

The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska: Human Rights in a Multi-Ethnic Bosnia

Brett Dakin*

INTRODUCTION

Any visitor to Banja Luka, Bosnia's¹ second largest city and the capital of the Republika Srpska, will surely be impressed. The city's wide boulevards are shaded by ancient trees and lined with welcoming outdoor cafés. The beautiful Vrbas River runs through the city and past a medieval fort where one can dine while watching the tranquil waters flow by. Dominated by a majestic Serbian Orthodox church and grand Catholic cathedral, the city's skyline evokes its rich religious and cultural heritage.

The contemporary visitor to Banja Luka, however, will not fail to notice the large, empty plot of land that lies in the city's center. To one side of the lot she will find an official blue and white van, from which local policemen patrol the site twenty-four hours a day.² While the visitor may not know why, even a simple stroll through the streets of Banja Luka will reveal that something central to the life of the city is missing.

This vacant, yet heavily guarded lot was once the site of the Ferhadija Mosque, destroyed by Bosnian Serbs in 1993, more than 400 years after it was first built. Though Banja Luka saw little combat during the 1992–95 Bosnian war, it fell victim to the Bosnian Serbs' policy of ethnic cleansing against the country's Bosnian Muslim population.³ Each of Banja Luka's

* J.D. candidate, Harvard Law School Class of 2003; B.A., Princeton University, 1998. The author worked as an intern at the Human Rights Chamber for Bosnia and Herzegovina during the summer of 2001. He wrote and designed the first digest of all the decisions on the merits issued by the Human Rights Chamber since its inception, a tool for Bosnian and international judges, attorneys, and human rights law practitioners. The author would like to thank Anne-Marie Slaughter, Ulrich Garms, Therese Nelson, and Karen Abravanel for their helpful comments, and the Chayes International Public Service Fellowship for funding.

1. Throughout this Article, the term "Bosnia" will refer to the independent state of Bosnia and Herzegovina, established in December 1995 and comprising two entities, the Republika Srpska and the Federation of Bosnia and Herzegovina.

2. Information based upon observations made by the author during a visit to Banja Luka in July 2001.

3. For an account of the ethnic cleansing committed by Serbs against Muslims in Bosnia during the war, see generally LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* 244–57 (1997).

fifteen mosques was destroyed between April and September 1993.⁴ As in other Bosnian cities that were ethnically mixed before the war, the destruction of the mosques was accompanied by, in the words of the United Nations Security Council, a "campaign of terror"⁵ against Muslim residents, resulting in a mass exodus of Muslims from Banja Luka. Before the war, an estimated 30,000 Muslims lived in Banja Luka; only 3000 to 4000 remained at the war's end.⁶ Today, Muslims in Banja Luka worship on the ground floor of an administrative building near the Ferhadija site.

The inter-ethnic conflict that led to the cleansing of Banja Luka's Muslim community would have been nearly unthinkable in the city twenty years ago. A tourist guide to Banja Luka printed in 1984—the year in which Bosnia, then one of the six constituent republics of Yugoslavia, hosted the Winter Olympics—reads, "Serbs, Muslims, Croats and members of other peoples and nationalities [*sic.*] . . . all live and work equally" in the city.⁷ The enormity of the changes that have occurred since the war is revealed in the 1996 version of the "Handbook of Banja Luka." This publication, which purports to "reinvigorate the remembrance about this wonderful city to those who couldn't, by reason of war, visit it for a long time," fails to make a single mention of Banja Luka's Muslim heritage,⁸ and instead celebrates the city as the "cultural, university, economic, financial and commercial center of the Republic of Srpska."⁹ The handbook's survey of the city's major cultural sites makes no reference to the Ferhadija Mosque, which was considered by many to be the most important and beautiful in the Balkans.

In December 1996, the Islamic Community in Bosnia and Herzegovina brought a case against the Republika Srpska at the Human Rights Chamber for Bosnia and Herzegovina in Sarajevo. In its application, the Islamic Community alleged that Muslims in Banja Luka had been discriminated against in the enjoyment of their right to freedom of religion and to peaceful enjoyment of their possessions. The application was the first of its kind before the Human Rights Chamber, and it resulted in a landmark 1999 decision in favor of the Islamic Community. In the case of *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska*, the Chamber found that the authorities in Banja Luka had interfered with the applicant's right to freedom of religion, deprived the applicant of its possessions, and discrimi-

4. This destruction usually occurred during the middle of the night, when the city was blockaded and a strict curfew was in place. *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska*, Case No. CH/96/29 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS JANUARY–JUNE 1999, ¶ 34 [hereinafter *The Islamic Community Case*].

5. S.C. Res. 941, U.N. SCOR, 3428th mtg., pmb., U.N. Doc. S/RES/941 (1994). Muslim residents of the Banja Luka area were the victims of frequent shootings, assaults, threats, and robberies.

6. *The Islamic Community Case*, *supra* note 4, ¶¶ 33, 36.

7. BANJA LUKA AND ITS SURROUNDINGS (1984) (on file with author) at 7.

8. HANDBOOK OF BANJA LUKA (1996) (on file with author) at 5.

9. *Id.*

nated against Muslims in Banja Luka in their right to freedom of religion on the grounds of religious and ethnic origin.¹⁰

This Article examines the *Islamic Community* case by setting it within its historical and jurisprudential context and discussing the implications of the Human Rights Chamber's decision for the protection of human rights in Bosnia and beyond. Part I describes the structure and functions of the Chamber. Part II considers the applicant, the Islamic Community in Bosnia and Herzegovina, and the rich Muslim heritage of the city of Banja Luka. Part III explains the proceedings before the Chamber and the body's decision in *Islamic Community*. Part IV analyzes the difficulties faced by the Chamber and the international community in enforcing the decision. The Article concludes by exploring the implications of *Islamic Community* and the Chamber's jurisprudence for the protection of human rights in Bosnia and transitional justice efforts elsewhere in the world.

I. THE COURT: THE HUMAN RIGHTS CHAMBER FOR BOSNIA AND HERZEGOVINA

The Human Rights Chamber was created by the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Agreement"),¹¹ which was the result of a series of intense negotiations among representatives of the three principal parties to the conflict in Bosnia: the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia. The negotiations were held in November 1995 at Wright-Patterson Air Force Base near Dayton, Ohio, and the agreement was signed in Paris on December 14, 1995. The Dayton Peace Agreement ended four years of conflict following the disintegration of Yugoslavia which were marked by brutal human rights violations on a scale not witnessed in Europe since the end of World War II.¹² The Dayton Peace Agreement was far more than a cease-fire; it was intended to go beyond securing a cessation of the hostilities (a daunting challenge in itself) by restoring civil society and the rule of law to Bosnia.¹³ In addition, the Agreement created an independent country where none had previously existed.¹⁴

In furtherance of their ultimate goal of a prosperous, democratic, and multi-ethnic state, the drafters directly incorporated essential international human rights agreements into the Dayton Peace Agreement and established

10. *The Islamic Community Case*, *supra* note 4, ¶ 214.

11. The General Framework Agreement for Peace in Bosnia and Herzegovina, 50th Sess., Agenda Item 28, U.N. Doc. S/1995/999 (Dec. 14, 1995), *reprinted* in 35 I.L.M. 89 [hereinafter *Dayton Peace Agreement*].

12. *See, e.g.*, SILBER & LITTLE, *supra* note 3.

13. *See* RICHARD HOLBROOKE, *TO END A WAR* 231-88 (1998).

