DECISION ON ADMISSIBILITY AND MERITS
(delivered on 4 April 2003)

Case no. CH/02/9499

Belkasem BENSAYAH

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 7 March 2003 with the following members present:

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

Mr. Ulrich GARMS, Registrar
Ms. Olga KAPIĆ, Deputy Registrar
Ms. Antonia DE MEO, Deputy Registrar

Having considered the aforementioned application 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:

I. INTRODUCTION

1. The applicant obtained citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina on 4 January 1995 under the name of Abdulkarim al-Sabahi from Yemen, one of several identities used by the applicant. On 8 October 2001 officers of the Federal Ministry of Interior searched the applicant's apartment because he was suspected of having committed the crime of certifying untrue matters. While this search was still underway the Federation Minister of the Interior issued a communiqué stating that the applicant was found in possession of the telephone number of Osama bin Laden's Senior liaison officer. Later on the same day, 8 October 2001, the applicant was arrested and held in custody in Zenica in connection with criminal proceedings on charges of use of a false identity.

2. On 19 October 2001 the Federal Prosecutor's office in Sarajevo started an investigation against the applicant for the suspicion of having prepared a terrorist attack on the US and UK Embassies in Sarajevo together with a group of co-suspects including the applicants in the Human Rights Chamber's cases CH/02/8679 *et al., Boudellaa et al.,* decision on admissibility and merits of 3 September 2002 ("*Boudellaa and Others* "). In November 2001 the Federal Ministry of Interior issued a decision revoking the applicant's citizenship of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. On 16 January 2002 the applicant's detention in Zenica was ended and the applicant was transferred to the central prison in Sarajevo where he was held in detention on suspicion of terrorism. The next day, 17 January 2002, the Supreme Court ordered that the applicant be released from pre-trial detention. However, instead of being released he was immediately taken into the custody of the Federation Police and then the following day handed over to the military forces of the United States of America based in Bosnia and Herzegovina as part of the NATO-led Stabilisation Force ("US forces[1]"). Subsequently, he was transferred to the military detention facility at Guantanamo Bay, Cuba.

3. The applicant complains about the fact that he was handed over to the military forces of the United States and thereby expelled from Bosnia and Herzegovina.

4. The case raises issues under Article 3 (prohibition of torture or inhuman or degrading treatment), Article 5 (right to liberty and security of person), Article 6 (right to a fair trial) and Article 8 (right to respect for home and 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

5. On 20 February 2002 the applicant's lawyer lodged an application with the Chamber on the applicant's behalf. The applicant's lawyer requested the Chamber, as a provisional measure, to issue a decision declaring that the criminal investigation against the applicant was not in accordance with the law.

6. On 9 April 2002 the Chamber decided to reject the request for provisional measures.

7. On 18 April 2002 the case was transmitted to the respondent Parties under Articles 3, 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 case may raise issues under Articles 3, 5 and 6, paragraph 1 of the Convention and

[1] Terminology: The Chamber notes that the Stabilisation Force ("SFOR") is composed of 35 States including the United States of America. The Agent for Bosnia and Herzegovina stated at the public hearing in *Boudellaa and Others*, on 10 April 2002, that the applicant and his co-suspects 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 in the following refer to the "US forces", except where reference is made to the fact that the delivery slip of the refusal of entry decisions was signed "SFOR" (see paragraph 50 below).

Article 1 of Protocol No. 6 to the Convention with regard to the decision of the respondent Parties to extradite or allow the expulsion of the applicant to a legal system that could expose the applicant to the possible risk of a violation of the rights protected by the mentioned provisions.

8. On 9 May 2002 the Chamber received the written observations of Bosnia and Herzegovina and on 20 May 2002 those of the Federation of Bosnia and Herzegovina. These observations were transmitted to the applicant's representative for comments on 13 May and on 24 May 2002 respectively. The applicant, i.e. his representative, replied to the observations of Bosnia and Herzegovina on 3 June 2002 and to those of the Federation on 14 June 2002.

