DECISION ON ADMISSIBILITY AND MERITS

(delivered on 11 October 2002)

Cases nos. CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691

Hadž BOUDELLAA, Boumediene LAKHDAR, Mohamed NECHLE and Saber LAHMAR

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 3 September 2002 with the following members present:

Ms. Michèle PICARD, President
Mr. Giovanni GRASSO, Vice-President
Mr. Dietrich RAUSCHNING
Mr. Hasan BALIĆ
Mr. Rona AYBAY
Mr. Želimir JUKA
Mr. Jakob MÖLLER
Mr. Mehmed DEKOVIĆ
Mr. Manfred NOWAK
Mr. Miodrag PAJIĆ
Mr. Vitomir POPOVIĆ
Mr. Viktor MASENKO-MAVI
Mr. Andrew GROTRIAN
Mr. Mato TADIĆ

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar

Having considered the aforementioned applications introduced pursuant to Article VIII(1) of the Human Rights Agreement ("the Agreement") set out in Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina;

Adopts the following decision pursuant to Articles VIII(2) and XI of the Agreement and Rules 57 and 58 of the Chamber's Rules of Procedure:

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I. INTRODUCTION

1. The applicants Boudellaa, Lakhdar and Nechle obtained citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina on 2 January 1995, 20 December 1997 and 25 August 1995, respectively. The applicant Lahmar was granted a permit for permanent residence in Bosnia and Herzegovina on 4 April 1997. In October 2001 the applicants were arrested and taken into custody on the suspicion of having planned a terrorist attack on the Embassies of the United States and the United Kingdom in Sarajevo. In November 2001 the Federal Ministry of Interior issued decisions revoking the citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina of the applicants Boudellaa, Lakhdar and Nechle. Also in November 2001 the Ministry of Human Rights and Refugees issued a decision terminating the permit for permanent residence of the applicant Lahmar in Bosnia and Herzegovina and banishing him from the country for a period of ten years. On 17 January 2002 the applicants were ordered to be released from pre-trial detention. However, instead of being released, they were immediately taken into the custody of the Federation Police, and then the following day they were handed over to the military forces of the United States of America ("US forces[1]") based in Bosnia and Herzegovina as part of the NATO led Stabilisation Force ("SFOR"). Subsequently, they were transferred to the military detention facility at Guantanamo Bay, Cuba.

2. The applicants claim that there were no grounds for the revocation of their citizenship and permit for permanent residency, nor for their expulsion from Bosnia and Herzegovina.

3. The cases raise issues under Article 3 (prohibition of torture or inhuman or degrading treatement), Article 5 (right to liberty and security of person), Article 6 (right to a fair trial) and Article 8 (right to respect for family life) of the European Convention on Human Rights ("the Convention"), Article 3 of Protocol No. 4 to the Convention (prohibition of expulsion of nationals), Article 1 of Protocol No. 6 to the Convention (abolition of the death penalty) and Article 1 of Protocol No. 7 to the Convention (procedural safeguards in relation to expulsion of aliens).

II. PROCEEDINGS BEFORE THE CHAMBER

4. The applicant Boudellaa lodged his application on 14 January 2002. The applicants Lakhdar, Nechle and Lahmar filed their applications with the Chamber on 16 January 2002. In their applications the applicants also requested the Chamber to issue orders for provisional measures to prevent their deportation or any other expulsion or extradition from Bosnia and Herzegovina. The applications were directed only against the Federation of Bosnia and Herzegovina.

5. On 17 January 2002 the Chamber issued orders for provisional measures, ordering the respondent Parties to take all necessary steps to prevent the applicants from being taken out of the territory of Bosnia and Herzegovina by the use of force. These orders were directed against both the Federation of Bosnia and Herzegovina and Bosnia and Herzegovina, as the respondent Parties.

6. On 18 January 2002 the cases were transmitted to the respondent Parties under Articles 3, 5 and 8 of the Convention and Article 3 of Protocol No. 4 and Article 1 of Protocol No. 7 to the Convention.

7. Bosnia and Herzegovina submitted its observations on the cases on 28 January 2002. The Federation of Bosnia and Herzegovina did so on 31 January 2002. These observations were communicated to the applicants' lawyers on 14 February 2002 for their observations in reply.

8. On 14 February 2002 the cases were re-transmitted to the respondent Parties under Article 3, Article 5 (in particular paragraphs (1)(c) and (1)(f), as well as the right to security of person), Article 6 (in particular paragraphs (1) and (2)), and Article 8 of the Convention, Article 3 of Protocol No. 4, Article 1 of Protocol No. 6 and Article 1 of Protocol No. 7 to the Convention. The Chamber further pointed out that the

[1] Terminology: The Chamber notes that the Stabilisation Force ("SFOR") are composed of forces from 35 States, including the United States of America. The Agent for Bosnia and Herzegovina stated at the public hearing, on 10 April 2002, that the applicants were handed over to US forces and that there was in fact no distinction between US forces and SFOR. The Chamber, while not agreeing with this analysis, will follow this terminology and refer to "US forces", except where reference is made to the fact that the delivery slips of the refusal of entry decisions were signed "SFOR" (see paragraph 55 below).

cases may raise issues under Article 3, Article 5 and Article 6 paragraph 1 of the Convention and Article 1 of Protocol No. 6 to the Convention, in particular with regard to the decision of the respondent Parties to extradite or to allow the expulsion of the applicants to a legal system that could expose the applicants to the possible risk of a violation of the rights protected by the mentioned provisions.

9. On 14 February 2002 the Chamber invited the Office of the High Representative ("OHR") and the United Nations Office of the High Commissioner for Human Rights ("UN OHCHR") to participate in the proceedings as *amici curiae*.

10. On 15 February 2002 the UN OHCHR accepted the Chamber's invitation to participate in the proceedings as *amicus curiae*.

11. On 25 February 2002 the OHR declined the invitation of the Chamber to take part in the proceedings as *amicus curiae*.

12. On 25 February 2002 the Chamber received additional observations from Bosnia and Herzegovina. On 25 and 26 February 2002 additional observations were received from the Federation of Bosnia and Herzegovina.

13. On 26 February 2002 the Chamber invited the Organisation for Security and Co-operation in Europe ("OSCE") to participate in the proceedings as *amicus curia*e.

14. On 6 March 2002 the Chamber decided to hold a public hearing in the cases on 10 April 2002.

15. On 6 March 2002 the Chamber received the observations of the applicants Boudellaa, Lakhdar and Nechle. On 7 March 2002 additional observations were received from the applicant Boudellaa.

16. On 6 March 2002 the applicants Boudellaa, Lakhdar and Nechle, through their lawyers Mr. Mustafa Bračković, Mr. Fahrija Karkin and Mr. Rusmir Karkin, submitted to the Chamber their claims for compensation.

17. On 11 March 2002 the relevant documents were communicated to the *amici curiae*, *i.e.* the UN OHCHR and the OSCE.

18. On 13 March 2002 the Chamber communicated the additional observations of the respondent Parties to the applicants for their observations and *vice versa*.

19. At the beginning of March 2002, SFOR expressed its interest to participate in the proceedings as *amicus curia*e, subject to the possibility to previously examine the case-files.

20. On 21 March 2002 the Chamber requested the respondent Parties and the applicants to inform it if they had any objections to communicating the relevant documents to SFOR in order for them to assess whether they wanted to take part in the proceedings as *amicus curiae*.

21. On 22 March 2002 the Federation of Bosnia and Herzegovina submitted additional information to the Chamber.

22. As both respondent Parties explicitly informed the Chamber that they did not have any objections and the applicants did not make any objections, the Chamber submitted the relevant documents to SFOR and invited them to take part in the proceedings as *amicus curiae* on 26 March 2002. On 29 March 2002 SFOR orally communicated to the Chamber that they would not act as *amicus curiae*.

23. On 27 March 2002 the OSCE informed the Chamber that it should address its *amicus curiae*-invitation to the Office for Democratic Institutions and Human Rights ("ODIHR"). The Chamber did so on 28 March 2002. On 3 April 2002 the ODIHR communicated to the Chamber that it would not act as *amicus curiae*.

24. On 27 March 2002 both respondent Parties replied to the applicants' compensation claims. No further observations from the respondent Parties were received.

25. On 5 April 2002 the UN OHCHR submitted its *amicus curiae* brief. The brief was hand delivered to all the parties on the same day.

26. On 10 April 2002 the Chamber held a public hearing on the admissibility and merits of the applications in the Cantonal Court building in Sarajevo. The applicants were represented by their lawyers: the applicant Boudellaa by Mr. Mustafa Bračković, the applicant Lakhdar by Mr. Fahrija Karkin, the applicant Nechle by Mr. Rusmir Karkin, and the applicant Lahmar by Mr. Mithat Kočo. Bosnia and Herzegovina was represented by one of its Agents, Mr. Jusuf Halilagić, who was assisted by Mr. Vesko Drljača from the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina, Ms. Ljiljana Lalović from the Ministry of Human Rights and Refugees in Bosnia and Herzegovina and Ms. Mirsada Žutić-Beganović from the Federal Ministry of Interior. The Federation of Bosnia and Herzegovina was represented by Ms. Emina Hasanović, its Agent, assisted by Ms. Safija Kulovac and Mr. Mirsad Gačanin. The UN OHCHR, appearing as *amicus curiae*, was represented by Ms. Madeleine Rees, Head of Office, and Ms. Jasminka Džumhur.

27. At the public hearing, the applicant Lahmar, through his lawyer Mr. Mithat Kočo, submitted to the Chamber his claim for compensation.

28. At the public hearing, the parties and the *amicus curiae* addressed the Chamber, after which they answered questions addressed to them.

29. On 23 April 2002 the Chamber received written information and a document from the Federation of Bosnia and Herzegovina with regard to issues raised at the public hearing.

30. On 18 June 2002 the Chamber received further written information from the Federation of Bosnia and Herzegovina and copies of the decision of the Supreme Court relating to the suspension of the criminal proceedings against the applicants.

31. The Chamber deliberated on the admissibility and merits of the cases on 5 February, 6 March, 11 April, 8 and 9 May, 5 and 6 June, 2 and 4 July, and 3 September 2002. The Chamber decided to join the applications on 3 September 2002, and on the same date it adopted the present decision on admissibility and merits.

III. ESTABLISHMENT OF THE FACTS

A. Applicants' personal lives in Bosnia and Herzegovina prior to October 2001

32. All four applicants are of Algerian origin and lived with their wives and children in Bosnia and Herzegovina until their arrests on 18 October 2001 (Lahmar), 19 October 2001 (Nechle), 20 October 2001 (Lakhdar) and 21 October 2001 (Boudellaa).

33. The applicant Hadž Boudellaa is an *imam* (a religious official) by profession, and he was employed by the humanitarian organisation "Human Appeal" in its Sarajevo office. He is married to a woman who is by birth a citizen of Bosnia and Herzegovina. He has three children with this wife. He has three more children with another woman whom he refers to as his spouse as well and who is also a native of Bosnia and Herzegovina. Since the application was submitted, a seventh child was born. According to the respondent Parties, the applicant came to Bosnia and Herzegovina in 1992.

34. The applicant Boumediene Lakhdar is a mechanic by profession, and he was employed by the humanitarian organisation "Red Crescent" in its office in Sarajevo. He is married to a wife who is not a

native of Bosnia and Herzegovina. They have two small children. According to the respondent Parties, the applicant came to Bosnia and Herzegovina in 1997.

35. The applicant Mohamed Nechle is an administrator by profession, and he was employed by the humanitarian organisation "Red Crescent" in its office in Bihać. He is married to a wife who is not a native of Bosnia and Herzegovina. They have two small children. According to the respondent Parties, the applicant came to Bosnia and Herzegovina in 1995.

36. The applicant Saber Lahmar is a professor of Arabic language by profession, and he was employed at the Islamic Centre of the High Saudi-Arabian Committee in Sarajevo. He is married to a wife whose origin is not known to the Chamber. At the time the application was submitted in January 2002, he and his wife had one minor child, and his wife was six months pregnant. According to the respondent Parties, the applicant came to Bosnia and Herzegovina in 1996.

37. None of the applicants have submitted to the Chamber any documentation on their naturalisation nor any documentation explaining their exact dates of entrance into Bosnia and Herzegovina and whether they have renounced their Algerian citizenship.

38. On 2 January 1995 the applicant Boudellaa was granted citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina. The applicants Lakhdar and Nechle were granted their citizenship on 20 December 1997 and 25 August 1995, respectively.

39. On 4 April 1997 the applicant Lahmar was granted a permit for permanent residence in Bosnia and Herzegovina.

B. Initiation of criminal proceedings against the applicants

40. In October 2001 the Supreme Court of the Federation of Bosnia and Herzegovina ("the Supreme Court") issued decisions ordering that the applicants be taken into custody on suspicion of having attempted to commit the criminal act of international terrorism, punishable under Article 168 paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina. The applicant Lahmar was arrested on 18 October 2001; the applicant Nechle was arrested on 19 October 2001; the applicant Lakhdar was arrested on 20 October 2001; and the applicant Boudellaa was arrested on 21 October 2001. The criminal proceedings against the applicants by the Federation authorities were initiated on the grounds of the suspicion that they were planning a bomb attack on the Embassies of the United States and the United Kingdom in Sarajevo. During these proceedings, one of the co-suspects of the applicants, B.B., was interrogated by agents of the US Federal Bureau of Investigations ("FBI") and confronted with the allegation that during a search of his home, the telephone number of a liaison officer of the al Qaida leader Osama Bin Laden had been found.

41. On 16 November 2001 the Supreme Court issued decisions extending the applicants' detention for a period of two months. The applicants appealed against these decisions. However, their appeals were rejected by the Supreme Court on 22 November 2001.

42. On 9 April 2002 the Supreme Court issued a decision to suspend the criminal proceedings against the applicants. The applicants appealed against this decision, asking for termination rather than suspension of the proceedings. On 8 May 2002 the Supreme Court refused the appeal of the applicants.

C. Revocation of citizenship, termination of permit for permanent residence and refusal of entry to the applicants

43. On 16 November 2001 the Federal Ministry of Interior issued decisions revoking the citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina of the applicants Boudellaa and Nechle. On 20 November 2001 the Federal Ministry of Interior issued a decision revoking the citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina of the applicant Lakhdar. The Federal Ministry of Interior based these revocations on Article 30 paragraph 2, in conjunction with Article

23 paragraph 1 of the Law on Citizenship of Bosnia and Herzegovina and Article 28 paragraph 3, in conjunction with Article 24 paragraph 1 of the Law on Citizenship of the Federation of Bosnia and Herzegovina. It reasoned that the fact that criminal charges had been brought against the applicants leads to the conclusion that, when they applied for citizenship, they had had hidden intentions to violate the Constitution and the laws of the Federation. These decisions were delivered to the applicants on 4 December 2001. On 28 December 2001 the Ministry of Civil Affairs and Communications approved the procedural decision on revocation of the citizenship of the applicants Boudellaa, Lakhdar and Nechle.

44. Also on 16 November 2001 the Commission for Consideration of the Status of Persons Naturalised after 6 April 1992 and before the Entry into Force of the Constitution of Bosnia and Herzegovina ("the Commission") replied to a request of the Supreme Court that it was not competent to consider the cases of the applicants Boudellaa, Nechle and Lakhdar.

45. On 23 November 2001 the Ministry of Human Rights and Refugees of Bosnia and Herzegovina issued a decision terminating the permit for permanent residence of the applicant Lahmar in Bosnia and Herzegovina and banishing him from the country for a period of ten years. The applicant was ordered to leave the country within three days from the date of issuance of the "valid" decision[2]. The decision stated that the initiative for the applicant's banishment was submitted by the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina through the Federal Ministry of Interior for the reason that the applicant was sentenced to 5 years imprisonment by the Supreme Court in its decision of 9 July 1998. The Ministry of Human Rights and Refugees established that the applicant served part of his sentence and that on 6 January 2000 the competent organ replaced the remaining part of the original sentence with a conditional sentence that would not be executed unless he committed a new criminal offence within the next 3 years. Since he was sentenced to a term of imprisonment longer than 4 years, the Ministry of Human Rights and Refugees found that the conditions were met for expelling the applicant under Article 29 paragraph 1(b) of the Law on Immigration and Asylum.

46. On 11 January 2002 the applicant appealed against the decision of the Ministry of Human Rights and Refugees of 23 November 2001 to the Appeals Panel of the Council of Ministers of Bosnia and Herzegovina. To the Chamber's knowledge, no decision has been taken on this appeal.

47. On 20 December 2001 the applicants Boudellaa, Lakhdar and Nechle initiated an administrative dispute before the Supreme Court against the decisions revoking their citizenship of the Federal Ministry of Interior of 16 and 20 November 2001. These proceedings are still pending.

48. On 28 December 2001 the Federal Ministry of Interior submitted to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina an initiative for the expulsion of the applicants Boudellaa, Lakhdar and Nechle from the territory of Bosnia and Herzegovina. The Ministry of Civil Affairs and Communications took no action upon this initiative.

49. On 10 January 2002 the Federal Ministry of Interior issued three decisions on refusal of entry onto the territory of Bosnia and Herzegovina to the applicants Boudellaa, Lakhdar and Nechle on the basis of Article 200 paragraph 1 of the Law on Administrative Procedure, Article 24 of the Law on Internal Affairs of the Federation of Bosnia and Herzegovina and Article 35 paragraph 2 and Article 27 paragraph 1(b) of the Law on Immigration and Asylum. Although these decisions are decisions on refusal of entry and not decisions of expulsion, they order the applicants to leave the territory of Bosnia and Herzegovina immediately. On 10 January 2002 the Federal Ministry of Interior also issued a procedural decision on refusal of entry into the territory of Bosnia and Herzegovina to the applicant Lahmar. This decision is based on Article 200 paragraph 1 of the Law on Administrative Procedure, Article 24 of the Law on Internal

[2] For the purposes of the present cases it is important to recall that the administrative laws in Bosnia and Herzegovina draw a distinction between "final" decisions (*konačno rješenje*) and "valid" decisions (*pravosnažno rješenje*). A "final" *konačno* decision is final within the administrative proceedings, there is no appeal within the administration against it, but the initiation of an administrative dispute before a competent court is possible. Once this judicial remedy has been exhausted, or the deadline to initiate the administrative dispute has expired, then the decision is "valid" (*pravosnažno*). However, a "final" decision is immediately enforceable upon delivery to the person concerned, unless the law provides otherwise (*see* Article 19 of the Federation Law on Administrative Disputes (paragraph 71 below), Article 26 of the Federation Law on Citizenship (paragraph 68 below) and Article 38 of the Bosnia and Herzegovina Law on Immigration and Asylum (paragraph 79 below)).

Affairs of the Federation of Bosnia and Herzegovina and Article 35 paragraph 2 of the Law on Immigration and Asylum of Bosnia and Herzegovina.

D. Diplomatic contacts concerning the applicants

50. According to a memorandum by the Council of Ministers of Bosnia and Herzegovina on the conduct of the officials of institutions of Bosnia and Herzegovina and its Entities regarding the so-called "Algerian group", prepared on 4 February 2002, which was submitted to the Chamber by the Federation of Bosnia and Herzegovina during the public hearing on 10 April 2002, on 11 October 2001, during an official visit to Sarajevo, a high-ranking official of the Algerian Secret Service was informed about the applicants and the suspicion that they were involved in terrorist activities. He promised full co-operation without specifying this any further. The high-ranking official exchanged information with members of the Federal Ministry of Interior and the *Agencija za Istraživanje Dokumentaciju* ("AID"), one of Bosnia and Herzegovina's secret services.

51. According to the document of 4 February 2002 referred to in the previous paragraph, on 11 January 2002 the Ministry of Foreign Affairs of Bosnia and Herzegovina contacted the Democratic National Republic of Algeria to inquire about the possibility to deport the applicants to their native country of Algeria. The representatives of Algeria refused the request to accept the applicants on 12 January 2002. On 14 January 2002 the Ministry of Foreign Affairs of Bosnia and Herzegovina once again unsuccessfully contacted the representatives of Algeria with the same request.

52. On 17 January 2002, in a diplomatic note, the US Embassy in Sarajevo informed Bosnia and Herzegovina that it was willing to take custody of the applicants and two more persons, who were all believed to have been involved in international terrorism.

E. Events of 17 and 18 January 2002

53. On 17 January 2002 the investigative judge of the Supreme Court issued a decision terminating the applicants' pre-trial detention on the ground that there were no further reasons or circumstances upon which pre-trial detention could be ordered. This decision refers to the applicants Boudellaa, Lakhdar and Nechle as citizens of Bosnia and Herzegovina and to the applicant Lahmar as a permanent resident of Bosnia and Herzegovina. According to the undisputed statement of Mr. Fahrija Karkin, lawyer of the applicant Lakhdar, the decision was brought to the prison of the Cantonal Court in Sarajevo, where the applicants were being held, at approximately 5 p.m. on 17 January 2002. It remains unclear whether the applicants ever personally received the decision ordering their release. The Chamber invited the Federation to submit the slips proving delivery of the decision, but no such evidence has been produced.

54. During the night of 17 to 18 January 2002, an unauthorised demonstration of approximately 500 persons took place outside the Sarajevo prison where the applicants were held, during which eight police officers were injured, one of them badly.

55. On 17 January 2002 at 11:45 p.m. the applicants were ordered to be released from pre-trial detention and were immediately taken into the custody of the Federation Police under the authority of the Federal Ministry of Interior. According to the document of the Council of Ministers of 4 February 2002 (see paragraphs 50-51 above), these forces and forces of the Ministry of Interior of Sarajevo Canton handed the applicants over to US forces at 6 a.m. on 18 January 2002[3]. On the same date those US forces delivered the decision on refusal of entry of 10 January 2002 to the applicants. The delivery slips submitted to the Chamber purport to be signed by each of the applicants and by "SFOR", as the delivering authority. The applicants' lawyers and the *amicus curiae* challenge the authenticity of the applicants' signatures. This occurred at the Sarajevo airport before the applicants boarded the aeroplane that transported them out of

[3] Terminology: Whilst the action of delivering the applicants to US forces to be transported to Guantanamo Bay, Cuba, may be considered an extradition or expulsion in nature, it has never been classified as such by the authorities, and no formal extradition procedures were followed. Therefore, for the purposes of this decision it has been classified as a "hand-over".

Bosnia and Herzegovina. The applicants are now believed to be at Camp X-Ray in Guantanamo Bay, Cuba, where they are held in detention by authorities of the United States.

IV. RELEVANT LEGISLATION, LAWS AND REGULATIONS

A. Criminal proceedings against the applicants

1. Criminal Code of the Federation of Bosnia and Herzegovina

56. The Criminal Code of the Federation of Bosnia and Herzegovina (Official Gazette of the Federation of Bosnia and Herzegovina— hereinafter "OG FBiH"–no. 43/98, 29/00 of 20 November 1998) ("the Criminal Code") came into force on 28 November 1998.

57. Article 20 reads as follows:

> "(1) Whoever intentionally commences execution of a criminal offence, but does not complete his/her action, shall be punished for the attempted crime only when the criminal offences in question is punished by imprisonment of five years or more, and for other criminal offences only where the law expressly prescribes punishment of the attempt alone.
> (2) An attempted criminal offence shall be punished within the limits of the punishment prescribed for the same criminal offence committed, but may be punished less severely."

58. Article 168, which is titled "International Terrorism", reads as follows:

> "(1) Whoever, with the intention of causing damage to a foreign country, liberation movement or international organisation, kidnaps a person or commits some other violence, causes an explosion or fire, or by some generally dangerous activity or generally dangerous means causes danger to human lives and property of a large value, shall be punished with a sentence of imprisonment of not less than one year.
> (2) If the death of one or more persons occurred as a consequence of an act referred to in paragraph 1 of this Article, then the perpetrator shall be punished with a sentence of imprisonment of not less than five years.
> (3) If, in the course of the commission of an act referred to in paragraph 1 of this Article, the perpetrator has deliberately deprived another person of his/her life, then he/she shall be punished with a sentence of imprisonment of not less than ten years or a longer term of imprisonment."

B. Issue of citizenship

1. Law on Citizenship of Bosnia and Herzegovina

59. Article 1 of the Law on Citizenship of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina— hereinafter "OG BiH"— no. 13/99) provides as follows:

> "(1) This Law determines the conditions for the acquisition and loss of citizenship of Bosnia and Herzegovina (hereinafter: the citizenship of BiH), in accordance with the Constitution of Bosnia and Herzegovina.
> (2) The citizenship laws of the Entities must be compatible with the Constitution of Bosnia and Herzegovina and with this Law."

60. Article 23 provides, insofar as is relevant, as follows:

> "Citizenship of Bosnia and Herzegovina may be withdrawn in the following cases:
> (1) when the citizenship of Bosnia and Herzegovina was acquired by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant, (...)"

61. Article 24 provides, insofar as is relevant, as follows:

"(1) Citizenship of Bosnia and Herzegovina is lost by release, renunciation or withdrawal on the day of notification to the person concerned of the legal decision. (…)"

62. Article 30 provides, insofar as is relevant, as follows:

" (…)
(2) Decisions under Articles 6, 7, 8, 9, 10, 11, 12, 21, 22 and 23 are taken by the competent authority of the Entity. (…)"

63. Article 31 provides, insofar as is relevant, as follows:

"(1) The decisions referred to in Article 30 paragraph 2, with the exception of decisions taken under Article 6, 7 and 8, must be submitted to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina within three weeks of the date of the decision.
(2) The decision of the competent authority of the Entity becomes effective two months following its submission to the Ministry of Civil Affairs of Bosnia and Herzegovina, unless this Ministry concludes that the conditions of Articles 9, 10, 11, 12, 21, 22 and 23 have not been fulfilled. (…)"

64. Article 40 provides, insofar as is relevant, as follows:

"(1) A Commission shall be established within two months after the date that this Law enters into force to review the status of persons naturalised after 6 April 1992 and before the entry into force of the Constitution of Bosnia and Herzegovina, as referred to in Article 1(7)(c) of the Constitution. …."