14. Although Bosnia and Herzegovina had for centuries been treated as an independent territorial unit, and arguably had more integrity as a potential independent state than Serbia or Croatia at the time of Yugoslavia's dissolution, it had never before been recognized as an independent state. ROBERT J. DONIA & JOHN V. A. FINE, JR., *BOSNIA AND HERZEGOVINA: A TRADITION BETRAYED* 7 (1994).

two unique human rights institutions in Bosnia. Through the Agreement on Human Rights, Annex 6 to the Dayton Peace Agreement ("Human Rights Agreement"), the parties agreed to secure to all citizens within their various jurisdictions the highest level of internationally recognized human rights and fundamental freedoms.¹⁵ The system of human rights protection envisioned for Bosnia was closely modeled after that established by the Council of Europe through the European Court of Human Rights in Strasbourg, France ("European Court"). Thus, at the center of the Human Rights Agreement are rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols ("European Convention").¹⁶ Through Annex 4 of the Dayton Peace Agreement, which sets out the Constitution of Bosnia and Herzegovina, the European Convention is directly incorporated into the constitution, and its provisions are given precedence over all other domestic law.¹⁷ In addition, the Human Rights Agreement directly incorporated a number of other international human rights agreements into the new constitution and granted them priority over all national and entity-level law.¹⁸ Each of these instruments is immediately enforceable at the domestic level, making Bosnia's system of human rights protection stronger, at least on paper, than that of most countries. In many states, economic, social, and cultural rights remain a mere aspiration and do not create concrete legal obligations.¹⁹ Indeed,

15. Dayton Peace Agreement, *supra* note 11, Annex 6, art. I. While the Dayton Peace Agreement was signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia, the Human Rights Agreement was signed by the newly independent state of Bosnia and Herzegovina and the two entities.

16. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention]. The European Convention is the law applied by the European Court of Human Rights, which sits in Strasbourg, France. The European Convention affirms the right to life, the right to a fair hearing, the right to private and family life, home, and correspondence, the right to own property, and the right to liberty of movement and residence. Also guaranteed by the European Convention are freedom of thought, conscience and religion, freedom of expression, freedom of peaceful assembly and association, and the enjoyment of these freedoms without discrimination.

17. Dayton Peace Agreement, *supra* note 11, Annex 4, art. II, § 2.

18. See Dayton Peace Agreement, *supra* note 11, app. to Annex 6, which obligates the parties to adhere to several human rights agreements, including the following: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1949 Geneva Conventions I-V on the Protection of the Victims of the War and 1977 Geneva Protocols I and II, the 1951 Convention relating to the Status of Refugees and its 1996 Protocol, the 1961 Convention on the Reduction of Statelessness, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights and its 1966 and 1989 Optional Protocols, the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR"), the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child, and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

19. Laura Palmer & Cristina Posa, *The Best Laid Plans: Implementation of the Dayton Peace Accords in the Courtroom and on the Ground*, 12 HARV. HUM. RTS. J. 361, 366 (1999).

there is perhaps no state in the world more closely linked to the web of international instruments guaranteeing various human rights, nor any state required to institutionalize those rights to a greater degree, nor any that must give greater access to the international community to ensure the realization of those rights²⁰

than Bosnia and Herzegovina.²¹

In addition to incorporating international human rights standards into the national constitution, the Human Rights Agreement established a two-part Commission on Human Rights, composed of the Human Rights Ombudsman and the Human Rights Chamber. The Ombudsman, appointed by the Organization for Security and Cooperation in Europe (OSCE), is responsible for investigating alleged or apparent violations of human rights guaranteed by the constituent agreements of the Dayton Peace Agreement. Following any investigation, the Ombudsman may issue a report setting out his or her findings and legal conclusions, facilitate a friendly settlement, or refer the case to the Human Rights Chamber.²²

The Human Rights Chamber, in contrast to the Ombudsman, issues decisions that are binding on the three government entities created by the Dayton Peace Agreement: the Federation of Bosnia and Herzegovina ("Federation"), the Republika Srpska, and the state of Bosnia and Herzegovina, which is the federal body encompassing both the Federation and the Republika Srpska. Although established by international treaty, the Chamber is a national institution whose composition reflects its unique hybrid character: six judges are Bosnian (two Muslims and two Croats appointed by the Federation, and two Serbs appointed by the Republika Srpska), while the remaining eight judges, appointed by the Council of Europe, are citizens of countries other than Bosnia or any neighboring state. According to the Human Rights Agreement, the judges "shall possess the qualifications required for appointment to high judicial office or be jurists of recognized competence."²³ The current members, all lawyers, bring to the Chamber varying experience in areas such as the judiciary, academics, private legal practice, administration, and international, criminal and human rights law.²⁴ The

20. Timothy William Waters, *The Naked Land: The Dayton Accords, Property Disputes and Bosnia's Real Constitution*, 40 HARV. INT'L L.J. 517, 536 (1999).

21. Note that the protection of the rights in these international instruments is limited. The Human Rights Agreement, for example, protects only the right not to be unfairly discriminated against in the enjoyment of ICESCR rights.

22. See Dayton Peace Agreement, *supra* note 11, Annex 6, arts. IV-VI.

23. See Dayton Peace Agreement, *supra* note 11, Annex 6, art. VII.

24. The current members of the Chamber are: Prof. Dr. Rona Aybay (Turkey), Mr. Hasan Balić (Federation), Mr. Mehmed Deković (Federation), Prof. Dr. Giovanni Grasso (Italy), Mr. Andrew Grotman (UK), Mr. Želimir Juka (Federation), Prof. Dr. Viktor Masenko-Mavi (Hungary), Mr. Jakob Müller (Iceland), Prof. Dr. Manfred Nowak (Austria), Mr. Miodrag Pajić (Republika Srpska), Prof. Dr. Vitomir Popović (Republika Srpska), Ms. Michele Picard (France), Prof. Dr. Dietrich Rauschnig (Germany), and Mr. Maro Tadić (Federation). The Human Rights Chamber for Bosn. & Herz., 2000 ANN. REP., Annex B. Ms. Picard is the current president of the Chamber.

Council of Europe designates one of the eight international judges as the president of the Chamber.

The Chamber's judges sit in two panels of seven members each,²⁵ except where an application raises "a serious question as to the interpretation" of the Human Rights Agreement, in which case all fourteen members may consider the application as a Plenary Chamber.²⁶ The Chamber is assisted by a multi-ethnic staff composed of Bosnian and international lawyers, a translation unit and an administrative support team. All Chamber proceedings are conducted in Bosnian-Croatian-Serbian²⁷ and in English.²⁸ The Chamber is funded by the state of Bosnia and Herzegovina with assistance from donor countries, including the United States and the European Union.²⁹ The composition of the Chamber stands in contrast to that of Bosnia's Constitutional Court, which includes six national judges, one of whom is the president, and only three international judges. The Constitutional Court, the highest domestic court in the country, hears referrals and appeals from domestic courts regarding constitutional questions.³⁰

As for the Chamber's jurisdiction, the Human Rights Agreement grants individuals, associations, non-governmental organizations, and even governments a private right of action against the state, the Federation or the Republika Srpska.³¹ The Chamber is competent to consider only those alleged or apparent human rights violations that have occurred since the Dayton Peace Agreement entered into force.³² Despite this limitation, the Chamber does address wartime incidents: consider, for example, an applicant who today claims that he has been denied access to his apartment, which he lost during the war. The apparent violation of his human rights under the European Convention is the relevant government authority's continuing failure, after the end of the war, to allow the applicant to reclaim his apartment.³³

25. Dayton Peace Agreement, *supra* note 11, Annex 6, art. X.

26. THE HUMAN RIGHTS CHAMBER FOR BOSN. & HERZ. R. PROC. 29 (reprinted in *The Human Rights Chamber for Bosn. & Herz.*, 2000 ANN. REP.).

27. Bosnian, Croatian, and Serbian are in fact three slight variations of the same language, known previously as Serbo-Croatian. Today, in order to avoid offending any particular ethnic group, it is common to refer to the language spoken in Bosnia as Bosnian-Croatian-Serbian.

28. THE HUMAN RIGHTS CHAMBER FOR BOSN. & HERZ. R. PROC. 30 (reprinted in *The Human Rights Chamber for Bosn. & Herz.*, 2000 ANN. REP.).

29. See *The Human Rights Chamber for Bosn. & Herz.*, 2000 ANN. REP., Annex H for a list of donor countries.

30. Dayton Peace Agreement, *supra* note 11, Annex 4, art. VI.

31. Dayton Peace Agreement, *supra* note 11, Annex 6, art. VIII, § 1. An application filed by the Federation against the Republika Srpska is currently pending before the Chamber.

32. See *Matanović v. The Republika Srpska*, Case No. CH/96/1 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS 1996-1997, the first decision issued by the Chamber, in which the Chamber decided that in accordance with generally accepted principles of law, the Human Rights Agreement could not be applied retroactively, and thus that the Chamber was not competent *ratione temporis* to consider events that took place prior to 14 December 1995, when the Dayton Peace Agreement went into effect.