9. On 10 July 2002 the Chamber requested from the respondent Parties additional information concerning the search of the applicant's apartment on 8 October 2001 and the question whether he was allocated a translator at the hearings in the criminal proceedings conducted against him.

10. On 22 July 2002 Bosnia and Herzegovina and on 25 July 2002 the Federation submitted such information. On 31 July 2002 the additional information was transmitted to the applicant's representative.

11. On 25 September 2002 the Chamber requested additional information from the respondent Party with regard to the confiscation of the piece of paper allegedly containing the telephone number of Osama bin Laden's Senior liaison officer. On 10 October 2002 the additional information was received and transmitted to the applicant's representative for information and possible comment.

12. On 6 February 2003 the Chamber asked the applicant's representative and the respondent Parties whether there had been any developments in the case. On 13 February 2003 the applicant's representative replied stating that the applicant was still detained in Guantanamo Bay and attaching a letter written in Arabic by the applicant to his wife from Camp X-Ray. On 18 and 20 February 2003 the Federation of Bosnia and Herzegovina submitted additional information which confirms that the applicant is still detained in Guantanamo Bay, that the domestic criminal procedure against the applicant is still suspended, and that the Municipal Court in Zenica received a photograph of the applicant from Interpol in Algeria in connection with an identity check of the applicant.

13. The Chamber deliberated on the admissibility and merits of the case on 9 April 2002, 7 July 2002, 3 September 2002 and on 7 March 2003. On the latter date Chamber adopted the present decision.

III. ESTABLISHMENT OF THE FACTS

1. As to the applicant's personal life in Bosnia and Herzegovina prior to October 2001

14. The applicant makes contradictory statements as to whether he is of Algerian or Yemeni origin. He lived with his wife and children in Bosnia and Herzegovina up until his arrest on 18 October 2001 where he resided under the names Abdulkarim al-Sabahi, born on 10 September 1960, in Miswar, Sana'a, the Republic of Yemen, and Belkasem Bensayah, born on 10 September 1960, in Miswar, Sana'a, the Republic of Yemen.

15. On a date unknown to the Chamber, the applicant came to Bosnia and Herzegovina. On 4 January 1995 he was granted citizenship of Bosnia and Herzegovina and citizenship of the Federation of Bosnia and Herzegovina under the name of Abdulkarim al-Sabahi from Yemen.

16. According to his own statement the applicant never worked in Bosnia and Herzegovina but was supported by money sent from his family in Yemen. The applicant married his wife in March 1997. She is by birth a citizen of Bosnia and Herzegovina. At the time of submission of the application the couple had two children.

17. The applicant has not submitted to the Chamber any documentation stating the exact date of his entrance into Bosnia and Herzegovina or any documentation on his naturalisation. He further has

not submitted any information as to whether he has renounced his Algerian or his Yemeni citizenship. Neither respondent Parties has submitted any information on this point.

2. Search of the applicant's apartment

18. On 8 October 2001 officers of the Federal Ministry of Interior searched the applicant's apartment in accordance with a search warrant issued by the Municipal Court in Zenica. This warrant states that the search is ordered at the applicant's apartment for gathering necessary information related to the commission of the criminal act of falsifying documents. The search was carried out in the presence of the applicant and of other witnesses.

19. In the afternoon of 8 October 2001, while this search was still underway, the Federal Minister of Interior issued a communiqué stating that the applicant was found in possession of the telephone number of Osama bin Laden's Senior Liaison Officer. According to the applicant's lawyer, that evening the news on television showed a report about the finding of the phone number.

20. On 9 October 2001, the applicant in the presence of his lawyer identified objects found and seized in his apartment during the search on 8 October 2001 before the investigative judge. He made a statement about each individual object, pointing out that some of those objects were not his and that some of the little notes were taken out of some books. He claims that those objects have no connection to the offence of certifying an untrue matter. The applicant's lawyer received a receipt listing all seized objects.