65. Article 41 provides, insofar as is relevant, as follows:

"(1) The Commission reviews individual applications for citizenship by naturalisation granted in the period mentioned in Article 40 paragraph 1. To this end, it considers the information provided by the persons concerned, as well as the procedural regularities.
(2) Upon a request by the Commission, the persons concerned and the competent authorities of Bosnia and Herzegovina and the Entities must submit all relevant information within a period determined by the Commission.
(3) If the person concerned does not comply with the request for information referred to in paragraph 2, then the Commission may withdraw the citizenship.
(4) If the Commission finds that the regulations in effect in the territory of Bosnia and Herzegovina at the time of naturalisation were not applied, and it is clear that the applicant was aware that he or she did not fulfil the conditions for naturalisation, then the citizen shall loose his or her citizenship of Bosnia and Herzegovina, unless he or she will thereby become stateless. If this person, by the time the decision of the Commission is taken, fulfils the conditions for naturalisation or facilitated naturalisation provided for in this Law, then he or she shall be considered a citizen of Bosnia and Herzegovina in accordance with this Law. …"

2. Law on Citizenship of the Federation of Bosnia and Herzegovina

66. Article 1 of the Law on Citizenship of the Federation of Bosnia and Herzegovina (OG FBiH no. 43/01) provides as follows:

"This Law shall regulate the conditions for the acquisition and loss of citizenship of the Federation of Bosnia and Herzegovina (hereinafter: the Federation), in accordance with the Constitution of Bosnia and Herzegovina, the Constitution of the Federation of Bosnia and Herzegovina and the Law on Citizenship of Bosnia and Herzegovina (hereinafter: the Law on BH Citizenship) (Official Gazette of Bosnia and Herzegovina no. 4/97,13/99)."

67. Article 24 provides, insofar as is relevant, as follows:

"One may be deprived of the citizenship of the Federation in the following cases:
(1) if the citizenship of the Federation was obtained on the basis of fraud, false information or by hiding any relevant fact that may refer to the claimant; (…)"

68. Article 26 provides as follows:

"Citizenship of the Federation shall cease by renunciation, withdrawal or deprivation from the date of delivery of a valid decision to a person to whom the administrative decision refers. If the permanent residence of such person is not known or cannot be determined, then the citizenship of the Federation shall cease on the date of publishing the valid decision in the Official Gazette of the Federation of Bosnia and Herzegovina.

Citizenship of the Federation shall cease under force of law pursuant to Articles 16, 17 and 18 of this Law on the date when the person in question acquires the citizenship of some other state."

69. Article 28 paragraph 3 provides as follows:

"A decision granting citizenship of the Federation under paragraph 2 of this Article, as well as a decision revoking citizenship of the Federation on the basis of Article 14 of this Law is issued by the competent Ministry of the Federation, except for a decision renouncing citizenship, for which the Ministry of Civil Affairs and Communications is competent, as provided in Article 30 paragraph 1 of the Law on Citizenship of Bosnia and Herzegovina."

70. Article 33 provides, insofar as is relevant, as follows:

"The (…) procedural decision on cessation of citizenship of the Federation under Articles 21, 22 and 24 of this Law, (…) must be submitted to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina within three weeks of the date of issuance of the procedural decision. The procedural decision shall enter into force two months after being submitted to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina if this Ministry does not determine that conditions for (…) withdrawal or deprivation of citizenship (…) under the Law on Citizenship of Bosnia and Herzegovina have not been fulfilled. (…)"

3. Law on Administrative Disputes of the Federation of Bosnia and Herzegovina

71. Article 19 of the Law on Administrative Disputes (OG FBiH no. 2/98) provides, insofar as is relevant, as follows:

"As a rule, an action shall not prevent the enforcement of the administrative act that the action is filed against, unless otherwise established by law.

On the plaintiff's request, the body competent for enforcement of a contested administrative act shall postpone the enforcement until the issuance of a valid court decision if the enforcement would inflict damage to the plaintiff that would be irreparable, and if the postponement is neither contrary to the public interest nor would inflict major irreparable harm to the opposite party. The evidence on the filed action shall be enclosed with the request for postponement. The competent body must issue a procedural decision on any request at the latest three days after receipt of the request to postpone enforcement.

The competent body under paragraph 2 of this Article may, for other reasons, postpone enforcement of a contested administrative act until the issuance of a valid court decision, provided this complies with the public interest.

The competent court to which the lawsuit has been filed may decide on the postponement of the enforcement of the administrative act against which the lawsuit has been filed on the conditions of paragraphs 2 and 3 of this Article, if requested so in writing by the plaintiff. The plaintiff may only file this request, provided that he has not previously requested the postponement of the enforcement of the procedural decision from the body specified in paragraph 2 of this Article."

C. Refusal of entry and expulsion

1. Law on Immigration and Asylum of Bosnia and Herzegovina

72. Article 27 of the Law on Immigration and Asylum (OG BiH no. 23/99) provides, insofar as is relevant, as follows:

"An alien may be refused entry
(…)

(b) if he/she lacks a visa, residence permit or other permit required for entry, residence and work in Bosnia and Herzegovina; (…)"

73. Article 29 provides as follows:

"An alien may be expelled from Bosnia and Herzegovina
(a) if he/she remains on the territory of Bosnia and Herzegovina after his/her residence permit has expired or has been revoked according to Articles 30 to 32.
(b) if he/she is convicted by a court in Bosnia and Herzegovina of a criminal offence and sentenced to more than four years imprisonment."

74. Article 30 provides, insofar as is relevant, as follows:

"Visas and residence permits may be revoked
(…)
(c) if his/her presence constitutes a threat to public order and security. (…)"

75. Articles 33 to 45 regulate the conditions and procedures for decisions on refusal of entry and for decisions on expulsion of aliens. Article 34 provides as follows:

"Aliens shall not be returned or expelled in any manner whatsoever to the frontier of territories, where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have formally been granted asylum. The prohibition of return or expulsion also applies to persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture or other inhuman or degrading treatment or punishment. Nor may aliens be sent to a country where they are not protected from being sent to such a territory."

76. Article 35 and Article 36 regulate the competencies to take decisions on refusal of entry and on expulsion. Article 35 provides, insofar as is relevant, as follows:

"(…) Decisions on the refusal of entry on the territory of Bosnia and Herzegovina are taken by the competent authority of the Entity. (…)"

and Article 36 provides as follows:

"Decisions on expulsion are taken by the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina."

77. As to decisions on refusal of entry, the Law distinguishes between persons who are refused entry at the border (Article 35 paragraph 1 and Article 37) and persons who, at the time of issuance of the decision on refusal of entry, are within the territory of Bosnia and Herzegovina (Article 35 paragraph 2 and Article 38).

78. As to the remedy against a decision on refusal of entry issued at the border, an alien may submit an appeal to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina, but this appeal has no suspensive effect.

79. As to the remedy against a decision on refusal of entry issued to an alien within the territory of Bosnia and Herzegovina, Article 38 provides, insofar as is relevant, as follows:

"An alien may appeal to the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina against a refusal of entry order taken on the territory of Bosnia and Herzegovina by the competent authority of the Entity.

An alien may appeal to the appeals panel as defined in Article 53 against an expulsion order by the Ministry of Civil Affairs and Communication of Bosnia and Herzegovina.

The execution is stayed pending an appeal according to this Article."

80. Article 53 provides, insofar as is relevant, as follows:

> "For the purposes of this Law, the Council of Ministers shall establish an appeals panel. (...)"

2. Law on Administrative Procedures of the Federation of Bosnia and Herzegovina

81. Article 139 of the Law on Administrative Procedures (OG FBiH no. 2/98, 48/99) provides, insofar as is relevant, as follows:

> "(1) A body may directly solve the issue in an expedite procedure:
> (...)
> 4) when the issue concerns urgent measures in the public interest which cannot be delayed and when the facts upon which the decision is based are established or at least shown to be probable."

82. Article 227 provides as follows:

> "(1) An appeal against a decision shall be submitted within 15 days if the Law does not envisage it in a different way.
> (2) The deadline for an appeal for each person and each body to which the decision was sent shall be calculated from the day of delivery of the decision."

83. Article 228 provides, insofar as is relevant, as follows:

> "(1) A decision cannot be implemented during the period in which it is possible to file an appeal. After a properly stated appeal, a decision cannot be implemented until the decision on appeal is sent to the party.
> (2) Exceptionally, a decision may be implemented during the appeal period, as well as after filing an appeal, if it was foreseen by the Law or if it is a matter of urgency (Article 139 item 1 line 4) or if the delay of implementation would cause irreparable damage to any of the parties. In the latter instance, it is possible to seek adequate insurance from the party in whose interest it is to carry out implementation and to condition the implementation on this insurance."

3. Law on the Council of Ministers and Ministries of Bosnia and Herzegovina

84. Article 39 of the Law on the Council of Ministers and Ministries of Bosnia and Herzegovina (OG BiH no. 11/00) provides as follows:

> "The Ministry of Human Rights and Refugees shall undertake actions for the protection of human rights and rights of refugees, immigration, emigration and asylum in accordance with the Constitution of Bosnia and Herzegovina and the General Framework Agreement for Peace in Bosnia and Herzegovina, international conventions and laws and other acts of authorised institutions of Bosnia and Herzegovina, and co-ordinate tasks on rights of refugees and, in that respect, achieve co-operation with the Entities."

85. Article 43 provides as follows:

> "The Ministry of Civil Affairs and Communications shall be competent for the areas of citizenship, politics and regulations on the application of international and inter-Entity criminal law, including relations with Interpol; establishment and functioning of mutual and international communication means; organisation of inter-Entity transport."

4. Code of Criminal Procedure of the Federation of Bosnia and Herzegovina

86. The Code of Criminal Procedure (OG FBiH no. 43/98, 23/99) (the "Code of Criminal Procedure") came into force on 28 November 1998, replacing the former Code of Criminal Procedure (Official Gazette of the Socialist Federal Republic of Yugoslavia— hereinafter "OG SFRY"–nos. 26/86, 74/87, 57/89, 3/90 and Official Gazette of the Republic of Bosnia and Herzegovina— hereinafter "OG RbiH"–nos. 2/92, 9/92).

87. Chapter XXXI of the Code of Criminal Procedure regulates the procedure for "extradition of persons who have been charged or convicted".

88. Article 506 provides, insofar as is relevant, as follows:

> "1. The extradition of persons from the territory of the Federation who have been charged or convicted shall be performed in accordance with the provisions of this Law unless the law of Bosnia and Herzegovina or an international treaty specifies otherwise. …."

89. Article 507 provides, insofar as is relevant, as follows:

> "The prerequisites for extradition are as follows:
> 1. that the person whose extradition is sought is not a citizen of Bosnia and Herzegovina or the Federation;
> 2. …;
> 3. that the crime for which extradition is requested has not been committed in the Federation, against it or against its citizen;
> 4. that the crime for which extradition is sought constitutes a crime under both domestic law and the law of the State in which it was committed;
> 5. that the crime for which extradition is sought does not constitute a political or a military crime;
> 6. …;
> 7. …;
> 8. …;
> 9. that there is sufficient evidence to support a reasonable suspicion that the alien whose extradition is sought committed the particular crime or that a final verdict already exists;
> 10. ….. and that the extradition is not sought for a crime for which capital punishment is prescribed by the law of the country seeking the extradition, unless the country seeking the extradition provides guarantees that capital punishment shall not be pronounced or exercised. …"

90. Article 508 provides, insofar as is relevant, as follows:

> "1. A proceeding for extradition of an accused or convicted alien shall be instituted on the petition of the foreign state.
> 2. A petition for extradition shall be submitted through diplomatic channels.
> 3. The following must accompany a petition for extradition:
> 1. the means of establishing the identity of the accused or convicted person (precise description, photographs, fingerprints, and the like);
> 2. a certificate or other data concerning the alien's citizenship;
> 3. the indicting proposal or verdict or decision of custody or some other equivalent document, in an original or certified copy, containing the first and last name of the person whose extradition is sought, and other data necessary to establish his identity, a description of the crime, the legal name of the crime and evidence to support a reasonable suspicion of his commission of the crime;
> 4. an extract from the text of the criminal law of the foreign State which is to be applied or which has been applied against the accused for the crime for which extradition is sought; and if the crime was committed on the territory of a third state, then an extract from the text of the criminal law of that State as well.
> 4. If these appendices are written in a foreign language, a certified interpretation in one of the official languages of the Federation should also be appended."

91. Article 509 provides, insofar as is relevant, as follows:

> "1. The Ministry of Foreign Affairs of Bosnia and Herzegovina shall deliver the petition for extradition of an alien through the Ministry of Civil Affairs and Communications to the Federal Ministry of Justice, which has a duty to immediately forward this petition to the investigative judge of the court in whose jurisdiction the alien is living or in whose jurisdiction he happens to be present.
> 2. If the permanent or temporary residence of an alien whose extradition is sought is not known, then the Federal Ministry of Justice shall first establish these facts through the Federal Ministry of Interior. …."

92. Article 510 provides, insofar as is relevant, as follows:

> "1. In urgent cases, when there is a danger that the alien will flee or conceal himself and when the foreign State has sought temporary custody of the alien, the competent law enforcement agency may

arrest the alien in order to take him before the investigative judge of the competent court on the basis of the petition of the competent foreign authority, regardless of how it was sent. The petition must contain data to establish the alien's identity, the nature and name of the crime, the number of the warrant, the date, place and name of the foreign authority ordering the custody, and a statement to the effect that extradition shall be sought through regular channels.

2. When custody is ordered in conformity with paragraph 1 of this Article and the alien is brought before the investigative judge, after his examination, the investigative judge shall report the arrest to the Ministry of Foreign Affairs of Bosnia and Herzegovina through the Ministry of Civil Affairs and Communications and through the Federal Ministry of Justice.

3. The investigative judge shall release the alien when the grounds for custody cease to exist or if the petition for extradition is not submitted by the date which he specifies in view of the remoteness of the State seeking extradition, such period not to exceed 3 months from the date when the alien was taken into custody. ...."

D. International law regarding the fight against terrorism

1. United Nations Security Council Resolution 1373 (2001)

93. United Nations Security Council Resolution 1373 (2001) was adopted by the Security Council at its 4385th meeting on 28 September 2001. It provides, insofar as is relevant, as follows:

"*The Security Council*,

...

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C., and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

"*Acting* under Chapter VII of the Charter of the United Nations,

"1 ...;

"2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to

any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

"3. *Calls* upon all States to:

(a) …;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) …;

(e) …;

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists; …."

2. Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism

94. On 15 July 2002, at its 804th meeting, the Committee of Ministers of the Council of Europe adopted a document entitled "Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism". These Guidelines provide, insofar as is relevant:

Preamble

"The Committee of Ministers,

(a.) Considering that terrorism seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society;

(b.) Unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed;

…

(d.) Recalling that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights, the rule of law and, where applicable, international humanitarian law;

(e.) Recalling the need for States to do everything possible, and notably to co-operate, so that the suspected perpetrators, organisers and sponsors of terrorist acts are brought to justice to answer for all the consequences, in particular criminal and civil, of their acts;

(f.) Reaffirming the imperative duty of States to protect their populations against possible terrorist acts;

….

(i.) Reaffirming states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights and, for the member states in particular, the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights;

adopts the following guidelines and invites member states to ensure that they are widely disseminated among all authorities responsible for the fight against terrorism.

I

States' obligation to protect everyone against terrorism

"States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies states' fight against terrorism in accordance with the present guidelines.

II

Prohibition of arbitrariness

"All measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III

Lawfulness of anti-terrorist measures

"1. All measures taken by states to combat terrorism must be lawful.

2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.

....

XII

Asylum, return ("refoulement") and expulsion

"1. ....

2. It is the duty of a State that has received a request for asylum to ensure that the possible return ("*refoulement*") of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion.

3. ....

4. In all cases, the enforcement of the expulsion or return ("*refoulement*") order must be carried out with respect for the physical integrity and for the dignity of the person concerned, avoiding any inhuman or degrading treatment.

XIII

Extradition

"1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.

2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

(i) the person whose extradition has been requested will not be sentenced to death; or

(ii) in the event of such a sentence being imposed, it will not be carried out.

3. Extradition may not be granted when there is serious reason to believe that:

(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;

(ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.

4. When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition.

....

XV

Possible derogations

"1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.

2. States may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life as guaranteed by these international instruments, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law. ..."

E. Legislation of the United States of America

1. President's Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

95. On 13 November 2001 the President of the United States signed a military order on the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (66 Federal Register 57833 of 16 November 2001) (the "US President's Military Order"). It provides, insofar as is relevant, as follows:

> "By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:
>
> "Section 1. Findings.
>
> (a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.
>
> (b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).
>
> (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.
>
> (d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.
>
> (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.
>
> (f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.
>
> (g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.
>
> "Section 2. Definition and Policy.
>
> (a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
>
> (1) there is reason to believe that such individual, at the relevant times,
> (i) is or was a member of the organization known as al Qaida;
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as

their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4. …

"Section 3. Detention Authority of the Secretary of Defense.

Any individual subject to this order shall be –

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

"Section 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for –

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) …;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

….

"Section 7. Relationship to Other Law and Forums.

…

(b) With respect to any individual subject to this order –

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal. …"

2. US Department of Defense Military Commission Order No. 1

96. On 21 March 2002, the Secretary of Defense of the United States, issued the US Department of Defense Military Commission Order No. 1, which sets forth the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism established under the US President's Military Order of 13 November 2001 (see paragraph 95 above). This Military Commission Order provides, insofar as is relevant, as follows:

"1. PURPOSE
This Order implements policy, assigns responsibilities, and prescribes procedures … for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials.

"2. ESTABLISHMENT OF MILITARY COMMISSIONS
In accordance with the President's Military Order, the Secretary of Defense or a designee (" Appointing Authority") may issue orders from time to time appointing one or more military commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.
….

"4. COMMISSION PERSONNEL
A. Members
(1) Appointment
The Appointing Authority shall appoint the members and the alternate member or members of each Commission. …

(3) Qualifications
Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), … . The Appointing Authority shall appoint members and alternative members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause. …

C. Defense
(1) Office of the Chief Defense Counsel
The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel.
Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:
(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and
(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel
(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, … If requested by the Accused, however, the Appointing Authority may allow the original

Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys, if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by the Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

(4) Continuity of Representation

The Accused must be represented at all relevant times by Detailed Defense Counsel. …

"5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

A. The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

B. The Accused shall be presumed innocent until proven guilty.

C. A Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

D. At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2).

E. The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

F. The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude the admission of evidence of prior statements or conduct of the Accused.

G. If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

H. The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

I. The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

J. The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

K. The Accused may be present at every stage of the trial before the Commission, consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Commission for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.
M. …
N. …
O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).
P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)2).

"6. CONDUCT OF THE TRIAL
A. Pretrial Procedures
…
(3) Notification of the Accused
The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. …

B. Duties of the Commission During Trial
The Commission shall:
(1) Provide a full and fair trial.
(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.
(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. … A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.
…

F. Voting
"….An affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the members. Votes on findings and sentences shall be taken by secret, written ballot."

G. Sentence
Upon conviction of an Accused, the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper. Only a Commission of seven members may sentence an Accused to death. …

H. Post-Trial Procedures
…
(2) Finality of Findings and Sentence
A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. …
(4) Review Panel
The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. …
(5) Review by the Secretary of Defense
The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.
(6) Final Decision
After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may

approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. …"

3. Laws of War

97. The US President's Military Order of 13 November 2001 provides, at Section 1(e), that "it is necessary for individuals subject to this order …, when tried, to be tried for violations of the laws of war and other applicable law by military tribunals". Sources of the "laws of war" include customary principles and rules of international law, international agreements, judicial decisions of national and international tribunals, national manuals of military law, scholarly treatises, and resolutions of various international bodies. The understanding of the "laws of war" of the United States Department of Defense is set forth in the *Field-Manual 27-10: The Law of Land Warfare*, promulgated by the Department of the Army. Relevant parts of *The Law of Land Warfare*, Chapter 8, Section II, dealing with crimes under international law, read:

"498. Crimes Under International Law

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise:

a. Crimes against peace.

b. Crimes against humanity.

c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned, only with those offenses constituting "war crimes."

"499. War Crimes

The term "war crime" is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.

"500. Conspiracy, Incitement, Attempts, and Complicity

Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable.

"502. Grave Breaches of the Geneva Conventions of 1949 as War Crimes

The Geneva Conventions of 1949 define the following acts as "grave breaches," if committed against persons or property protected by the Conventions:

…

c. GC [Geneva Convention relative to the Protection of Civilian Persons in Time of War].

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. (*GC, art. 147.*)

"504. Other Types of War Crimes

In addition to the "grave breaches" of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ("war crimes"):

a. Making use of poisoned or otherwise forbidden arms or ammunition.

…

d. Firing on localities which are undefended and without military significance.

…

j. Pillage or purposeless destruction.

…"

Section III, dealing with the punishment of war crimes, reads *inter alia*:

"505. Trials

a. Nature of Proceeding. Any person charged with a war crime has the right to a fair trial on the facts and law.

b. *Rights of Accused.* Persons accused of "grave breaches" of the Geneva Conventions of 1949 are to be tried under conditions no less favorable than those provided by Article 105 and those following [of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War – hereinafter "the Third Geneva Convention of 1949"].

c. *Rights of Prisoners of War.* Pursuant to Article 85 [of the Third Geneva Convention of 1949], prisoners of war accused of war crimes benefit from the provisions of [the Third Geneva Convention of 1949], especially Articles 82-108 (...).

d. *How Jurisdiction Exercised.* War crimes are within the jurisdiction of general courts-martial (...), military commissions, provost courts, military government courts, and other military tribunals (...) of the United States, as well as of international tribunals.

e. *Law Applied.* As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States. However, directives declaratory of international law may be promulgated to assist such tribunals in the performance of their function.

"508. Penal Sanctions

The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law. Corporal punishment is excluded. Punishments should be deterrent, and in imposing a sentence of imprisonment it is not necessary to take into consideration the end of the war, which does not of itself limit the imprisonment to be imposed."

4. United States Code

98. The US Code, Title 18, provides, insofar as is relevant, as follows:

Section 1114 - Protection of officers and employees of the United States

"Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished -
(1) in the case of murder, as provided under section 1111; ..."

Section 1117 - Conspiracy to murder

"If two or more persons conspire to violate section...1114...of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life."

Section. 2332a (18 U.S.C. 2332a) - Use of certain weapons of mass destruction

"(a) Offense Against a National of the United States or Within the United States. -
A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction (other than a chemical weapon as that term is defined in section 229F), including any biological agent, toxin, or vector (as those terms are defined in section 178) -
(1) against a national of the United States while such national is outside of the United States;
(2) against any person within the United States, and the results of such use affect interstate or foreign commerce or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce; or
(3) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States,
shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life."

Section 2332b (18 U.S.C. 2332b) - Acts of terrorism transcending national boundaries

"(a) Prohibited Acts. -
(1) Offenses. -

Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b) –

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).

(2) Treatment of threats, attempts and conspiracies. -

Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

"…

"(c) Penalties. -

(1) Penalties. -

Whoever violates this section shall be punished -

…

(A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;

…

(F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and

"(d) Proof Requirements. -

The following shall apply to prosecutions under this section:

(1) Knowledge. -

The prosecution is not required to prove knowledge by any defendant of a jurisdictional base alleged in the indictment.

(2) State law. -

In a prosecution under this section that is based upon the adoption of State law, only the elements of the offense under State law, and not any provisions pertaining to criminal procedure or evidence, are adopted.

"(e) Extraterritorial Jurisdiction. -

There is extraterritorial Federal jurisdiction -

(1) over any offense under subsection (a), including any threat, attempt, or conspiracy to commit such offense; and

(2) over conduct which, under section 3, renders any person an accessory after the fact to an offense under subsection (a).

Sec. 3591. - Sentence of death

"(a) A defendant who has been found guilty of -

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593 -

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

"(b) …

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified,

except that no person may be sentenced to death who was less than 18 years of age at the time of the offense."

V. COMPLAINTS

99. In their applications, which were submitted in the four days preceding their hand-over by the Federation Police to US forces, the applicants complain about a violation of Article 3 of the Convention, as by their expulsion to Algeria they would be subjected to torture, inhuman and degrading treatment and punishment. They also complain of a violation of the right to have a trial within a reasonable time in respect to their appeal for annulment of the decisions on revocation of citizenship (they bring this complaint under Article 5 paragraph 3 of the Convention). Further, they complain of a violation of Article 8 of the Convention, the right to respect for private and family life, which would be affected by their removal from Bosnia and Herzegovina.

100. In their written submission of 6 March 2002, the applicants add to their original complaints allegations of violations of several provisions which had been referred to by the Chamber in communicating the applications to the respondent Parties: Article 5 paragraph 1 of the Convention in regard to the detention of the applicants, Article 6 of the Convention and in particular the presumption of innocence, and Article 3 of Protocol No. 4 to the Convention or respectively Article 1 of Protocol No. 7 to the Convention in regard to the expulsion of the applicants, Article 1 of Protocol No. 6 to the Convention in light of the fact that the applicants were expelled to a legal system in which they are under the possible risk of imposition of the death penalty.

101. In the submission of 6 March 2002, the applicants further add the allegation that their right under Article 13 of the Convention was violated due to a lack of effective remedies against the possible violations of Articles 3, 5 and 8 of the Convention. Further, they add the claim that they were discriminated against in their rights as protected by Articles 3, 5, 6 and 8 of the Convention because they are aliens.

VI. SUBMISSIONS OF THE PARTIES

A. Bosnia and Herzegovina

1. As to the facts and domestic law

102. In its written submissions of 28 January 2002, concerning the procedure of the revocation of citizenship, Bosnia and Herzegovina states that the applicants had hidden intentions not to respect the Constitution and laws of Bosnia and Herzegovina and that therefore the revocation of citizenship was in accordance with the law. In addition to the criminal proceedings initiated against the applicants, Bosnia and Herzegovina claims that the applicants made false statements and submitted false documents in order to acquire citizenship. Bosnia and Herzegovina further argues that the applicants' citizenship was removed at the time of the delivery of the decisions on revocation to the applicants on 4 December 2001, in accordance with Article 24 of the Law on Citizenship of Bosnia and Herzegovina.