33. See, e.g., *Vladan Durić v. The Federation of Bosnia and Herzegovina*, Case No. CH/97/49 Human

When deciding whether or not to admit a particular application, the Chamber must consider if effective remedies are available to the applicant through relevant domestic courts or administrative agencies. Where an effective domestic remedy exists and results in a final decision, the application must be lodged within six months of the issuance of that decision.³⁴ The Chamber must also consider whether the application concerns substantially the same matter as that of a case already examined by the Chamber, and whether the matter is currently before another international human rights body or commission established by the Dayton Peace Agreement.³⁵ Once the Chamber decides to admit an application for consideration, it transmits the application to the respondent party. The respondent party then submits a response in the form of written observations to the Chamber, which then transmits those observations to the applicant.³⁶

Once it has received both parties' written observations, the Chamber deliberates and decides what action to take. It has the power to facilitate a friendly settlement,³⁷ to adopt and deliver a legally binding decision,³⁸ and to order the respondent party to take provisional measures³⁹ (for example, to stop the construction of a power plant⁴⁰ or to prevent the eviction of an applicant from his or her apartment). If the Chamber finds that the applicant has suffered a human rights violation, it must determine the appropriate remedy, which can include ordering the respondent party to pay monetary compensation to the applicant.⁴¹ Once a decision has been delivered, either party has the right to file a request for review of the decision.⁴²

Most of the applications submitted to the Chamber concern issues of real property. The tremendous upheaval that occurred during the war—villages throughout the country that were once majority Muslim became majority Serb, and vice versa—displaced hundreds of thousands of citizens from their

Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS JANUARY–JUNE 2000, in which the applicant had left Bosnia to receive medical treatment during the war, only to return to Bosnia to find that his apartment had been reallocated to a temporary user. Unable to regain possession through domestic procedures, he filed an application at the Chamber. The Dayton Peace Agreement guarantees the right of all refugees and displaced persons "freely to return to the homes of origin." Dayton Peace Agreement, *supra* note 11, Annex 7, art. I.

34. Dayton Peace Agreement, *supra* note 11, Annex 6, art. VIII, § 2(a).

35. *Id.* §§ 2(b), (d).

36. THE HUMAN RIGHTS CHAMBER FOR BOSN. & HERZ. R. PROC. 53 (*reprinted in* The Human Rights Chamber for Bosn. & Herz., 2000 ANN. REP.).

37. Dayton Peace Agreement, *supra* note 11, Annex 6, art. IX.

38. *Id.* art. XI.

39. *Id.* art. VIII, § 2(f).

40. See, e.g., *Dautbegović and 51 Other Villagers from Duge v. The Federation of Bosnia and Herzegovina*, Case No. CH/00/5480 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS 2001 (in which the applicants alleged that the planned construction of a hydroelectric plant near their village threatened their homes and livelihood).

41. Dayton Peace Agreement, *supra* note 11, Annex 6, art. XI, § 1(b).

42. THE HUMAN RIGHTS CHAMBER FOR BOSN. & HERZ. R. PROC. 63 (*reprinted in* The Human Rights Chamber for Bosn. & Herz., 2000 ANN. REP.). Requests for review can be filed only against panel decisions, not against plenary decisions, such as the decision in this case.

homes and left many in limbo.⁴³ The Chamber offers a legal mechanism to facilitate the return of Bosnia's citizens to their prewar homes.⁴⁴ The Chamber has also issued decisions in cases concerning torture and detention,⁴⁵ the death penalty (which it declared illegal),⁴⁶ employment discrimination,⁴⁷ pension rights,⁴⁸ and environmental degradation.⁴⁹

As of December 2001, 8481 applications had been registered with the Chamber. The Chamber had issued 1033 decisions, involving 1282 individual applications (one decision may resolve more than one application), 534 of which were on admissibility alone and 122 of which were on admissibility and merits. The Chamber had decided to strike out 298 applications and had facilitated one friendly settlement. The remaining decisions included decisions on compensation, decisions on review, and decisions on requests for review.⁵⁰ The extraordinary number of applications filed with the Chamber is a testament to the faith Bosnian citizens have in that body (arguably the most efficient state-level institution in the country) as a means of redressing serious human rights violations suffered after the end of the war.

II. THE APPLICANT: THE ISLAMIC COMMUNITY AND BANJA LUKA'S MUSLIM HERITAGE

The Islamic Community in Bosnia and Herzegovina was founded in 1882 and is currently registered as a legal person in the Municipality of Sarajevo, the site of its headquarters.⁵¹ According to its constitution, the Islamic Community comprises "the sole and united community of Muslims in Bosnia-Herzegovina, of [Bosnian Muslims] outside their homeland, and of other Muslims who accept it as their own."⁵² The Islamic Community exists for

43. By one estimate, only 42% of all people in Bosnia remained in their home of origin at the end of the war. Eric Rosand, *The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law*, 33 CORNELL INT'L L.J. 113, 114.

44. Another mechanism is the Commission for Displaced Persons and Refugees, later renamed the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), established by Annex 7 to the Dayton Peace Agreement to decide claims of refugees and displaced persons for real property. *See* Dayton Peace Agreement, *supra* note 11, Annex 7.

45. *See, e.g., Matanović*, *supra* note 32.

46. *See, e.g., Sretko Damjanović v. Federation of Bosnia and Herzegovina*, CH/96/30 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS 1997.

47. *See, e.g., Edita Rajić v. Federation of Bosnia and Herzegovina*, CH/97/50 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS 2000.

48. *See, e.g., Milan Banjać and M.M. v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, CH/98/232 and 480 Human Rights Chamber for Bosnia and Herzegovina, DECISIONS AND REPORTS 2001.

49. *See, e.g., Dautbegović and 51 Other Villagers from Duge v. The Federation of Bosnia and Herzegovina*, *supra* note 40.

50. The Human Rights Chamber for Bosn. & Herz., DEC. 2001 MONTHLY STATISTICAL SUMMARY (on file with author).

51. *The Islamic Community Case*, *supra* note 4, ¶¶ 25, 27.

52. CONST. OF THE ISLAMIC COMMUNITY IN BOSN. & HERZ., adopted November 26, 1997, Sarajevo (on file with author), art. I.

the purpose of "taking care of the religious rights of Muslims."⁵³ It "provides necessary conditions for its members, according to its capacities, so that they can perform their Islamic religious obligations,"⁵⁴ and "organizes activities through which it acquires, protects, and augments the property of the Islamic Community."⁵⁵ The property of the Islamic Community consists mainly of endowments, or *vakuf*, including real property and other financial gifts, and other income and revenue.⁵⁶ After the establishment of the system of "social ownership" that governed during the period of socialist Yugoslav rule, the Islamic Community lost all of its property in Banja Luka, except for the mosques and the land on which they stood.⁵⁷ In addition, the Community retained access to and use of certain living spaces for religious officials.⁵⁸

During the period of Turkish rule in Bosnia, which lasted from the end of the fifteenth century to the end of the nineteenth century, Banja Luka was an important cultural and political center.⁵⁹ The city was the seat of the Bosnian *sanjak-bey*, the representative of the imperial government in Istanbul. One of the more influential *sanjak-beys* to reside in Banja Luka was Ferhad-Pasha Sokolović, who built more than two hundred structures in the city, including public baths, a clock tower, schools, bridges, shops, and the Ferhadija Mosque, which was named after this powerful leader.⁶⁰ Completed in 1579, the main structure of the Ferhadija stood 18 meters high; 128 steps in a stone spiral staircase led to the top of the nearly 42-meter high minaret, which provided a view of Banja Luka and beyond.⁶¹ "None of the objects built up after Ferhadija . . . could jeopardize its domination," wrote one observer; "[i]t was a real, monumental, piece of art viewed from every angle."⁶²

The Ferhadija survived the Austrian invasion of Banja Luka in 1688 (during which much of the Turkish authorities' work was destroyed) and the subsequent assumption of Austro-Hungarian rule in 1878.⁶³ The mosque was damaged during a 1969 earthquake, but was quickly rebuilt and later renovated with aid from the United Nations Economic Social and Cultural

53. *Id.* art. X.

54. *Id.* art. XI.

55. *Id.* art. XIII.