21. The applicant claims that he was presented a slip of paper which contained a telephone number of a certain "Abu Zubeid", allegedly one of Osama bin Laden's senior liaison officers, not during the identification of seized objects on 9 October 2001, but only during an interrogation by the FBI on 25 October 2001. The applicant denies knowing the phone number or a person called "Abu Zubeid". The respondent Party claims that the phone number was seized during the search of the apartment and listed as number 13 of the list of seized items. The respondent Party further claims that it was presented to the applicant for identification and comments on 9 October 2001.

3. Criminal proceedings against the applicant

a. Criminal Proceedings in Zenica concerning the suspicion of "certification of untrue matters"

22. On 8 October 2001 the applicant was arrested on suspicion that he had committed the criminal offence of "certification of untrue matter", as held punishable under Article 353 paragraph 2 in conjunction with paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina. The applicant was suspected of residing in Bosnia and Herzegovina under the false names "Abdulkarim al-Sabahi" and "Belkacem Bensayah".

23. On 9 October 2001 the applicant was brought before the investigative judge in the presence of his lawyer. The investigative judge of the Municipal Court in Zenica issued a procedural decision ordering the applicant's detention for a period of one month starting at the moment of his arrest, i.e. 8 October 2001.

24. On 10 October 2001 the applicant's lawyer filed an appeal with the Criminal Panel of the Municipal Court against this procedural decision which was rejected on 12 October 2001.

25. On 16 October, deciding upon a request of the Zenica municipal prosecutor, the investigative judge of the Municipal Court in Zenica issued a procedural opening an investigation against the applicant for suspicion that he had committed the criminal offence of certifying untrue matter.

26. On 26 October 2001 the Municipal Prosecutor's Office in Zenica brought an indictment against the applicant.

27. On 29 October 2001 the Municipal Court in Zenica extended the applicant's detention ordered on 9 October 2001 for a maximum period of two months or until the completion of the main hearing.

28. At a hearing, the applicant fully admitted that he had committed the criminal act of certifying untrue matter as set out in the indictment. All the same, the President of the Panel of the Municipal Court in Zenica trying the applicant, postponed the main hearing for an indefinite period in order to establish the real identity of the applicant, requesting assistance in this respect from the Republic of Algeria.

29. On 16 January 2002 the Municipal Court in Zenica terminated the applicant's detention.

b. Criminal Proceedings in Sarajevo concerning the suspicion of "international terrorism"

30. On 17 October 2001 the applicant was heard by the members of US Federal Bureau of Investigation ("FBI") at the premises of the Ministry of Interior of the Zenica-Doboj Canton in the presence of his lawyer and translator. At this hearing the applicant was questioned about plans to carry out terrorist attacks against the United States and British Embassies in Sarajevo.

31. On 20 October 2001, upon a request of the Federation Prosecutor, the applicant was heard by a judge in Sarajevo with respect to the suspicion that he had committed the attempted crime of international terrorism under Article 168 paragraph 1 in conjunction with Article 20 of the Criminal Code. The applicant was transferred from Zenica prison for this hearing to Sarajevo and brought back afterwards. The applicant's lawyer was present at the hearing. The applicant requested to be provided with an interpreter for the Arab language and he was allocated one. The applicant claims that no evidence concerning the suspicion that he was involved in terrorist activities was presented to him. He further claims that when his lawyer requested to examine the case file, the request was refused with the explanation that the lawyer would be able to do so after obtaining the procedural decision on conducting an investigation.

32. On the same day, 19 October 2001, the Federal Prosecutor's Office submitted a request to the Supreme Court of the Federation of Bosnia and Herzegovina ("the Supreme Court") that it carry out an investigation against the applicant and other persons from the so called "Algerian Group" (including the applicants in *Boudellaa and Others)* on grounds of suspicion of having attempted to commit the criminal act of international terrorism.

