for purposes of human protection indicated a general reluctance to accept military action without the Security Council's authorization.

The Outcome Document of the 2005 World Summit

The different conceptions of the notion of responsibility to protect finally became apparent in the drafting process of the Outcome Document of the 2005 World Summit. Both the form and contours of the concept were intensively debated before the high-level plenary meeting. Several states (Algeria, Belarus, Cuba, Egypt, Iran, Pakistan, the Russian Federation, and Venezuela) expressed reservations about including the responsibility to protect in the Outcome Document. Some delegations argued that the concept was too vague and open to abuse. Others doubted that it was compatible with the Charter, noting that there is no shared responsibility in international law outside the responsibility of a state to protect its own citizens and the institutional mandate of the United Nations to safeguard international peace and security. [FN65] Still others again questioned the legal nature of the responsibility to protect and sought to frame this idea in terms of a moral principle. U.S. ambassador John R. Bolton, for example, stated in a letter dated August 30, 2005, that the United States would "not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law." [FN66] Accordingly, the U.S. delegation proposed that the idea of an international responsibility to protect be defined in the form of a "moral responsibility" of

the international community to "use appropriate diplomatic, economic, humanitarian and other peaceful means, including under Chapters VI and VIII of the Charter to help protect populations from ... atrocities." [FN67]

The final text of the Outcome Document is a compromise solution that seeks to bridge the different positions. States avoided reducing the idea of responsibility to protect to a purely moral concept. However, paragraphs 138 and 139 of the Outcome Document represent a rather curious mixture of political and legal considerations, which reflects the continuing division and confusion about the meaning of the concept.

The two paragraphs are drafted in a discursive fashion, which is typical of political declarations. The clearest commitment is contained in paragraph 138. It opens with the straightforward statement that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity." [FN68] This sentence reflects the traditional bond of duty between the host state and its citizens. This bond is expressly recognized by the respective heads of state and government by way of a collective affirmation ("We accept that responsibility ..."). [FN69]

The passage on the responsibility of the international community is framed in more cautious terms. The Outcome Document relied implicitly on the distinction between responsibility to prevent, responsibility to react, and responsibility to rebuild made by the Commission on State *109 Sovereignty and Intervention. However, each of these concepts is treated in individual terms with varying degrees of support.

The idea of responsibility to prevent is phrased in terms of a general appeal ("should, as appropriate") to the international community to assist states and the United Nations in the prevention of crimes. [FN70] Responsibility to react is taken up in paragraph 139, which states plainly and unconditionally that "[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." [FN71] This sentence suggests that the idea of responsibility to react enjoys at least some acceptance with regard to measures falling short of the use of force.

However, the Outcome Document assumes a more reserved stance vis-a-vis responsibility to take collective action through the Security Council under Chapter VII. The second sentence of paragraph 139 places this idea under a double qualifier. First, the heads of state and government merely reaffirm their preparedness to take such action. [FN72] This language points toward a voluntary, rather than a mandatory, engagement. Moreover, states commit themselves to act only "on a case-by-case basis" through the Council, [FN73] which again stands in contrast to the assumption of a systematic duty. This dual condition distinguishes the tenor of the Outcome Document from the responsibility-driven approach of the high-level panel toward collective security [FN74] and appears to reflect the view of those states that questioned the proposition that the Charter creates a legal obligation for Security Council members to support enforcement action in the case of mass atrocities. [FN75] The idea of guidelines for the authorization or endorsement of the use of force by the Council was dropped entirely.

More fundamentally, the text of the Outcome Document does not firmly state that UN collective security action constitutes the only option for responding to mass atrocities through the use of force. Some states claimed that the concept of

collective action under the umbrella of the responsibility to protect should not preclude action absent Security Council authorization. The United States, for example, argued that the Outcome Document should not foreclose the possibility of unauthorized intervention, noting that there "may be cases that involve humanitarian catastrophes but for which there is also a legitimate basis for states to act in self-defense." [FN76] The Outcome Document does not exclude this line of reasoning. It leaves the door open to unilateral responses through its "case-by-case" vision of collective security and a qualified commitment to act in cooperation with regional organizations ("as appropriate"). [FN77]

*110 Importantly, the Outcome Document places the entire concept of responsibility to react under a final, additional proviso. The heads of state and government stressed "the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law." [FN78] This language was inserted in the text in deference to states that felt that responsibility to protect was not yet sufficiently clear in conceptual terms and needed further consideration in the General Assembly before its implementation. [FN79] The express reference to the need for conformity with "the principles of the Charter and international law" creates further ambiguity. It almost seems to suggest that the drafters of the Outcome Document had some doubts whether their own proposal was consistent with international law and the Charter.

The concept of responsibility to rebuild received even less explicit support. The heads of state and government merely expressed their intention to commit themselves, "as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out." [FN80] The issue of postintervention engagement was mainly addressed in institutional terms, namely, through the creation of the Peacebuilding Commission, which was specifically established to address the challenge of helping countries make the transition from war to lasting peace. [FN81]

Altogether, the Outcome Document is rather confusing. The fact that responsibility to protect is treated under a separate heading indicates that the idea as such enjoys basic support. Obviously, the drafters also sought to give the concept a certain legal meaning. However, its individual components remain unclear as a result of obvious differences in opinion.

II. TRADITION VS. INNOVATION

The continuing international division raises some doubts about the status of the concept of responsibility to protect. The High-Level Panel Report qualified this concept as an emerging norm. However, this characterization is misleading, since it is overoptimistic and overpessimistic at the same time. Some of the features of the concept are actually well embedded in contemporary international law, while others are so innovative that it may be premature to speak of a crystallizing practice.

*111 Partly "Old Wine in New Bottles"

As mentioned above, the responsibility to protect is not a completely novel idea. Some of the allegedly emerging elements of the concept have surfaced in the past.

Sovereignty as responsibility. The shift from sovereignty as control to sovereignty as responsibility appears to be less radical than suggested by its history. [FN82]

The understanding that a state exercises the functions of an agent and trustee for the human beings who are affected by the consequences of state action is not a twentieth-century principle, but can be traced much further back. It appeared as early as the time of Hugo Grotius, whose conception of law was based on the assumption that the rules governing the organization and behavior of states exist ultimately for the benefit of the actual subjects of the rights and duties concerned, individual human beings. [FN83] Grotius even maintained that it would be just to resort to war to prevent a state from maltreating its own subjects. [FN84] A similar understanding of the state is reflected in the work of contract theorists. John Locke viewed the relationship between the state and its citizens in terms of "trust." [FN85] In fact, the word "trust" appears more frequently than "contract" in his most famous political work, The Second Treatise of Civil Government.