103. In respect to possible extradition[4] of the applicants, Bosnia and Herzegovina submits that on 12 January 2002, in reply to a request made by INTERPOL in Sarajevo, the National Democratic Republic of Algeria, represented by its Embassy in Rome, refused to accept the applicants in the event they were deported from Bosnia and Herzegovina.[5] On 17 January 2002 in a diplomatic note the US Embassy in Sarajevo informed Bosnia and Herzegovina that it was willing to take custody of the applicants and two more persons who were all believed to be involved in international terrorism. Bosnia and Herzegovina concludes that as Algeria, the applicants' country of origin, did not want the applicants back, it was Bosnia

[4] The use of the word "extradition" contains no formal assessment other than conveying the submissions of Bosnia and Herzegovina. This word is repeated in the submissions of the Federation of Bosnia and Herzegovina and of the applicants.

[5] It is unknown whether the applicants were still citizens of Algeria at this time. At the public hearing on 10 April 2002, the Agents of the respondent Parties and the lawyers for the applicants were unable to clarify this fact.

and Herzegovina's right under international law to extradite the applicants to the authorities of the United States of America, who had asked for their extradition on the suspicion that the applicants were involved in terrorist activities. At the public hearing, however, the Agent of Bosnia and Herzegovina stated that, neither at the time of the hand-over nor at the time of the public hearing, Bosnia and Herzegovina was aware of any intention of the United States to initiate criminal proceedings against the applicants. Bosnia and Herzegovina placed the applicants "under the supervision" of the US forces, which did not involve "detention" of the applicants. Facilitating such "supervision" was a necessary form of co-operation by Bosnia and Herzegovina in the international fight against terrorism. The Agent lamented that in the translation of the Note Verbale of the US Embassy the word "custody" had been translated as "supervision".

104. At the public hearing the Agent of Bosnia and Herzegovina stated that he did not have any official information as to when the applicants were taken out of Bosnia and Herzegovina.

2. As to the admissibility

105. Bosnia and Herzegovina claims that the cases are inadmissible. Firstly, Bosnia and Herzegovina is of the opinion that the Chamber exceeded its jurisdiction by extending the cases to it as a respondent Party, because the applicants did not direct their applications against Bosnia and Herzegovina. Secondly, Bosnia and Herzegovina argues that it is not responsible for any of the acts giving rise to the alleged violations of the applicants' rights as protected by the Convention. Thirdly, it claims that the applicants have not exhausted the available domestic remedies. Finally, it claims that the applicants did not wait six months before submitting their applications, the applicants thereby being in breach of the six-months rule under Article VIII(2)(a) of the Agreement.

3. As to the merits

106. In regard to the merits, Bosnia and Herzegovina did not submit any written observations. At the public hearing, Bosnia and Herzegovina argued that it was obliged under the UN Security Council Resolution 1373 of 28 September 2001 (see paragraph 93 above), to accede to the US request and that the applicants were not citizens at the time of their hand-over. Furthermore, Bosnia and Herzegovina maintains that it has not taken any of the decisions or conducted any of the operations complained of by the applicants.

4. As to the order of a provisional measure

107. Bosnia and Herzegovina alleges that it was never delivered the order for a provisional measure in a proper way. It argues that even if the order was transmitted to the facsimile of the legal service of the Council of Ministers on 17 January 2002, at 6:26 p.m., it could not have complied with the order, because the Council of Ministers, where the Agents are situated, stops working at 5:00 p.m. However, on 18 January 2002, at 9:00 a.m., when the Agents started working the next day, the applicants were already outside of the territory of Bosnia and Herzegovina. Moreover, the regular practice is that the Agents of Bosnia and Herzegovina receive cases and decisions of the Chamber and other materials directly by courier.

108. Bosnia and Herzegovina opines that the English version and the Bosnian version of the order for a provisional measure are different in a number of decisive details. Bosnia and Herzegovina assumes from these mistakes that both the President and the Vice President were outside of Sarajevo at the relevant time. Bosnia and Herzegovina considers that in particular cases of such importance, the order should have been issued only after the President or any other judge issuing the order had personal insight into the files, even if that means that the judge must travel to Sarajevo immediately.

109. In addition, the Agent of Bosnia and Herzegovina stated in its written observations of 25 February 2002, and repeated at the public hearing on 10 April 2002, that the Chamber is fully aware that Bosnia and Herzegovina has no authority to give effect to orders by the Chamber. The Agent of Bosnia and Herzegovina stated in paragraph 2 of the written observations:

> "...we would like to point out the following preliminary legal issues that are now under the Chamber's competence, and to which the Chamber, up to now, paid no attention to in its consideration and/or statements on the above-mentioned cases:
>
> "(10) In its provisional measure the Chamber requested the state of Bosnia and Herzegovina to prevent the applicants to be taken out of Bosnia and Herzegovina by the use of force. The esteemed Chamber, most certainly, should know by now that the state of Bosnia and Herzegovina, in its distinction from its Entities, does not institutionally possess any instrument of force ... and such wording of the order for provisional measures is not enforceable by the state of Bosnia and Herzegovina...."

B. The Federation of Bosnia and Herzegovina

1. As to the facts

110. The Federation submitted a written account of the facts pertaining to the criminal proceedings against the applicants, the revocation of citizenship and the hand-over of the applicants to US forces which coincides in substance with the facts as established by the Chamber in paragraphs 40 to 55 above.

111. At the public hearing the Federation stated that the organs of the Federation only acted as agents executing the orders of Bosnia and Herzegovina. Therefore, the Federation is not responsible for any acts concerning the applicants and in particular not for handing-over the applicants to US forces. The Federation also claims that the applicants lost their citizenship at the time the decisions on revocation were delivered to the applicants on 4 December 2001.

112. In reply to a question by the Chamber, the Agent of the Federation stated that she did not have any explanation as to why the decision on refusal of entry of 10 January 2002 was not delivered to the applicants before 18 January 2002.

2. As to the admissibility

113. In the written submissions the Federation did not submit any arguments with regard to the admissibility of the cases. At the public hearing, the Federation joined the argument of Bosnia and Herzegovina that the cases are inadmissible because, in the legal system of the Federation, effective remedies exist both in relation to theory and practise, which have not been exhausted by the applicants.

3. As to the merits

114. With regard to the presumption of innocence as protected by Article 6 paragraph 2 of the Convention, the Federation claims that the decisions of the Supreme Court in the investigative proceedings against the applicants were only based on doubt and suspicion and not on the presumption of guilt.

115. In respect to the detention of the applicants, the respondent Party claims that until their release from pre-trial detention, the detention was justified under Article 5 paragraph 1(c) of the Convention. The detention subsequent to their release from pre-trail detention until the hand-over to US forces was justified under Article 5 paragraph 1(f) in order to ensure their expulsion.

116. In respect to the merits, the Federation points out that there can only be a violation of either Article 3 of Protocol No. 4 to the Convention or of Article 1 of Protocol No. 7 of the Convention. In the additional written submissions of 25 February 2002, the Federation submits in regard to the alleged violation of Article 6 that there is no violation with regard to the reasonableness of the duration of any proceedings initiated until that day.

117. The Federation further argues that under Article 1 paragraph 2 of Protocol No. 7 to the Convention, it was justified for reasons of national security to expel the applicants before they could avail themselves of the procedural safeguards provided for in Article 1 paragraph 1 of Protocol No. 7 to the Convention.

4. As to the order for a provisional measure

118. The Federation stated that it received the order for a provisional measure at 6:26 p.m. on 17 January 2002, and it transmitted it to the Federal Ministry of Interior, which confirmed receipt.

C. The applicants

119. In regard to the admissibility the applicants point out that there is also responsibility of Bosnia and Herzegovina, as their expulsion also involved acts that fall within the responsibility of Bosnia and Herzegovina. In addition, the Chamber ordered the provisional measure against both the Federation of Bosnia and Herzegovina and Bosnia and Herzegovina, and both parties did not comply with the order.

120. They further claim that they have exhausted all available remedies. In particular, they have initiated an administrative dispute against the revocation of citizenship before the Supreme Court, which is still pending. However, nothing has proven effective against the forceful expulsion of the applicants. The applicants also submit that they did not request the Supreme Court to suspend the revocation of citizenship because, under Article 26 of the Law on Citizenship of the Federation of Bosnia and Herzegovina, the revocation of citizenship only enters into force upon the decision of the Supreme Court in the administrative dispute. Therefore, they submit, a request for provisional suspension would have been redundant.

121. In regard to the merits the applicants submit that there was a violation in regard to the reasonableness of time as the administrative dispute before the Supreme Court regarding the revocation of citizenship was not decided before the applicants were expelled.

122. In their original applications the applicants were under the impression that they would be extradited[6] to Algeria. They alleged that a possible extradition to Algeria might result in a violation of their rights as protected by Article 3 of the Convention as they would probably be subject to arbitrary detention, torture, and degrading treatment including sexual maltreatment, and the applicants could even "disappear" and be murdered. The applicants having been taken to the United States of America, the applicants' representatives now claim a violation of Article 3 in regard to the applicants' treatment at Camp X-Ray, Guantanamo Bay, Cuba. According to the submissions of their lawyers, they are held in cages under inhuman conditions, as publicly known from coverage by the international media.

123. Moreover, the lawyer of the applicant Lakhdar claimed at the public hearing that the signature of his client on the delivery slip, which should prove that on 18 January 2002 the applicant was delivered the decision on refusal of entry, was forged. He pointed out that a comparison of the applicant's signature on other documents with the signature on the delivery note would prove that the signature on the delivery slip was not made by the same person; therefore, it could not be his client's signature on the delivery slip.

D. UN OHCHR as *amicus curiae*

124. On 5 April 2002, the UN OHCHR, as *amicus curiae*, submitted its written observations on the admissibility and merits of the applications. The UN OHCHR offered further arguments in its oral presentation at the public hearing on 10 April 2002. At the public hearing the UN OHCHR clarified that it has appeared as *amicus curiae* not on behalf of the applicants but "to contribute to the understanding of the application of human rights to all parties in the proceedings". It has sought to explain that the "two absolutes" — "the absolute necessity of ensuring the effective prosecution of terrorism and the absolute necessity of upholding the rule of law and human rights" — "are not incompatible", as follows:

[6] See footnote 5 above.

> "While we recognise that the threat of terrorism may require specific measures, we call on all governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. Such steps might particularly affect the presumption of innocence, the right to a fair trial, freedom from torture and privacy rights, freedom of expression and assembly, and the right to seek asylum. The purpose of anti-terrorism measures is to protect human rights and democracy, not to undermine these fundamental values of our societies. The nature and manner of implementation of such measures must be fully consistent with this. We believe that in this case those vital concerns are being raised."

125. In summary, the UN OHCHR submits that all four applications are admissible. It further submits that "the respondent Parties have singularly failed in their obligations under Article 1 of the Convention, and that there are violations of Articles 3, 5, 6" of the Convention. In addition, there are either violations of Article 3 of Protocol No. 4 or Article 1 of Protocol No. 7 (depending on the citizenship status of applicants Boudellaa, Nechle, and Lakhdar). Lastly, there may be violations due to the lack of guarantees in relation to obligations under Article 1 of Protocol No. 6 to the Convention.

126. With respect to admissibility, the UN OHCHR first argues that the applicants had no effective domestic remedies to challenge the withdrawal of their citizenship (applicants Boudellaa, Nechle, and Lakhdar) or permanent residence (applicant Lahmar). The applicants' citizenship has not been effectively withdrawn until the Supreme Court of the Federation has decided their cases, as domestic legislation provides that a procedural decision to withdraw citizenship becomes valid only when the administrative dispute has been concluded. The applicants had duly initiated administrative disputes at the Supreme Court of the Federation and these disputes were still pending at the time of their removal. Mr. Lahmar, the applicant with the permanent residence status, also submitted an appeal to the appropriate body, the Appeal Panel of the Council of Ministers, in accordance with the Law on Immigration and Asylum of Bosnia and Herzegovina. However, since this body was not officially functioning at that moment, there was no effective remedy Mr. Lahmar could pursue.

127. The UN OHCHR further argues that there was no effective and accessible domestic remedy for the applicants to challenge the decisions on refusal of entry into the territory. The Law on Immigration and Asylum of Bosnia and Herzegovina provides a right to appeal a decision on refusal of entry. However, the decisions on refusal of entry were issued and served on the applicants on 18 January 2002; therefore, it was nearly impossible for them to exercise their right of appeal, since most likely they were removed from the territory before the deadline for their appeal.

128. Moving on to the merits, the UN OHCHR divides the entire process leading to the removal of the applicants from the jurisdiction into four areas of concern: removal of citizenship rights and refusal of entry; first period of detention from the date of arrest until the decision of the Supreme Court of the Federation to release the applicants on 17 January 2002; second period of detention from the Supreme Court's decision of 17 January 2002 until the hand-over of the applicants to US forces on 18 January 2002; and third period of detention from the hand-over of the applicants to their subsequent removal from the jurisdiction of Bosnia and Herzegovina by US forces.

129. The UN OHCHR argues that the applicants had no effective remedy, within the meaning of Article 13 of the Convention, to challenge their removal of citizenship rights and refusal of entry. This Article has been interpreted to impose on states a duty to provide a national authority that can deal with the substance of a complaint under the Convention and grant effective relief (see, *e.g.*, Eur. Court HR, *Murray v. United Kingdom*, judgment of 28 October 1994, Series A no. 300-A, pages 37-38, paragraph 100; Eur. Court HR, *Aydin v. Turkey*, judgment of 25 September 1997, Reports of Judgments and Decisions 1997-VI, paragraph 103). Since the applicants were removed from the jurisdiction before their appeals against the removal of citizenship rights and refusal of entry could be heard by the competent domestic authorities, the institutional mechanisms available to them were ineffective. In addition, the applicants had no opportunity to raise the substance of the rights they were claiming. The UN OHCHR submits that "as there was no possibility in fact, if not in law, of accessing the requisite bodies to assert those rights, then the respondents denied the applicants the possibility of an effective remedy and are in violation of Article 13". The UN OHCHR also notes that if they had been provided with an effective remedy, the applicants would

have had the right to argue that any expulsion from the jurisdiction could have violated their rights protected by Article 8 of the Convention. According to the UN OHCHR, "the Article 8 rights of the applicants have clearly been interfered with and there has been no opportunity to argue the lawfulness", which in turn violates Article 13.

130. The first period of detention (from arrest to the Federation Supreme Court's decision to release them on 17 January 2002) could be in violation of Article 5(1)(c) of the Convention, according to the UN OHCHR. Unless the respondent Parties demonstrated that there was reasonable suspicion that each of the applicants committed a criminal offence and that the detention and arrest were truly aimed at bringing them before a judicial authority, the detention was in violation of the Convention. Although the European Court of Human Rights (the "European Court") has recognised a wider margin of appreciation in terrorism cases, it has emphasised that the essence of Article 5(1)(c) safeguards cannot be impaired.

131. The UN OHCHR considers three possible scenarios for the second period of detention (after the Federation Supreme Court ordered the applicants' release on 17 January 2002): that the detention was covered by Article 5(1)(c); that the detention was to enable extradition from Bosnia and Herzegovina; and that the detention was to enable their deportation. Since the Federation Supreme Court had ordered the applicants' release from detention, further detention would necessitate another judicial decision based on new information. As no such new decision was issued, the UN OHCHR argues that the further detention "had become arbitrary and hence unlawful" under Article 5(1)(c). On the other hand, Article 5(1)(f) allows detention for the purposes of extradition and deportation, provided such detention is "lawful". However, no valid proceedings for either extradition or deportation were carried out; rather, the applicants were subjected to illegal transfers to a third party. Consequently, the UN OHCHR submits that Article 5(1)(f) is also inapplicable as a justification for the continued detention of the applicants after the decision on release of 17 January 2002.

132. For the third period of detention (from the hand-over of the applicants to US forces to their removal from the jurisdiction by US forces), the UN OHCHR relies on the case law of the European Court to argue that the respondent Parties had a responsibility to protect the applicants' rights even after their transfer. The UN OHCHR submits that this positive obligation extended, in particular, to protecting the applicants' rights under Article 3, Article 5, Article 6, and Article 1 of Protocol No. 6 to the Convention.

133. The UN OHCHR notes that Article 3 of Protocol No. 4 prohibits the expulsion of nationals, while Article 1 of Protocol No. 7 requires certain procedural safeguards in connection with the expulsion of aliens. The UN OHCHR argues that applicants Boudellaa, Lakhdar and Nechle still retained their citizenship at the moment of their illegal transfer; therefore, Article 3 of Protocol No. 4 protected them, as nationals of Bosnia and Herzegovina, from expulsion. In the alternative, if the applicants had lost their citizenship, then they were still protected as aliens by Article 1 of Protocol No. 7. In particular, Article 1 of Protocol No. 7 requires an opportunity to submit reasons against the expulsion, to have these reasons reviewed, and to be represented for these purposes before the competent authority. While these rights may be limited in the interests of public order or national security, the respondent Parties have not relied on national security or public order to justify the expulsions. In fact, no procedural guarantees were followed. Since these requirements were not met, the UN OHCHR concludes that the applicants' rights guaranteed by Article 1 of Protocol No. 7 have been violated.

134. With respect to the removal of the applicants' citizenship, the UN OHCHR further points out that there exists a "necessity of not making people stateless". None the less, although the respondent Parties did not know whether or not the applicants had Algerian citizenship or any other available citizenship, they were still prepared to remove the applicants' citizenship of Bosnia and Herzegovina. The UN OHCHR admits that the Law on Citizenship of the State of Bosnia and Herzegovina contains no time limit for challenging the validity of naturalised citizenship. However, it submits that the Law on Citizenship must be read in connection with the criminal offence at issue, from which it follows that the time limit "has to be related to the statute of limitation for initiating criminal proceedings for those crimes". Lastly, on the issue of how to reconcile the Federation Law on Citizenship with the State Law on Citizenship, the UN OHCHR argues as follows:

> "As a matter of construction, it is only possible for the State to ensure the highest level of internationally recognised human rights by stating that the final decision on loss of citizenship at the State level can only be final (*i.e.*, valid and enforceable) after the procedure in Federation Law on Citizenship and Article 26 has been completed, as it is only through the Federation Law on Citizenship that the individual has the possibility of challenging the decision. So, therefore, we would say that in order for … the State to cancel citizenship, the procedures at the Federation level must be exhausted".

135. As explained with respect to the ineffectiveness of domestic remedies, the UN OHCHR contends that there has been a violation of Article 5 of the Convention because proper procedures prescribed by law were not followed in connection with the applicants' detention.

136. With respect to Article 6, the UN OHCHR suggests that the respondent Parties may have failed to guarantee the applicants' rights, particularly with respect to the presumption of innocence and a fair hearing. The UN OHCHR makes no submission as to whether the military tribunals under the US President's Military Order comply with the requirements of Article 6.

137. According to the UN OHCHR, the "crucial" or "core" issues with respect to the merits of the applications are "the obligations of Bosnia and Herzegovina towards the applicants to protect their rights under Article 3 of the Convention". The UN OHCHR argues that, in the absence of guarantees from the United States as to the treatment of the applicants, the transfer of the applicants to US authorities has violated Article 3 of the Convention because it is possible that they could face the death penalty if convicted on charges of terrorism. Noting that "it is known as a matter of public record that the death penalty does apply in relation to alleged terrorists held at Guantanamo Bay", the UN OHCHR opines "that there was a positive obligation on Bosnia and Herzegovina at that time to ensure, to absolutely ensure, that there was no transfer without guarantees that the death penalty would not be imposed".

138. For its argument in relation to Article 3, the UN OHCHR relies upon the European Court's decision in *Soering v. United Kingdom*, in which it explained that the extradition of an applicant to the United States to stand trial on capital murder charges and face the possibility of the death penalty would "plainly be contrary to the spirit and intendment of the Article" (Eur. Court HR, judgment of 7 July 1989, Series A no. 161, page 35, paragraph 88). In later cases, the European Court applied the same considerations to expulsion cases (see, *e.g.*, Eur. Court HR; *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, page 28, paragraph 70). As the European Court stated in *Chahal v. United Kingdom*, even a threat to national security could not justify taking such a risk, because "the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct" (Eur. Court HR, judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, paragraph 79). The UN OHCHR notes that in *Soering* the European Court further provided that Article 3 covered not just the violations that had already taken place, but also the "foreseeable consequences in the requesting country" (*Soering* at page 35, paragraph 90). Imposition of the death penalty need not be certain or even probable (*id.* at page 37, paragraph 94). The UN OHCHR submits that Bosnia and Herzegovina must conduct a material examination of whether an expulsion would be compatible with Article 3 prior to ordering such expulsion. No such examination occurred in the present cases.

139. With respect to Article 1 of Protocol No. 6, the UN OHCHR observes that the military tribunals were empowered to seek the death penalty. Therefore, the UN OHCHR concludes, "it is incumbent upon the State of Bosnia and Herzegovina to ensure that guarantees are given in relation to its non-application to the applicants". As no evidence has been produced of such guarantees from the United States, the UN OHCHR submits that the respondent Parties "are liable for any violations that occurred or occur from the moment the applicants were illegally transferred to the custody of the United States".

140. The UN OHCHR also argues that the respondent Parties have no defence to their failure to comply with the Chamber's order for provisional measures. In accordance with Annex 6 to the General Framework Agreement, the Chamber's decisions are final and binding on all parties. The UN OHCHR notes that superseding the authority of the Chamber, an independent judicial body, with that of the Executive undermines the rule of law.

141. In the event the Chamber finds a violation of the Convention, the UN OHCHR suggests that compensation for pecuniary damages could be an available remedy. In addition, the Chamber could order Bosnia and Herzegovina "to take all necessary measures and steps to have the applicants returned to the jurisdiction so that they can then have their procedures followed, their citizenship determined, and/or if the extradition is requested, for a formal legal request to be made and for the procedures to be gone through in accordance with the law and in accordance with the demands of the Convention".

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Admissibility against Bosnia and Herzegovina

142. Bosnia and Herzegovina has challenged the admissibility of the applications on three grounds:

a. As to Bosnia and Herzegovina as a respondent Party

143. Bosnia and Herzegovina emphasises that the application forms and documents appended thereto did not name Bosnia and Herzegovina as a respondent Party; therefore, it claims that the Chamber exceeded its jurisdiction by naming Bosnia and Herzegovina as a respondent Party.

144. Bosnia and Herzegovina further argues that it cannot be held responsible for possible violations in the present cases. In addition, it claims that the matters relevant to the present applications do not fall within the responsibility of Bosnia and Herzegovina, because it has neither been given the relevant competence by the Constitution of Bosnia and Herzegovina and other legislation, nor has it *de facto* taken action from which a possible violation of the applicants' rights might arise.

145. The Chamber recalls that it has on previous occasions considered applications against respondent Parties not specifically named by the applicant. In Z*ahirović* (case no. CH/97/67, *Sakib* Z*ahirović v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, decision of 9 July 1999, paragraphs 93-94, Decisions July-December 1999), the Chamber stated:

> "93. Bosnia and Herzegovina has argued that it cannot be considered a respondent Party in this case. It is true that the applicant submitted his application against the Federation as the only respondent Party. In its observations of 18 May 1998 the Federation, however, argued that Bosnia and Herzegovina was solely responsible for the actions of the Livno-Bus Company as it had been a state-owned company. As recalled above (see paragraph 91), the Chamber's jurisdiction extends to alleged or *apparent* violations of the rights and freedoms provided for in the relevant international agreements appended to the Agreement, *inter alia,* where such a violation is alleged *or appears* to have been committed by one or several of the Parties to the Agreement. The Chamber notes the complexity of the legal and constitutional arrangements of Bosnia and Herzegovina because of which it would be unreasonable to expect applicants to be able in all circumstances to address the correct respondent Party. This approach is in line with the object and purpose of the right of individual petition provided by the Agreement.
>
> "94. It is on the above basis that the Chamber has consistently considered that it is not restricted by the applicant's choice of respondent Party. In its case law the Chamber has repeatedly found violations of the Agreement to have been committed by a respondent Party designated by the Chamber itself (see, *e.g.*, *Turčinović v. Bosnia and Herzegovnia and The Federation of Bosnia and Herzegovina,* case no. CH/96/31, decision of 9 May 1997, Decisions 1996-97, paragraph 11). On the basis of its competence under the Agreement the Chamber has further provided, in Rule 33(1) of its Rules of Procedure, that it may, *proprio motu*, take any action which it considers expedient or necessary for the proper performance of its duties under the Agreement. In the present case the Chamber eventually decided to transmit the application not only to the Federation but also to the State of Bosnia and Herzegovina for observations, thereby affording it an opportunity to take part in

adversarial proceedings."

146. The Chamber therefore, in accordance with its previous jurisprudence, rejects the argument by Bosnia and Herzegovina that it is precluded from examining, for the purposes of the Agreement, the potential responsibility of Bosnia and Herzegovina for the events complained of.

147. In regard to the second argument that Bosnia and Herzegovina is not and cannot be responsible for the alleged violations of the applicants' rights, the Chamber observes – without prejudging the merits of the cases – that the organs of the Government of Bosnia and Herzegovina have been factually involved in the proceedings concerning the applicants. Bosnia and Herzegovina has, for example, established diplomatic contacts with the governments of Algeria and the United States of America[7] with regard to the applicants. It has also, in accordance with the domestic law, played a role in the process of the revocation of citizenship of the applicants Boudellaa, Lakhdar and Nechle. The decision on termination of the permit for permanent residence, which included an expulsion order in the case of the applicant Lahmar, was issued by the Ministry of Human Rights and Refugees of Bosnia and Herzegovina. The responsibilities of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina in the cases before the Chamber are closely intertwined. The Chamber therefore finds that it is not appropriate to declare the cases inadmissible against Bosnia and Herzegovina at this stage, but it will examine the responsibility of Bosnia and Herzegovina with regard to each alleged violation on the merits.

b. Exhaustion of domestic remedies

148. Bosnia and Herzegovina argues that the applicants did not exhaust domestic remedies. In this respect the respondent Party refers to the procedure before the Supreme Court regarding the applicants' complaint against the administrative act on revocation of citizenship. The respondent Party further claims that in filing a lawsuit against the revocation of citizenship, the applicants have failed to request the Supreme Court to postpone the execution of the administrative act of revocation of citizenship. In accordance with Article 19 of the Law of Administrative Disputes (see paragraph 71 above), this claim would have been examined within three days. The respondent Party further points out that, due to the large case-load of the Supreme Court, the cases of the applicants have not been resolved yet, as the applicants failed to file a written request for urgency.

i. In regard to the applicants Boudellaa, Lakhdar and Nechle

149. The Chamber considers that the alleged violation of the rights of the applicants Boudellaa, Lakhdar and Nechle is not directly the revocation of their citizenship, which merely represents one element in the overall proceedings. On this point the Chamber notes that the Convention does not protect the right to citizenship as such, nor is a violation of that right the subject matter of the cases before the Chamber. The impugned acts in the cases of the applicants Boudellaa, Lakhdar and Nechle are the applicants' detention, the order of refusal of entry and the hand-over of the applicants into the custody of US forces.