33. On 25 October 2001 the investigative judge of the Supreme Court ordered the applicant's detention for the period of one month. The decision ordering detention states that this period of detention will start to run from the day of the termination of the detention ordered by the Municipal Court in Zenica in the proceedings regarding the suspicion of certifying an untrue matter (see paras. 22 to 29 above).

34. On 30 October 2001 the investigative judge of the Supreme Court, upon the request of the Federal Prosecutor's Office, issued the procedural decision ordering the conduct of an investigation against the applicant and seven other persons (including the applicants in *Boudellaa and Others*) on grounds of the suspicion that they committed the criminal offence of international terrorism held punishable under Article 168 paragraph 1 of the Criminal Code.

35. On 5 November 2001, the applicant's lawyer filed an appeal against this decision of the investigative judge of the Supreme Court.

36. On 22 November 2001 the Criminal Panel of the Supreme Court rejected the appeals of the applicant and four other persons from the so-called "Algerian Group" against the decisions to extend their detention.

37. On 9 April 2002 the Supreme Court issued a decision to suspend the criminal proceedings against the applicant. The applicant's representative appealed against this decision asking for termination of the proceedings rather than suspension. On 8 May 2002 the Supreme Court refused the appeal of the applicant.

4. Revocation of citizenship and refusal of entry to the applicant

38. On 16 November 2001 the Federal Ministry of Interior issued a decision revoking the applicant's citizenship of Bosnia and Herzegovina and his citizenship of the Federation of Bosnia and Herzegovina. The Federal Ministry of Interior based this revocation 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 applicant leads to the conclusion that, when he applied for the citizenship, he had had hidden intentions to violate the Constitution and the laws of the Federation. This decision was delivered to the applicant on 4 December 2001.

39. Also on 16 November 2001 the Commission for Consideration of the Status of Persons Naturalised After 6 April 1992 and Before Entry Into Force of the Constitution of Bosnia and Herzegovina ("the Commission"), replying to a request of the Supreme Court, stated that it was not competent to consider the case of the applicant.

40. The applicant did not appeal the procedural decision on revocation of citizenship. He submits that although he disagreed with the reasons given in the decision on revocation of citizenship, he was aware that other reasons existed that would justify such a decision. Furthermore, the applicant had the intention to move to Algeria before his children reached school-age.

41. On 28 December 2001 the Bosnia and Herzegovina Ministry of Civil Affairs and Communications gave its approval to the procedural decision of 16 November 2001 on revocation of the applicant's citizenship.

42. On the same day, 28 December 2001, the Federal Ministry of Interior submitted to the Bosnia and Herzegovina Ministry of Civil Affairs and Communications an initiative for the expulsion of the applicant from the territory of Bosnia and Herzegovina. The Ministry of Civil Affairs and Communications took no action upon this initiative.

43. On 10 January 2002 the Federal Ministry of Interior issued a decision on refusal of entry to the applicant onto the territory of Bosnia and Herzegovina 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 this decision is a decision on refusal of entry and not a decision of expulsion, it orders the applicant to leave the territory of Bosnia and Herzegovina immediately.

44. The co-ordination team monitoring the realisation of the plan of activities in the fight against terrorism consisting of representatives of the Bosnia and Herzegovina Council of Ministers, the Ministry for Civil Affairs and Communications of BiH, the Ministry for Human Rights and Refugees of Bosnia and Herzegovina and the State Border Service, were informed of the decision on refusal of entry and requested to take necessary measures and action within their competence.

5. Diplomatic contacts concerning the applicant

45. On 10 April 2002 the Chamber held a public hearing in *Boudella and Others* (hereinafter "the public hearing"). At the public hearing the Federation of Bosnia and Herzegovina informed the Chamber about 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. According to this memorandum, on 11 October 2001, during an official visit to Sarajevo, a high official of the Algerian Secret Service was informed about the applicant and the suspicion that he and others were involved in terrorist activities. He promised full co-operation without specifying this any further. The high 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.