Similarly, in international law the state has never been exclusively considered a self-referential entity. Sovereignty and domestic jurisdiction have traditionally served as forums for the protection of the well-being and interests of human beings. Ever since the seventeenth century, attempts have been made to grant individuals and groups international protection from the arbitrary exercise of state authority. [FN86] Religious groups were even protected by treaty from their own sovereign. Later, this protection was extended to minorities. [FN87] In the external relations of *112 states, citizens and subjects of other states were often perceived as capital assets or extensions of a state's dignity. However, foreigners were protected by a minimum standard of protection under international law, which came to include guarantees of equality and dignity at the beginning of the twentieth century. [FN88] Moreover, the classical paradigm of diplomatic protection, which is rooted in customary international law, is at least partly built on the idea of the fusion of private and public (state) interests. [FN89]

It is also well understood that sovereignty entails duties on the international plane. Sovereignty never meant that a state could act in its territory regardless of the effect of its acts on another state. This point was expressly made in 1928 by the arbitrator Max Huber in the award in the Island of Palmas case. [FN90] After the end of World War II, the adoption of the UN Charter and the rise of key human rights instruments eroded the classic equation of sovereignty and "power." Although the Charter was oriented toward protecting the sanctity of sovereignty, it contained important references to human rights protection. The preamble, the last sentence of Article 2(7), [FN91] and Articles 1(3) and 55 made it clear that the Charter was designed to "protect the sovereignty of peoples" and was "never meant as a licence for governments to trample on human rights and human dignity." [FN92] This reading of the Charter was recognized in legal doctrine as early as 1947. [FN93] It became apparent with the unleashing of Chapter VII after the Cold War. It was accompanied by the recognition of the concept of erga omnes obligations ("obligations of a State towards the international community as a whole") by the ICJ [FN94] and was later followed by the establishment of separate rules of state responsibility for "serious breaches of obligations under peremptory norms of general international law" by the International Law Commission (ILC). [FN95]

*113 Consequently, it has been argued on numerous occasions over the last

several decades that sovereignty cannot be used as a shield against intervention. Some authorities made this point in the immediate aftermath of World War II. Hersch Lauterpacht, for example, in the sixth edition of Oppenheim's International Law, departed from the view of his predecessor, noting that "when a State renders itself guilty of cruelties against and persecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible." [FN96]

In the 1980s, the concept of a "duty to intervene" was invoked by groups seeking access to victims for the purpose of humanitarian assistance. Humanitarian organizations used the vocabulary of "duty" (devoir d'ingerence) to make the case that nongovernmental organizations should have unrestricted access to victims of humanitarian catastrophes, even without the consent of the territorial state. [FN97]

In the 1990s, this argument was extended to certain military interventions, specifically those in collapsed states and those styling themselves as "humanitarian interventions." In the context of Somalia, it was argued that the prohibition of the use of force does not rule out interventions in states that are unable to protect their populations because of a collapse of public authority. Such interventions, so went the argument, would not run counter to the principles of sovereignty and territorial integrity of the host state, which Charter Articles 2(4) and 2(7) are designed to protect. [FN98]

Later, this reasoning was more frequently applied to humanitarian interventions, and in particular to the case of Kosovo. [FN99] Proponents of the legality of humanitarian interventions relied on the concept of sovereignty as responsibility to justify a (limited) right to use force for humanitarian purposes. They contended that humanitarian interventions are compatible with the telos of the principle of nonintervention and the prohibition of the use of force under Article 2(4). Both norms, they claimed, were meant to protect the citizens of a state, rather than the state as an entity. This rationale ceases to apply in favor of the state when the domestic sovereign violates the rights of its own population. [FN100]

*114 Recently, the departure from classic principles of nonintervention was codified in the Constitutive Act of the African Union. [FN101] Article 4(h) of the treaty recognizes an express right of intervention of the Union, [FN102] the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity [as well as a serious threat to legitimate order]." [FN103]

The concept of responsibility to protect is rooted in the same school of thought. It relies on the axiom that sovereignty exists essentially for the purpose of protecting people. The state is conceived of as the principal guardian of the rights of its people; however, it loses this status of primacy in cases where it is unable or unwilling to ensure this protection.

Parameters of intervention. A similar point may be made with respect to the concept of intervention when used in connection with the notion of responsibility to protect.

The idea of intervention as a continuum (responsibility to prevent, responsibility to protect, responsibility to rebuild) did not come out of the blue. The need for a multiphased vision of international engagement became evident

during the multidimensional UN peacekeeping of the 1990s. Secretary-General Boutros Boutros-Ghali developed a tripartite conception of peacemaking in his widely read Agenda for Peace, which distinguished peacemaking as preventive diplomacy and "post-conflict peacebuilding." [FN104] Individual aspects of this distinction were then developed in other reports, such as the Brahimi report, [FN105] which stressed the importance of the continuity of the process from preventive action to peace building, and the report of the secretary-general "No Exit Without Strategy," which stressed the idea of responsibility after intervention and the need for a postengagement strategy after elections. [FN106]

An even longer historical lineage marks the criteria for the legitimacy of intervention proposed by the Commission on State Sovereignty and the high-level panel. At least four of these criteria (just cause, right intention, last resort, and proportionality of means) hark back to the just war doctrine.

*115 All of these examples illustrate one broader point. Many of the elements of the concept of responsibility to protect are not novel, but rooted in a broader ideological or legal tradition; and it appears to be this link that allowed the concept to gain some acceptance in recent practice.

Partly Progressive Development of the Law

Other elements of the responsibility to protect, in contrast to those just reviewed, are innovative--so innovative, indeed, that it is difficult to ascribe them to the existing acquis of international law.

The concept of responsibility to protect appears to associate the idea of human security with certain duties, that is, a collective responsibility to act in the face of gross human rights violations (e.g., to prevent, to react, to rebuild). This vision is novel. So far, such duties have been derived (if at all) from the (rather vague) concept of solidarity. To link protection to responsibility goes a step further, in particular, if responsibility is understood in the sense of a positive obligation.

The law of state responsibility recognizes that certain violations of international law affect all states, [FN107] and it authorizes states to respond to such violations through claims for "the cessation of the ... wrongful act," demands for the performance of reparation, [FN108] or countermeasures. [FN109] However, contemporary international law imposes only limited positive duties on states. The ILC Articles on State Responsibility, for instance, endorse the idea that certain breaches of international law may be so grave as to trigger not only a right, but also a certain obligation of states to foster compliance with the law. But the ILC limited this principle to the particular category of violations designated as serious breaches ("a gross or systematic failure by the responsible State" [FN110]) of "a peremptory norm of general international law." [FN111] The Commission specified that such breaches would entail two sets of consequences: (1) a positive obligation of states "to cooperate to bring [the serious breach] to an end through lawful means" (Article 41(1)); and (2) a negative obligation of states not to recognize as lawful a situation created by the serious breach and not to render aid or assistance in maintaining that situation (Article 41(2)).

The duty of cooperation under Article 41(1) comes close to the idea of collective responsibility under the concept of responsibility to protect. The Commission made clear that the obligation to cooperate applies to states whether or not they are individually affected by the serious breach. It associated this

duty, in particular, with two forms of action, which are also relevant to the responsibility to protect: "a joint and coordinated effort by all states to counteract the effects of [serious] breaches" of peremptory norms of general international law; [FN112] and international cooperation, which would be "organised in the framework of a competent international organization, in particular the United Nations." [FN113]

*116 However, the Commission subjected the entire concept of an obligation to cooperate to an express caveat. It acknowledged that it is open to question whether general international law at present prescribes a positive duty of cooperation and conceded that in that respect Article 41(1) "may reflect the progressive development of international law." [FN114]

The concept of responsibility to protect takes the idea of responsibility even a step further than the ILC. The Outcome Document of the 2005 World Summit modifies the threshold set by the ILC articles. It does not link the idea of a collective international responsibility to a double qualifier (serious breaches of peremptory norms of general international law, such as genocide [FN115]), but extends that idea to all forms of "genocide, war crimes, ethnic cleansing and crimes against humanity." [FN116] Moreover, the targeted obligation to cooperate to end the breach is transformed into a general responsibility to "use diplomatic, humanitarian or other peaceful means" or collective (security) action to "help protect populations from atrocities." It is thus clear: if the responsibility to protect as set forth in the Outcome Document is meant to entail positive obligations in the sense of Article 41(1) of the ILC articles, it marks an even more progressive development of international law than the project of the ILC.