150. Neither respondent Party has substantiated how the remedies which they claimed were not exhausted, *i.e.* the request for suspension of execution and a request for urgency to the Supreme Court, would have proven effective remedies against the impugned acts, namely, the detention of the applicants until their hand-over to US forces.

151. The Chamber is well aware that revocation of the applicants' citizenship raises questions of importance when assessing whether the applicants' cases fall under Article 3 of Protocol No. 4 to the Convention, which forbids the expulsion of nationals, or under Article 1 of Protocol No. 7 to the Convention, which provides for procedural safeguards in respect to the expulsion of aliens. However, the Chamber finds that these questions do not raise issues of admissibility. These issues will therefore be discussed on the merits.

ii. In regard to the applicant Lahmar

[7] The Diplomatic note of 17 January 2002 from the US Embassy is specifically addressed to the Government of Bosnia and Herzegovina and the Ministry of Foreign Affairs (there is no Ministry of Foreign Affairs at the Entity level).

152. The applicant Lahmar was not a citizen of Bosnia and Herzegovina, but only a permanent resident. His permanent residence status was terminated as he was convicted of a criminal offence and sentenced to more than four years imprisonment. The applicant appealed against the decision of the Ministry of Human Rights and Refugees on 11 January 2002 to the Appeals Panel of the Council of Ministers of Bosnia and Herzegovina; the appeal is still pending. Therefore, in accordance with Article 38 of the Law on Immigration and Asylum, the execution of the decision to expel the applicant should have been stayed. The argument made by Bosnia and Herzegovina hence appears not to apply to him as the applicant has exhausted all possible remedies.

iii. Conclusion in regard to the exhaustion of domestic remedies

153. Accordingly, the Chamber finds that the applicants have complied with the requirement set out in Article VIII(2)(a) of the Agreement. The Chamber therefore decides not to declare the applications inadmissible on the ground that the applicants have not exhausted the effective domestic remedies.

c. Six-months rule

154. Bosnia and Herzegovina objects to the admissibility of the applications in that the applicants failed to wait six months after the final decision in their cases, as required by Article VIII(2)(a) of the Agreement, before filing their applications with the Chamber. This provision reads:

> "The Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria: (a) ... that the application has been filed with the Commission within six months from such date on which the final decision was taken."

155. In its long-standing case law, the Chamber has always interpreted the six-months rule in accordance with the clear wording of the rule and its *ratio legis* to mean that an applicant is obliged to submit his application to the Chamber within six months after a final decision has been taken. The Chamber recalls that the six-months rule is designed to mark out the temporal limits of supervision carried out by the Chamber in order to ensure a certain degree of legal certainty. The applicants were not obliged to wait for six months before submitting an application; on the contrary, they were obliged to file applications within six months. The applicants hence complied with Article VIII(2)(a) of the Agreement.

2. Admissibility against the Federation of Bosnia and Herzegovina

156. In its written submissions the Federation of Bosnia and Herzegovina has not objected to the admissibility of the applications. However, during the public hearing the Federation of Bosnia and Herzegovina joined the argument of the other respondent Party, Bosnia and Herzegovina, that the cases should be declared inadmissible due to non-exhaustion of domestic remedies. The Chamber finds the same reasoning applies to reject this argument as set out above in paragraphs 148 to 153 with regard to the admissibility against Bosnia and Herzegovina.

3. Admissibility of the alleged violation of "reasonableness of time"

157. In accordance with Article VIII(2) of the Agreement, "the Chamber shall decide which applications to accept.... In so doing, the Chamber shall take into account the following criteria: ... (c) The Chamber shall also dismiss any application which it considers incompatible with this Agreement, manifestly ill-founded, or an abuse of the right of petition."

158. The applicants allege in their applications that there was a violation of their right to a trial within a reasonable time as protected by Article 5 paragraph 3 of the Convention. The applicants substantiate their claim by stating that this violation arises from the fact that the Supreme Court did not decide in the administrative dispute regarding the revocation of citizenship before the applicants were physically removed from the territory of Bosnia and Herzegovina.

159. Article 5 paragraph 3 of the European Convention reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

160. The Chamber notes that Article 5 paragraph 3 of the Convention provides for safeguards in respect to persons detained pending criminal proceedings. As to the applicants' detention, its lawfulness was examined several times by the Supreme Court of the Federation. On the basis of the Supreme Court's decisions and considering the nature of the charges against the applicants, the Chamber does not consider that their detention from 19 to 21 October 2001 until 17 January 2002, when their release from pre-trial detention was ordered by the Supreme Court, was unreasonably long.

161. Furthermore, even if the applicants' claim to have their administrative dispute before the Supreme Court decided within a reasonable time could be interpreted as a claim of a violation of the right protected by Article 6 paragraph 1 of the Convention "to a fair and public hearing within reasonable time", the Chamber notes that the European Commission of Human Rights (the "European Commission") has consistently held that the determination of "civil rights and obligations" within the meaning of Article 6 paragraph 1 of the Convention does not encompass proceedings concerning a person's citizenship (Eur. Commission HR, *S v. Switzerland*, no. 13325/87, decision of 15 December 1988, Decisions and Reports 59, page 256, at page 257). This remains the case even where the decision will have repercussions on the exercise of civil rights and obligations.

162. Therefore, the Chamber finds that the right to have one's status as a citizen determined within a reasonable time is not a right which is included among the rights and freedoms guaranteed under the Agreement. It follows that these parts of the applications are incompatible *ratione materiae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c). The Chamber therefore decides to declare the applications inadmissible in this respect.

4. Conclusion as to admissibility

163. The Chamber decides to declare inadmissible the claim of a violation of the "reasonable time requirement" in regard to the proceedings before the Supreme Court in the administrative dispute against the revocation of citizenship. The remainder of the applications is declared admissible against both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, in their entirety, as no other grounds for declaring the cases inadmissible have been established.

B. Merits

164. Under Article XI of the Agreement the Chamber must address the question whether the facts established above disclose a breach by the respondent Party of its obligations under the Agreement.

1. Expulsion proceedings

165. Article 3 of Protocol No. 4 regarding the prohibition of expulsion of nationals reads:

> "1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
>
> "2. No one shall be deprived of the right to enter the territory of the State of which he is a national."

166. Article 1 of Protocol No. 7 regarding procedural safeguards relating to expulsion of aliens reads:

> "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
> a. to submit reasons against his expulsion,
> b. to have his case reviewed, and
> c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> "2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security."

167. With regard to the rights protected by Article 3 of Protocol No. 4 and Article 1 of Protocol No. 7, the Chamber notes preliminarily that, while the Convention uses the terms "expelled" and "expulsion", the application of these provisions is not limited to cases in which the applicant is the subject of an "expulsion" in accordance with domestic legal terminology. The protection afforded by the two provisions applies also in cases in which a person is deported, removed from the territory in pursuance of a refusal of entry order or handed over to officials of a foreign power.

168. The Chamber further notes that Article 3 of Protocol No. 4 prohibits any expulsion of nationals, while Article 1 of Protocol No. 7 provides certain procedural safeguards for the expulsion of aliens.

a. In regard to the applicants Boudellaa, Lakhdar and Nechle

169. The applicants Boudellaa, Lakhdar and Nechle obtained both the citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina, as it is not possible to be a citizen of the State without having citizenship of one of the Entities and *vice versa*.

170. On 16 and 20 November 2001 the Federal Ministry of Interior issued decisions against each of the three applicants revoking their citizenship on the grounds that the applicants "had hidden intention not to respect the Constitution, laws and other provisions of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina" and that they "shall harm international and other interests of Bosnia and Herzegovina".

i. Whether the applicants Boudellaa, Lakhdar and Nechle were citizens of Bosnia and Herzegovina at the time of their expulsion

171. The last paragraph of the decisions of 16 and 20 November 2001 states that the decisions are "final"[8] and cannot be appealed against, but an administrative dispute may be initiated before the Supreme Court. On 20 December 2001 all three applicants initiated an administrative dispute before the Supreme Court to invalidate the revocation decisions. The Chamber notes that in accordance with Article 19 of the Law on Administrative Disputes, the initiation of an administrative dispute does not have suspensive effect. However, the applicants could have asked the Supreme Court to suspend the revocation of their citizenship under the Law on Administrative Disputes. They failed to do so.

172. Both respondent Parties argue that the applicants lost their citizenship at the time of the delivery of the decisions on revocation to them on 4 December 2001. This opinion is in accordance with Article 24 of the State law, which provides that citizenship is lost on the day of notification of the decision to the person concerned. Article 26 of the Federation law, however, states that the citizenship of the Federation ceases to exist when the valid decision is delivered to the person. The Chamber notes that the decision of the Federal Ministry of Interior is not valid, but merely final. It does not become valid until the Supreme Court issues a decision in the administrative dispute.

173. Therefore, according to the State law, the citizenship was revoked at the time of delivery of the decision to the applicants, *i.e.* on 4 December 2001. According to the Federation law however, the citizenship is not revoked until the valid decision, *i.e.* the decision of the Supreme Court in the administrative dispute, is delivered to the person concerned. As the Supreme Court has not yet issued a decision, according to the Federation law, the applicants would still appear to be citizens of the Federation of Bosnia and Herzegovina.

174. Furthermore, both laws require that the decision revoking the applicants' citizenship be submitted to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina (Article 31 of the State law and Article 33 of the Federation law). According to a literal reading of the law, the decision does not become effective until two months after this submission and under the condition that this Ministry concludes that the conditions of, in this case, Article 23 of the State law and Article 24 of the Federation law, have been fulfilled. Apparently the decisions of the Federal Ministry of Interior of 16 and 20 November 2001 were submitted to the Ministry on the dates of their respective issuance. Still, according to a literal reading of both the State law and the Federation law, the decisions, which were delivered to the applicants on 4 December 2001, did not become effective until two months later, that is until 16 and 20 January 2002, respectively. However, at the public hearing, the Agent for Bosnia and Herzegovina argued that the provision had to be interpreted as providing that the revocation of citizenship becomes effective on the date that the Ministry of Civil Affairs and Communication explicitly expressed its consent, *i.e.*, on 28 December 2001. Only when that consent is expressed by silence does the decision become effective two months after submission to the Ministry of Civil Affairs and Communication.

175. The Chamber finds that the legal situation regarding the question of whether the citizenship of the applicants Boudellaa, Lakhdar and Nechle was revoked remains unclear as the law of the Federation and the law of Bosnia and Herzegovina are not harmonised. As explained in paragraph 172 above, Article 24 of the State law and Article 26 of the Federation law provide for different requirements. The Chamber finds further that there are valid arguments on both sides for giving priority to either law. On one hand, there is the argument of Bosnia and Herzegovina made at the public hearing that the State law always takes priority over the law of an Entity. On the other hand, the Chamber notes that the Federation law is the later law. In addition, one could argue that as the legal situation is unclear, such uncertainty should not be resolved at the expense of the applicants, and accordingly, the laws should be interpreted in their favour. Other elements, as discussed in paragraphs 171 to 174 above, contribute to the extreme legal uncertainty as to whether the applicants were citizens of Bosnia and Herzegovina on 10 January 2002, the date of the decision on refusal of entry and on 18 January 2002, the date of their hand-over to US forces.

[8] See footnote 3 above.

176. The Chamber will not decide whether the applicants had lost their citizenship on the date they were handed over to US forces, *i.e.* on 18 January 2002. It will give the respondent Parties the benefit of the uncertainty in this respect – even though this uncertainty results from a lack of clarity in the legislation of the respondent Parties and in the actions of their organs – and it will proceed to consider the applications under Article 1 of Protocol No. 7 to the Convention, which provides aliens with procedural safeguards in case of expulsion.

ii. Examination of the expulsion of the applicants Boudellaa, Lakhdar and Nechle under Article 1 of Protocol No. 7 to the Convention

177. Assuming that the applicants Boudellaa, Lakhdar and Nechle had lost their citizenship at the time of expulsion and therefore were to be considered as aliens, the Chamber will now examine whether the respondent Parties have acted in accordance with their obligations arising from the Convention and its Protocols, namely whether they have acted in accordance with Article 1 of Protocol No. 7 to the Convention.

178. Article 1 of Protocol No. 7 to the Convention on "procedural safeguards relating to the expulsion of aliens" was added to afford minimum guarantees to aliens in the event of expulsion from the territory of a Contracting Party (see Explanatory Report on Article 1 of Protocol No. 7 to the Convention). Article 1 paragraph 1 of Protocol No. 7 to the Convention provides that no lawful resident may be expelled from the territory of a Contracting State except in pursuance of a decision reached in accordance with the law.

179. The Chamber therefore must examine whether the expulsion of the applicants was in accordance with the domestic law. Article 36 of the Law on Immigration and Asylum provides for a decision on expulsion to be taken by the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina. It is undisputed that such a decision was never issued with respect to the applicants Boudellaa, Lakhdar and Nechle. The Federal Ministry of Interior submitted an initiative to the Ministry of Civil Affairs and Communications to issue such a decision, but the Ministry of Civil Affairs and Communications took no action.

180. Nonetheless, the Chamber notes that on 10 January 2002 the Federal Ministry of Interior issued three decisions on refusal of entry to the applicants Boudellaa, Lakhdar and Nechle into the territory of Bosnia and Herzegovina on the basis of Article 27 paragraph 1(b) of the Law on Immigration and Asylum. These are – technically speaking – decisions on "refusal of entry" and not "expulsion" orders. However, these decisions also order the applicants to leave the territory of Bosnia and Herzegovina immediately. The Chamber has examined whether these decisions could provide a legal basis for a lawful expulsion from the territory of Bosnia and Herzegovina for the purposes of Article 1 of Protocol No. 7. The Chamber notes in this respect that:

(a) The Federation as respondent Party has not argued that a decision on refusal of entry provides a sufficient basis for an expulsion.
(b) On the contrary, the Agent of the Federation has submitted that, in detaining the applicants in view of their hand-over to US forces, the organs of the Federation were acting on the assumption that decisions on expulsion had been issued by the Ministry of Civil Affairs and Communications.
(c) The Federal Ministry of Interior asked the Ministry of Civil Affairs and Communications to issue decisions on expulsion against the applicants.
(d) Article 34 of the Law on Immigration and Asylum prohibits the expulsion of aliens to countries in which their life is threatened or they are in danger of being subjected to torture, inhuman or degrading treatment. No such limitations are provided for with respect to the issuance of decisions on refusal of entry. As a result, if a decision on refusal of entry could substitute for a decision on expulsion, these limitations could be easily circumvented.

181. The Chamber therefore finds that the decisions of 10 January 2002 on refusal of entry, which also order the applicants to leave the territory of Bosnia and Herzegovina immediately, do not provide a sufficient legal basis in accordance with the Law on Immigration and Asylum for the expulsion of the applicants.

182. Notwithstanding this conclusion, the Chamber will also examine whether, assuming the decisions on refusal of entry could be considered a sufficient basis for the expulsion of the applicants, this expulsion would have been in accordance with the law.

183. It is submitted by the respondent Parties that on 18 January 2002 all four applicants received, from US forces, the decisions of 10 January 2002 on refusal of entry. The Federation has been unable to explain why these decisions were delivered to the applicants by members of a foreign military force at the moment of their being taken out of the country, considering that the applicants had previously been detained by the Federation in the eight days between the issuance and delivery of the decisions. These decisions of 10 January 2002 state that an appeal does not have suspensive effect in light of Article 228 paragraph 2 of the Law on Administrative Procedures. However, Article 38 of the Law on Immigration and Asylum provides that an appeal against a decision on refusal of entry to a person within the borders of Bosnia and Herzegovina has suspensive effect. The Chamber is of the opinion that there is no doubt that Article 38, as the *lex specialis*, governs this issue; therefore, an appeal should have had suspensive effect. The Agent of the Federation has agreed with this conclusion.

184. In conclusion, the Chamber finds that the expulsion of the applicants was not in accordance with domestic law, because: (a) the applicants were practically deprived of their right to appeal against the decisions on refusal of entry; (b) the decisions themselves were misleading, in that they stated that an appeal would not halt the execution, while the relevant law clearly provided the contrary; and (c) the decisions had not been delivered to the applicants and therefore had not entered into force when the applicants were effectively removed from the territory of Bosnia and Herzegovina by handing them over to US forces. These violations of domestic law in themselves are sufficient to establish that the decisions to refuse entry to the applicants were not reached in accordance with the law.

185. In addition, the Chamber finds that the expulsion was unlawful because it was carried out in violation of the Chamber's binding order for provisional measures of 17 January 2002, which ordered both respondent Parties to take all necessary steps to prevent the applicants from being taken out of the territory of Bosnia and Herzegovina. The Chamber recalls that in its previous case law, the Chamber has held that an order for provisional measures is binding and has the status of national law. The Chamber recalls that, for example, in the *D.K.* case, it held that the eviction of the applicant was not "in accordance with the law" for the purposes of Article 8(2) of the Convention, even though the competent authorities had established that the applicant was an illegal occupant, because there was an order for provisional measures of the Chamber prohibiting the eviction (case no. CH/98/710, *D.K. v. Republika Srpska*, decision on admissibility and merits of 2 November 1999, paragraphs 33-37, Decisions August–December 1999).

186. The Chamber notes that according to the submission of the Federation, the order for provisional measure was received on 17 January 2002 and transmitted to the Federal Ministry of Interior (see paragraph 118 above). However, the Federation failed to implement the order.

187. The Chamber also notes that Bosnia and Herzegovina alleges that the order for provisional measures was not delivered to it in a timely and proper manner. Bosnia and Herzegovina submitted in its written observations of 25 February 2002, and repeated at the public hearing on 10 April 2002, that the Chamber must be aware that Bosnia and Herzegovina has no authority to give effect to orders by the Chamber (see paragraph 109 above). It is not necessary for the Chamber to examine these submissions. It is undisputed that the applicants were held in detention by officials of the Federation when its order was issued, that they were handed over to US forces by officials of the Federal Ministry of Interior, and that the order for provisional measures had been brought to the attention of the Federal Ministry of Interior before the hand-over of the applicants. This is sufficient to establish the unlawfulness of the expulsion in this respect as well.

188. The Chamber finds that the respondent Parties have not followed the requirements of a legal expulsion procedure arising from the domestic law. They thereby violated the condition set out in Article 1 paragraph 1 of Protocol No. 7 to the Convention of "a decision reached in accordance with law". Therefore,

there is no need to examine whether in the applicants' cases such circumstances prevailed as to allow the respondent Parties, under Article 1 paragraph 2, to rely on the permission to expel the applicants before they could exercise the procedural rights set out in Article 1 paragraph 1(a), (b) and (c) of Protocol 7 to the Convention.

189. The Chamber also finds that these violations fall within the responsibility of both respondent Parties. The law and also the factual actions taken by both respondent Parties in regard to the revocation of citizenship, the decision on refusal of entry and also the hand-over of the applicants to US forces, after ensuring through diplomatic contacts that those forces would take them into custody and take them out of the country, involved actions by both respondent Parties which constitute a violation of the applicants' rights.

iii. Examination of the expulsion of the applicants Boudellaa, Lakhdar and Nechle under Article 3 of Protocol No. 4 to the Convention

190. As explained above (see paragraph 176), the Chamber has decided to give the respondent Parties the benefit of the doubt regarding the question of whether the applicants still were citizens of Bosnia and Herzegovina at the time of their expulsion. The Chamber has therefore proceeded to examine the expulsion under Article 1 of Protocol No. 7 to the Convention, which governs the expulsion of individual aliens. Nonetheless, the Chamber finds that, for the reasons explained below, the applications also raise serious issues under Article 3 of Protocol No. 4 to the Convention, concerning whether or not the applicants were citizens at the time of their expulsion.

191. The Chamber notes that a right to nationality as incorporated in Article 15 of the Universal Declaration of Human Rights does not form part of the rights and freedoms prescribed in the Convention. The Chamber is further aware that a provision according to which a "State would be forbidden to deprive a national of his nationality for the purpose of expelling him" was expressly excluded from Protocol No. 4 to the Convention. Although the Committee of Ministers of the Council of Europe stated that it approved the underlying principle, the majority thought that: "it was inadvisable in Article 3 to touch upon the delicate question of the legitimacy of measures depriving individuals of nationality" (Explanatory Report on the Second to Fifth Protocols, H (71) 11 (1971), pages 47-48).

192. However, the Chamber finds that, if States could simply withdraw the citizenship of one of their citizens in order to expel him without being in violation of Article 3 of Protocol No. 4 to the Convention, then the protection of the right enshrined in that provision would be rendered illusory and meaningless. A measure of the national authorities, which has as its sole object the evasion of an obligation, is equivalent to a violation of that provision. This is also implicit from the rationale underlying Article 17 of the Convention, which reads:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

193. The Chamber is well aware that a violation of a Convention right can be found based on this line of reasoning only in very evident cases, in which the national authority exclusively intended to evade the operation of the Convention by their measure. The Chamber must therefore now examine whether the sole purpose of withdrawing the applicants' citizenship was to expel them.

194. The Chamber notes that the applicants Boudellaa and Nechle obtained their citizenship in 1995 before the entry into force of the Constitution of Bosnia and Herzegovina. In accordance with Articles 40 and 41 of the Law on Citizenship of Bosnia and Herzegovina, their applications for citizenship were therefore subject to review by the Commission for Consideration of the Status of Persons Naturalised after 6 April 1992 and before the entry into force of the Constitution of Bosnia and Herzegovina ("the Commission") set up under Article 40 of this Law. According to Article 41, a citizen loses his citizenship if the Commission finds that at the time of naturalisation the applicant did not fulfil the conditions for

naturalisation and the applicant was aware of that fact. Upon the request of the Supreme Court of 14 November 2001, on 16 November 2001 the Commission stated that it was not considering the applicants' cases. The Chamber notes that without awaiting any formal decision of the Commission, the Federal Ministry of Interior on 16 and 20 November 2001 issued decisions revoking the citizenship of the applicants.

195. The Chamber also notes that, as it will find when examining the applications under Article 6 paragraph 2 of the Convention, the decisions revoking the applicants' citizenship are based on reasoning that is incompatible with respect for the presumption of innocence and with the rule of law (see paragraphs 238 to 249 below).

196. The Chamber notes further that according to information submitted by Bosnia and Herzegovina (see paragraphs 50 to 52 above) already on 11 October 2001, during an official visit to Sarajevo, a high-ranking official of the Algerian Secret Service was informed about the applicants and the suspicion that they were involved in terrorist activities. On 11 January 2002 the Ministry of Foreign Affairs of Bosnia and Herzegovina contacted the Democratic National Republic of Algeria to inquire about the possibility to deport the applicants to their native country, Algeria, which representatives of Algeria refused on 12 January 2002. On 14 January 2002 the Ministry of Foreign Affairs of Bosnia and Herzegovina once again unsuccessfully contacted representatives of Algeria with the same request. There was also diplomatic contact with the US Embassy in Sarajevo. According to the diplomatic note of 17 January 2002, the US Embassy signalled its willingness to assume custody of the applicants. The proceedings of the applicants against the withdrawal of citizenship had been at the same time pending before the Supreme Court since 20 December 2001. All this shows that various efforts were undertaken to locate a country that would receive the applicants upon their removal from the territory of Bosnia and Herzegovina.

197. The Chamber also considers that the expulsion of the applicants was carried out in a hasty manner, before the validity of the revocation of citizenship was finally clarified by the Supreme Court.

198. The Chamber observes, taking into account all the circumstances, that in the present cases numerous factors point toward the conclusion that the respondent Parties revoked the applicants' citizenship for the sole purpose of expelling them. This would constitute a violation of Article 3 of Protocol No. 4 to the Convention, whether or not the decision on revocation of citizenship had entered into force at the time of the expulsion. However, having found a violation of Article 1 of Protocol No. 7, the Chamber refrains from making a definite finding on this issue.

iv. Conclusion as to the expulsion of the applicants Boudellaa, Lakhdar and Nechle

199. As noted above, the Chamber makes no finding as to whether the applicants were still citizens at the time of their expulsion. In light of the fact that the respondent Parties claim that their authorities acted lawfully in the hand-over of the applicants to US forces, as they assumed in good faith that the applicants were no longer citizens of Bosnia and Herzegovina, the Chamber has examined the cases under Article 1 of Protocol No. 7 to the Convention, which protects the right of aliens to be expelled only in a lawful manner. The Chamber finds that both respondent Parties acted in violation of Article 1 of Protocol No. 7 to the Convention.

b. In regard to the applicant Lahmar

200. The applicant Lahmar never acquired citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina. On 4 April 1997 he was granted a permit for permanent residence. Article 3 of Protocol No. 4 to the Convention therefore cannot apply in his case, as he was not a national of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina. The Chamber must therefore examine whether the expulsion of the applicant Lahmar constitutes a violation of Article 1 of Protocol No. 7 to the Convention, which applies to the expulsion of aliens.

201. On 23 November 2001 the Ministry of Human Rights and Refugees issued a procedural decision terminating the applicant's permit for permanent residence and banishing him from the country for ten years, as he had been convicted of a criminal offence and sentenced to more than four years imprisonment. In accordance with Article 30 paragraph c of the Law on Immigration and Asylum, he was therefore considered to constitute a threat to public order and security.

202. The Ministry of Human Rights and Refugees on 23 November 2001 also ordered the expulsion of the applicant Lahmar. This decision, in accordance with Article 29 paragraphs a and b of the Law on Immigration and Asylum of Bosnia and Herzegovina, was also based on the fact that the applicant had been convicted of a criminal offence and sentenced to more than four years imprisonment.