56. *Id.* art. XXX.

57. *The Islamic Community Case*, *supra* note 4, ¶ 28.

58. *Id.* ¶ 29.

59. *See, e.g.*, DONIA & FINE, *supra* note 14, at 52.

60. BANJA LUKA AND ITS SURROUNDINGS, *supra* note 7, at 15.

61. Federation of Bosnia and Herzegovina, Ministry of Education, Science, Culture and Sports, *Cultural Heritage of Special Value Destroyed in the War 1992–1995*, Sarajevo, May 1998. *See also* BANJA LUKA AND ITS SURROUNDINGS, *supra* note 7, at 58. For photographs of the Ferhadija before and after its destruction, see Community of Bosnia Foundation, *Sites of Worship Diligently Destroyed*, at <http://www.haverford.edu/relg/sells/banjaluka/banjaluka.html> (last visited Feb. 22, 2002).

62. ALEKSANDER ACO RAVLIĆ, *FERHADIIJA OF BANJA LUKA: THE BEAUTY WHICH THEY KILLED* 173 (Rijeka, Croatia: AARiS, 1996).

63. BANJA LUKA AND ITS SURROUNDINGS, *supra* note 7, at 15–16.

Organization (UNESCO).⁶⁴ But neither the Ferhadija, nor any of the city's fourteen other mosques, survived the destruction brought on the city by Bosnian Serb forces on May 7, 1993.⁶⁵ A 1994 exhibition about life in Banja Luka in the early twentieth century, organized by the city's Bosnian Serb authorities, featured not even one of the mosques that had dotted the city landscape during that period.⁶⁶ Even before the end of the war, Serb authorities had initiated the process of erasing Banja Luka's Muslim heritage from the city's history.

After the Dayton Peace Agreement came into force, city authorities continued to remove the remains of Banja Luka's mosques. Ancient tombstones in the city's Islamic cemeteries were destroyed and cleared away from the lots, often along with the exhumed remains of Muslim dead. The authorities hired a local public utility company to truck away the rubble.⁶⁷ Muslims who continued to worship in Banja Luka were subjected to physical assaults and verbal provocation at religious ceremonies such as public funeral processions; local police offered no protection.⁶⁸ By 1996, the Ferhadija Mosque had even been removed from the Banja Luka Municipality's official property map.⁶⁹ In 1997 the Islamic Community requested that municipal authorities erect fences around all fifteen mosque sites in order to prevent their use as parking lots and garbage dumps, and also sought approval for plans to reconstruct the mosques at their original sites. The local authorities did not respond to the Islamic Community's requests.⁷⁰

In July 1998, when the mufti of Banja Luka died, the religious traditions of Banja Luka's Muslim community were disrupted once again. According to the Islamic Community's constitution, the mufti is "the principal religious organ on the territory of the Mufti jurisdiction."⁷¹ Among other roles, the mufti "ensures that the religious rights of Muslims are being protected; ensures the provision of conditions for the performance of Islamic obligations; [and] assures the execution of decisions and directives of the higher organs of the Islamic Community."⁷² The Islamic Community's request for permission to bury the mufti on the site of the Ferhadija Mosque was denied by the authorities on the basis of a prohibition on burials at that location that had been in force since 1945.⁷³ When Muslims nevertheless attempted

64. RAVLIĆ, *supra* note 62, at 171.

65. Given the extraordinary attention that had been paid to the Ferhadija Mosque both internationally and within the region, it is difficult to understand how its destruction was allowed to take place. Notably, non-Muslims in Banja Luka, including the local Roman Catholic bishop, protested the destruction.

66. RAVLIĆ, *supra* note 62, at 172.

67. *The Islamic Community Case*, *supra* note 4, ¶¶ 57–61.

68. *Id.* ¶ 167.

69. *Id.* ¶ 40.

70. *Id.* ¶ 41.

71. CONST. OF THE ISLAMIC COMMUNITY IN BOSN. & HERZ., *supra* note 52, art. XLIII.

72. *Id.* art. XLV.

73. *Islamic Community Case*, *supra* note 4, ¶ 44.

to hold a funeral for the mufti, a group of about 500 Bosnian Serbs gathered in Banja Luka to prevent the ceremony from taking place. The demonstrators physically assaulted local Muslims and international monitors, but again the local police failed to respond.⁷⁴

III. THE CASE: *THE ISLAMIC COMMUNITY IN BOSNIA AND HERZEGOVINA V. THE REPUBLIKA SRPSKA*

In December 1996, three years after the destruction of the Ferhadija Mosque, the Islamic Community filed an initial application against the Republika Srpska at the Human Rights Chamber for Bosnia and Herzegovina. The application alleged that the authorities in the Republika Srpska had carried out, or had at least condoned, the destruction of the mosques and the killing, expulsion, and displacement of Muslims in Banja Luka during the war. In addition, the application alleged that after the entry into force of the Dayton Peace Agreement, "the municipal bodies of Banja Luka destroyed and removed remains of the mosques, desecrated adjoining graveyards—or allowed these acts to happen—and failed to take certain action requested by the applicant for the protection of the rights of its members."⁷⁵ Ultimately, the Islamic Community would allege that the authorities' failure to permit the reconstruction of the mosques or even the erection of fences around the mosque sites, their failure to protect Muslims during worship and funerals, and their refusal to allow the burial of the mufti on the Ferhadija site constituted discrimination against it and its members in the enjoyment of their right to freedom of religion and to peaceful enjoyment of their possessions on the grounds of religion and national origin.⁷⁶

After gathering information from the applicant, the respondent party, the Human Rights Ombudsman, and other interested parties such as UNESCO and the OSCE, the Chamber decided in July 1998 to issue a sweeping order for provisional measures. A provisional measure allows the Chamber to stop the respondent party's activity of which the applicant complains while the Chamber further deliberates on the merits of the case.⁷⁷ The Chamber ordered the Republika Srpska to refrain from "the construction of buildings or objects of any nature" and "the destruction or removal of any object remaining" on the mosque sites, cemeteries, and other Islamic sites indicated in the application, and to prevent any such construction, destruction or removal by any other public or private institution or person.⁷⁸

74. *Id.* ¶ 73. The mufti of Banja Luka was later buried in Sarajevo without incident.

75. *Id.* ¶ 1.

76. *Id.* ¶ 118.

77. THE HUMAN RIGHTS CHAMBER FOR BOSN. & HERZ. R. PROC. 36 (reprinted in *The Human Rights Chamber for Bosn. & Herz.*, 2000 ANN. REP.).

78. *The Islamic Community Case*, *supra* note 4, ¶ 12.

In November 1998, the Chamber held a public hearing in the *Islamic Community* case at a business facility in Banja Luka.⁷⁹ The Chamber heard testimony from the applicant and its representatives, but not from the respondent party; without explanation, the authorities of the Republika Srpska had decided at the last minute not to attend the hearing.⁸⁰ The Chamber deliberated on the admissibility and merits of the case from November 1998 through May 1999, and publicly delivered its decision on June 11, 1999.

In its decision, the Chamber first confronted the issue of the admissibility of the Islamic Community's application. It concluded that the Islamic Community could claim status as a "victim" on behalf of its members in Banja Luka regarding the alleged violation of the members' right to freedom of religion; as a legal person capable of possessing property, the applicant could also claim victim status for the alleged violation of its property rights.⁸¹ The Chamber also found that, in light of the situation in Banja Luka, no effective domestic remedy was available to the applicant, and therefore declared the application admissible insofar as it alleged human violations occurring after the Dayton Peace Agreement entered into force.⁸² Due to the temporal limitation on the Chamber's jurisdiction, it declared inadmissible all complaints regarding the destruction of the fifteen mosques in Banja Luka in 1993 and the killing, expulsion and displacement of Muslims in Banja Luka *prior* to December 14, 1995.⁸³

The Chamber next considered possible discrimination abridging the right to freedom of religion guaranteed by Article 9 of the European Convention on Human Rights.⁸⁴ The Chamber's competence to consider discrimination

79. Pressure from local authorities forced the Chamber twice to change the venue of the public hearing. The Chamber had first arranged to hold the hearing in a private school, but the school's director subsequently refused to rent the space after allegedly having received a call from the mayor of Banja Luka directing him not to do so. Next the Chamber made arrangements with the manager of the International Press Centre in Banja Luka, who then informed the Chamber that the Centre would be unavailable, explaining that he had been told that his business would suffer were he to provide the space. The Chamber finally settled on the business facility, which was provided with the assistance of the OSCE. *Id.* ¶¶ 18–20. The mayor of Banja Luka was known publicly to have voiced his opposition to the reconstruction of the Ferhadija mosque. *Id.* ¶ 169. In a letter to then-High Representative Carlos Westendorp dated April 13, 1998, the mayor wrote that the Ferhadija was a "monument of the cruel Turkish occupation and . . . cannot be treated as a national monument of the Bosniac people, because we are assured that the Bosniaks are not the descendants of those whose grandees raped Serbian maidens for 500 years The reconstruction of Ferhadija would be perceived by the Serbian people as the blackest [i.e., most degrading] humiliation, it would reopen old wounds and engender far-reaching consequences." Letter from Mayor Djordje Umičević to High Representative Carlos Westendorp, Apr. 13, 1998 (on file with author).