III. CONSTRUCTIONAL AMBIGUITIES

These normative ambiguities are complemented by some constructional deficiencies. Some of the implications of the conception of responsibility to protect have not yet been fully contemplated from a legal perspective. Two issues deserve further attention: the concept of complementarity, and the consequences of a violation of the responsibility to protect.

The "Complementarity Trap"

Complementarity has been used as a tool to win the support of states for the concept of responsibility to protect. All of the four documents that refer to the concept rely on complementarity. They make a distinction between the primary responsibility to protect of the host state, and the fallback responsibility of the international community, [FN117] which is triggered if the host is unable or unwilling to secure protection. [FN118] This setting of priorities accords with the idea that domestic authorities are often "best placed to take action" on the ground [FN119] and enjoy the proper legitimacy to make fundamental choices about the future of their constituency.

However, in some cases this scheme may actually turn into a complementarity trap. The complementarity principle may create an additional threshold for collective security action, *117 which would burden the Security Council. The argument of states' primary responsibility may be used to constrain, rather than enable, Council involvement. This risk looms particularly large in the case of paragraph 139 of the Outcome Document, which indicates that, in principle, collective action shall be taken only if national authorities manifestly fail to

protect their populations from genocide, war crimes, ethnic cleansing, or crimes against humanity. The meaning of the term "manifestly fails" is unclear. Moreover, the requirement of manifest failure may be used as an additional means to challenge the legality and timing of collective security action. Nonfailure may be invoked as a defense in a double sense, both prior to international engagement and following any such deployment. Domestic authorities may invoke their primary responsibility to argue that international actors are either not yet competent to assume control or no more entitled to exercise such protection than local actors.

The case of Darfur serves as an example in this regard. In the Security Council, some states used the argument of primacy to prevent the imposition of sanctions against Sudan. They claimed that it was premature to take collective action, since the crisis in Sudan had not yet reached a stage where the domestic government had manifestly failed to exercise its responsibility to protect. [FN120] This experience shows that the concept of complementarity is a doubleedged sword. It preserves domestic ownership but may in some instances run counter to the very idea of strengthening collective security. To avoid any incompatibilities with the collective security system, the operation of the complementarity principle should remain subject to the Chapter VII powers of the Security Council under the Charter.

Implications of Inaction

All of the four documents examined are silent on the fundamental question of how to deal with violations of the responsibility to protect. This issue has been addressed only in cursory fashion by the architects of the concept.

Some agreement appears to have taken hold on the idea that inaction by the host state can be remedied through collective action. But what if states or international authorities do not live up to their residual responsibility to protect? Should such omissions equally be subject to some sanction; and, if so, how should they be remedied?

The four documents fail to deal with this question. If the responsibility to protect were indeed a primary legal norm of international law, it would be logical to assume that such violations should entail some form of legal sanction in case of noncompliance. But it is uncertain on what basis and under which rules such violations could be remedied. This specific type of violation, the breach of a positive duty, is not addressed as such by the regime of the law of state responsibility. [FN121] Nor has it been conclusively determined whether and under what conditions inaction by an international organization may entail international legal responsibility. [FN122] One *118 might argue that a state's noncompliance with a duty "to protect" might trigger a certain right, or even duty, of third parties to protest against this inaction. Yet it is difficult to imagine what legal consequences noncompliance by a political body like the Security Council should entail. It is highly questionable whether the architects of the responsibility to protect wanted to attach any direct legal consequence to such inaction.

The uncertainty surrounding the consequences of noncompliance raises a broader question of principle. It sheds doubt on the notion that responsibility to protect was meant to be an emerging hard norm of international law at all, instead of "soft law" or a political principle.

IV. CONCLUSION

A comparative analysis of the report of the International Commission on State Sovereignty and Intervention, the High-Level Panel Report, the Report of the Secretary-General, and the Outcome Document of the 2005 World Summit indicates that responsibility to protect is a multifaceted concept with various elements. The core tenet of the concept (sovereignty entails responsibility) enjoys broad support among states, and in the United Nations and civil society. However, each of the four documents examined here embodies a slightly different vision of responsibility to protect. This divergence explains part of its success. The notion became popular because it could be used by different bodies to promote different goals.

The guiding theme of the concept is a sharing of responsibility by the territorial state (primary responsibility) and other actors in matters of human security. The main components of this division of responsibility may be described in five propositions that enjoy different levels of support, ranging from the most accepted to the least.

Proposition No. 1: The Host State Has a Duty to Protect Citizens on Its Territory

The most commonly accepted proposition is that the host state has a responsibility to protect citizens on its territory from large-scale atrocities. This duty is recognized in an equal fashion by all four documents and has been articulated in contemporary statements by state representatives. [FN123] It is rooted in the traditional obligation of the state to safeguard the well-being and security of persons under its jurisdiction, which is reflected, inter alia, in universal and regional human rights conventions, [FN124] and reinforced by the growing commitment to criminalizing genocide, crimes against humanity, and war crimes under domestic law. [FN125]

*119 Proposition No. 2: States Failing the Duty to Protect Have a Weak Sovereignty Defense

Second, the documents in question reflect an emerging consensus on what one may call the negative dimension of responsibility to protect: the limited ability of the host state to invoke sovereignty against external interference. Responsibility to protect is based on the assumption that the host state has a duty to accept aid, assistance, or even the use of force from the outside. [FN126] This idea may be found in the final clause of Article 2(7) of the Charter. It gains a broader dimension in the context of responsibility to protect, which makes it harder for states to invoke sovereignty as a shield when they are failing to protect their populations. State sovereignty and territorial integrity are no longer a blanket defense against intervention. States will be forced to substantiate the claim that they are upholding certain norms and standards of governance vis-a-vis their own population when they invoke sovereignty as a defense against external interference.