203. The applicant appealed against the decision of the Ministry of Human Rights and Refugees on 11 January 2002 to the Appeals Panel of the Council of Ministers of Bosnia and Herzegovina. This appeal is still pending and should have had suspensive effect. Therefore, in accordance with Article 38 of the Law on Immigration and Asylum, the execution of the decision to expel the applicant should have been stayed.

204. Moreover, as noted above, the Chamber had ordered both respondent Parties to take all necessary steps to prevent the applicant from being taken out of the territory of Bosnia and Herzegovina. The applicant was handed over to US forces in violation of this order, which enjoyed the force of law.

205. As stated above, Article 1 of Protocol No. 7 requires the respondent Parties not to expel an alien lawfully resident in the territory of a State, except in pursuance of a decision reached in accordance with the law. In light of the circumstances that, pursuant to Article 38 of the Law on Immigration and Asylum, the appeal against the decision on expulsion should have stayed its execution, and that the Chamber had issued an order barring the applicant's expulsion, this requirement is not fulfilled. The respondent Parties are thereby in breach of their obligations arising from Article 1 of Protocol No. 7 to the Convention.

2. Article 5 of the Convention – detention of the applicants in Bosnia and Herzegovina

206. Article 5 paragraphs 1(c) and (f) reads:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> …
>
> f. the lawful arrest or detention … of a person against whom action is being taken with a view to deportation or extradition."

a. As to the applicants' detention until the entry into force of the Supreme Court decision to release them on 17 January 2002

207. The Chamber notes that the applicants were held in pre-trial detention until the entry into force of their release order on 17 January 2002. This pre-trial detention was based on procedural decisions by the investigative judge of the Supreme Court ordering the applicants' detention. The procedural decisions were based on the suspicion that the applicants had committed criminal acts of international terrorism, as prohibited by Article 168 paragraph 1 in conjunction with Article 20 paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina. The decision regarding the applicant Boudellaa was issued on 22 October 2001; the decision regarding the applicant Lahmar was issued on 18 October 2001; the decision regarding the applicant Nechle was issued on 20 October 2001; and the decision regarding the applicant Lakhdar was issued on 21 October 2001. The Chamber notes that the reasons upon which the pre-trial detention is based are not set out in great detail in these procedural decisions.

208. On 30 October 2001 the Supreme Court issued a decision to open an investigation against all four applicants and four other persons based on reasonable suspicion that these eight persons had committed a punishable attempt of the criminal offence of international terrorism. This decision sets out the suspicion against each individual applicant in more detail than the procedural decisions which ordered their pre-trial detention. It explains to what extent the applicants knew each other and the other four persons accused of the same criminal offence, and it explains that the applicants, together with the other four accused persons, were under the suspicion of being involved in preliminary activities in order to carry out a terrorist attack on the US Embassy in Sarajevo.

209. On 17 January 2002 the Supreme Court ordered the release of the applicants, as the conditions for continued investigative custody were no longer satisfied. According to the submission of the Federation of Bosnia and Herzegovina, the applicants were released from pre-trial detention at 11:45 p.m. on the same day. They were taken into custody by forces of the Ministry of Interior.

210. The applicants do not appear to allege that their detention, as ordered by the Supreme Court, in connection with the investigation into their involvement in the alleged terrorist activities, was unlawful. However, they have challenged their detention before the domestic courts and the Supreme Court has upheld the orders for custody. Moreover, the *amicus curiae* has expressed doubts as to whether the applicants' detention was supported by sufficient evidence to justify a reasonable suspicion. Also, the Chamber notes the lack of detail and reasoning in the procedural decisions ordering the applicants' arrest.

211. For these reasons, the Chamber has examined whether the applicants' detention until the entry into force of the Supreme Court's decision of 17 January 2002 was lawful in accordance with Article 5 paragraph 1(c) of the Convention, and specifically whether the arrest and detention were based on a reasonable suspicion that each applicant had committed an offence.

212. The Chamber recalls that the case law of the European Court of Human Rights has allowed a wider margin of appreciation in the manner of the application of Article 5 where issues arise relating to terrorism, as long as the essence of the safeguard provided for by subparagraph (c) is left intact. In the case *Fox, Campbell and Hartley* (Eur. Court HR, judgment of 30 August 1990, Series A no. 182, pages 16-17, paragraph 32), the European Court stated:

> "The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1(c). The Court agrees ... that having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.
>
> In this respect, terrorist crime falls into a special category. Because of the attendant risk of loss of life and human suffering, the police are obliged to act with utmost urgency in following up all information, including information from secret sources. Further, the police may frequently have to arrest a suspected terrorist on the basis of information which is reliable but which cannot, without putting in jeopardy the source of the information, be revealed to the suspect or produced in court to support a charge.
>
> ... [T]he "reasonableness" of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1(c) is impaired...."

213. The Chamber considers that the pre-trial detention and the decision of 30 October 2001 to open an investigation against the applicants must be considered in light of the special circumstances in regard to international terrorism following the attacks on the World Trade Center, the Pentagon and other targets in the United States of America on 11 September 2001. The Chamber takes account of the obligations of the respondent Parties arising from paragraph 2(e) of the UN Security Council Resolution 1373 (2001) to:

> "Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts".

214. The Chamber does not find that in the present cases the Federation has stretched the notion of "reasonableness" to the point where the essence of the safeguard provided by Article 5 paragraph 1(c) of the Convention is impaired. Hence, the Chamber is satisfied that the Federation of Bosnia and Herzegovina has complied with the requirements of Article 5 paragraph 1(c) of the Convention, the suspicion upon which the pre-trial detention was based being "reasonable". Accordingly, the Chamber finds no violation of Article 5 of the Convention for the period from the time of the original arrest until the entry into force of the decision of the Supreme Court to release the applicants on 17 January 2002.

b. As to the applicants' detention after the entry into force of the Supreme Court decision to release them on 17 January 2002 and until the hand-over to US forces

215. The Chamber recalls that the Supreme Court of 17 January 2002 ordered that the applicants were "to be immediately released from detention". According to the submissions of the Federation at the public hearing, the Registry of the Supreme Court only works until 4 p.m. The Chamber concludes therefore that the decision ordering the release must have been issued before that time. It seems that after the decision of the Supreme Court was issued, it was sent by a messenger to the prison in which the applicants were held in detention. The lawyer of the applicant Lakhdar, Mr. Fahrija Karkin, who was standing outside the prison gates on 17 January 2002, stated at the public hearing that he saw the messenger of the Supreme Court enter the prison at around 5 p.m. He claims that from that time onward for the next few hours he unsuccessfully tried to contact his client. He further states that he was not informed about the Supreme Court order to release his client at that point in time. These statements remain undisputed.

216. The Chamber notes that according to the submissions of the Federation of Bosnia and Herzegovina, the applicants were only released from pre-trial detention at 11:45 p.m. on 17 January 2002 and not immediately after receipt of the order by prison authorities. Neither respondent Party submits any reasons for the delay of execution of the Supreme Court order.

217. The Chamber further notes that, despite the delivery of a legitimate order for the release of the applicants, and despite no issuance of further orders for detention, the applicants were immediately taken into custody by members of the Federation Police and remained in their custody until 6:30 a.m. the following day, when they were handed over to US forces. It remains unclear in this context whether the applicants were informed about their release from pre-trial detention, and hence, whether they learnt that their detention now had a different quality, as it was based on different grounds.

i. Possible justification under Article 5 paragraph 1(c)

218. The Federation states that it complied with the Supreme Court order by releasing the applicants at 11:45 p.m. on 17 January 2002, the same day the Supreme Court issued the order.

219. The Chamber recalls the decision of the European Court in *Quinn v. France* (Eur. Court HR, judgment of 22 March 1995, Series A no. 311). In that case the Paris Court of Appeal directed the immediate release of the applicant Quinn. However, the applicant Quinn was not notified and no steps were taken to release him. Eleven hours after the decision of the Court of Appeal, whilst still held in detention, he was arrested again with a view to being extradited. The European Court in this case held that although some delay in executing an order for release was understandable, the eleven hours of detention until the arrest of the applicant Quinn for extradition were clearly not covered by Article 5 paragraph 1(c) of the Convention (*id.* at pages 17-18, paragraph 42).

220. The Chamber notes that in the present cases, by 11:45 p.m. on 17 January 2002, the applicants had been held in detention for some six to eight hours after the Supreme Court had ordered their "immediate" release. The Chamber finds that the Supreme Court decision to order the applicants' release ought to have been complied with by the prison authorities when they received the order of the Supreme Court in the late afternoon or early evening of 17 January 2002. The continued detention on 17 January 2002 after the entry into force of the Supreme Court decision was clearly not covered by Article 5 paragraph 1(c) of the Convention, as their release after this much time had elapsed cannot be considered to be "immediate" and in compliance with the Supreme Court order.

ii. Possible justification under Article 5 paragraph 1(f) for the period after 11:45 p.m. on 17 January 2002

221. The Chamber must now examine whether the applicants' detention after 11:45 p.m. was justified under Article 5 paragraph 1(f) of the Convention, which allows the "lawful arrest or detention ... of a person against whom action is being taken with a view to deportation or extradition".

222. The Chamber notes that in order to rely on Article 5 paragraph 1(f) of the Convention as a justification for the detention of the applicants, the respondent Parties must fulfil two conditions: the arrest and detention must be "lawful" and, in addition, the action against the persons arrested and detained must be taken "with a view to deportation or extradition".

223. Firstly, therefore, the respondent Parties must demonstrate that the detention was "lawful". The detention of the applicants can only be considered as being "lawful" under the condition that it complies with the procedure prescribed by law. The Convention here essentially refers back to domestic law, but it also requires that any deprivation of liberty be in conformity with the purpose of Article 5, namely to protect individuals from arbitrariness. Hence, lawfulness would require the respondent Parties to follow a procedure in accordance with the procedural requirements of the domestic law. In addition, Article 5 paragraph 1(f) requires the respondent Parties to ensure that the aim and essence of Article 5 of the Convention are observed and that the detention was not arbitrary.

224. At least one of the respondent Parties must have shown that it issued a detention order grounded on a legal basis, that it informed the applicants about the reasons for their detention, and that there was a possibility for the applicants to challenge the decision. However, both respondent Parties have failed to demonstrate that there was an order for continued detention, or in the alternative, to demonstrate that domestic law in Bosnia and Herzegovina entitles them to detain the applicants in view of a possible expulsion upon which the detention of the applicants was based. The respondent Parties have further failed to substantiate that they followed proper legal procedures when keeping the applicants in detention subsequent to Supreme Court's procedural decision.

225. A minimum requirement of legal procedure for a legal detention is the requirement to inform the persons subject to the detention, here the applicants, about the reasons for the detention. In light of the fact that the decisions, in which the applicants were ordered to leave the country immediately, were delivered to them by US forces at the airport, when they were about to board the aeroplane that took them out of the country on 18 January 2002, it seems highly unlikely that they were duly informed that they were now held in detention in order to be expelled, and, certainly, they had no opportunity to challenge the decisions ordering their detention for expulsion purposes.

226. Secondly, Article 5 paragraph 1(f) of the Convention requires that at the end of the detention, the applicants should have either been deported or extradited. The respondent Parties admitted in the public hearing that the applicants were simply handed over to the custody of US forces.

227. There is no evidence to suggest that the hand-over of the applicants can be interpreted to be an extradition. In particular, the diplomatic note of 17 January 2002 from the US Embassy cannot be understood to be a valid extradition request of the United States of America. In this note the US Embassy in Sarajevo advised the Government of Bosnia and Herzegovina that it was "prepared to assume custody of the six specified Algerian citizens" and it offered to "arrange to take physical custody of the individuals at a

time and location ... mutually convenient". This note, however, does not fulfil the requirements for a formal extradition of persons who have been charged or convicted as provided for in Chapter XXXI of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (see paragraphs 87 to 92 above). In particular, it includes neither the indicting proposal against the applicants nor an extract of the criminal law to be applied in the United States. The Chamber also notes that, in accordance with Article 507 of the Code of Criminal Procedure, the prerequisites for extradition include the fact that the person whose extradition is sought is not a national of Bosnia and Herzegovina and of the Federation and that the crime for which extradition is requested "has not been committed in the Federation".

228. In assessing the conditions to be met under Article 5 paragraph 1(f), the Chamber recalls the jurisprudence of the European Court in the *Bozano* case (Eur. Court HR, *Bozano v. France,* judgment of 18 December 1986, Series A no. 111). In this case an Italian national convicted *in absentia* of murder was forcibly taken by French police officers to the Swiss border, where he was transferred to Swiss police custody without giving him a chance to contact his wife or lawyer or to nominate a country of expulsion. This occurred after a French court had refused to order extradition to Italy and the French government had ordered the applicant Bozano's expulsion. The European Court ruled that: "Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to 'detention' necessary in the ordinary course of 'action ... taken with a view to deportation'"; hence, there was no justification under Article 5 paragraph 1(f) of the Convention (*id.* at pages 26-27, paragraph 60). It concluded that the detention had been arbitrary and did not fulfil the requirements of a justification under Article 5 paragraph 1(f) (*id.*).

229. The Chamber notes that the jurisprudence of the European Court that an arbitrary detention does not meet the requirements of Article 5 paragraph 1(f) also applies here. The Chamber finds that in the present cases the detention of the applicants was not intended to carry out a legal expulsion in accordance with the rules and procedure as prescribed in the domestic law. The detention was intended to keep the applicants under control until their hand-over to US forces. The Chamber considers that in the present cases detention for an aim other than a legal expulsion renders the detention arbitrary and incompatible with Article 5 paragraph 1(f) of the Convention.

iii. Conclusion

230. Hence, the Chamber finds that there was no justification under Article 5 paragraph 1 of the Convention for the respondent Parties to keep the applicants in detention after the order of the Supreme Court to release the applicants from pre-trial detention entered into force in the early evening of 17 January 2002. The detention from that period of time until the applicants were handed over to the custody of US forces constitutes a violation of the applicants' rights as protected by Article 5 paragraph 1 of the Convention.

c. As to the hand-over of the applicants to US forces and their detention thereafter until their forced removal from Bosnia and Herzegovina

231. Article 1 of the Convention reads as follows:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

232. A positive obligation arises from Article 1 of the Convention for the respondent Parties to secure the rights and freedoms set out in the Convention in regard to all persons within their jurisdiction, including the applicants. The Chamber notes that in this context the term "jurisdiction" is to be interpreted broadly (see, *e.g.*, Eur. Court HR, *Loizidou v. Turkey,* judgment of 23 March 1995, Series A no. 310, pages 23-24, paragraph 62). In the present case, the obligation implies that before handing over the applicants to the custody of the authorities of another State, the respondent Parties were obliged to obtain and examine information as to the legal basis of that custody, as reflected in the quoted provisions relating to extradition proceedings.

233. The hand-over of the applicants to the custody of US forces without seeking and receiving any information as to the basis of the detention constitutes a breach of the respondent Parties' obligations to protect the applicants against arbitrary detention by foreign forces. Considering the broad interpretation of the term "jurisdiction", this obligation arises even if under the Dayton Peace Agreement the respondent Parties had no direct jurisdiction over US forces stationed in Bosnia and Herzegovina.

234. This obligation concerns both Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina.

235. Bosnia and Herzegovina received the diplomatic note of 17 January 2002 from the US Embassy in Sarajevo in which the US advised the Government of Bosnia and Herzegovina that they were "prepared to assume custody of the six specified Algerian citizens" and offered to "arrange to take physical custody of the individuals at a time and location" "mutually convenient". Therefore, Bosnia and Herzegovina was well aware of the possible hand-over of the applicants to US forces and the intention of US forces to keep the applicants detained. Bosnia and Herzegovina facilitated the hand-over by informing the Federation of Bosnia and Herzegovina of the request of the United States of America. Bosnia and Herzegovina cannot therefore deny its knowledge that a possible violation of the applicants' rights in the form of an illegal detention by US forces on the territory of Bosnia and Herzegovina could occur, and it had the positive obligation to prevent such a possible violation.

236. In respect to the responsibility of the Federation of Bosnia and Herzegovina, the Chamber notes that it was police officers of the Federation of Bosnia and Herzegovina who actually handed over the applicants. At the public hearing the Federation of Bosnia and Herzegovina claimed that it only acted on behalf of Bosnia and Herzegovina. However, even if this were true, the Federation of Bosnia and Herzegovina still cannot be absolved from responsibility, its police forces being a mere instrument in the hands of Bosnia and Herzegovina. The Chamber finds that even in this case there was a positive obligation on the Federation of Bosnia and Herzegovina to refuse to perform any act that would result in a violation of the applicants' rights that are protected by the Convention.

237. The Chamber therefore finds that both respondent Parties have violated Article 5 paragraph 1 of the Convention by handing over the applicants into illegal detention by US forces.

3. Article 6 paragraph 2 of the Convention – presumption of innocence

238. Three of the applicants, Boudellaa, Lakdhar and Nechle, submit that the decisions revoking their citizenship involved a breach of the presumption of innocence provided for in Article 6 paragraph 2 of the Convention.

239. Article 6 paragraph 2 provides:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

240. The applicants in question obtained citizenship of Bosnia and Herzegovina in 1995 and 1997. On 16 and 20 November 2001 the Federal Ministry of Interior issued decisions revoking their citizenship. The Ministry based these decisions on Article 30 paragraph 2, in conjunction with Article 23 paragraph 1, of the Law on Citizenship of Bosnia and Herzegovina and Article 28 paragraph 3, in conjunction with Article 24 paragraph 1, of the Law on Citizenship of the Federation of Bosnia and Herzegovina (see paragraphs 43 and 59 to 70 above).

241. The reasons given by the Ministry of Interior were the same in all three cases. The Ministry of Interior reasoned in effect that criminal charges had been brought against the applicants and that accordingly it could be concluded that, at the time they obtained citizenship, they had harboured hidden intentions to violate the Constitution and laws of Bosnia and Herzegovina and of the Federation. The relevant parts of the decisions stated:

> "[I]t has been established that, ... when the request for granting citizenship of the Republic of Bosnia and Herzegovina was filed, the named person stated that he shall respect the Constitution, laws and other provisions of the Republic of Bosnia and Herzegovina.
>
> "In the Act of Service of the Criminal Police within this Ministry ... of 13 November 2001, it was stated that criminal charges were brought to the Federal Prosecution against the named person due to grounds for suspicion that he had committed the attempted criminal offence under Article 168 paragraph 1 (international terrorism) of the Criminal Code of the Federation of Bosnia and Herzegovina. Accordingly, it can be concluded that the named person had hidden intentions not to respect the Constitution, laws and other provisions of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina and that he shall harm international and other interests of Bosnia and Herzegovina."

242. The relevant provisions of national law do not permit the withdrawal of citizenship on the basis of a mere suspicion that a person has committed an offence or on the basis merely that a criminal charge has been brought against the person concerned. Article 23 of the Law on Citizenship of Bosnia and Herzegovina, on which the decisions appear to be based, provides that citizenship may be withdrawn "when the citizenship ... was acquired by means of fraudulent conduct, false information or concealment of any relevant fact..." (see paragraph 60 above). This implies that it must be proven to the satisfaction of the authority in question that conduct of the relevant kind actually occurred. Article 24 of the Federation Law on Citizenship provides similar terms (see paragraph 67 above).

243. The reasoning in the relevant decisions indicates that the Federal Ministry of Interior concluded, solely on the basis of the fact that the applicants had been charged with the offences mentioned, that they had obtained their citizenship by fraud or other means mentioned in the relevant provisions. The only reasonable interpretation of the decisions is that the Ministry concluded that the applicants were guilty of the offences of attempted international terrorism with which they were charged, and that they had had the intention of engaging in such activities when their requests for citizenship were granted. The question before the Chamber is, therefore, whether the authorities breached the applicants' right to the presumption of innocence under Article 6 paragraph 2 of the Convention in drawing such conclusions from the charges pending against them.

244. The European Commission of Human Rights has held, in case law of long standing, that Article 6 of the Convention does not apply to proceedings concerning citizenship, since such proceedings do not involve either "the determination of his civil rights and obligations or of any criminal charge against him" within the meaning of Article 6 (see, *e.g.*, Eur. Commission HR, *S v. Switzerland*, no. 13325/87, decision of 15 December 1988, Decisions and Reports 59, page 256, at page 257). It is also established in the case law of the European Court that decisions regarding the entry, stay and deportation of aliens do not concern the determination of civil rights and obligations or criminal charges; therefore, Article 6 of the Convention is inapplicable to proceedings regarding such matters *(*Eur. Court HR, *Maaouia v. France,* no. 39652/98, judgment of 5 October 2000, paragraphs 40-41). It follows that Article 6 of the Convention did not apply directly to the proceedings concerning the withdrawal of the applicants' citizenship and their subsequent removal from the country.

245. However, at all relevant times the three applicants were subject to criminal charges in the proceedings against them in the Supreme Court of the Federation. They were therefore entitled to the protection provided by Article 6 of the Convention, including in particular the presumption of innocence provided for in Article 6 paragraph 2, as they were persons "charged with a criminal offence" within the meaning of that provision. The question which arises is therefore whether the scope of the protection afforded by Article 6 paragraph 2 is wide enough to cover statements made and decisions taken in relation to the applicants' citizenship.

246. The presumption of innocence is one of the elements of a fair criminal trial required by Article 6. However both the European Commission and the European Court have held that it may be infringed upon not only by a judge or court hearing the case, but also by other public authorities. In

particular, in the case of *Allenet de Ribemont v. France* (Eur. Court HR, judgment of 10 February 1995, Series A no. 308), the European Court held that there had been a violation of Article 6, paragraph 2 arising from statements, alleging the applicant's guilt of certain charges pending against him, made by a Minister and senior police officers at a press conference. The European Court pointed out that the two police officers were conducting the inquiries in the case and stated that "their remarks, made in parallel with the judicial investigation and supported by the Minister of Interior, were explained by the existence of that investigation and had a direct link with it. Article 6 § 2 therefore applies in this case" (*id.* at page 17, paragraph 37).

247. In several cases the European Court has held that Article 6 paragraph 2 of the Convention applies to proceedings concerning legal expenses and compensation for detention on remand after criminal proceedings have been terminated (see, *e.g.*, Eur. Court HR, *Rushiti v. Austria,* no. 28389/95, judgment of 21 March 2000, paragraphs 31-32). In the *Rushiti* case, the European Court stated that the "general aim of the presumption of innocence ... is to protect the accused against any judicial decision or other statements by State officials amounting to an assessment of the applicant's guilt without him having previously been proved guilty according to law" (*id.* at paragraph 31).

248. In accordance with this case law, Article 6 paragraph 2 may thus apply to protect an accused person against statements made and decisions taken outside the scope of the criminal proceedings themselves, at least where there is a sufficient link to the criminal proceedings. The European Commission has held, however, that a distinction must be drawn between civil and criminal proceedings arising out of the same facts and that Article 6 paragraph 2 of the Convention does not necessarily preclude the accused person from being found liable in civil proceedings for acts which may constitute a criminal offence, even though he has not been convicted in criminal proceedings (Eur. Commission HR, *C. v. United Kingdom*, no. 11882/85, decision of 7 October 1987, Decisions & Reports 54, page 162, at pages 166-167).

249. In the present cases, as the Chamber has already pointed out, the Ministry of Interior reached conclusions of fact adverse to the applicants solely on the basis of the fact that they had been charged in the criminal proceedings. It treated the criminal charges as evidence of the applicants' guilt. It did not, as far as appears from its decisions, make its own examination of the evidence and reach its own conclusions of fact on the basis of the appropriate standard of proof. The circumstances were therefore not analogous to those in *C. v. United Kingdom.* In the Chamber's opinion, in so acting, the Ministry of Interior misused the criminal charges pending against the three applicants in question and violated their rights under Article 6 paragraph 2 of the Convention.

250. As to the applicant Lahmar, the reason given for the decision terminating his permit for permanent residence was that he had been sentenced to five years imprisonment by the Supreme Court on 9 July 1998 (see paragraph 45 above). His case does not therefore raise any issue under Article 6 paragraph 2 of the Convention.

4. Article 8 of the Convention – right to family life

251. In their applications to the Chamber, all four applicants claimed to be victims of a violation of Article 8 of the Convention, which reads as follows:

> "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."

252. In view of its findings that there has been a violation of Article 5 of the Convention, and also in view of its findings in respect to the illegal expulsion of the applicants, the Chamber does not consider it necessary to examine the cases separately under Article 8 of the Convention.

5. The hand-over of the applicants to US forces

a. Application of the Human Rights Agreement in expulsion cases

253. The applicants have alleged that they are at risk of having their rights to life and to freedom from torture, inhuman and degrading treatment violated outside the territory of Bosnia and Herzegovina and that the respondent Parties are responsible for such alleged violations because they handed over the applicants to US forces. As these are the first cases before the Chamber in which a violation of the rights protected by the Agreement is alleged to have effects outside the territory of Bosnia and Herzegovina, the Chamber finds it useful to set forth, on the basis of the jurisprudence of the European Court, the principles that govern the application of the Agreement in expulsion cases where it is alleged that the Convention rights will not be respected in the country of destination.

254. Article I of the Agreement states:

> "The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex. …"

255. Article I of the Agreement thereby mirrors Article 1 of the Convention, which reads:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

256. In interpreting Article 1 of the Convention, the European Court has stated as follows in the *Soering* case:

> "Article 1 … sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. …" (Eur. Court HR, *Soering v. United Kingdom,* judgment of 7 July 1989, Series A no. 161, page 33, paragraph 86).

257. "In keeping with the essentially territorial notion of jurisdiction, the [European] Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention" (Eur. Court HR, *Banković et al. v. Belgium & 16 Other Contracting States*, no. 52207/99, decision on admissibility of 12 December 2001, paragraph 67).

258. In accordance with the statement of the European Court quoted above, the Chamber finds that the Agreement "does not govern the actions of States not Parties to it". Specifically, it does not govern the actions of the United States of America, nor does it require the Parties to impose observance of the rights protected in the Agreement on the United States of America. In this sense, the present cases do not call for "extra-territorial application" of the Agreement.