80. *The Islamic Community Case*, *supra* note 4, ¶ 21.

81. *Id.* ¶¶ 125–31.

82. *Id.* ¶¶ 132–36, 142–49.

83. *Id.* ¶ 150. Recall the Chamber's decision in *Matanović* limiting its competence *ratione temporis* to consideration of events which occurred after the entry into force of the Dayton Peace Agreement on December 14, 1995. *Matanović v. The Republika Srpska*, *supra* note 32.

84. Article 9 of the European Convention reads,

issues derives both from Article 14 of the European Convention, which prohibits discrimination, and from a separate directive in the Human Rights Agreement to consider allegations of discrimination.⁸⁵ When deciding whether or not discrimination has occurred, the Chamber follows the method established by the European Court of Human Rights. First, the Chamber determines if the applicant has been treated differently from others in the same or relevantly similar situation. The Chamber then decides if there was a legitimate aim for this differential treatment and a "reasonable relationship of proportionality between the means employed and the aim sought to be realized."⁸⁶ In the course of its reasoning in *Islamic Community*, the Chamber made reference to the European Court's decision in *Otto-Preminger-Institut v. Austria*, which held that securing religious pluralism was essential to any successful democratic society.⁸⁷

The Chamber found that Muslims in Banja Luka had been subjected to differential treatment compared with the local Serbian Orthodox majority. In the absence of any reasonable justification for such treatment, the Chamber concluded that Banja Luka authorities had actively engaged in, or had at least passively tolerated, discrimination against Muslims on the basis of their religious and ethnic origin. Thus, the Chamber found that the respondent party, the Serb government, had failed to meet its obligation under the Hu-

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

European Convention, *supra* note 16.

85. Article 14 of the European Convention reads,

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

European Convention, *supra* note 16. According to Article II of the Human Rights Agreement, the Chamber shall consider, in addition to alleged and apparent violations of human rights as provided in the European Convention,

alleged or apparent discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status arising in the enjoyment of any of the rights and freedoms provided for in the international agreements listed in the Appendix to this Annex, where such violation is alleged or appears to have been committed by the Parties, including by any official or organ of the Parties, Cantons, Municipalities, or any individual acting under the authority of such official or organ.

Dayton Peace Agreement, *supra* note 11, Annex 6, art. II.

86. *The Islamic Community Case*, *supra* note 4, ¶ 156.

87. *Id.* ¶ 169. See *Otto Preminger-Institut v. Austria*, 295 Eur. Ct. H.R. (ser. A) at 19 (1994) (involving a filmmaker's challenge of a government order to destroy a film the theme of which challenged normally accepted concepts of religion).

man Rights Agreement to respect and secure the right to freedom of religion without discrimination.⁸⁸

The Chamber next considered whether there had been a violation of the applicant's members' Article 9 right to freedom of religion in isolation from the alleged discrimination. The Chamber recalled the European Court's decision in *Manoussakis v. Greece*, which held that any determination by a government on the legitimacy of religious beliefs or activities violates the right to freedom of religion.⁸⁹ The Chamber concluded that the failure of the authorities in Banja Luka to respond to the applicant's request for permission to rebuild the mosques was an interference with, or at least a limitation of, the right of Muslims in Banja Luka to freely manifest their religion as guaranteed by Article 9. In addition, the authorities' failure to protect Muslims against assaults, provocation and other disturbances during worship and funerals violated the respondent party's positive obligation to secure the right to freedom of religion for the applicant's members in Banja Luka.⁹⁰

Next, the Chamber considered the alleged violation of the applicant's right to peaceful enjoyment of its possessions, as guaranteed by Article 1 of Protocol No. 1 of the European Convention, as well as alleged discrimination in the enjoyment of that right.⁹¹ The Chamber first found that the objects remaining on the mosque sites at the time the Dayton Peace Agreement entered into force, as well as the applicant's right to use the land on which the destroyed mosques had stood, were "possessions" protected by Article 1 of Protocol No. 1.⁹² The Chamber then found that the destruction and removal of objects on the sites constituted a deprivation of the applicant's possessions.⁹³ The Chamber also found that the municipality's refusal to allow the applicant to reconstruct any of the mosques amounted to a "control of use" of its possessions, which was not grounded in any public or general interest that might justify such an interference with property rights.⁹⁴ Furthermore, the Chamber found that the applicant had been dis-

88. *The Islamic Community Case*, *supra* note 4, ¶ 173.

89. *Id.* ¶ 176. See Eur. Court HR, *Manoussakis and Others v. Greece* judgment of 26 Sept. 1996, *Reports of Judgments and Decisions* 1996-IV, ¶ 47. A key case in the European Court's religious freedom jurisprudence, *Manoussakis* concerned a law requiring those who wished to establish a place of worship to obtain the approval of both a government minister and the Greek Orthodox Church.

90. *Id.* ¶¶ 184-88.

91. Art. 1 of Protocol No. 1 of 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 the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

European Convention, *supra* note 16.

92. *The Islamic Community Case*, *supra* note 4, ¶ 196.

93. *Id.* ¶¶ 197-98.

94. *Id.* ¶¶ 199-203.

criminated against in the enjoyment of its rights under Article 1 of Protocol No. 1, again on the grounds of religious and ethnic origin.⁹⁵

Having found a violation of the applicant's human rights by the respondent party, the Chamber determined an appropriate remedy. First, the Chamber ordered the Republika Srpska to take immediate steps to allow the applicant to erect enclosures around the sites of the fifteen destroyed mosques. Next, it ordered the respondent party to take all necessary action to refrain from the construction of buildings or objects on the sites of the destroyed mosques and on the cemeteries and other Islamic sites, and not to permit any such construction by any institution or person other than the applicant. The Chamber then ordered the respondent party to refrain from destroying or removing any objects remaining on the sites of any of the destroyed mosques and on the cemeteries and other Islamic sites, and not to permit any such destruction or removal by any institution or person other than the applicant. Finally, the Chamber ordered the Republika Srpska to grant the applicant the necessary permits, as already requested by the Islamic Community, for the reconstruction of seven of the destroyed mosques on their original sites.⁹⁶ This final order would prove the most controversial, testing the enforcement mechanisms of the Chamber and the international community in Bosnia.

IV. ENFORCEMENT: THE WAR CONTINUES

The Chamber's decision in favor of the Islamic Community was a vindication of the applicant's rights and a condemnation of the Serb government's actions in Banja Luka. In *Islamic Community*, the Chamber declined to award monetary damages in favor of an unprecedented order of government action, sending a strong message that government passivity in the face of serious human rights violations was unacceptable in post-Dayton Bosnia. However, a court decision means little indeed on paper until it is carried out. Since it has no enforcement agency and cannot exercise the powers of arrest, search or seizure, the Chamber relies in large part on the good faith of the respondent party (here, the Republika Srpska) to ensure that its decisions are implemented.⁹⁷ In addition, the Chamber is assisted by international organiza-

95. *Id.* ¶¶ 206–07.