Proposition No. 3: Foreign Entities May Intervene Nonforcibly

Third, there is growing support for the idea that both the United Nations and third states may intervene nonforcibly (i.e., through diplomatic,

humanitarian, and peaceful means) in cases where the host state fails to protect citizens on its territory from genocide, war crimes, ethnic cleansing, and crimes against humanity. The Outcome Document strongly emphasizes a collective response "through the United Nations." [FN127] However, none of the four documents excludes state-based responses. [FN128] Under the ILC Articles on State Responsibility, this option finds support in the right of "injured State[s]" [FN129] to take countermeasures under Article 49 and the entitlement of "[a]ny state" to claim "cessation of the internationally wrongful act, and assurances and guarantees of non-repetition" when the "obligation breached is owed to the international community as a whole." [FN130]

Proposition No. 4: Foreign States May Intervene Forcibly

It is far more controversial whether and under what circumstances states may use force to put an end to large-scale atrocities. The use of military force is expressly excluded from the realm of possible countermeasures under the ILC articles. [FN131] In the context of the responsibility to protect, the approach to unauthorized uses of force varies from document to document. The High-Level Panel Report ("exercisable by the Security Council") [FN132] and the Report of the Secretary-General reflect continuing reservations about responses outside the collective security *120 system. At the same time, states did not categorically reject the option of (individual or collective) unilateral action in the Outcome Document. This discrepancy leaves some leeway to argue that the concept of responsibility to protect is not meant to rule out such action in the future. [FN133] However, all four documents subscribe to one common qualifier: they make clear that the collective security system shall remain the primary forum for military action. Unilateral responses (if contemplated at all [FN134]) are envisaged only as a last resort.

Proposition No. 5: Foreign Entities Have a Positive Duty to Act

Finally, there is even less agreement on the last proposition, that the United Nations or states have a positive obligation to intervene under the concept of responsibility to protect. The potential addressee of such an obligation is a matter of some confusion. All four documents adhere to the core idea of the Commission on State Sovereignty and Intervention to shift the focus from the right to intervene to a responsibility to protect. However, the consensus becomes very thin when it comes to defining to whom this responsibility shifts if a state fails to live up to its (primary) duty to protect citizens living on its territory.

The Commission on State Sovereignty and Intervention avoided taking a clear stance on this issue. It simply referred to the residual responsibility of the broader community of states [FN135]--a notion that lacks any legal specificity. The High-Level Panel Report, the Report of the Secretary-General, and the Outcome Document postulate that coercive collective action is to be undertaken through the Security Council. [FN136] This assumption, however, fails to answer the fundamental question: What if the international community, through the Security Council, fails to exercise its responsibility to protect? Does the burden then shift back to individual states, groups of states, or regional organizations; and, if so, to which states and organizations?

In addition, one finds hardly any evidence that states understand the three substantive components of responsibility to protect (responsibility to prevent, responsibility to react, responsibility to rebuild) in the sense of a positive duty to act under international law. The cautious phrasing of paragraph 139 of the

Outcome Document ("[W]e are prepared to take collective action ... on a case-by-case basis") resulted partly from the unwillingness of Security Council members to concede that the Council has a firm duty to act. States are even less inclined to accept this proposition. Under current international law, their obligations encompass at best the duties identified by the ILC in Article 41 of the 2001 Articles on State Responsibility.

The concept of responsibility to protect may gradually replace the doctrine of humanitarian intervention in the course of the twenty-first century. However, at present, many of the propositions of this concept remain uncertain from a normative point of view or lack support. Responsibility to protect is thus in many ways still a political catchword rather than a legal norm. Further fine-tuning and commitment by states will be required for it to develop into an organizing principle for international society.

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[FN1]. See generally C. F. Amerasinghe, The Conundrum of Recourse to Force-- To Protect Persons, 3 INT'L ORGS. L. REVV. 7 (2006); Laurence Boisson de Chazournes & Luigi Condorelli, De la "responsabilite de proteger" ou d'une nouvelle parure pour une notion deja bien etablie, 110 REVUE GeNeRALE DE DROIT INTERNATIONAL PUBLIC 11 (2006); Gareth Evans, The Responsibility to Protect and the Duty to Prevent, 98 ASIL PROC. 77 (2004); Peter Hilpold, The Duty to Protect and the Reform of the United Nations--A New Step in the Development of International Law? 2006 MAX PLANCK UN Y.B. 35; Gelijn Molier, Humanitarian Intervention and the Responsibility to Protect After 9/11, 53 NETH. INT'L L. REVV. 37 (2006); Thomas G. Weiss, The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era, 35 SECURITY DIALOGUE 135 (2004); Paul D. Williams & Alex J. Bellamy, The Responsibility to Protect and the Crisis in Darfur, 36 SECURITY DIALOGUE 27 (2005); Gareth Evans & Mohamed Sahnoun, The Responsibility to Protect, FOREIGN AFF., Nov./Dec. 2002, at 99; ALEX J. BELLAMY, PREVENTING FUTURE KOSOVOS AND FUTURE RWANDAS: THE RESPONSIBILITY TO PROTECT AFTER THE 2005 WORLD SUMMIT (Carnegie Council, Policy Brief 2006), at <http://www.cceia.org/media/Bellamy_Paper.pdf>. For comprehensive documentation on the subject, see Responsibility to Protect--Engaging Civil Society, at <http://www.responsibilitytoprotect.org>.

[FN2]. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at VIII (2001), available at <http://www.iciss.ca/report-en.asp> [hereinafter RESPONSIBILITY TO PROTECT].

[FN3]. A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 56-57, para. 201 (2004), available at <http://www.un.org/secureworld/report.pdf> (emphasis added) [hereinafter High-Level Panel Report].

[FN4]. Id., paras. 202, 201.

[FN5]. In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005, paras. 16-22 (2005), available

at <http://www.un.org/largerfreedom/contents.htm> [hereinafter Report of the Secretary-General].

[FN6]. Id., para. 135 (citing High-Level Panel Report, supra note 3, para. 203).

[FN7]. 2005 World Summit Outcome, GA Res. 60/1, paras. 138-39 (Oct. 24, 2005) [hereinafter Outcome Document].

[FN8]. Id., para. 138.

[FN9]. Id., para. 139.

[FN10]. See SC Res. 1674, para. 4 (Apr. 28, 2006) ("reaffim[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity").

[FN11]. WIKIPEDIA FREE ENCYCLOPEDIA, Responsibility to Protect (Dec. 6, 2006), at <http://en.wikipedia.org/wiki/Responsibility_to_protect> (emphasis added).

[FN12]. The Outcome Document is qualified by some as a "milestone in the relationship between sovereignty and human rights." See the abstract dated July 28, 2006, of the online version of Alex J. Bellamy, Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit, 20 ETHICS & INT'L AFF. 143 (2006), at <http://www.cceia.org/resources/journal/20_2/articles/5384.html>, in which Bellamy's article is described as taking a different view.

[FN13]. RESPONSIBILITY TO PROTECT, supra note 2, ch. 2.

[FN14]. Id., para. 2.14.

[FN15]. For a survey of the classic understanding of sources of law, see 1 L. OPPENHEIM, INTERNATIONAL LAW 22-23 (Hersch Lauterpacht ed., 6th ed. 1947).

[FN16]. Law-declaring resolutions of the General Assembly, for example, may assist in the determination or interpretation of international law or even constitute evidence of international custom. Scholars differ, however, as to whether "law-declaring resolutions" of the Assembly can create law beyond their contributory role in the formation of customary international law. See generally GEORGES ABI-SAAB, LES RESOLUTIONS DANS LA FORMATION DU DROIT INTERNATIONAL DU DEVELOPPEMENT 9 (1971). For doubts, see Hartmut Hillgenberg, A Fresh Look at Soft Law, 10 EUR. J. INT'LL L. 499, 514 (1999).