46. 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 applicant and several other persons, including the applicants *Boudellaa and Others*, to their native country of Algeria. The representatives of Algeria refused the request to accept the applicant 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. The Chamber has no information as to whether the respondent Parties also tried to contact the Republic of Yemen with a similar request.

47. 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 applicant and other persons who were all believed to have been involved in international terrorism.

6. The Events of 17 and 18 January 2002

48. On 17 January 2002 the investigative judge of the Supreme Court issued a decision terminating the applicant's pre-trial detention ordered by the Supreme Court on 25 October 2001 on the ground that there were no further reasons or circumstances based upon which pre-trial detention could be ordered. This decision refers to the applicant as citizen of Bosnia and Herzegovina. According to the undisputed statement of Mr. Fahrija Karkin, lawyer of Mr. Lakhdar, one of the applicants in *Boudellaa and Others*, the decision was brought to the prison of the Cantonal Court in Sarajevo, where the applicant was being held, at approximately 5 p.m. on 17 January 2002. It remains unclear whether the applicant ever personally received the decision ordering his release.

49. During the night of 17 to 18 January 2002 an unauthorised demonstration of approximately 500 persons took place outside the Sarajevo prison, in which the applicant and other persons also suspected of terrorist activities, including the applicants in *Boudellaa and Others*, were held, during which eight police officers were injured, one of them badly.

50. On 17 January 2002 at 11.45 p.m. the applicant was ordered to be released from pre-trial detention and 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, these forces and forces of the Ministry of Interior of Sarajevo Canton handed the applicant over to the US forces at Butmir Base at 6 a.m. on 18 January 2002[2]. On the same date those US forces delivered the decision on refusal of entry of 10 January 2002 to the applicant. The delivery slip submitted to the Chamber purports to be signed by the applicant and by "SFOR", as the delivering authority. This occurred at the Sarajevo airport before the applicant boarded the plane that transported him out of Bosnia and Herzegovina.

7. Developments subsequent to the hand-over of the applicant

51. On 31 December 2002 the US Embassy in Sarajevo informed the applicant's representative in Bosnia and Herzegovina in a letter that the applicant was transported by US forces to Guantanamo Bay on 19 January 2002, where he is being held as an enemy combatant. According to the Embassy's letter, the applicant and five other Algerians arrested in Bosnia and Herzegovina (including the applicants of *Boudellaa and Others)* may be detained until the cessation of the "on-going armed conflict and related attacks against the United States, its citizens and citizens of numerous other nations". The applicant's representative was further informed that the applicant is being treated in accordance with the Third Geneva Convention of 1949 and that he and his fellow detainees receive regular visits from the International Red Cross. She was also told that the applicant's wife could correspond with her husband but that visits by family members, attorneys and members of international organisations or public interest groups were prohibited. In January 2003 the applicant's representative submitted to the Chamber a letter written by his client to his wife in Zenica sent from detention in Guantanamo Bay.

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[2] Terminology: Whilst the action of delivering the applicant to the 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 ever followed. Therefore, for the purposes of this decision, it has been classified as a "hand-over".

IV. RELEVANT LEGISLATION

A. The issue of citizenship

1. Law on Citizenship of Bosnia and Herzegovina

52. Article 1 of the Law on Citizenship of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina— hereinafter "OG BiH"— no. 13/9 and 96/03)) 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."

53. 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, (…)"

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

> "(1) The 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. (…)"

55. 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. (…)"

56. 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. (…)"

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

57. 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)."

58. 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; (…)"

59. Article 26 provides as follows:

> "The citizenship of the Federation shall cease by renouncing, withdrawal and depriving from the date of delivery of the valid decision to a person to which the administrative decision refers. If the permanent residence of such person is not known or may not be determined, the citizenship of the Federation shall cease on the date of publishing of the valid decision in the Official Gazette of the Federation of Bosnia and Herzegovina.
>
> The 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."