259. However, it is a well-established principle of the case law of the European Court that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Articles 2 and/or 3 (or, exceptionally, under Articles 5 and/or 6) and hence engage the responsibility of that State under the Convention (*Banković* at paragraph 68; *see also Soering* at pages 35-36, paragraph 91; *Cruz Varas and*

Others v. Sweden, judgment of 20 March 1991, Series A no. 201, page 28, paragraphs 69 and 70; *Vilvarajah and Others v. United Kingdom*, judgment of 30 October 1991, Series A no. 215, page 34, paragraph 103). In such cases, liability is incurred "by an action of the respondent State concerning a person while he or she is on its territory, clearly within its jurisdiction," and "such cases do not concern the actual exercise of a State's competence or jurisdiction abroad" (*Banković* at paragraph 68). Such liability for the respondent Parties arises from the positive obligation enshrined in Article I of the Agreement and Article 1 of the Convention to secure the rights and freedoms in regard to all persons within their jurisdiction. It would be against the general spirit of the Convention and of the Agreement for a Party to extradite an individual to another State where there was a substantial risk of a violation the Convention (*see Soering* at pages 34-35, paragraph 88).

260. The Chamber notes that Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina have recognised this principle and incorporated it into their legislation. Article 34 of the Law on Immigration and Asylum of Bosnia and Herzegovina prohibits expulsion, in any manner whatsoever, where there exists a risk that the expelled person may be subjected to torture or other inhuman or degrading treatment or punishment. It provides, insofar as is relevant:

> "(34) Aliens shall not be expelled in any manner whatsoever to the frontier of territories, where their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group or political opinion.... The prohibition of return or expulsion also applies to persons in respect of whom there are grounds for believing that they would be in danger of being subjected to torture or other inhuman or degrading treatment or punishment. Nor may aliens be sent to a country where they are not protected from being sent to another such territory."

261. Article 507 paragraph 1 of the Federation Code of Criminal Procedure prohibits extradition in cases in which the person to be extradited might be subject to death penalty:

> "(1) The prerequisites for extradition are as follows:
> 10. ...; and that the extradition is not sought for a crime for which capital punishment is prescribed by the law of the country seeking extradition, unless the country seeking extradition provides guarantees that the capital punishment shall not be pronounced or exercised".

262. In accordance with this principle established by the European Court, the Chamber will examine whether the respondent Parties, by handing over the applicants to US forces, have violated the applicants' rights not to be subject to the death penalty and not to be subject to torture, inhuman or degrading treatment. Before it examines the applications with specific regard to these two rights, the Chamber will address two arguments made by the respondent Parties, which purportedly exempt the respondent Parties from any responsibility under both Article 1 of Protocol No. 6 to the Convention and Article 3 of the Convention.

b. Whether the obligation to co-operate in the international fight against terrorism prevails over obligations under the Human Rights Agreement

263. Bosnia and Herzegovina argues that it was obliged under the UN Security Council Resolution 1373 of 28 September 2001 to accede to the request by the United States to hand over individuals suspected of terrorist activities (see paragraphs 93 and 106 above). It argues that this obligation, flowing from a Security Council Resolution adopted under Chapter VII of the UN Charter, has an overriding character.

264. The Chamber fully acknowledges the seriousness and utter importance of the respondent Parties' obligation, as set forth in paragraph 2 of the UN Security Council Resolution 1373 (see paragraph 93 above), to "(c) deny safe haven to those who finance, plan, support, or commit terrorist acts ...", to "(e) ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice ..." and to "(f) afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing and support of terrorist acts ...".

265. Contrary to the argument made by Bosnia and Herzegovina, however, the Chamber finds that the obligation to co-operate in the international fight against terrorism does not relieve the respondent Parties from their obligation to ensure respect for the rights protected by the Agreement. In this regard, the Chamber recalls the "Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism" of 15 July 2002 (see paragraph 94 above). The Chamber understands these Guidelines to be an authoritative clarification of the principles deriving from the Convention for the respect for human rights in the fight against terrorism.

266. In the Preamble to the Guidelines, the Committee of Ministers, while "unequivocally condemning all acts, methods and practices of terrorism as criminal and unjustifiable", "recall[s] that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights [and] the rule of law" and "reaffirm[s] states' obligation to respect, in their fight against terrorism, the international instruments for the protection of human rights". The Council of Ministers recognises that "[e]xtradition is an essential procedure for effective international co-operation in the fight against terrorism" (Guideline XIII, paragraph 1). Nonetheless, Guideline XIII restates the Convention principles:

> "2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:
> (i) the person whose extradition has been requested will not be sentenced to death; or
> (ii) in the event of such a sentence being imposed, it will not be carried out.
>
> 3. Extradition may not be granted when there is serious reason to believe that:
> (i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment …".

267. In summary, the Chamber finds that the international fight against terrorism cannot exempt the respondent Parties from responsibility under the Agreement, should the Chamber find that the hand-over of the applicants to US forces was in violation of Article 1 of Protocol No. 6 to the Convention or Article 3 of the Convention.

c. Whether the respondent Parties were obliged to consider the possibility of imposition of the death penalty or inhuman or degrading treatment only if raised by the applicants

268. At the public hearing on 10 April 2002, the Agent of Bosnia and Herzegovina argued that it was up to the applicants to ensure that their rights were not infringed upon and to raise the issue that their delivery to US forces put them at risk of a violation of their rights protected by the Convention. The Chamber finds that the suggestion that this burden could fall upon the applicants represents an erroneous analysis of the Convention and the rule of law. The implication of this conclusion, if accepted, would be that any Contracting State to the Convention could expel, extradite, or hand over any individual to any state, irrespective of its implementation of human rights, with complete disregard for the individual's fate. This prospect is completely against the spirit and intention of the Convention and other international instruments, and as such, it cannot be accepted by the Chamber.

269. In addition, the Chamber must point out that the applicants have never been provided any decision concerning their extradition or delivery to US authorities, nor have the respondent Parties submitted evidence to the effect that the applicants were otherwise informed thereof. It is likely that the applicants only became *de facto* aware that they were to be transported to Guantanamo Bay, Cuba, to possibly face trial, during the night of 17 and 18 January 2002, or at the time they were handed over to US forces and forced to board the aeroplane that took them out of Bosnia and Herzegovina. The argument that it was up to the applicants to draw the attention of the authorities to the alleged risks involved in their delivery to US forces is more than a misunderstanding of the law; it shows, under the factual circumstances of these cases, bad faith and cynicism.

d. Article 1 of Protocol No. 6 to the Convention – the death penalty

270. The applicants complain that their delivery to US forces places their lives at substantial risk, as they will face capital punishment if convicted under certain US counter-terrorism statutes. They allege that this amounts to a violation of their right to life protected by Article 2 of the Convention. The Chamber notes that Article 2 of the Convention allows the imposition and execution of the death penalty under certain circumstances. The Chamber will therefore consider this complaint under Article 1 of Protocol No. 6 to the Convention, which prohibits the death penalty and thereby supersedes Article 2 of the Convention in this respect. For the reasons explained below, the Chamber will consider this complaint under Article 1 of Protocol No. 6 in conjunction with Article 6 of the Convention.

271. Article 2 paragraph 1 of the Convention provides:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

272. Article 1 of Protocol No. 6 to the Convention provides:

> "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

273. In accordance with Article 1 of Protocol No. 6 to the Convention, the imposition of the death penalty is prohibited and the death penalty is abolished. For the purposes of international co-operation in criminal matters, this means that:

> "the extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:
> (i) the person whose extradition has been requested will not be sentenced to death; or
> (ii) in the event of such a sentence being imposed, it will not be carried out."
> (Guideline XIII(2) (see paragraph 94 above); *see also* Eur. Commission HR, *Aylor-Davis v. France*, no. 22742/93, decision of 20 January 1994, Decisions and Reports 76-A, page 164 at pages 170-172; Eur. Commission HR, *Raidl v. Austria*, no. 25342/94, decision of 4 September 1995, Decisions and Reports 82-B, page 134).

274. It is undisputed that in the present cases the respondent Parties have not sought assurances from the United States that the death penalty would not be imposed and carried out against the applicants. It therefore remains for the Chamber to examine whether the applicants risk being sentenced to death. If so, since the respondent Parties have failed to seek such assurances, there will be a violation of Article 1 of Protocol No. 6.

i. Failure to follow extradition proceedings

275. The Chamber notes that, according to the submission of Bosnia and Herzegovina of 25 January 2002 and of the Federation of Bosnia and Herzegovina, the applicants, at the time of their hand-over to US forces, were under suspicion of participating in acts of international terrorism. At the public hearing on 10 April 2002, the Agent of Bosnia and Herzegovina explained, with respect to the obligations of Bosnia and Herzegovina arising from the UN Security Council Resolution 1373 (2001) to support the fight against terrorism: "The applicants had to be put under the supervision Šof the United StatesĆ because the presumption existed that they have knowledge of terrorist activities."

276. The Chamber notes that the laws of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina do not provide for individuals suspected of criminal activities to be "put under the supervision" of a foreign State by any procedure other than the extradition procedure governed by the Federation Law on Criminal Procedure. The Chamber recalls that Article 508 of the Law of Criminal Procedure requires that a petition for extradition shall include the indictment or the decision ordering custody against the person to

be extradited. In addition, an extract of the text of the criminal law to be applied by the foreign State seeking extradition must accompany a petition for extradition. Reading Article 508 in conjunction with Article 507(1)(10), the Chamber notes that in the applicants' cases, the petition for extradition would have had to include a statement as to whether the death penalty is applicable to the offences the applicants are suspected of and, if so, whether the death penalty will be sought.

277. No extradition proceedings pursuant to the Federation Code of Criminal Procedure were initiated in the applicants' cases. The respondent Parties did not obtain any statement from the United States as to whether custody was sought for the purpose of bringing the applicants to trial, and if so, which law the applicants would be tried under and what penalties would be applied in the event of a conviction. Answers to these questions are crucial in order to assess whether the applicants face a real risk of being subjected to the death penalty. The facts that have emerged during the proceedings before the Chamber, the submissions of the Parties and the information obtained by the Chamber *proprio motu* have not been able to dispel the uncertainty clouding these matters. The Chamber finds that since this lack of information is a consequence of the respondent Parties' failure to follow extradition proceedings, the resulting uncertainty can only be weighed to the disadvantage of the respondent Parties when assessing the risk of imposition and execution of the death penalty against the applicants. The Chamber will now proceed to assess the risk of imposition of the death penalty on the basis of the available elements, keeping this principle in mind.

ii. Substantive criminal law applicable to possible charges against the applicants

278. The criminal proceedings against the applicants by the Federation authorities were initiated on the grounds of the suspicion that they were planning a bomb attack on the Embassies of the United States and the United Kingdom in Sarajevo. During these proceedings, one of the co-suspects of the applicants, B.B., was interrogated by FBI agents and confronted with the allegation that during a search of his home, the telephone number of a liaison officer of the al Qaida leader Osama Bin Laden had been found. The Chamber therefore concludes that it is reasonable to assume that the applicants are at risk of being charged not only with planning an attack on the US Embassy in Sarajevo, but also with being part of the al Qaida conspiracy to wage a terrorist war against the United States.

279. The Chamber notes that in a possible trial of the applicants, the applicable law might be either the law applicable to violations of the laws of war or US federal law. The US President's Military Order of 13 November 2001 provides, at Section 1(e) that "it is necessary for individuals subject to this order …, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals" (see paragraph 95 above). Sources of the "laws of war" include customary principles and rules of international law, international agreements, judicial decisions of national and international tribunals, national manuals of military law, scholarly treatises, and resolutions of various international bodies. The understanding of the "laws of war" of the United States Department of Defense is set forth in the *Field-Manual 27-10: The Law of Land Warfare*, promulgated by the Department of the Army (see paragraph 97 above). "As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States" (Paragraph 505*e* of the *Law of Land Warfare*). If the defendants in a trial for violations of the "laws of war" are classified as illegal combatants, then they will be deprived of the safeguards provided by the Third Geneva Convention of 1949 for the trial of prisoners of war.

280. As to applicable penalties, Paragraph 508 of the *Law of Land Warfare* states that "[t]he punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law". No further indication is given as to when the death penalty can be imposed. Historically, the death penalty has been amply applied to violations of the laws of war. In 1862, during the so-called "Indian Wars" in the American West, a portion of the Sioux tribe in Minnesota declared war on white settlers. During a battle in which the Sioux forces were defeated, the US Army captured more than 400 Sioux fighters. The Army refused to grant them prisoner of war status and instead classified them as illegal combatants. Thus, they were eligible for trial before a military commission. After summary trials before this commission, 303 were sentenced to death (President

Lincoln later commuted all but 38 of the death sentences) (Douglas Linder, *The Dakota Conflict Trials*, at http://jurist.law.pitt.edu/trials23.htm).

281. The US Supreme Court case of *Ex parte Quirin*, 317 U.S. 1 (1942), is a landmark Second World War case in which eight German saboteurs were captured after coming ashore in New York and Florida with plans and equipment to blow up rail centres, bridges, other public works, and industrial plants. President Franklin D. Roosevelt established a military commission to try them under the laws of war, and they were quickly found guilty. The US Supreme Court upheld the convictions, and six of the eight were executed a few days later. Footnotes 9 and 10 of this judgment list numerous other cases in which the death penalty was imposed for violations of the laws of war.

282. Under US federal law, the death penalty is available for conspiracies related to the events of 11 September 2001, as is apparent from the Indictment and Notice of Intent to Seek a Sentence of Death filed in *United States v. Moussaoui* in the Eastern District of Virginia. In that case, the US Attorney seeks the death penalty on four counts of the Indictment, including counts charging offences under 18 U.S.C. § 2332a and 2332b ("Use of certain weapons of mass destruction" and "Acts of terrorism transcending national boundaries"). Thus, if the applicants were charged and convicted on any similar count involving these offences, they could face capital punishment. In such a prosecution, it would not be necessary for the US authorities to show that the applicants personally committed any overt act; it would be sufficient for US authorities to show that they were members of the conspiracy and that one of the other conspirators acted to further its aims.

283. Finally, the Chamber notes that, whether the applicants are tried under US federal criminal law or under the "laws of war", Section 1(f) of the US President's Military Order provides "that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts". The US President's Military Order thereby, and in particular through the explicit reference to Section 1(f) contained in Section 4(b), mandating the Secretary of Defense to issue further orders and regulations concerning the trials to be held before the military commissions, opens the door to elements of summary justice in both the substantive criminal law and the procedural rules to be applied by the military commissions (see paragraph 95 above).

iii. Relationship between fair trial guarantees and the imposition of the death penalty

284. The Chamber recalls that in international human rights law there is a well-established relationship between the fairness of the trial and the imposition of the death penalty. The United Nations Human Rights Committee has consistently noted that "in capital punishment cases, State Parties have an imperative duty to observe rigorously all the guarantees for a fair trial" (see, *e.g., Earl Pratt and Ivan Morgan v. Jamaica,* Communication No. 210/198, U.N. Doc. Supp. No. 40 (A/44/40) at 222 (1989), decision of 6 April 1989, paragraph 15). In cases in which it has found a violation of the guarantees of a fair trial, the UN Human Rights Committee has recommended the commutation of the death sentence. In this respect the Chamber recalls Resolution 1984/50 on "Safeguards guaranteeing protection of the rights of those facing the death penalty", adopted by the UN Economic and Social Council on 25 May 1984. In particular, safeguard No. 5 provides:

> "Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."

285. The Chamber is of the opinion that, as a matter of experience intimately related to this principle of human rights law, courts that are not fully independent from the executive power and that offer reduced procedural safeguards and limitations on the right to legal assistance, are more likely to impose the death sentence than courts that fully respect all the rights of defendants enshrined in international human rights instruments, *e.g.*, in Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the

Convention. The Chamber will therefore examine the procedure before the military commissions that are likely to try the applicants, should they be brought to trial, in the light of Article 6 of the Convention.

iv. Defendants' rights in a trial before a military commission

286. Article 6 of the Convention provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> "3. Everyone charged with a criminal offence has the following minimum rights:
> a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> b. to have adequate time and facilities for the preparation of his defence;
> c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

287. The Chamber notes that the applicants were taken to the US detention centre known as "Camp X-Ray" in Guantanamo Bay, Cuba. There, pursuant to the US President's Military Order of 13 November 2001, it appears that the applicants will not stand trial before a regular US court, but may instead face prosecution before a military commission. (This US President's Military Order, which relates to "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", applies to any non-US citizen who, at the US President's determination: "(i) is or was a member of the organization known as al Qaida"; and "(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy...." (Section 2(a)(1) of the US President's Military Order, see paragraph 95 above).)

288. Section 4 of the US President's Military Order sets out the general parameters for the military commissions and for subsequent orders and regulations concerning proceedings before such military commissions. Section 4(a) provides:

> "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

289. The Chamber notes that, pursuant to Section 4(b), the members of the military commissions are appointed by the US Secretary of Defense. Under Section 4(b) and (c), the Secretary of Defense shall issue "rules for the conduct of the proceedings of military commissions, including pre-trial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys". In issuing these procedural rules, the Secretary of Defense is mandated to take into account that "it is not practicable to

apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" (Section 1(f) of the US President's Military Order). On 21 March 2002, the US Department of Defense issued Military Commission Order No. 1 (hereinafter "MC Order No. 1"), setting forth "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism" and implementing the US President's Military Order.

290. The Appointing Authority, *i.e.* the Secretary of Defense or a person designated by him, may appoint the members of the military commission "from time to time" (MC Order No. 1, § 2), *ad hoc* for any specific trial. Moreover, the Appointing Authority may remove members for "good cause" (MC Order No. 1, § 4(A)(3)).

291. Each member of a military commission shall be a commissioned officer of the United States armed forces (MC Order No. 1, § 4(A)(3)), and therefore a subordinate of the Appointing Authority within a military command structure.

292. Moreover, the findings of a military commission and of a review panel and the sentence imposed become final only once they have been reviewed and approved by the President or the Secretary of Defense (MC Order No. 1, § 6(H)(2, 4, 5 and 6)). While he may not change a not guilty finding into a guilty finding, the Secretary of Defense may "return the case for further proceedings" (MC Order No. 1, § 6(H)(2 and 5)).

293. The Chamber notes that the duration of the detention of the applicants awaiting trial or release without trial is potentially unlimited: the Executive Order and the Military Commission Order No. 1 contain no time limits until which the detainees must be charged or released if no charges are brought, and they set no time frame for possible trials of the applicants.

294. The hearings of the military commissions shall be open to the public, unless otherwise decided by the Appointing Authority or the Presiding Officer (MC Order No. 1, § 6(B)(3), which provides ample grounds for excluding the public).

295. The accused's presence at the proceedings, the prosecution's duty to forward to the defence exculpating evidence, the defence's right to obtain a copy of documents introduced into evidence by the prosecution, and the defence's right to call witnesses are all subject to the requirement to safeguard "protected information" (MC Order No. 1, § 5). Such "protected information" is defined broadly (MC Order No. 1, § 6(D)(5)).

296. The MC Order No. 1 establishes the Office of the Chief Defense Counsel, who shall be a judge advocate of the US armed forces, shall "supervise the overall defense efforts" and "shall facilitate proper representation of all Accused" (MC Order No. 1, § 4(C)(1)). The Chief Defense Counsel "shall detail one or more Military Officers who are judge advocates of any United States armed forces to conduct the defense for each case before a Commission", called the Detailed Defense Counsel (MC Order No. 1, § 4(C)(2)). The defendant may also retain a military officer or a civilian attorney of his own choosing to represent him (MC Order No. 1, § 4(C)(3)). However, retaining civilian defence counsel has at least two serious drawbacks: he or she can be excluded from any part of the proceedings, when the Presiding Officer or the Appointing Authority decide to close the proceedings for reasons of confidentiality; and civilian attorneys must be "at no expense to the United States". Moreover, civilian attorneys must have been "determined to be eligible for access to information classified at the level secret or higher" (MC Order No. 1, § 4(C)(3)). None the less, the defendant "must be represented at all relevant times by Detailed Defense Counsel" (MC Order No. 1, § 4(C)(4)), and "Detailed Defense Counsel may not be excluded from any trial proceedings or portion thereof" (MC Order No. 1, § 5(K)).

297. In accordance with Section 7(b)(2) of the US President's Military Order, defendants shall not have any recourse to any remedy before any court in the United States, "any court of any foreign nation" or "any international tribunal". The US District Court for the District of Columbia has recently confirmed that US federal courts have no jurisdiction to consider claims by aliens detained in Camp X-Ray for the protection of

US Constitutional rights (*Rasul v. Bush* and *Odah v. United States*, Nos. 02-299 and 02-828 (D. D.C.), decision of 30 July 2002, at www.dcd.uscourts.gov/02-299.pdf).

298. The Chamber finally notes that only aliens can be tried under the US President's Military Order and the Military Commission Order No. 1 (Section 2(a) of the US President's Military Order; MC Order No. 1, § 1). US citizens suspected of being members of al Qaida or of having engaged in international terrorism cannot be excluded from the jurisdiction of regular courts in the United States and deprived of the constitutional guarantees protecting criminal defendants.

299. The Chamber finds that the US President's Military Order and the Military Commission Order No. 1 establish tribunals whose independence from the executive power is subject to deep-cutting limitations. The rights to trial within a reasonable time, to a public hearing, to equality of arms between prosecution and defence and to counsel of the accused's choosing are all severely curtailed. Moreover, the applicants are discriminatorily deprived of the guarantees enshrined in the Bill of Rights of the US Constitution. The Chamber finds that all these elements considerably increase the risk of the death penalty being imposed and executed on the applicants.

v. Conclusion as to imposition of the death penalty

300. In conclusion, the Chamber finds that considerable uncertainty exists as to whether the applicants will be charged with a criminal offense, what charges will be brought against them, which law will be deemed applicable, and what sentence will be sought. This uncertainty does not exclude the imposition of the death penalty against the applicants. On the contrary, the US criminal law most likely applicable to the applicants provides for the death penalty for the criminal offences with which the applicants could be charged. This risk is compounded by the fact that the applicants face a real risk of being tried by a military commission that is not independent from the executive power and that operates with significantly reduced procedural safeguards. Hence, the uncertainty as to whether, when and under what circumstances the applicants will be put on trial and what punishment they may face at the end of such a trial gave rise to an obligation on the respondent Parties to seek assurances from the United States, prior to the hand-over of the applicants, that the death penalty would not be imposed upon the applicants. The Chamber therefore finds that, in handing over the applicants to US forces, the respondent Parties have failed to take all necessary steps to ensure that the applicants will not be subject to the death penalty. They have thereby violated Article 1 of Protocol No. 6 to the Convention.

e. Article 3 of the Convention – prohibition of torture or inhuman or degrading treatment

301. The Chamber will examine whether the respondent Parties violated Article 3 of the Convention by handing-over the applicants to US forces. The Chamber points out that, in examining this alleged violation of Article 3 of the Convention by the organs of both Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, the Chamber is not making any assessment as to how detainees at Camp X-Ray, Guantanamo Bay, Cuba, are treated by US authorities. As explained above (see paragraphs 253 to 262), the Chamber is solely concerned with the question of whether the authorities of the respondent Parties failed to comply with their obligations under the Agreement when they handed over the applicants to US forces.

302. Article 3 of the Convention reads:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

303. The applicants complain of a violation of Article 3 of the Convention with regard to the treatment that they expect to receive at the detention facility at Guantanamo Bay, Cuba. More specifically, one of the lawyers of applicants elaborated that, "having in mind that the applicant has been transferred to the USA, *i.e.* to the Guantanamo Base on Cuba, and the circumstances prevailing there with regard to the treatment of prisoners, against which all international organisations dealing with the protection of human rights have protested, and where, according to the evidence in the Amnesty International Report and the world media,

the applicant is put in a space that can freely be called a cage in which detainees are chained with masks on their faces in a kneeling position, a violation of Article 3 has occurred because, having in mind the above mentioned facts, the existence of ill-treatment of the applicant, *i.e.* torture, inhuman and degrading treatment and punishment, seems obvious."

304. At the public hearing on 10 April 2002, the respondent Parties stated that, at the time of handing-over the applicants to US forces, they did not consider the United States to be a country where the applicants would be placed at a high risk of being subjected to treatment prohibited by Article 3 of the Convention.

305. The law governing the complaint before the Chamber has been stated by the European Court in a number of judgments:

> "[T]he expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country" (Eur. Court HR, *Ahmed v. Austria*, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, paragraph 39; *see also Soering v. United Kingdom*, judgment of 7 July 1989, Series A no. 161, pages 35-36, paragraphs 90-91; *Cruz Varas and Others v. Sweden* judgment of 20 March 1991, Series A no. 201, page 28, paragraphs 69-70; V*ilvarajah and Others v. United Kingdom*, judgment of 30 October 1991, Series A no. 215, page 34, paragraph 103; and *Chahal v. United Kingdom*, judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, page 1853, paragraph 74).

i. Conditions of detention as a violation of the right not to be subjected to torture or inhuman or degrading treatment

306. The Chamber notes that it is well-established case law that conditions of detention *per se*, without any allegation of deliberate ill-treatment by the police, prison guards or other persons, can already amount to inhuman or degrading treatment. This can be due to prolonged isolation, deprivation of light or uninterrupted exposure to artificial light, overcrowding, absence of heating, poor sanitary conditions, lack of exercise or, more likely, an accumulation of such conditions (Eur. Court HR, *Guzzardi v. Italy,* judgment of 6 November 1980, Series A no. 39, page 40, paragraph 107, finding no violation of Article 3 with regard to detention conditions; Eur. Commission HR, *Ensslin, Baader, Raspe v. Germany*, no. 7572/76 *et al.*, decision of 8 July 1978, Decisions and Reports 14, page 64, at pages 109-111, finding no violation of Article 3 with regard to isolated detention of terrorists; *McFreely and Others v. United Kingdom*, no. 8317/78, decision of 15 May 1980, Decisions and Reports 20, page 44, at pages 81-89, finding no violation of Article 3 with regard to the conditions of detention of IRA terrorists); *Dougoz v. Greece,* no. 40907/98, judgment of 6 March 2001, paragraphs 45-49, finding a violation of Article 3 due to poor detention conditions while the applicant was awaiting extradition).