[FN17]. The assessment of "soft law" may be based on an analysis of such sources. See generally Alan Boyle, Soft Law in International Law-Making, in INTERNATIONAL LAW 141 (Malcolm D. Evans ed., 2006).

[FN18]. The Institute of International Law found that principles and rules

proclaimed in law-developing resolutions "may influence State practice, or initiate a new practice that constitutes an ingredient of new customary law," or "contribute to the consolidation of State practice, or to the formation of the opinio juris communis." Institut de droit international, The Elaboration of General Multilateral Conventions and of Non-Contractual Instruments Having a Normative Function or Objective, Res. II, conclusion 22 (Cairo Conference, 1987), available at <http://www.idi-iil.org/idiE/resolutionsE/1987_caire_02_ en.PDF>.

[FN19]. See Boisson de Chazournes & Condorelli, supra note 1, at 11-18; Molier, supra note 1, at 47-52.

[FN20]. See Molier, supra note 1, at 37-62.

[FN21]. RESPONSIBILITY TO PROTECT, supra note 2, at VII (quoting Secretary-General Kofi A. Annan, Millennium Report and Annual Report on the Work of the Organization, UN Docs. A/54/2000 & A/55/1 (2000), at 48 & para. 37, respectively).

[FN22]. Id., para. 2.14.

[FN23]. The commission found that the expressions "humanitarian intervention" and "right to intervene," which had been used in "past debates," did not "help to carry the debate forward." Id., para. 2.4.

[FN24]. Id., para. 2.29.

[FN25]. See generally SIMON CHESTERMAN, JUST WAR OR JUST PEACE: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 228 (2001); Antonio Cassese, Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community? 10 EUR. J. INT'LL L. 23 (1999); Antonio Cassese, A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis, 10 EUR. J. INT'LL L. 791; Ralph Zacklin, Beyond Kosovo: The United Nations and Humanitarian Intervention, 41 VA. J. INT'L L. 936 (2001).

[FN26]. RESPONSIBILITY TO PROTECT, supra note 2, para. 2.29. The commission was critical of the notion of "humanitarian intervention." It believed that the "humanitarian" argument could be used to disguise motives for an intervention and that it would tend "to prejudge the very question in issue-- that is, whether the intervention is in fact defensible." The commission also abandoned the term in response to opposition by humanitarian agencies and organizations to the "militarization" of the word "humanitarian," which they argued could not be ascribed "to any kind of military action." Id., para. 1.40.

[FN27]. One of the particularities of the report is that it formulated specific "threshold" criteria for "military intervention for human protection purposes." Id., para. 4.19. Military intervention may be

> justified in two broad sets of circumstances, namely in order to halt or avert:
>
> large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or

large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

Id. (emphasis omitted).

[FN28]. Id., para. 1.40.

[FN29]. Id., para. 2.30.

[FN30]. Id., para. 2.29.

[FN31]. Id., para. 5.1.

[FN32]. Id., para. 2.15.

[FN33]. Id.

[FN34]. Id., para. 2.31.

[FN35]. Id.

[FN36]. Id., para. 6.28.

[FN37]. Id., para. 6.37.

[FN38]. Id.

[FN39]. Id., para. 4.32.

[FN40]. Id., paras. 4.18, 4.32-.48.

[FN41]. High-Level Panel Report, supra note 3, paras. 29-30.

[FN42]. Id., paras. 199-203.

[FN43]. Id., para. 201 ("[S]overeign Governments have the primary responsibility to protect their own citizens from ... catastrophes ...").

[FN44]. Id.

[FN45]. The ICJ reaffirmed in the Barcelona Traction case that obligations erga omnes "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." Barcelona Traction, Light & Power Co. (Belg. v.

Spain), Second Phase, 1970 ICJ REP. 3, 32, para. 34 (Feb. 5) [hereinafter Barcelona Traction].

[FN46]. This understanding was challenged by the United States in the context of the drafting of the Outcome Document. The U.S. representative to the United Nations addressed this point in a letter to the UN member states dated August 30, 2005, noting that "the responsibility of the other countries in the international community is not of the same character as the responsibility of the host, and we thus want to avoid formulations that suggest that the other countries are inheriting the same responsibility that the host state has." Letter from Ambassador Bolton to UN Member States Conveying U.S. Amendments to the Draft Outcome Document Being Prepared for the High Level Eventon Responsibility to Protect, at 2 (Aug. 30, 2005), available at <http://www.responsibilitytoprotect.org/index.php/pages/2>, <http://www.un.int/usa/reform-un-jrb-ltr-protect-8-05.pdf> [hereinafter Bolton Letter].

[FN47]. High-Level Panel Report, supra note 3, para. 202.

[FN48]. This point was also made in paragraph 198 of the report, where the panel stressed that "[t]he task is not to find alternatives to the Security Council as a source of authority but to make the Council work better than it has."

[FN49]. High-Level Panel Report, supra note 3, para. 256.

[FN50]. Id., para. 196. There the panel stated:

> It may be that some States will always feel that they have the obligation to [protect] their own citizens, and the capacity, to do whatever they feel they need to do, unburdened by the constraints of collective Security Council process. But however understandable that approach may have been in the cold war years, when the United Nations was manifestly not operating as an effective collective security system, the world has now changed and expectations about legal compliance are very much higher.

[FN51]. Id., para. 272. The panel stated that "[a]uthorization from the Security Council should in all cases be sought for regional operations." However, the panel left a small backdoor open by recognizing that "in some urgent situations" such an "authorization may be sought after such operations have commenced." Id. (emphasis added).

[FN52]. Id., para. 203 ("exercisable by the Security Council authorizing military intervention as a last resort"). As regards the Commission on State Sovereignty and Intervention, see text at notes 36-40.

[FN53]. For a full discussion, see the contributions in FUTURE IMPLICATIONS OF THE IRAQ CONFLICT: SELECTIONS FROM THE AMERICAN JOURNAL OF INTERNATIONAL LAW (ASIL 2004).

[FN54]. High-Level Panel Report, supra note 3, para. 207.

[FN55]. Id., para. 204.

[FN56]. Id., para. 207.

[FN57]. Id., para. 209.

[FN58]. Report of the Secretary-General, supra note 5, para. 135.

[FN59]. Id., para. 133.

[FN60]. Id., pts. I(C), II(A), respectively.

[FN61]. Id., para. 135 ("[I]f national authorities are unable or unwilling to protect their citizens, then the responsibility shifts to the international community ...").

[FN62]. Id., para. 135 ("When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action ...").

[FN63]. Id., para. 126.

[FN64]. Id.

[FN65]. For a survey of the statements of Algeria, Cuba, Egypt, Iran, Pakistan, Russia, and Venezuela, see Responsibility to Protect--Engaging Civil Society, Chart on Government Positions (Aug. 11, 2005), at <http://www.responsibilitytoprotect.org/index.php/pages/2>.

[FN66]. Bolton Letter, supra note 46, at 2.

[FN67]. Id. at 3 (enclosure entitled "United States Proposals: Responsibility to Protect").

[FN68]. Outcome Document, supra note 7, para. 138.

[FN69]. Id.

[FN70]. Id.

[FN71]. Id., para. 139.

[FN72]. Id. ("In this context, we are prepared to take collective action ...." (emphasis added)).