96. *Id.* ¶ 214. Messrs. Vitomir Popović and Miodrag Pajić, the two Bosnian Serb members of the Chamber, attached a dissenting opinion in which they argued that the application should have been declared inadmissible as outside the Chamber's competence *ratione personae* and *ratione temporis*, for reasons of *lis alibi pendens*, and for failure to exhaust local remedies. Note that earlier in the proceedings in *The Islamic Community Case*, the applicant had requested the disqualification of Mr. Popović, who had served as Vice-President of the Government of the Republika Srpska when the mosques were destroyed. In its motion, the applicant alleged that Popović had made comments on television in 1996 stating that mosques would "never again be built in Banja Luka." Finding that the allegation was unsubstantiated, the Chamber rejected the applicant's request. *Id.* ¶ 13.

97. According to the Human Rights Agreement, "the Parties undertake to provide all relevant information to, and to cooperate fully with, the Chamber . . . [and] implement fully decisions of the Chamber." Dayton Peace Agreement, *supra* note 11, Annex 6, arts. X–XI.

tions in Bosnia that wield more direct power over Bosnia's government bodies, including the NATO Stabilization Force (SFOR), the International Police Task Force (IPTF),⁹⁸ the OSCE, and the Office of the High Representative (OHR).⁹⁹ In fact, if the respondent party does not implement a decision within the time limit set by the Chamber, the judges will routinely refer the case to the OHR. The Chamber also informs the OHR, OSCE, and IPTF of any orders for provisional measures so that the parties' compliance with those measures can be monitored.¹⁰⁰ Implementation rates have steadily increased since the Chamber's first decision was issued in 1996, but the Chamber still struggles to achieve full compliance.¹⁰¹

The events that followed the Chamber's public delivery of its decision in *Islamic Community* demonstrate the tremendous challenges of implementation. After the decision, the Republika Srpska maintained that the construction of the mosque was not a political or religious issue, but rather a matter of urban planning best handled by local authorities. In December 2000, after more than a year had passed without any government action, the Islamic Community sent a letter to the OHR complaining that no permit for the reconstruction of the Ferhadija Mosque had yet been issued.¹⁰² That same month, Republika Srpska Prime Minister Milorad Dodik insisted that "the reconstruction is uncertain and impossible bearing in mind [the] difficult economic and social situation."¹⁰³

After the application of considerable pressure to the Republika Srpska government by the international community,¹⁰⁴ the relevant authorities in Banja Luka finally complied with the Chamber's decision and issued a permit for the reconstruction of the Ferhadija Mosque in March 2001. On May

98. The IPTF is charged with, among other things, "monitoring, observing, and inspecting law enforcement activities and facilities, including associated judicial organizations, structures, and proceedings." *Id.* Annex 11, art. III.

99. The OHR is the chief civilian peace implementation agency in Bosnia and Herzegovina, with the task of overseeing the implementation of the civilian aspects of the Dayton Peace Agreement on behalf of the international community. *See id.* Annex 10.

100. The Human Rights Chamber for Bosn. & Herz., 1998 ANN. REP., at 11–12.

101. Measuring implementation of court decisions is a notoriously difficult exercise. The OHR has come up with a raw figure, which stood at 73% as of March 2001. Human Right Coordination Centre, *Human Rights Quarterly Report* (Sept. 1, 2000–Mar. 31, 2001) (on file with author) at 44, ¶ 202. Traditionally, the Federation has been more willing than the Republika Srpska to cooperate with the Chamber, although in the past it has used tactics such as limiting its pre-hearing written observations to one page to frustrate the Chamber's proceedings. *See* Posa & Palmer, *supra* note 19, at 369.

102. *See Center for Islamic Architecture Sends Letter to OHR—RS Government Should Finance Reconstruction of Ferhadija Mosque* (Dec. 6, 2000), at <http://www.ohr.int/ohr-dept/presso/bh-media-rep/round-ups> [hereinafter Media Roundup]. The Media Roundup is a daily compilation of local Bosnian news articles (translated into English) updated and maintained by the Office of the High Representative.

103. *Id.*

104. For example, the High Representative dismissed the mayor of Banja Luka, Djodje Umićević, as a result of the failure to implement the Chamber's decision. *See Nezavisne Novine: When BiH Rebuilds all Destroyed Churches, the RS Will Construct Mosques* (Dec. 11, 2000), at Media Roundup, *supra* note 102. In addition, US Ambassador Thomas Miller had made several public statements to the effect that Bosnia could not move forward until religious monuments were reconstructed. *See US Ambassador Thomas Miller: No Progress Without Reconstruction of Religious Objects* (Dec. 18, 2000), at Media Roundup, *supra* note 102.

7, 2001, nearly two years after the Chamber's decision was delivered, a ceremony to mark the laying of a foundation stone for the Ferhadija was held in Banja Luka. In attendance were national officials such as Bosnia's Foreign Minister Zlarko Lagumdžija, representatives of the international community, including the Special Representative of the U.N. Secretary-General to Bosnia and Herzegovina, Jacques Paul Klein, and a few hundred Muslim refugees who were bussed in from other parts of Bosnia for the occasion.

The much-anticipated effort to begin reconstruction of the Ferhadija came to an abrupt halt, however, when a crowd of 3000 to 4000 Bosnian Serb demonstrators gathered at the Ferhadija site. The demonstrators threw stones, eggs, and bottles at the visiting Muslim refugees, and even set refugees' prayer rugs afire. Serb demonstrators climbed to the top of the Islamic Community building near the Ferhadija site, lowered the Islamic flag, burned it, and raised the Bosnian Serb flag in its place. United States Ambassador Thomas Miller and Jacques Paul Klein were trapped along with other visiting officials inside the Islamic Community building, and had to be evacuated. Bosnian Serb demonstrators stoned Foreign Minister Lugumdžija's car and set fire to five buses that had transported the Muslim pilgrims. In perhaps the greatest affront to the Islamic Community, a live pig was turned loose directly on the Ferhadija site.¹⁰⁵

SFOR troops and Bosnian Serb police succeeded in separating the two groups and bringing the violence to an end, but the stone-laying ceremony was canceled.¹⁰⁶ The incident, certainly not the first of its kind in post-war Bosnia, had interrupted yet again the Islamic Community's efforts to prevent its heritage in Banja Luka from being erased.¹⁰⁷ In response, the United States government shut down its offices in Banja Luka and instructed its citizens not to travel to the city.¹⁰⁸ Ambassador Miller criticized the Republika Srpska, stating that its "police cannot fulfill its basic duties, that is, compliance with law and maintenance of peace and order."¹⁰⁹ The High Representative, Wolfgang Petritsch, issued a strong condemnation of the violence. "I am shocked that the [Republika Srpska] still appears to be a place with no rule of law, no civilized behaviour and no religious freedom," he said. "Small groups of extremists are allowed to spread ultra-nationalism,

105. See, e.g., *Serbs, Muslims Clash, Block UN, US Envoy's Inside Building*, Agence France-Presse, May 7, 2001; *Serbs Rampage In Banja Luka, Attack Muslims, International Officials* (BBC News, May 7, 2001); *RTRS on Ferhadija Incident* (May 7, 2001), at Media Roundup, *supra* note 102. Muslims consider pigs to be unclean and strictly avoid all contact with them.

106. Fifty SFOR vehicles, including tanks, were placed near the site, and several helicopters circled above. See *RTRS on Ferhadija incident*, *supra* note 105.