307. In *Kröcher and Möller v. Switzerland* (Eur. Commission HR, no. 8463/78, decision of 16 December 1982, Decisions and Reports 34, page 24, at pages 51-55), the detention conditions complained of, although less serious than those in Guantanamo Bay, can be usefully compared to those complained of by the applicants before the Chamber, in that they were dictated by extreme security requirements in a "climate of terrorism", rather than by abandonment and degradation. In the *Kröcher and Möller* case, the prison conditions included isolation, constant artificial lighting, permanent surveillance by closed-circuit television, denial of access to newspapers and radio and lack of physical exercise. The Commission expressed "serious concern with the need for such measures, their usefulness and their compatibility with Article 3 of the Convention" (*id.* at page 57). However, it concluded that the applicants were not subjected to inhuman or degrading treatment (*id.*). In reaching this conclusion the Commission accepted the State Party's submission that the applicants were dangerous, that they were alleged to be terrorists, and that there was a risk of escape and collusion. The Chamber notes that also in all other cases concerning high-level security measures in the detention of alleged or convicted terrorists quoted above, no violation was found.

ii. Application of Article 3 in extradition and expulsion cases

308. Turning to the cases in which Article 3 was applied in the context of extradition or expulsion, the Chamber notes that the cases it is aware of can be divided into three categories. In the first group of cases, applicants allege that their extradition would constitute inhuman or degrading treatment in that, in detention in the receiving country, they would not receive medical care they desperately need (*see* Eur. Court HR, *D. v. United Kingdom,* decision of 2 May 1997, Reports of Judgments and Decisions 1997-III, paragraphs 39-54, finding a violation of Article 3; Eur. Commission HR, *Raidl v. Austria*, no. 25342/94, decision of 4 September 1995, Decisions and Reports 82-B, page 134, finding no violation of Article 3). The Chamber finds that the situation complained of in these cases is so different from that of the applicants, that they cannot provide any guidance in the present cases.

309. The second group of cases, such as *Soering v. United Kingdom* (Eur. Court HR, judgment of 7 July 1989, Series A no. 161) and *E.M. Kirkwood v. United Kingdom* (Eur. Commission HR; no. 10479/83, decision of 12 March 1984, Decisions and Reports 37, page 158), concern complaints under Article 3 in the context of the death penalty. In the *Soering* case, the European Court found that the so-called "death row phenomenon", *i.e.* the psychological situation faced by a person awaiting for years the execution of a death sentence, amounted to treatment contrary to Article 3 of the Convention (*Soering* at pages 44-45, paragraph 111). The Chamber considers that it has already dealt with the risk of imposition of the death penalty under Article 1 of Protocol No. 6, which was not applicable in the *Soering* case, and that there is no separate complaint about the "death row phenomenon" before it. It shall therefore not consider the issue of the death penalty under Article 3 in the cases before it.

310. In the third and most substantial group of cases, the applicants complained that their expulsion would put them at risk of persecution based on their ethnic origin or political activity. In *Cruz Varas and Others v. Sweden*, the first applicant alleged that "his expulsion exposed him to the risk that he would be arrested and tortured once more on his return to Chile" (Eur. Court HR, judgment of 20 March 1991, Series A no. 201, page 28, paragraph 71). In the *Vilvarajah* case, the applicants claimed that upon their return to Sri Lanka, they had been arbitrarily detained by security forces, tortured and otherwise ill-treated, as part of a pattern of persecution against young Tamil men (Eur. Court HR, *Vilvarajah and Others v. United Kingdom,* judgment of 30 October 1991, Series A no. 215, pages 34-35, paragraph 104). In *Chahal v. United Kingdom*, one of the applicants, a supporter of the Sikh separatist movement, claimed that he would be subjected to torture and persecution if returned to India, in particular with regard to the situations of Sikhs in Punjab (Eur. Court HR, judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, paragraph 26). In the *Ahmed* case, the applicant, a Somali national, complained that his expulsion to Somalia would expose him to a serious risk of being subjected to treatment contrary to Article 3 of the Convention (Eur. Court HR, *Ahmed v. Austria*, judgment of 17 December 1996, Reports of Judgments and Decisions 1996-VI, paragraph 35). In *Hilal v. United Kingdom,* the applicant, an active member of the Civic United Front, an opposition party in Zanzibar, claimed to have been ill-treated in detention in Tanzania before and to be placed at risk of torture or inhuman and degrading treatment contrary to Article 3 if he were expelled from the United Kingdom to Tanzania (Eur. Court HR, judgment of 6 March 2001, no. 45276/99, paragraphs 52-53). The Chamber will now examine to what extent this case law is applicable to the cases before the Chamber.

iii. Respondent Parties' responsibility in the present cases

311. Returning to the cases currently before it, the Chamber notes that the applicants' lawyers are claiming that the conditions of detention in Camp X-Ray are such as to violate the applicants' rights under Article 3. In their submissions the applicants' lawyers expressly rely on media reports and other publicly available information, which in fact was made available to the media by US authorities, who have allowed journalists to observe and to describe the conditions of detention at Camp X-Ray. The applicants' lawyers are not alleging that the applicants are victims of any hidden, secret ill-treatment or of any persecutory conduct by US authorities different from the publicly known measures, which are purportedly necessary for security reasons.

312. The Chamber is not aware of any case decided by an international human rights body in which it found a violation of the right not to be subject to torture or inhuman or degrading treatment by the expelling or extraditing State on the basis that the applicant was extradited to a State where high-security conditions of detention were so invasive as to amount to a violation of Article 3. The Chamber considers that this is so because, as the *Kröcher and Möller* case shows, the detention of highly dangerous individuals requires the authorities to strike a very delicate balance between the requirements of security and basic individual rights (*see* Eur. Commission HR, *Kröcher and Möller v. Switzerland* no. 8463/78, decision of 16 December 1982, Decisions and Reports 34, page 24). This determination will require a case-specific, ongoing assessment of the danger of flight, of collusion, of the detainees harming themselves, and of the security situation inside and outside the detention facility. Therefore, the Chamber finds that an extraditing State is not in a position and cannot be required to carry out this balancing exercise.

313. The Chamber also notes that the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of 1984 ("the Torture Convention") is the only human rights treaty containing a provision explicitly applying the principle of *non refoulement*, which has its origin in refugee and asylum law, to torture. The Chamber therefore considers the case law of the UN Committee against Torture, which is charged with examining individual complaints of violations of the Torture Convention, to be particularly relevant. Article 3 of the Torture Convention reads as follows:

> "1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

314. In developing criteria to determine whether "substantial grounds" exist, the UN Committee against Torture has clarified that:

> "[T]he existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances" (*Mutombo v. Switzerland*, Communication No. 13/1993, U.N. Doc. A/49/44 at 45 (1994), paragraph 9.3; *see also Tahir Hussain Khan v. Canada*, Communication No. 15/1994, U.N. Doc. A/50/44 at 46 (1995), paragraph 12.2).

315. The Chamber notes that Article 3 of the Torture Convention applies only to torture, and not to other cruel or inhuman treatment or punishment falling short of torture. The Chamber is aware that the European Court has explicitly stated in the *Soering* case that the obligation not to extradite under Article 3 of the Convention also extends to cases in which the individual would face a real risk of exposure to inhuman or degrading treatment or punishment in the receiving State (Eur. Court HR, *Soering v. United Kingdom*, judgment of 7 July 1989, Series A no. 161, page 35, paragraph 88; *see also Vilvarajah and Others v. United Kingdom,* judgment of 30 October 1991, Series A no. 215, page 34, paragraph 103). Notwithstanding this difference in scope between the two provisions, the Chamber considers that the test developed by the UN Committee against Torture in application of paragraph 2 of Article 3 of the Torture Convention is relevant to complaints under Article 3 of the Convention as well.

316. Applying the test developed by the UN Committee against Torture to the applicants' case, the Chamber notes that there is no allegation or indication that in the United States there is a consistent pattern of gross, flagrant or mass violations of human rights. This consideration, while on its own insufficient to relieve the respondent Parties of all responsibility for handing over the applicants to US forces, weighs heavily against finding that the respondent Parties were under an obligation to consider that

the applicants could be at a specific, substantial risk of being subjected to treatment contrary to Article 3 while in US custody.

317. The Chamber also notes that, as shown in the decisions of the European Commission and the European Court (see paragraph 310 above), the threshold for finding that conditions of detention dictated by justified security concerns are in violation of Article 3 of the Convention is indeed a very high one.

318. Furthermore, the Chamber notes that Section 3(c) of the US President's Military Order provides:

> "Any individual subject to this order shall be –
> …
> (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
> (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
> (d) allowed the free exercise of religion consistent with the requirements of such detention".

319. Finally, the Chamber notes that the International Committee of the Red Cross visited and continues to maintain an active presence at the detention facilities at Guantanamo Bay. The Chamber will therefore give the respondent Parties the benefit of the assumption that they were relying also on this international control mechanism in entrusting the applicants to US custody, and that their treatment there would comply with the minimum standards expected of detention.

iv. Conclusion as to Article 3 of the Convention

320. To sum up, the Chamber finds that the respondent Parties were not under an obligation to evaluate whether the conditions of detention at Camp X-Ray strike the right balance between security requirements and the basic rights of the detainees before handing the applicants over to US forces. Moreover, the Chamber observes that it has not been alleged that there is a consistent pattern of gross human rights violations in the United States of America, and that the threshold for finding a violation of Article 3 due to conditions of detention dictated by security concerns is very high. Finally, the Chamber notes that the US President's Military Order provides that all prisoners shall be treated humanely and that US authorities have admitted the International Committee of the Red Cross to monitor the conditions of detention at Camp X-Ray. On the basis of all the above considerations, the Chamber concludes that the respondent Parties did not violate their duty to protect the applicants from torture or inhuman or degrading treatment or punishment by handing them over to the United States. Accordingly, the Chamber finds that there has been no violation of Article 3 of the Convention by the respondent Parties.

f. Article 6 of the Convention – fair trial

321. All four applicants complain that any trial that they may face by US authorities will not be a fair trial. Therefore, they claim that the respondent Party, by handing them over to US authorities, contributed to a violation of Article 6 of the Convention.

322. In view of its finding of a violation of Article 1 of Protocol No. 6 to the Convention, the Chamber does not consider it necessary to examine the cases separately under Article 6 of the Convention.

6. Conclusion as to the merits

323. In conclusion, in its discussion on the merits of the applications, the Chamber has found that with respect to the expulsion of all four applicants, both respondent Parties acted in violation of Article 1 of Protocol No. 7 to the Convention because they failed to act in accordance with the law. The Chamber has refrained, however, from deciding whether the respondent Parties also acted in violation of Article 3 of Protocol No. 4 to the Convention with respect to the expulsion of the applicants Boudellaa, Lakhdar and Nechle. As to the detention of the four applicants in Bosnia and Herzegovina, the Chamber has found that both respondent Parties violated the rights of the applicants protected by Article 5 paragraph 1 of the Convention for the time period of detention after the entry into force of the Supreme Court decision to

release them on 17 January 2002 until and including their detention in Bosnia and Herzegovina after the hand-over to US forces. In light of this finding, the Chamber has not considered it necessary to examine the applications separately under Article 8 of the Convention. In response to the applicant's complaints under Article 6 paragraph 2 of the Convention, the Chamber has decided that the respondent Parties violated the presumption of innocence with respect to the applicants Boudellaa, Lakhdar and Nechle. Next the Chamber has examined the obligations of the respondent Parties in handing over the applicants to US forces, which lead to their present detention at Camp X-Ray in Guantanamo Bay, Cuba. Taking into consideration that it remains possible that US authorities may seek and potentially impose the death penalty against the applicants, the Chamber has found that the respondent Parties should have sought assurances from the United States prior to handing over the applicants to US forces that the death penalty would not be imposed upon them; failing to do so constitutes a violation of Article 1 of Protocol No. 6 to the Convention. On the other hand, the Chamber has concluded that the respondent Parties did not violate their obligation under Article 3 of the Convention to protect the applicants from torture or inhuman or degrading treatment or punishment by handing them over to US forces. Lastly, the Chamber has not considered it necessary to examine the applications separately under Article 6 of the Convention with respect to the complaint that the hand-over exposes the applicants to the risk of an unfair trial by the US authorities.

VIII. REMEDIES

324. Under Article XI(1)(b) of the Agreement, the Chamber must address the question of what steps shall be taken by the respondent Parties to remedy the established breaches of the Agreement. In this connection, the Chamber shall consider issuing orders to cease and desist, monetary relief, and provisional measures.

325. The applicants have made compensation claims in the amount of several hundred thousand Convertible Marks (*Konvertibilnih Maraka*, "KM") in relation to the pecuniary and non-pecuniary damages suffered by the applicants themselves and their families. These claims include compensation for lost income, compensation for mental suffering of both the applicants and their families, and reimbursement for their attorney fees. Both respondent Parties summarily reject the compensation claims as ill-founded and in any event excessive.

326. The Chamber found violations with respect to all four applicants of Article 1 of Protocol No. 7 to the Convention (expulsion); Article 5 paragraph 1 of the Convention (illegal detention) and Article 1 of Protocol No. 6 to the Convention (abolition of death penalty). In addition the Chamber found a violation of Article 6 paragraph 2 of the Convention (presumption of innocence) with regard to the applicants Boudellaa, Lakdhar and Nechle.

327. Considering its findings regarding the delivery of the decisions on refusal of entry to the applicants, made in the context of the discussion under Article 1 of Protocol No. 7 to the Convention (see paragraphs 177 to 188 above), the Chamber orders the Federation to take all necessary steps to annul the decisions on refusal of entry of 10 January 2002.

328. The Chamber also orders Bosnia and Herzegovina to take all necessary steps to decide, as a matter of urgency, on the appeal of the applicant Lahmar against his expulsion order, taking into account, *inter alia*, its duties under Article 34 of the Law on Immigration and Asylum. Bosnia and Herzegovina shall promptly inform the applicant's representative of this decision.

329. With regard to the applicants Boudellaa, Nechle, and Lakdhar, the Chamber orders the Federation to take all necessary steps to ensure that the administrative dispute before the Supreme Court concerning the decisions revoking the citizenship of the three applicants is decided, taking into account the Chamber's decision.

330. The Chamber further orders Bosnia and Herzegovina to use diplomatic channels in order to protect the basic rights of the applicants. In particular, the Chamber orders Bosnia and Herzegovina to take all

possible steps to establish contacts with the applicants and to provide them with consular support. Bosnia and Herzegovina is further ordered to take all possible steps to prevent the death penalty from being pronounced against and executed on the applicants, including attempts to seek assurances from the United States via diplomatic contacts that the applicants will not be subjected to the death penalty.

331. The respondent Parties are also ordered to retain lawyers authorised and admitted to practice in the relevant jurisdictions and before the relevant courts, tribunals or other authoritative bodies in order to take all necessary action to protect the applicants' rights while in US custody and in case of possible military, criminal or other proceedings involving the applicants. The respondent Parties will each bear half the cost of the attorney fees and expenses of such lawyers.

332. The Chamber further orders the respondent Parties to compensate each applicant in the amount of 10,000 KM for their suffering arising from the violations found with respect to the illegal detention under Article 5, the expulsion under Article 1 of Protocol No. 7, and the failure to seek assurances that the applicants will not face the death penalty under Article 1 of Protocol No. 6. The respondent Parties will each bear half the cost of this compensation for non-pecuniary damages. As the applicants are currently not able to receive such compensation, the compensation shall be placed on an account for the applicants. Should the applicants return to Bosnia and Herzegovina within 12 months from the delivery of the decision, the compensation shall be immediately paid to them. If the applicants do not return to Bosnia and Herzegovina within twelve months of the delivery of this decision, then the non-pecuniary compensation shall be paid to their respective wives and children living in Bosnia and Herzegovina by 11 November 2003.

IX. CONCLUSIONS

333. For these reasons, the Chamber decides,

1. unanimously, to declare inadmissible the complaints in regard to the length of proceedings before the Supreme Court of the Federation of Bosnia and Herzegovina in the administrative dispute against the revocations of citizenship;

2. by 8 votes to 6, to declare admissible the remainder of the applications;

3. by 8 votes to 6, that both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, violated the right of all four applicants not to be arbitrarily expelled, as guaranteed by Article 1 of Protocol No. 7 to the European Convention on Human Rights, the respondent Parties thereby being in breach of Article I of the Human Rights Agreement;

4. by 13 votes to 1, that there has been no violation of the right to liberty and security of person of any of the four applicants as guaranteed by Article 5 paragraph 1 of the Convention, with regard to the period of time from the original arrest until the entry into force of the decision of the Supreme Court of the Federation of Bosnia and Herzegovina to release the applicants on 17 January 2002;

5. by 8 votes to 6, that both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, violated the right to liberty and security of person of all four applicants as guaranteed by Article 5 paragraph 1 of the Convention, with regard to the period from the entry into force of the decision of the Supreme Court of the Federation of Bosnia and Herzegovina to release the applicants on 17 January 2002 until the hand-over of the applicants to US forces, the respondent Parties thereby being in breach of Article I of the Agreement;

6. by 7 votes to 7, with the casting vote of the President, that both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, violated the right to liberty and security of person of all four applicants as guaranteed by Article 5 paragraph 1 of the Convention, with regard to the period from the hand-over of the applicants to US forces until their forceful removal from the territory of Bosnia and Herzegovina, the respondent Parties thereby being in breach of Article I of the Agreement;

7. by 7 votes to 7, with the casting vote of the President, that both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, in the decisions withdrawing the citizenship, violated the right of the applicants Boudellaa, Lakdhar and Nechle to be presumed innocent until proven guilty according to the law as guaranteed by Article 6 paragraph 2 of the Convention, the respondent Parties thereby being in breach of Article I of the Agreement;

8. by 7 votes to 7, with the casting vote of the President, that both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, violated the right of all four applicants not to be subjected to the death penalty, as guaranteed by Article 1 of Protocol No. 6 to the Convention, by failing to seek assurances from the United States of America that the applicants would not be subjected to the death penalty, the respondent Parties thereby being in breach of Article I of the Agreement;

9. by 11 votes to 3, that there has been no violation of the right not to be subjected to torture or to inhuman or degrading treatment as guaranteed by Article 3 of the Convention;

10. by 12 votes to 2, that it is not necessary to consider the cases under Article 8 of the Convention;

11. by 10 votes to 4, that it is not necessary to consider the applicants' complaints that they will not receive a fair trial after their hand-over to US forces under Article 6 of the Convention;

12. by 7 votes to 7, with the casting vote of the President, to order the Federation of Bosnia and Herzegovina to take all necessary steps to annul the decisions on refusal of entry to the four applicants of 10 January 2002;

13. unanimously , to order Bosnia and Herzegovina, to take all necessary steps to decide, as a matter of urgency, on the appeal of the applicant Lahmar against his expulsion order, taking into account, *inter alia*, its duties under Article 34 of the Law on Immigration and Asylum and to inform the applicant's representative of this decision;

14. by 8 votes to 6, to order the Federation of Bosnia and Herzegovina to take all necessary steps to ensure that the administrative dispute before the Supreme Court of the Federation of Bosnia and Herzegovina concerning the decisions revoking the citizenship of the applicants Boudellaa, Nechle, and Lakdhar is decided, taking into account the Chamber's decision;

15. by 10 votes to 4, to order Bosnia and Herzegovina to use diplomatic channels in order to protect the basic rights of the applicants, taking all possible steps to establish contacts with the applicants and to provide them with consular support;

16. by 9 votes to 5, to order Bosnia and Herzegovina to take all possible steps to prevent the death penalty from being pronounced against and executed on the applicants, including seeking assurances from the United States via diplomatic contacts that the applicants will not be subjected to the death penalty;

17. by 9 votes to 5, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to retain lawyers authorised and admitted to practice in the relevant jurisdictions and before the relevant courts, tribunals or other authoritative bodies in order to take all necessary action to protect the applicants' rights while in US custody and in case of possible military, criminal or other proceedings involving the applicants, each of the respondent Parties bearing half the cost of the attorney fees and expenses;

18. by 8 votes to 6, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to pay to each applicant 10,000 Convertible Marks (*Konvertibilnih Maraka*) by way of compensation for non-pecuniary damages, no later than 11 November 2002, each of the respondent Parties bearing half the cost of the compensation;

19. by 8 votes to 6, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to place the compensation awarded in sub-paragraph 18 above in an account for the applicants, which shall be paid to them immediately should they return to Bosnia and Herzegovina

within 12 months from the delivery of this decision. If the applicants do not return to Bosnia and Herzegovina by 11 October 2003, then the respondent Parties are ordered to pay the compensation established in sub-paragraph 18 above to their respective wives and children in Bosnia and Herzegovina by 11 November 2003; and

20. unanimously, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to report to it no later than 11 November 2002, and thereafter periodically every two months until full implementation of the Chamber's decision is achieved, on all steps taken by the respondent Parties to implement the decision.

(signed)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
President of the Chamber

Annex I Partly dissenting opinion of Ms. Michèle Picard
Annex II Partly dissenting opinion of Mr. Dietrich Rauschning
Annex III Partly dissenting opinion of Mr. Viktor Masenko-Mavi and Mr. Giovanni Grasso
Annex IV Dissenting opinion of Mr. Mato Tadić, joined by Mr. Miodrag Pajić

ANNEX I

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mme. Michèle Picard:

PARTLY DISSENTING OPINION OF MS. MICHÈLE PICARD

I disagree with the decision of the majority of the Chamber that it is not necessary to examine the applications separately under Article 6 of the Convention (see paragraph 322 above). In the *Soering* decision, the European Court of Human Rights did not exclude that a decision on extradition could exceptionally raise a problem under Article 6, where there is a risk that the applicant would suffer "a flagrant denial of justice" in the receiving State (Eur. Court HR, *Soering v. United Kingdom*, judgment of 7 July 1989, Series A no. 161, paragraph 113).

While there are considerable doubts whether the applicants will face the death penalty, there seems to be no doubt that the risk of suffering a flagrant denial of justice exists. It was well known already before their expulsion that they were to be detained with an unclear legal status for an undetermined period of time and with no access to a lawyer, like all the other detainees in Guantanamo Bay, Cuba. Moreover, they will not benefit from the guarantees, especially the US Constitutional guarantees, protecting every criminal defendant in the United States. Finally, we are forced to note that all the safeguards provided for in the Military Commission Order No. 1 of 21 March 2002 can be excluded by a decision of the presiding officer of the Military Commission in charge of the trials (*see, e.g.,* Section 4(A)(5)(a) of MC Order No. 1). This applies to the presence of the public, the presence of the accused himself during the proceedings, the defense's right to obtain a copy of the documents used as evidence, the defense's right to call witnesses and to cross-examine witnesses and, above all, the right of the accused to choose his defense counsel (*see, e.g., id.* and Sections 5 and 6(D) of MC Order No. 1).

Considering the rules of criminal proceedings in force in the American legal system, that is an "accusatory" system, which relies to a great extent on the equality of arms between the defense and the prosecution, the absence of these guarantees might lead to a totally unfair trial.

When they handed over the applicants to the United States, the authorities of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina were aware of this legal situation concerning the detainees in Guantanamo Bay. Nevertheless, they did not try to seek any guarantees. Therefore, I am of the opinion that the Chamber should have found a violation of Article 6 of the Convention as well.

(signed)
Mme. Michèle Picard

ANNEX II

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Mr. Dietrich Rauschning.

PARTLY DISSENTING OPINION OF MR. DIETRICH RAUSCHNING

1. I am part of the majority finding that the respondent Parties have violated the human rights of the applicants guaranteed by the European Convention on Human Rights (the "Convention") and Protocol No. 7 to the Convention, as stated under paragraphs 3 and 5 of the conclusions. But I dissent with the decisions carried by the dominant half of the Chamber with the casting vote of the President contained in paragraphs 6, 7 and 8 of the conclusions, and I disagree with the corresponding reasoning of the dominant judges.

I. Violation of the duty of the respondent Parties to seek assurances from the United States that the applicants would not be subjected to the death penalty, conclusion no. 8

2. My main dissent concerns the findings of the dominant half of the Chamber leading to conclusion no. 8, based on the reasoning in paragraphs 270 *seq.* of the decision. I share the starting point of the dominant opinion derived from the decisions of the European Court of Human Rights in the cited cases of *Soering v. United Kingdom* (Eur. Court HR, judgment of 7 July 1989, Series A no. 161), *Cruz Varas and Others v. Sweden* (Eur. Court HR, judgment of 20 March 1991, Series A no. 201), and *Vilvarajah and Others v. United Kingdom* (Eur. Court HR, judgment of 30 October 1991, Series A no. 215). According to these judgments, it may not be permissible to extradite or expel an applicant:

> "where substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he was returned" (*Vilvarajah* at paragraph 103; *paraphrased by the Grand Chamber in H.L.R v. France*, judgment of 29 April 1997, Reports of Judgments and Decisions 1997-III, paragraph 34).

There is no dispute that this principle is applicable as well for the risk being subjected to the death penalty. Consequently, the normative formula may be adjusted to read as follows:

> where substantial grounds *exist* for believing that the person concerned faced a real risk of being subjected to the *death penalty* in the *receiving* State.

The respondent Parties may have violated the human rights of the applicants if such substantial grounds existed for believing that the applicants face a real risk being subjected to the death penalty by the authorities of the United States.

3. The applicants were handed over to US forces on 18 January 2002 and were brought into US custody outside of Bosnia and Herzegovina. This resulted in an expulsion. As to the decisive time for the assessment, there is no reason to deviate from the established jurisprudence of the European Court of Human Rights, as stated in the *Vilvarajah* decision:

> "Further, since the nature of the Contracting State's responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk **must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion**; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears" (*Vilvarajah* at paragraph 107 (emphasis added)).

If the expulsion has already taken place, then an applicant may challenge whether the respondent Parties have ignored *substantial grounds for believing that such a real risk* exists. In these cases the material point in time for this assessment can only be the time of the expulsion; however, this does not preclude the Chamber from taking into account later developments supporting the assessment made at the decisive

time.

4. In paragraph 274 of the dominant opinion, the premise for further examination has been shortened to "whether the applicants risk being sentenced to death". This shortening diverts from the established requirements for finding a violation by the respondent Party, as developed in the jurisprudence of the European Court of Human Rights, yet no reason for this divergence is provided.