[FN73]. Id.

[FN74]. See text at notes 43-57 supra.

[FN75]. See Bolton Letter, supra note 46, at 1.

[FN76]. Id. at 2.

[FN77]. The Outcome Document states:

> In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Outcome Document, supra note 7, para. 139 (emphasis added); see also Amerasinghe, supra note 1, at 47 ("[I]t would seem that the resolution does not rule out humanitarian intervention by other States as a means of discharging this responsibility.").

[FN78]. Outcome Document, supra note 7, para. 139.

[FN79]. See, for example, the statement of the delegate of the Russian Federation at the Security Council's open debate on December 9, 2005, on the protection of civilians in armed conflict:

> We all remember well the complex compromise that was required to reflect that issue [responsibility to protect] in the 2005 Summit Outcome document. In that connection--and the outcome document states this--we need to have a detailed discussion in the General Assembly of the issue of the responsibility to protect before we can discuss its implementation.

UN Doc. S/PV.5319, at 19 (Dec. 9, 2005) (statement of Mr. Rogachev), reprinted in Responsibility to Protect--Engaging Civil Society, Excerpted Statements on the Responsibility to Protect at the Security Council Open Debate on the Protection of Civilians in Armed Conflict, at <http:// www.responsibilitytoprotect.org>.

[FN80]. Outcome Document, supra note 7, para. 139 (emphasis added).

[FN81]. Id., para. 97-105. For a closer survey, see GA Res. 60/180 (Dec. 30, 2005) (Peacebuilding Commission).

[FN82]. See text at notes 22-24 supra. The concept of responsibility to protect builds on earlier works in peace research, notably FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996).

[FN83]. This understanding is reflected in Grotius's conception of things that are public and common to all men. See HUGO GROTIUS, DE MARE LIBERUM, ch. V (Ralph Deman Magoffin trans., Oxford Univ. Press 1916) (1609); HUGO GROTIUS, DE JURE BELLI AC PACIS, bk. II, ch. 2 (Francis W. Kelsey trans., Clarendon Press 1925) (1625); see generally Hersch Lauterpacht, The Grotian Tradition in International

Law, 1946 BRIT. Y.B. INT'LL L. 1, 27.

[FN84]. GROTIUS, DE JURE BELLI AC PACIS, supra note 83, bk. II, ch. XXV, pt. VIII(2), where Grotius states that if a ruler "should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded." According to Lauterpacht, "[T]his is the first authoritative statement of the principle of humanitarian intervention--the principle that the exclusiveness of domestic jurisdiction stops where outrage upon humanity begins." Lauterpacht, supra note 83, at 46.

[FN85]. See, for example, JOHN LOCKE, The Second Treatise of Government, ch. XIII, s149, in TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press 1988) (1690), where he states:

> Though in a Constituted Commonwealth, standing upon its own Basis, and acting according to its own Nature, that is, acting for the preservation of the Community, there can be but one Supreme Power, which is the Legislative, to which all the rest are and must be subordinate, yet the Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them. For all Power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the Power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.

[FN86]. See 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 273 (3d ed. 1957).

[FN87]. A good example is the Peace Treaty of Versailles, in which Poland agreed to "protect the interests of inhabitants of Poland who differ from the majority of the population in race, language or religion." Treaty of Peace, Art. 93, June 28, 1919, Allied & Associated Powers--Ger., 11 Martens (ser. 3) 323, 225 Consol. TS 188. The Versailles Treaty was complemented by a Treaty of Minorities of June 28, 1919, between the Principal Allied and Associated Powers and Poland, 112 Brit. Foreign & St. Papers 232.

[FN88]. At the beginning of the twentieth century, claims commissions invoked the minimum standard as a benchmark in cases where states failed to protect the life, property, or human dignity of foreigners. SCHWARZENBERGER, supra note 86, at 201.

[FN89]. This bond was stressed more than half a century ago by the Permanent Court of International Justice in the Mavrommatis case, where the Court held that "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting .... its right to ensure, in the person of its subjects, respect for the rules of international law." Mavrommatis Palestine Concessions, 1924 PCIJ (ser. A) No. 2, at 12 (Aug. 30).

[FN90]. In the award, it is pointed out that "[t]erritorial sovereignty ..... has as corollary a duty," namely, the "obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory." Island of Palmas, 2 R. Int'l Arb. Awards 829, 839 (1928). In 1949 this understanding was reaffirmed in Article 14 of the Draft Declaration on the Rights and Duties of States, which provided that "[e]very State has the duty to conduct its relations with other States in accordance .... with the

principle that the sovereignty of each State is subject to the supremacy of international law." International Law Commission [ILC], Draft Declaration on Rights and Duties of States, Art. 14, GA Res. 375(IV), annex (Dec. 6, 1949), available at <http://www.un.org/law/ilc/>.

[FN91]. The subsequent rise of regional and universal human rights instruments provided evidence that human rights could no longer be considered as "internal affairs" that fall "essentially within the domestic jurisdiction of any State" within the meaning of Article 2(7) of the Charter.

[FN92]. Kofi Annan, UN secretary-general, Intervention, 35th Annual Ditchley Foundation Lecture (June 26, 1998), available at <http://www.ditchley.co.uk/page/173/lecture-xxxv.htm>.

[FN93]. See OPPENHEIM, supra note 15, at 280 ("The Charter of the United Nations, in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organisation, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society." (footnote omitted)).

[FN94]. Barcelona Traction, 1970 ICJ REP. 3, 32, para. 33 (Feb. 5).

[FN95]. Articles on Responsibility of States for Internationally Wrongful Acts, pt. II, ch. 3, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002) [hereinafter Articles on State Responsibility].

[FN96]. OPPENHEIM, supra note 15, at 280. This conclusion is preceded by the following reasoning: "There is general agreement that, by virtue of its personal and territorial supremacy, a State can treat its own nationals according to discretion. But there is a substantial body of opinion and of practice in support of the view that there are limits to that discretion" (and that intervention is permissible when the state denies its nationals their fundamental human rights). Id. at 279-80 (footnotes omitted).

[FN97]. LE DEVOIR D'INGeRENCE (Mario Bettati & Bernard Kouchner eds., 1987); OLIVIER CORTEN & PIERRE KLEIN, DROIT D'INGeRENCE OU OBLIGATION DE ReACTION? (1992).

[FN98]. See generally Daniel Thurer, Der zerfallene Staat und das Volkerrecht, 74 DIE FRIEDENS-WARTE 275 (1999).

[FN99]. Note, however, that small and some large states (e.g., China and Russia) have strong reservations about unauthorized humanitarian intervention.

[FN100]. For example, FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 217 (3d rev. ed. 2005), states:

> Force used in defense of fundamental human rights is therefore not a use of force inconsistent with the purposes of the United Nations. State

sovereignty makes sense only as a shield for persons to organize themselves freely in political communities. A condition for respecting state sovereignty is, therefore, that sovereign governments (minimally) respect human rights. Delinquent governments forfeit the protection afforded by Article 4(2).

[FN101]. See Constitutive Act of the African Union, Art. 4(j), (h), July 11, 2002, OAU Doc. CAB/LEG/23.15, available at <http://www.africa-union.org> [hereinafter AU Web site].