107. Only days earlier, violent clashes had led to several injuries in similar circumstances during a ceremony to lay the foundation stone for another mosque in Trebinje. See, e.g., *id.*

108. See *US Closes Their Offices in Banja Luka* (May 10, 2001), at Media Roundup, *supra* note 102.

109. *Interview with Thomas Miller* (May 8, 2001), at Media Roundup, *supra* note 102.

intolerance and violence. I hold the authorities responsible for this frightening state of affairs."¹¹⁰

On the other hand, leaders in the Republika Srpska also denounced the violence, and two Republika Srpska cabinet ministers resigned in the wake of the Ferhadija incident.¹¹¹ Among the more heartening statements made in the wake of the incident was that of a Banja Luka Orthodox Church official, who stressed that "any sort of extremism is not in keeping with Orthodox religion and I understand Serbs . . . suffered [during the war], but they need to cool their heads. The mosque in Banja Luka did exist, which means if we destroyed it then we have to rebuild it. It is a sort of penance."¹¹² The Republika Srpska Ministry of Interior initiated an investigation into the violence and pressed charges against thirty-four people.¹¹³ As for the Islamic Community, it announced that it would file another claim against the Republika Srpska before the Human Rights Chamber in connection with the incident.¹¹⁴

After a period of delay and confusion, on June 18, 2001, the Islamic Community held a second ceremony to commemorate the laying of the cornerstone of the Ferhadija Mosque. Once again, Bosnian government officials and international community representatives joined Republika Srpska officials in Banja Luka for the occasion. Again, the event was marred by violence: police clashed with at least 150 demonstrators, using tear gas and water cannons to prevent them from disrupting the ceremony. Officers were attacked with stones and bottles, and at least thirteen were seriously injured.¹¹⁵

But on this occasion, the demonstrators, far fewer in number than they had been on May 7, failed to stop the ceremony, and the cornerstone was laid. The leader of the Islamic Community announced, "Let this mosque be a bridge of reconciliation between Muslims and Christians."¹¹⁶ And Banja Luka's mufti, noting that "Ferhadija is a symbol of reconciliation," actually commended the Republika Srpska police for a job well done.¹¹⁷ Despite

110. *High Representative Appalled at Outbreak of Violence in Banja Luka* (May 7, 2001), at Media Roundup, *supra* note 102.

111. See *BL Town Authorities Condemn Baja Luka Incident* (May 9, 2001), at Media Roundup, *supra* note 102; *RS Government Dismisses Police Officials* (May 15, 2001), at Media Roundup, *supra* note 102.

112. *Serb Orthodox Church Condemns the Violence in Banja Luka* (May 10, 2001), at Media Roundup, *supra* note 102.

113. See *RS Ministry of Interiors Continues Investigation on Violence in Banja Luka* (May 11, 2001), at Media Roundup, *supra* note 102. But see *Feral Tribune Editorial* (May 14, 2001), at Media Roundup, *supra* note 102 (alleging that rocks used by the demonstrators had been transported to the site in city utility service trucks).

114. See *Islamic Community will Sue the RS Before the Human Rights Chamber* (May 10, 2001), at Media Roundup, *supra* note 102. As of this writing, no application had been filed by the Islamic Community at the Chamber in regard to the Banja Luka incident.

115. See, e.g., *Ferhadija Cornerstone Laid as Police Clashes with Demonstrators* (June 18, 2001), at Media Roundup, *supra* note 102.

116. *The Ferhadija Cornerstone Laid in Spite of Demonstrations* (June 19, 2001), at Media Roundup, *supra* note 102.

117. *Interview with Banja Luka Mufti Edbem Camdzic* (June 20, 2001), at Media Roundup, *supra* note

these remarkable words, the euphoria of the ceremony's success was short-lived. As of this writing, the cornerstone has been removed from the Ferhadija site for fear of vandalism and theft.¹¹⁸

CONCLUSION: THE LESSONS OF ISLAMIC COMMUNITY

Now that the permits for the reconstruction of the Ferhadija Mosque in Banja Luka have been issued, the time has come to examine what lessons we can learn from *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska*. This brief concluding Part examines the implications of *Islamic Community* in three different areas: first, how well does the Dayton system of human rights protections function? Second, can the Human Rights Chamber serve as a model for achieving transitional justice in contexts other than Bosnia and Herzegovina? Third, are judicial institutions really the best mechanisms through which to confront the past and move forward in multi-ethnic, war-torn societies?

A. Dayton and the Protection of Human Rights in Bosnia

Much ink has been spilled on the defects of the Dayton Peace Agreement.¹¹⁹ Among the more controversial aspects of the Dayton constitutional framework is the effective elevation of the two entity governments above the central state of Bosnia and Herzegovina. The perception that the central government is weak at best, and irrelevant at worst, is reflected in the jurisprudence of the Chamber: only rarely is the national government named as a respondent party in Chamber cases; when it is, the Chamber usually refrains from ordering the state to take any action. In addition, the Dayton Peace Agreement intentionally left unclear the relationship among courts at the municipal, entity, and federal levels.¹²⁰ The Chamber must grapple with sharply conflicting interpretations of the law issued by courts at different levels of government in both the Federation and the Republika Srpska.

At its signing, the underlying elements of the Dayton framework struck many as a cynical tradeoff between human rights protections and political stability. Timothy Waters has argued that domestic political actors continue to view Dayton as a "crucial way-station, a means of continuing the struggle

102. This interview likely was conducted before it became clear that the Republika Srpska Ministry of Interior had sent a bill to the Islamic Community for the costs of security for the ceremony. See *Srpskanska Associations Protest the Bill from the RS Ministry of Interior* (July 24, 2001), at Media Roundup, *supra* note 102.

118. Information based upon author's visit to Banja Luka and discussions with Chamber staff there during July 2001.

119. See, e.g., Waters, *supra* note 20; Fionnuala Ni Aolain, *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, 19 MICH. J. INT'L L. 957, 957 (1998); Shelley Inglis, *ReConstructing Rights: The Dayton Peace Agreement, International Civil Society Development, and Gender in Postwar Bosnia-Herzegovina*, 30 COLUM. HUM. RIGHTS L. REV. 65, 65 (1998).

120. Inglis, *supra* note 119, at 86.

for dominance and control.”¹²¹ At the national level, ethnic representation is so finely calibrated as to effectively paralyze the government. At the local level, Dayton’s “ethno-national” constitutional principles, whereby citizens’ political and ethnic identities are fused, have impeded the formation of a multi-ethnic society.¹²² As the story of *Islamic Community* makes clear, among the most consistently ethno-national groups are the entities’ police forces, the very actors to which the heaviest burden of implementing the human rights provisions of the Dayton Peace Agreement must fall.¹²³

The Chamber’s decision in *Islamic Community* embodied the international community’s aspirations for Bosnia: a place where all citizens have the right to return to their original homes and to practice their religion freely alongside neighbors of various religions and ethnicities. However, the Dayton structures, perhaps by necessity, assume that ethnicity and politics are indistinct. According to the system of political representation established in Dayton, for example, a Bosnian Serb living in the Federation cannot represent fellow Serbs in the national legislature; only Serbs from the Republika Srpska can.¹²⁴ This system has led to the concentration of political power in three major parties defined by ethnicity (Muslim, Croat, and Serb) and has rendered political stalemate inevitable. Thus, the Dayton framework implicitly undermines the very objectives the Human Rights Chamber was designed to achieve.

B. *The Human Rights Chamber as a Model for Transitional Justice*

As we have seen, the Chamber is unique among international efforts at transitional justice in its hybrid character, the result of incorporating international norms and actors into a domestic judicial system. In fact, while the Chamber is a domestic court, its very existence is premised on the future incorporation of Bosnia into Europe. Implementation of the Chamber’s decisions by the entity governments is a prerequisite for Bosnia’s admission to the Council of Europe, the first step toward full membership in the European Union. Given the benefits of membership in the Council—such as increased foreign aid, heightened prestige, and a role in decision-making processes—admission to this body can serve as an important incentive for governments in Bosnia to cooperate with the Chamber.

The close relationship between the Chamber and Europe’s regional institutions, particularly the European Court of Human Rights and the Council of Europe, is essential to the Chamber’s power to transform local government in Bosnia. The Dayton arrangement seeks to induce compliance with international human rights norms by Bosnia’s governments through persuasion rather than coercion. This approach has the potential to provide just the

121. Waters, *supra* note 20, at 518.

122. Inglis, *supra* note 119, at 83.

123. Waters, *supra* note 20, at 558.

124. Inglis, *supra* note 119, at 83.

sort of incentive to Bosnia's governments to act "liberally"¹²⁵ that Abram Chayes and Antonia Chayes have argued is necessary to incorporate states successfully into the international system.¹²⁶ By complying with the Chamber's decisions, the Republika Srpska and the Federation of Bosnia and Herzegovina bind themselves to "a tightly woven fabric of international agreements, organizations, and institutions that . . . penetrate deeply into their internal economics and politics."¹²⁷ In the case of Bosnia, this complex fabric includes the international human rights instruments other than the European Convention that are included in the Dayton Peace Agreement.¹²⁸ If the incentives for compliance are strong enough, then these governments will "submit to the pressures that international regulations impose" in order to be players on the international stage.¹²⁹

The Chamber weds international norms and domestic actors in other ways as well. Working together, Bosnian and international judges apply to each application they consider the law of the European Convention, the case history of the European Court of Human Rights, *and* the laws of the former Yugoslavia and of Bosnia and Herzegovina. If and when the Chamber ceases to exist and is folded into Bosnia's Constitutional Court,¹³⁰ its jurisprudence will live on as a tool for Bosnian judges, lawyers, academics, and practitioners. The law of the Chamber will serve as a key point of reference for Bosnians as they negotiate their country's entrance into Europe and the international community.