5. In paragraphs 275 to 277, the dominant opinion challenges that the extradition procedures provided in the law of Bosnia and Herzegovina have not been followed. During the proceedings, the respondent Parties have stated consistently that the hand-over of the applicants was not an extradition with the aim to prosecute the applicants under the authority of the United States, but rather, an expulsion. The respondent Parties had attempted to expel the applicants to their country of origin, Algeria, without success. After such failure, they handed over the applicants to a foreign State, the United States, that had agreed to receive them. Neither the respondent Parties nor the United States has ever stated that the applicants were handed over with the aim to be prosecuted in criminal proceedings. The stated reason for the detention of the applicants by the United States consistently has been that they are a danger to security; the statements of the respondent Parties are in conformity with this stated reason. Consequently, there was no reason to apply the extradition procedures. As a result, I cannot agree with the dominant opinion that the omission of extradition procedures leads to the conclusion that the applicants have been placed at risk of suffering imposition of the death penalty.

6. As stated in paragraph 2 above of this dissenting opinion, the obligation of the respondent Parties not to expose a person under their jurisdiction to a foreign authority *where substantial grounds exist for believing that the person concerned faced a real risk of being subjected to the death penalty in the receiving State* applies as well in cases of expulsion. Substantial grounds for believing that the applicants faced a real risk of being subjected to the death penalty under the authority of the United States can only exist if, for cases like the applicants' cases, the applicable law of the United States provides for the death penalty—otherwise there could be no risk of the death penalty.

7. In assessing this question on 18 January 2002, the respondent Parties had to rely on the US President's Military Order of 13 November 2001. That Military Order states in Section 2 that an individual who is or was a member of al Qaida or who has engaged in acts or preparation of international terrorism is detained, "and, if the individual is to be tried", he is tried only in accordance with Section 4. Section 4 of the US President's Military Order regulates the authority to establish military commissions. Section 4(a) provides that "*when tried*" an individual "may be *punished in accordance with the penalties provided under applicable law, including life imprisonment or death*" (emphasis added). This provision circumscribes the general competence of the military commissions, but is not the material basis for imposition of the death penalty. Rather, the US President's Military Order expressively refers to *applicable law* as the substantive legal basis for a sentence to death. Consequently, the Military Order itself is not a sufficient ground upon which to base a belief in the risk of imposition of the death penalty against the applicants.

8. The US President's Military Order primarily emphasises detaining members of the enemy forces in this war against terrorism, which is regarded by the United States as an armed military conflict. In the first 10 months after the issuance of the Military Order, no military commissions have been established, and it is not certain that they ever will be. This latter fact supports the attitude of the respondent Parties in January 2002 when they did not focus on the death penalty issue, but rather on the security aspects.

9. In January 2002 when the respondent Parties assessed the risk of the applicants, they could assume that the US authorities are convinced of the following: that the applicants had conspired to launch a bomb attack on the US Embassy in Sarajevo; that no overt acts in this direction occurred; that no explosives or weapons have been found; and that the applicants had contact with the al Qaida network. During the proceedings before the Chamber, the respondent Parties provided information about their knowledge of the potential charges that could be brought against the applicants by US authorities. Such information was made known to them during the criminal proceedings against the applicants in Bosnia and Herzegovina. The respondent Parties could assume that the US authorities had not withheld information from them that could result in more severe charges against the applicants. On the basis of the information

made known to them, the respondent Parties were obliged to assess whether, under the law to be applied by US authorities, substantial grounds existed for believing that the applicants faced a real risk of being subjected to the death penalty by US authorities.

10. In the first instance, the respondent Parties could refer to the Federal Criminal Code of the United States as the "applicable law". The requirements for imposition of the death penalty in criminal proceedings governed by US federal law are prescribed in the US Code, Title 18, Section 3591 (see paragraph 98 above of the decision). Section 3591 first requires that the accused "has been found guilty of … any other offense for which a sentence of death is provided". In these cases, the applicants at most committed an inchoate or incomplete criminal offence in the form of a conspiracy. Plans to bomb a US Embassy may be considered under the following sections of the US Code:

> 18 U.S.C. §§ 844 (f), (i), (n), (destroy property);
> 18 U.S.C. §§ 1111, 1114, 1117 (murder);
> 18 U.S.C. § 2332 (homicide of US national outside US);
> 18 U.S.C. §2332a (use of weapons of mass destruction).

However, none of these provisions allow for imposition of the death penalty for the inchoate form of the crime, *i.e.*, for a conspiracy. Section 2332b of Title 18 of the US Code, which defines acts of terrorism transcending national boundaries (see paragraph 98 above of the decision), could not be applied against the applicants because it pertains only to acts with results within the United States. None the less, even this provision does not allow for imposition of the death penalty in cases of a conspiracy to commit acts of terrorism transcending national boundaries. Thus, the first requirement for application of Section 3591, that the death penalty is provided for in the specific criminal offence at issue, cannot be met.

11. Nevertheless, I will address the second condition for application of Section 3591 as well. The general rule on application of the death penalty contained in Section 3591 requires that the accused:

> "(A) intentionally killed the victim; …
> "(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act" (18 U.S.C. § 3591, see paragraph 98 above of the decision).

However, in these cases, no one claims that the applicants killed any person or intentionally participated in an act directly resulting in the death of any victim. Consequently, the second condition for imposition of the death penalty cannot be met in the cases of the applicants.

12. It follows that, because neither of the two conditions prescribed by Section 3591 of Title 18 of the US Code can be met, the US Federal Criminal Code does not provide for imposition of the death penalty for any potential charges which could be brought against the applicants by US authorities and which therefore formed the foundation for the respondent Parties' assessment of the risk to the applicants (see paragraph 9 above of this opinion).

13. The dominant opinion intentionally neglects that it follows from Title 18 of the US Code that the respondent Parties could not have had *substantial grounds for believing that the applicants faced a real risk of being subjected to the death penalty* under the authority of the United States. The dominant opinion does not even consider the decisive provision of Section 3591 of Title 18 of the US Code. Instead, in paragraph 282 of the decision, the dominant opinion states summarily that it follows from the Notice of Intent to Seek a Sentence of Death filed on 28 March 2002 in *United States v. Moussaoui* in the US District Court for the Eastern District of Virginia that "the death penalty is available for conspiracies related to the events of 11 September 2001". Based upon this, the dominant opinion then concludes that "if the applicants were charged or convicted on any similar count involving these offences, they could face capital punishment" by US authorities.

14. However, firstly it must be recognised that the respondent Parties cannot be blamed for failing to draw the same conclusion at the decisive time of the applicants' expulsion in January 2002, because the Notice in *United States v. Moussaoui* was filed on 28 March 2002, more than two months after the applicants' expulsion. Secondly, the substantive conclusion reached by the dominant opinion based upon that Notice, namely that the death penalty could be imposed upon the applicants, contradicts the

provisions of Section 3591 of Title 18 of the US Code and is ill-founded.

a. The Notice of Intent to Seek a Sentence of Death, which is filed by the attorney for the Government, is a special procedural act prescribed in Section 3593 of Title 18 of the US Code. It reserves the possibility to seek imposition of the death penalty "if the defendant is found guilty … of an offense described in section 3591" (18 U.S.C. § 3595(b)). The filing of the Notice results in a special proceeding before a jury or a court after a conviction or guilty plea to determine the appropriate sentence and the possible imposition of the death penalty. Therefore, from this mere procedural act in a different case arising under different facts and circumstances, the respondent Parties could not be required to assume that a possible conspiracy charge against the applicants could result in the imposition of the death penalty against them (see paragraph 9 above of this dissenting opinion).

b. The applicants' cases cannot be considered the same as the *Moussaoui* case: Mr. Moussaoui has been charged with being a member of the group of about 20 persons who prepared and implemented the terrorist attack on 11 September 2001 on the World Trade Center in New York, resulting in the deaths of more than 3000 victims. Allegedly he trained, together with some other core members of the group, to pilot the hijacked aircrafts. During the criminal proceedings against Mr. Moussaoui, the US Government has changed the indictment to include having "caused the deaths of thousands of persons" by his behaviour (*United States v. Moussaoui*, Superseding Indictment). These details can easily be confirmed by reviewing the docket of the proceedings, which is available on the Internet.

In the applicants' cases, nobody was injured by any act in Bosnia and Herzegovina for which the applicants can be charged with a criminal offence. The only evidence of the applicants' relationship to the al Qaida network known to the respondent Parties is that the telephone number of a liaison of Osama bin Laden was found in the apartment of an alleged co-conspirator of the applicants. Even if this piece of evidence were interpreted in the worst case scenario, *i.e.*, that the applicants are related to the al Qaida network, there is still no substantial ground to believe that the applicants can be charged with setting a cause or failing to prevent the killing of more than 3000 victims on 11 September 2001.

This opinion corresponds with the criminal practice in the United States: The indictment in the case of *United States v. Ernest James Ujaama* before the US District Court for the Western District of Washington charges the defendant with Conspiracy to Provide Material Support and Resources to Designated Foreign Terrorist Organizations, US Code, Title 18, § 2339B. The death penalty is not provided in this indictment, even if the death of any person results from the charged offence. Moreover, the defendant, who has more ties to the al Qaida network than mere telephone contact, has not been indicted for participating in the attacks of 11 September. Another example of an indictment limited to providing support to terrorists is the indictment in the case of *United States v. Karim Koubriti and Others* before the US District Court for the Eastern District of Michigan, Southern Division. However, the dominant judges omit this argument in their reasoning.

For these reasons, the respondent Parties cannot be seriously blamed for not believing that any person in the world having any alleged relations with the al Qaida network is subject to imposition of the death penalty by US authorities just because a telephone number of a liaison of the al Qaida network was found in the room of a co-conspirator.

15. I regret that the dominant judges refused to consider these legal issues in their reasoning, but stated instead that the death penalty is available for conspiracies related to the events of 11 September 2001 (see paragraph 282 of the decision). Furthermore, the last sentence of that paragraph has no basis in the US Federal Criminal Code with regard to the provisions referred to; rather, they make an incorrect sweeping statement on US federal criminal law (*id.*).

16. It is likely that the applicants will not be prosecuted at all, but only held as prisoners during the armed conflict. However, if they would be prosecuted, it is doubtful that the US Federal Criminal Code, discussed above, will be applied by the military commissions in charge of the criminal proceedings (see

paragraph 279 of the decision). The military commissions may apply the *laws of war*, as provided in Section 1(e) of the US President's Military Order of 13 November 2001. However, it is established in the US law and in international law as well that the death penalty can only be imposed for grave breaches of the law. In the present cases, it cannot be considered that the presumed relationship to the al Qaida network as such constitutes a grave breach of the laws of war. Neither can the suspicion of planned terrorist attacks in Bosnia and Herzegovina, which involved no overt act and which resulted in no injuries, be deemed to constitute grave breaches of the laws of war.

I am not sure whether the dominant judges are really drawing conclusions from the death penalties imposed in the Sioux Wars 140 years ago which can be applied to the law applicable today (see paragraph 280 of the decision) and whether these conclusions can be utilised to conclude further that in these cases the respondent Parties have substantial grounds to believe that the applicants face the real risk of being sentenced to death by US authorities. In addition, the facts of the US Supreme Court case of *Ex parte Quinn*, in which German saboteurs were captured after landing in the United States with equipment to blow up public utilities and were sentenced to death in 1942, cannot be compared to the presumed possible charges against the applicants.

The fact that the military commissions may apply the laws of war against detainees in Camp X-Ray in the event of any possible future prosecutions does not in itself provide substantial grounds for the respondent Parties to believe that the applicants face a real risk of being sentenced to death.

17. The reasoning of the dominant opinion continues to develop arguments based upon the prescribed procedures of the military commissions and reaches the conclusion that these tribunals will tend to issue death penalties because they do not fulfil the requirements of Article 6 of the Convention (paragraphs 284—299 of the decision). However, the European Court of Human Rights has not, up until the present day, applied Article 6 as a yardstick to measure the judicial system of a non-Contracting State in cases of expulsion or extradition. The dominant opinion develops this argument as a reason for its belief that imposition of the death penalty is more likely by the military commissions, and to this end, it examines the US Department of Defense Military Commission Order No. 1 of 21 March 2002. I admit that this Order sheds light on the nature of the military commissions, and I further admit that the procedures for the military commissions do not meet the requirements of Art. 6. None the less, I doubt that these arguments can form *substantial grounds for believing that the applicants face a real risk of being sentenced to death.* On the one hand, the respondent Parties could not have known and ought not to have known (*see* Eur. Court HR, *Vilvarajah and Others v. United Kingdom*, judgment of 30 October 1991, Series A no. 215, paragraph 107) about the Department of Defense Order at the time of the applicants' expulsion since it was issued three months after the expulsion. On the other hand, the reasoning of the dominant opinion draws a one-sided and distorted picture of the rules on military commissions. For example, paragraph 291 of the dominant opinion gives the wrong impression that the judicial members of the military commission are subordinate to the Appointing Authority in their judicial functions. It neglects the important functions of the judge advocates, who are known as very qualified and independent jurists. And it omits to mention that a death sentence requires a unanimous affirmative vote of all seven members of the commission (MC Order No. 1 § 6(F) and (G)). Thus, it cannot be said that the substance of the rules and procedures of the military commissions have been prescribed in a manner that is likely to result in a bending of the law at the expense of the applicants.

18. In my opinion the conclusion of the dominant judges in paragraph 300 of the decision is not convincing. There is no separate right of the applicants nor obligation of the respondent Parties to seek assurances that the death penalty would not be imposed. The applicants' expulsion would have violated their human rights in regard to the protection of their lives only if:

> *substantial grounds would have existed at the time of the expulsion, which were known or ought to have been known by the respondent Parties, for believing that the applicants faced a real risk of being subjected to the death penalty under the authority of the United States.* If these grounds exist, then the expelling state may remedy the situation by asking for the said assurances.

In answering the decisive question with respect to its substantive aspect, the dominant opinion states only that "the US criminal law most likely applicable to the applicants provides for the death penalty for the

criminal offences with which the applicants could be charged" (paragraph 300 of the decision). This statement is, in my opinion, ill-founded. The conclusion of the dominant opinion further refers to various "uncertainties", which result in the breach of the obligation to ask for assurances "that the death penalty would not be imposed upon the applicants" (*id.*). But these reasons do not constitute substantial grounds for the respondent Parties to believe that the applicants faced a real risk of being subjected to the death penalty. Consequently, there was no reason for the respondent Parties to seek assurances from the United States concerning the death penalty before handing over the applicants.

This result does not contradict conclusion no. 3 of the decision that the applicants were handed over to US forces in violation of Article 1 of Protocol No. 7 to the Convention.

II. Violation of the right to liberty of the applicants with regard to the period from the hand-over of the applicants to US forces until their forceful removal from the territory of Bosnia and Herzegovina, conclusion no. 6

19. I could not vote in favour of conclusion no. 6 with the reasoning given by the dominant judges in paragraphs 235 to 237 of the decision. The dominant opinion merely states that the applicants were handed over into "*illegal detention* by US forces" (see paragraphs 235 and 237 of the decision). The United States considers itself to be in an armed conflict with the international terrorist network of al Qaida and to be using its right of self-defence. It claims that it is entitled to detain members of the enemy's forces according to international law. The questions may remain open whether such position follows from the rules of the laws of warfare and whether these rules are applicable in this context. However, these questions must be considered before the dominant opinion may state that the applicants were handed over into illegal detention by US forces. Yet the dominant opinion omits these considerations.

III. Violation of the presumption of innocence, conclusion no. 7

20. I consider that the ground given by the authorities of the Federal Ministry of Interior for the revocation of citizenship of three of the applicants is without sense. It cannot be concluded from the fact that criminal charges of terrorism were brought against the applicants that, when they applied for citizenship of Bosnia and Herzegovina some years ago, they gave false statements on their intentions to respect the Constitution (see paragraph 241 of the decision). The respondent Parties submitted that there were other reasons for the revocation of the citizenship, such as the applicants using multiple identities and giving false statements about the loss of their citizenship of origin. It is up to the national courts to decide whether the revocation of citizenship is valid and effective.

21. The dominant judges find that the reference to the bringing of criminal charges against the applicants as a reason for revoking their citizenship violates the rights of the three applicants stated in Article 6, paragraph 2 of the Convention to be "presumed innocent until proved guilty according to law". I share the view that Article 6, paragraph 2 of the Convention was applicable to protect the three applicants, who had been charged with a criminal offence (see paragraph 245 of the decision), and I admit that the presumption of innocence may be applicable in special cases outside the criminal proceedings concerning this charge.

22. However, firstly, I cannot agree with the interpretation written in paragraph 243 of the decision that the Federal Ministry of Interior "concluded that the applicants were guilty of the offences". The Ministry referred to the fact that these "charges were brought to the Federal Prosecution". The fact referred to was true. Moreover, to conclude from this fact that the applicants gave false statements in the proceedings of naturalisation some years ago is ill-founded, regardless of whether or not the Ministry thought they were guilty. The Ministry did not state that they were guilty, and nothing more can be inferred from the illogical conclusion that the applicants gave false statements.

23. The more substantial question is whether the presumption of innocence precludes the authorities in administrative matters from basing a decision on charges of having committed a criminal offence before the guilt of the accused has been established by a criminal judgment. No jurisprudence is known to address this problem. The decision on admissibility of the European Commission on Human Rights in *N.D. v. Netherlands* (no. 22078/93, decision on admissibility of 6 April 1994) may be helpful. In that case, the applicant was charged with the criminal offence of arson, but these criminal charges were later dropped for lack of evidence. Thereafter, civil proceedings ensued between the applicant and the insurer of the burned

building. The civil court rejected the applicant's claim against the insurance company, because it found that the applicant bore a certain responsibility for the fire. In its decision declaring the application inadmissible the Commission stated:

> "The Commission recalls that a distinction must be made between civil proceedings and criminal proceedings arising out of the same events. By virtue of the different standards of proof normally observed in such proceedings, acquittal at the end of a criminal trial, because the accused has not been shown guilty of an offence beyond all reasonable doubt, does not necessarily preclude that same person's civil liability on the balance of probabilities" (*id.*).

24. In administrative law the subject matter at issue determines what standards of proof must be applied. In various laws it may be stated that certain consequences require a conviction in criminal proceedings. For questions of public security with an aim to prevent danger, many states have established a legal rule that behaviour which could be prosecuted can be used in an administrative decision independently of its establishment in a criminal judgment. The presumption of innocence does not forbid that decisions in those administrative matters may be based on other evidence, such as a decision of the prosecutor to open a criminal investigation. The presumption of innocence contained in Article 6, paragraph 2 of the Convention, which aims to protect the fairness of criminal proceedings, cannot be interpreted so widely as to forbid that. It is up to the national administrative law and the competent courts to decide what standards of proof are to be applied, but in administrative law, such determination does not raise human rights issues concerning the presumption of innocence.

25. For these reasons I was forced to vote against conclusion no. 7 of the decision.

(signed)
Dietrich Rauschning

ANNEX III

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the partly dissenting opinion of Messrs. Viktor Masenko-Mavi and Giovanni Grasso.

PARTLY DISSENTING OPINION OF MESSRS. VIKTOR MASENKO-MAVI AND GIOVANNI GRASSO

This case is one of those cases which tests the viability of the European Convention on Human Rights (the "Convention") in the changing world. We are pleased that the majority of the Chamber is of the opinion that the measures to be taken by European democratic governments in order to cope with newly emerging problems (like international terrorism) must comply with the provisions of the Convention. In paragraphs 265 and 267 of the decision, the Chamber rightly acknowledges that the obligation to co-operate in the international fight against terrorism does not relieve the respondent Parties from their obligation to ensure respect for the human rights protected by the Convention. This is why we agreed with the majority in finding the violations specified in the Conclusions.

However, we are of the opinion that in these cases there were also violations of Articles 3 and 6 of the Convention. The respondent Parties, when they in January 2002, by extra-legal actions, contributed to the hand-over of the applicants to military forces of the United States, were aware or should have been aware of the intention and the relevant legislation of the requesting State, especially of the US President's Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism of 13 November 2001. It should have been the duty of the respondent Parties, apart from observing the domestic rules and procedures on extradition, also to weigh carefully the consequences of their actions in light of the requirements of the Convention. The rights secured by Articles 3 and 6 of the Convention are of extreme importance, and in cases where there is a real risk of their flagrant violation, the extraditing or expelling State is bound either to take measures aimed at securing the guarantees enshrined in them or to refuse the extradition or expulsion. This obligation of member States of the Convention has been recognised by the European Court of Human Rights in several of its judgments (*see, e.g.*, Eur. Court HR, *Soering v. United Kingdom*, judgment of 7 July 1989, Series A no. 161; *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240). The Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, adopted on 15 July 2002, also points out this obligation of member States (see paragraph 94 above). It clearly states that extradition may not be granted when there is a serious reason to believe that the person concerned will be subjected to torture or to inhuman or degrading treatment. Furthermore, the Guidelines specifically draw the attention of member States to the following: "*When the person whose extradition has been requested makes out an arguable case that he/she has suffered or risks suffering a flagrant denial of justice in the requesting State, the requested State must consider the well-foundedness of that argument before deciding whether to grant extradition"* (Guidelines, Section XIII, paragraph 4 (emphasis added)).

We think that in light of the measures adopted by the State taking over the custody of the applicants and placing them under its jurisdiction, the applicants have presented an arguable claim that there is a serious reason to believe that their rights secured by Articles 3 and 6 of the Convention might be violated. The legal uncertainty created by the US President's Military Order of 13 November 2001 should have prompted the authorities of Bosnia and Herzegovina and the Federation to carefully consider the issues covered by Articles 3 and 6 of the Convention. As a result of this Order, the applicants' rights guaranteed by Articles 3 and 6 of the Convention are in real danger. There are no clear indications which concrete charges would be brought against the applicants, under which applicable law, when they would be charged, how long they would be detained without trial, or which legal remedies they would be entitled to use to challenge the legality of their detention (see paragraph 300 above). Unlimited detention without concrete charges and a trial, effectuated only for preventive purposes can and should be considered as inhuman treatment covered by Article 3 of the Convention. The mental anguish of persons so detained, resulting from the complete uncertainty as to when, how, and on the basis of which law they would be charged, and also resulting from the uncertainty concerning whether they would be released at all if found not-guilty, is within the domain of suffering which qualifies as inhuman, the infliction of which is prohibited by Article 3 of the Convention.

The same legal uncertainty prevails in respect of the problem of a fair trial in general and not only in respect of the fairness of a trial connected to the imposition of the death penalty. Had there been no death penalty at issue in these cases, the problems concerning the fairness of the trial would still have been under consideration, as specified by the Chamber in paragraphs 284 to 300 of the decision. This kind of uncertainty in respect of the fairness of criminal proceedings is not acceptable: a sending State is liable if it expels a person to a State where the basic principles of a fair trial are seriously endangered. In addition to all these uncertainties, the machinery established for a possible trial of the applicants "is not independent from the executive power" and "operates with significantly reduced procedural safeguards" (see paragraph 300 above).

The measures taken by the member States to fight terrorism should be carried out by lawful means, with due respect for human rights and the principle of the rule of law. Terrorism is an ultimate threat to human rights, but the fight against terrorism might also jeopardise human rights if it goes unreasonably beyond the limits of recognised human rights standards. When adopting measures to combat terrorism, the community of States should also be alert to the danger, as it has been pointed out by the European Court of Human Rights, of "undermining or even destroying democracy on the ground of defending it" (Eur. Court HR, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, paragraph 49).

For these reasons, we respectfully dissent.

(signed)
Viktor Masenko-Mavi

(signed)
Giovanni Grasso

ANNEX IV

In accordance with Rule 61 of the Chamber's Rules of Procedure, this Annex contains the dissenting opinion of Mr. Mato Tadić, joined by Mr. Miodrag Pajić.

DISSENTING OPINION OF MR. MATO TADIĆ, JOINED BY MR. MIODRAG PAJIĆ

In the portion of the decision on admissibility (see paragraph 163 above), as well as in conclusion no. 2, the majority of the Chamber declared the applications admissible, having found a violation of human rights in the merits. However, I am of the opinion that the applications are inadmissible in their entirety as follows:

a) In accordance with the Human Rights Agreement and the Chamber's Rules of Procedure, a basic requirement of admissibility is the exhaustion of domestic remedies.

In the present cases, three of the applicants received procedural decisions on the revocation of their citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina, which were issued by the Ministry of Interior of the Federation of Bosnia and Herzegovina on 16 and 20 November 2001, respectively. These procedural decisions are final and enforceable immediately upon their delivery, unless the possibilities granted by the domestic law are used.

Article 19 of the Law on Administrative Disputes (OG FBiH no. 2/98) stipulates as follows:

> "As a rule, an action shall not prevent the enforcement of the administrative act that the action is filed against, unless otherwise established by law.
>
> On the plaintiff's request, the body competent for enforcement of a contested administrative act shall postpone the enforcement until the issuance of a valid court decision if the enforcement would inflict damage to the plaintiff that would be irreparable, and if the postponement is neither contrary to the public interest nor would inflict major irreparable harm to the opposite party. … The competent body must issue a procedural decision on any request at the latest three days after receipt of the request to postpone enforcement."

On 20 December 2001 the applicants filed an action with the Supreme Court of the Federation of Bosnia and Herzegovina, thus initiating an administrative dispute related to the procedural decisions issued by the Ministry of Interior of the Federation of Bosnia and Herzegovina. However, they did not request **the postponement of the enforcement,** thus allowing the domestic authorities to continue the proceedings. The defence's statement that a positive outcome could not be expected is unacceptable. In this regard, the Chamber, in my opinion, has not provided satisfactory reasoning to support its decision on the admissibility of the applications. Since it has not been shown by any means that this remedy is ineffective, the available domestic remedies have not been exhausted. Therefore, the applications should have been declared inadmissible in their entirety pursuant to Article VIII(2)(a) of the Agreement.

b) The respondent Parties have also accepted the United Nations Security Council Resolution 1373 and joined the fight against all forms of terrorism, aiming to prevent the actions of potential perpetrators or conspirators; thereby, they obliged themselves to take appropriate steps. Certainly, that fight against terrorism does not imply human rights violations. At the same time, however, Bosnia and Herzegovina, being an infant State in transition and under a special kind of protectorate, should not be expected to meet such highly demanding standards which would hardly even be complied with by some countries with highly established legal systems and the rule of law.

Also, for the aforementioned reasons, the applications should have been declared inadmissible. As far as I am concerned, the applications are absolutely inadmissible and it is not necessary to address specific conclusions resulting from any finding of a human rights violation.

(signed)
Mato Tadić

(signed)
Miodrag Pajić