[FN102]. See generally Ben Kioko, The Right of Intervention Under the African Union's Constitutive Act: From Non-interference to Non-intervention, 85 INT'L REV. RED CROSS 807 (2003).

[FN103]. Constitutive Act of the African Union, supra note 101, Art. 4(h). The bracketed words regarding "a serious threat to legitimate order" are added to this provision by Article 4 of the Protocol on Amendments to the Constitutive Act of the African Union, Feb. 3, 2003, available at AU Web site, supra note 101. This Protocol has not yet entered into force. The modalities of the right to intervene are set forth in the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 9, 2002, available at AU Web site, supra. This Protocol balances the principles of "non-interference" and respect "for the sovereignty and territorial integrity of Member States" with "respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law." See id., Art. 4.

[FN104]. AN AGENDA FOR PEACE--PREVENTIVE DIPLOMACY, PEACEMAKING, AND PEACE-KEEPING, REPORT OF THE SECRETARY-GENERALL, at 2, para. 5, UN Doc. A/47/277-S/24111 (1992), UN Sales No. E.95.I.15 (1995).

[FN105]. Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305-S/2000/809.

[FN106]. No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations, Report of the Secretary-General, para. 26, UN Doc. S/2001/394. In this report, the secretary-general emphasized that "[m]ission closure, as a result of the failure of the parties to abide by their agreements, does not represent an end to the responsibility of either the United Nations system or the Security Council, nor need it signal an end to the Council's involvement." The report went on to recommend that, in such situations, Council members should "individually and collectively" consider "what forms of leverage are available to address the conflict." Id.

[FN107]. See Articles on State Responsibility, supra note 95, Arts. 42(b) ("injured State"), 48(1) ("State other than injured State").

[FN108]. Id., Art. 48(2)(a), (b).

[FN109]. Id., Arts. 49-53. Countermeasures may be taken by "injured States."

[FN110]. Id., Art. 40(2).

[FN111]. Id., Art. 40.

[FN112]. Id., Art. 41 Commentary, para. (3).

[FN113]. Id., para. (2).

[FN114]. Id., para. (3).

[FN115]. The prohibition against genocide is recognized as a peremptory norm of international law. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, para. 64 (Int'l Ct. Justice Feb. 3, 2006). This case is more difficult to make with respect to crimes against humanity and war crimes, which comprise a large bundle of individual crimes whose status of recognition varies.

[FN116]. Outcome Document, supra note 7, paras. 138, 139.

[FN117]. RESPONSIBILITY TO PROTECT, supra note 2, para. 2.30; High-Level Panel Report, supra note 3, para. 201; Report of the Secretary-General, supra note 5, para. 135; Outcome Document, supra note 7, para. 138.

[FN118]. One may observe here a certain structural parallel to the complementarity regime of the International Criminal Court under Article 17 of the Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, available at <http://www.un.org/law/ilc/>.

[FN119]. See RESPONSIBILITY TO PROTECT, supra note 2, para. 2.30.

[FN120]. Responsibility to protect was invoked in particular in the context of the adoption of Security Council Resolution 1556 on July 30, 2004. For a survey of statements following its adoption, see UN Doc. S/PV.5015 (July 30, 2004). See generally Alex J. Bellamy, Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq, 19 ETHICS & INT'L AFF. 31 (2005).

[FN121]. The ILC Articles on State Responsibility deal with omissions only briefly in the context of breaches of a "composite act." Articles on State Responsibility, supra note 95, Art. 15. No specific consequences are attached to a failure to act under chapter I of Part II: Content of the International Responsibility of a State.

[FN122]. See generally Responsibility of International Organizations, in International Law Commission, Report on the Work of Its 56th Session, ch. V, UN GAOR, 59th Sess., Supp. No. 10, at 94, UN Doc. A/59/10 (2004).

[FN123]. See, for example, the statements by the UK representative and the representative of the Philippines after the adoption of Security Council Resolution 1556 (2004). UN Doc. S/PV.5015, supra note 120, at 5, 10.

[FN124]. See, for example, Article 2, in conjunction with Article 6 (right to

life) and Article 9 (liberty and security of persons), of the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; and Article 1, in conjunction with Article 2 (right to life), and Article 5 (liberty and security of persons), of the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 UNTS 221.

[FN125]. This process is fostered by the enactment of implementation legislation under the Rome Statute of the International Criminal Court, supra note 118. See generally Jann K. Kleffner, The Impact of Complementarity on National Implementation of Substantive International Criminal Law, 1 J. INT'L CRIM. JUST. 86 (2003). Paragraph 138 of the Outcome Document, supra note 7, makes reference to this commitment ("This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.").

[FN126]. See Anne-Marie Slaughter, Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform, 99 AJIL 619, 625 (2005).

[FN127]. Outcome Document, supra note 7, para. 139.

[FN128]. This option is contemplated, inter alia, in RESPONSIBILITY TO PROTECT, supra note 2, paras. 4.3-4.9.

[FN129]. Note that several states may be "injured" in case of a violation of an erga omnes obligation. Articles on State Responsibility, supra note 95, Art. 42(b). In its commentary on Article 42, the Commission noted expressly that a broader range of states may have a legal interest in ensuring compliance with such obligations, even though none of them is individually or specially affected by the breach.

[FN130]. Id., Art. 48(1), (2).

[FN131]. Countermeasures shall not affect "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations." Id., Art. 50(1)(a).

[FN132]. High-Level Panel Report, supra note 3, para. 203.

[FN133]. See in this sense Amerasinghe, supra note 1, at 47.

[FN134]. See RESPONSIBILITY TO PROTECT, supra note 2, paras. 6.36, 6.37.

[FN135]. Id., para. 2.31.

[FN136]. High-Level Panel Report, supra note 3, para. 203 ("by the Security Council"); Report of the Secretary-General, supra note 5, para. 135 ("Security Council may"); Outcome Document, supra note 7, para. 139 ("through the Security Council").

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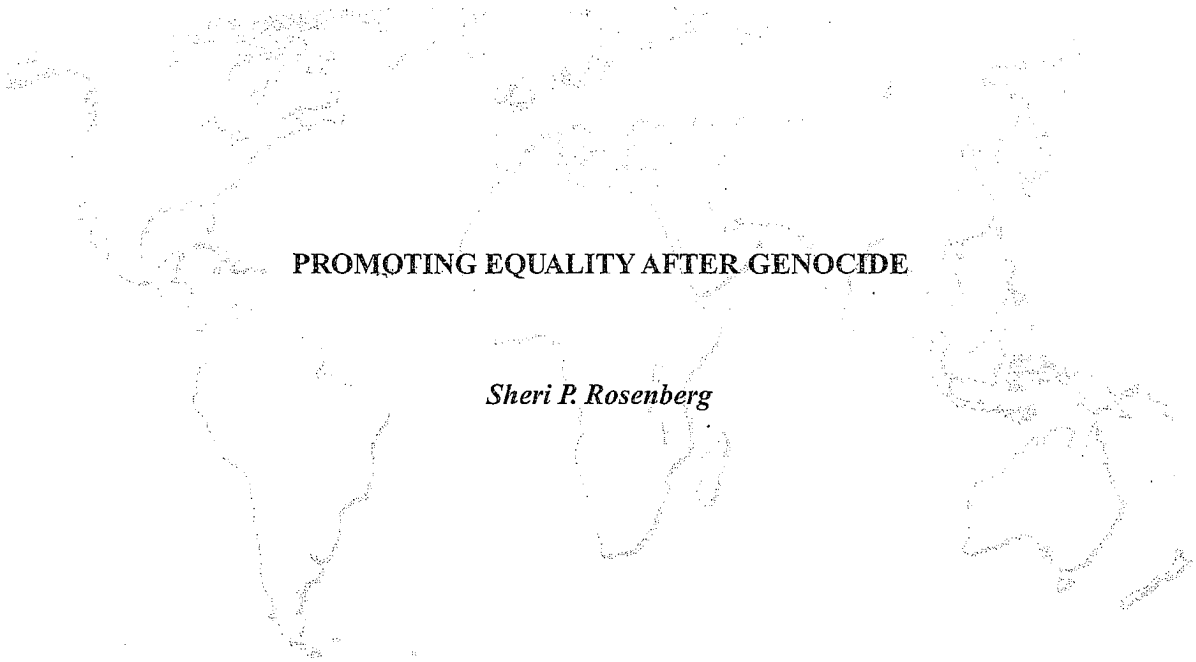