The Human Rights Chamber's work is also an important contribution to the development of international human rights law. Beyond the context of European integration, we might regard the Chamber as a recent entrant into the movement that Anne-Marie Slaughter has termed "judicial globalization."¹³¹ The Chamber, like the European Courts of Justice and Human Rights, empowers individual litigants to hold governments to their international commitments—in this case, the negotiated human rights provisions of the Dayton Peace Agreement. In a sense, then, the Chamber offers a third voice in the ongoing dialogue between the European Court of Human Rights and national jurisdictions in Europe about individual and group rights and the relationship between citizens and the state. It might no

125. Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 240 (2000).

126. See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVERLIGNTY* (1995).

127. *Id.* at 26.

128. See Dayton Peace Agreement, *supra* note 11, app. to Annex 6.

129. CHAYES & CHAYES, *supra* note 126, at 27.

130. The Dayton Peace Agreement does not provide for the merger of the Chamber and the Constitutional Court. Rather, the merger has been proposed by the European Commission for Democracy through Law ("Venice Commission"), a commission within the Council of Europe. The Constitutional Court has argued that Article XIV of the Human Rights Agreement provides a legal basis for the merger, so that no constitutional amendment would be necessary to effectuate it. The issue remains unresolved as of this writing.

131. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1103 (2000).

longer be valid to say that the European Court, whose decisions have achieved global prominence, is the "exclusive interpreter of the [European] Convention's provisions."¹³² As a result, the Chamber's jurisprudence may represent an important element of the movement toward a truly global jurisprudence of international human rights.

However, the hybrid character of the Chamber and the use of the European Convention present a number of difficulties. First, the language of the Convention is not necessarily best suited to the unique circumstances of post-war Bosnia and the mass atrocities the country has experienced. Indeed, "there should be no expectations that [the Convention] has tailor-made solutions to the scale and type of human rights violations that took place during the war in Bosnia and which accompany the post-war phase."¹³³ In addition, the incorporation of the Convention into Bosnia's constitution results in an uncomfortable, and perhaps unfair, reality: unlike citizens of all other countries in which the Convention is applied, individual applicants in Bosnia cannot take their cases to the European Court of Human Rights.

Second, how can we be sure that the perceived benefits of integration into the international community offered by an arrangement such as Dayton will even accrue in the context of transitional justice? What if the government body in question is simply impervious to the incentive model spelled out above? After all, the entity governments of Bosnia are not states; it is not clear that the Chayes theory of a "new sovereignty" based on international status applies to them.¹³⁴ Given the post-war context, Serb leaders in Bosnia may find it more expedient to exploit ethnic tensions and dwell on the past than to worry about attracting the aid and investment necessary to reconstruct the country's infrastructure and build a better future. Essentially, Chayes and Chayes equate sovereignty with status,¹³⁵ and it is unclear what result will obtain when international status is simply not relevant to the aspirations of local government leaders.

Third, extensive international involvement in a transitional justice mechanism such as the Chamber raises problems as well. By employing an existing international instrument and its related institution, such as the European Convention and the European Court, the international community has taken ownership of the justice process, creating a monopoly on human rights norms that might discourage capacity building at the local level. There is a practical difficulty as well: "The international community cannot hope (nor wish) to act *in loco parentis* to the Bosnian state indefinitely."¹³⁶ The Human Rights Chamber will not exist forever, and it remains to be seen which domestic institution in Bosnia will ultimately assume the Chamber's

132. *Id.* at 1109.

133. Ni Aolain, *supra* note 119, at 978.

134. See generally, CHAYES & CHAYES, *supra* note 126.

135. See *id.* at 27.

136. Ni Aolain, *supra* note 119, at 987.

responsibility for redressing serious human rights violations suffered after the end of the war.¹³⁷ Finally, the hybrid nature of the Dayton framework creates confusion as to jurisdictional questions. Ill-defined relationships among the three systems—the domestic courts, the supra-national International Criminal Tribunal for the Former Yugoslavia (ICTY), and, somewhere in the middle, domestic-international structures like the Chamber—may have resulted in local ambivalence regarding the judicial process. Here, the “diverse and messy process of judicial interaction” of which Slaughter has written might ultimately serve to undermine judicial authority.¹³⁸

C. Tribunals in Transitional Justice

There may be general lessons to be learned from *Islamic Community* about the utility of traditional judicial instruments in transitional contexts. We have witnessed a “contagion of accountability”¹³⁹ in recent years, accompanied by the growth of international tribunals and judge-made law. Certainly, recently created judicial organs like the Chamber help to internalize human rights and humanitarian law norms in societies in transition. By focussing on law and rhetorical power, the judges of the Chamber, nowhere more than in their decision in *Islamic Community*, demonstrate their unwillingness to give in to the forces of ethnic partition. Ordering the reconstruction of the Ferhadija Mosque, which represents *Bosnia's* heritage as well as the Islamic Community's, may not have been the easiest choice. However, it was the only legal course of action the Chamber could pursue.

Such an unyielding adherence to the law may be courageous, but it might ignore the reality on the ground. The bloody events accompanying the attempts to begin reconstruction of the Ferhadija reflected the poisoned political climate in Banja Luka. Many explained the Republika Srpska's failure to implement the decision in terms of Bosnian Serb politicians' fear that, were they to accede to the requests of the Islamic Community, they would be marked as traitors to their people. Some members of the Islamic Community argued that the only way to begin reconstruction would be for the High Representative to simply impose the Chamber's decision on the local authorities; “otherwise,” one Islamic leader said, “[they] will never issue the permit.”¹⁴⁰

As the difficulties encountered in implementing *Islamic Community* clearly demonstrate, law can only take us so far. A focus on legalism and rhetoric, when political legitimacy on the ground has so little to do with international norms, “risks either the complete irrelevance of those norms, or a

137. See *supra* note 130.

138. See Slaughter, *supra* note 131, at 1103.

139. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 9 (2001).

140. RS Ministry for Urban Affairs to Evaluate the Islamic Community Complaint About Ferhadija (Feb. 2, 2001), at Media Roundup, *supra* note 102.

dangerous and compromising co-optation."¹⁴¹ Even the most well-reasoned legal opinion, deliberated over for hours in chambers in Sarajevo, amounts to nothing in the face of domestic political intransigence and a lack of international will. The legitimacy of mechanisms such as the Chamber depends on results, not on rhetorical flourishes and well-crafted legalese.

On the other hand, the Serb authorities *did* finally issue the permit. The Chamber's decision in *Islamic Community* gave the applicant a written instrument that it could use as a tool to press aggressively for the enforcement of the judgment, and it also laid the basis for further persuasive action against the Republika Srpska by the international community. Most important, the decision may have provided essential cover for political moderates in Banja Luka, whose quiet voices in favor of reconstruction ultimately seem to have drowned out the shouts of the more extreme Serb forces. In this sense, the Chamber acted just as an effective international tribunal ideally should: by granting individuals the right to initiate cases against their governments, it has developed "constituencies in both domestic and transnational society."¹⁴²

Regardless of how we interpret the relative success or failure of the Human Rights Chamber in *Islamic Community*, we must question whether a traditional judicial approach is well suited to war-torn, multi-ethnic contexts like Bosnia and Herzegovina. Perhaps a less confrontational mechanism than the Chamber, which requires two opposing sides and results in clear winners and losers, would be more appropriate in a transitional context. Our preference in the West for prosecution should not blind us to the possibility that trials may not accomplish our desired goals for transitional justice.¹⁴³ For, in the end, while *Islamic Community* was an unmistakable affirmation of the right of Muslims in Banja Luka to practice their religion freely, it was only a partial success. More than eight years after its destruction, the Ferhadija has yet to be rebuilt.

141. Waters, *supra* note 20, at 522.

142. Slaughter, *supra* note 125, at 248.

143. See Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002).