PROMOTING EQUALITY AFTER GENOCIDE

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

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I. INTRODUCTION

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

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

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

2. The term "ethnic cleansing" was coined in the early 1980s by the Serbian ultranationalist leader, Vojislav Sesselj. The term derived its current meaning during the war in BiH, where it was initially used by journalists and was subsequently adopted as part of the vocabulary of the U.N. Security Council and by other U.N. institutions. Tadeusz Mazowiecki, Special Rapporteur for the Former Yugoslavia of the Human Rights Commission defined ethnic

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. In the landmark *Constituent Peoples Case*, the Constitutional Court of BiH pronounced that "peaceful relations" are best produced in a "pluralist society." "[A]n overall objective of the Dayton Peace Agreement [is] to . . . re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination." Ustavni sud Bosne i Hercegovine [Constitutional Court of Bosnia and Herzegovina], Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina, Case U-5/98, Partial Decision, July

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

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

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

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

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

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

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

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

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

II. BOSNIAN INDEPENDENCE AND DESCENT INTO WAR

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

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

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

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

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

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

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

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

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

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

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

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

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

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23. *Id.*

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

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

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

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

28. There is no evidence to support the contention that the Bosniak party intended to

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

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

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

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

III. THE DAYTON PROTECTORATE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

47. The importance is underlined by the fact that the term "human rights" appears in the document at least seventy times. *See* MANFRED NOWAK, SHORTCOMINGS OF EFFECTIVE ENFORCEMENT OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA AFTER DAYTON: FROM THEORY

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

A. *Human Rights and Nondiscrimination in the GFAP*

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

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

48. GFAP, *supra* note 8, annex 4, art. II (1).

49 *Id.* annex 4, art. II(2).

50. NOWAK, *supra* note 47, at 97.

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

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

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

B. Current Ethnic Composition

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

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

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52. *Id.* annex 4, art. II(5).
53. *Id.* annex 7, art. I(2).
54. *Id.* annex 7, art. I(3).
55. *Id.* annex 7, art. I(3)(a) (emphasis added).
56. *Id.* annex 6.
57. *Id.* annex 7.
58. *Id.* annex 10. Over time, the High Representative has gained significant power within BiH

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

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

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

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

61. *Id.* at 12.

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

63. *Id.*

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

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

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

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

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

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

IV. QUASI-INTERNATIONAL COURTS SET UP UNDER THE GFAP

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

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

69.

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

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

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

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

A. Constitutional Court

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

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

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

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

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

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

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

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

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

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

75.

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

Id. art. II.

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

B. Human Rights Chamber

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

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

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

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

78. *Id.* art. XIV.

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

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

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

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

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

V. THE JURISPRUDENCE OF EQUALITY

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

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

82. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. *Property Issues*

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

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

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

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

94. *Id.* para. 33.

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

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

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

98. *Id.*

99. *Id.* para. 32.

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

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

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

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

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

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* para. 3.

106. Article 8 of the European Convention reads:

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

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

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

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

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

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

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

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

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

Id. at protocol 1, art. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. High Representative's Law on Cessation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

140. *Id.* para. 6.

141. *Id.* para. 20.

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

143. *Id.* para. 41.

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

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

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

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

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

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

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

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

147. *Id.* para. 1.

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

149. *Id.* para 17.

150. *Id.*

151. *Id.*

152. *Id.* para. 19.

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

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

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

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

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

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

B. *Employment Issues*

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

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

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

163. *See generally id.*

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

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

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

167. *Id.*

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

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

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

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

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

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

170. Article 5 reads:

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

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

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

1. Application of Wartime Decrees

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

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

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

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

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

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

173. *Id.* para. 27.

174. *Id.*

175. *Id.*

176. *Id.* para. 1.

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

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

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

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

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

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

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

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

182. *Id.* para. 124.

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

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

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

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

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

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

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

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

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

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

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

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

193. *Rajić*, Case CH/97/50, para. 1.

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

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

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

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

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

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195 Decree with Force of Law on Labor Relations, art. 15.

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

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

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

2. Application of Postwar Laws

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

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

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

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

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

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

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

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

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

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

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

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

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

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

210. *Id.*

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

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

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

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

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

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

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

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

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

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

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

216. *Id.* para. 12.

217. *Id.* para. 13.

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

219. *Id.*

220. *Id.* para. 58.

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

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

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

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

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

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

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

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

224. *Id.* para. 13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

253. *Id.* para. 53.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

262. In the SFRY—and in the understanding today—to be a "constituent people" (*narod*) amounted essentially to being a "state creating" people and not to being a national minority (*narodnost*, literally nationality). Dayton jettisoned the terms *narod* and *narodnost*, employing instead the term "constituent people." But it has the same meaning. It should be mentioned that in 1974, the BiH Constitution listed the Muslims, Serbs, and Croats, and members of other nations (*naroda*) and nationalities (*narodnosti*) who lived in BiH as Bosnia's people. CONSTITUTION OF BOSNIA AND HERZEGOVINA pt. I, art. I (1974). The salience of these distinctions and the popular fear of being relegated to "minority status" were heightened during the war. Milan Lukic (subsequently indicted for war crimes by the ICTY) told BBC journalist Alan Little that during the expulsion of Bosniaks from Visegrad in 1992, the aim was to drive the non-Serb population down below five percent, because a people who fell below five percent could not be "*narod*" or "constituent" according to Yugoslav law. INT'L CRISIS GROUP, EUROPE REPORT NO. 128, IMPLEMENTING EQUALITY: THE "CONSTITUENT PEOPLES" DECISION IN BOSNIA & HERZEGOVINA 7 n. 5 (Apr. 16, 2002), http://www.crisisgroup.org/home/index.cfm?=1&id=1498.

A. *Collective Equality*

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

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

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

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

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

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

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

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

266. *Id.* para. 56.

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

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

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

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

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

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

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

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

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

271. *Id.* para. 68.

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

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

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

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

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

B. Individual Equality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

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