60. Article 28 paragraph 3 provides as follows:

> "The decision granting citizenship of the Federation under paragraph 2 of this Article, as well as the 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 the decision on renouncing citizenship, for which the Ministry of Civil Affairs and Communications is competent, as under Article 30 paragraph 1 of the Law on Citizenship of Bosnia and Herzegovina."

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

> "The (…) procedural decision on cessation of citizenship of the Federation under Article 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 are not fulfilled. (…)"

3. The Law on Administrative Disputes

62. Article 19 of the Law on Administrative Disputes (OG FBiH no. 2/98 and 8/00) 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 the enforcement of the 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 it inflict a major irreparable harm to the opposite party. The evidence on the filed action shall be enclosed with the request for the postponement. The competent body must issue a procedural decision on any request at the latest three days after the receipt of the request to postpone the enforcement.
>
> The competent body under paragraph 2 of this Article may, for other reasons, postpone the enforcement of the 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."

B. The refusal of entry

1. The Law on Immigration and Asylum

63. 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; (…)"

64. 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."

65. 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. (…)"

66. 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."

67. 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. (…)"

68. Article 36 provides as follows:

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

69. 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).

70. 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.

71. 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."

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

72. Article 139 of the Law on Administrative Procedures (OG FBiH no. 2/98 and 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."

73. 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."

74. 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. The Code of Criminal Procedure of the Federation of Bosnia and Herzegovina

75. The Code of Criminal Procedure (OG FBiH no. 43/98, 23/99, 50/01 and 27/02) (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).

76. Article 183 provides, in so far as relevant, as follows:

1. If there are grounds for suspicion that a person has committed a crime, but the conditions do not exist for mandatory custody, custody may be ordered against that person in the following cases:
    1. if he conceals himself or if other circumstances exist which suggest the strong possibility of flight;
    2. if there is a warranted fear that he will destroy, hide, alter or falsify evidence or clues important to criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, fellow accused or accessories in terms of concealment;
    3. if particular circumstances justify the fear that the crime will be repeated or an attempted crime will be completed or a threatened crime will be committed and for those offenses a sentence of imprisonment of three years or a more severe penalty is prescribed;
    4. if the crime is one for which, because of the manner of execution or the consequences of the crime, detention is necessary for the safety of the citizenry. These include crimes envisaged in the Criminal Code of the Federation: terrorism (Article 146), genocide (Article 153), war crimes against civilian population (Article 154), war crimes against the injured and the diseased (Article 155), war crimes against war detainees (Article 156), organizing groups and encouraging genocide and war crimes (Article 157, paragraphs 1 and 2), unlawful killing or wounding of enemy (Article 158), use of unallowed combat devices (Article 160), international terrorism (Article 168), endangering of persons under international protection (Article 169), taking hostages (Article 170), murder (Article 171, paragraphs 1 and 2), inducing suicide and

aiding in suicide (Article 175, paragraphs 2 and 3), serious bodily injury (Article 177, paragraphs 3 through 5), kidnapping (Article 184, paragraphs 2 and 3), rape (Article 221), sexual intercourse of a disabled person (Article 223, paragraph 2), sexual intercourse with a minor (Article 224, paragraphs 2 and 3), sexual intercourse by abuse of position (Article 225, paragraph 3), unauthorized production and trafficking of narcotic drugs (Article 252), larceny (Article 275), robbery (Article 276), serious cases of larceny or robbery (Article 277) hijacking of aircraft or vessel (Article 321), and endangering the safety of aircraft flight (Article 322).

2. In the case referred to in Paragraph 1, Point 2 of this article, custody shall be terminated as soon as the evidence is obtained for which custody was ordered.

….

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

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

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

79. 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 Bosnia and Herzegovina or a Federation national;
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 both under domestic law and under 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 be sufficient evidence to support a reasonable suspicion that the foreigner whose extradition is sought did commit the particular crime or that a final verdict be already in existence.
10. ….. and if the extradition is not sought for a crime for which capital punishment is prescribed based on the law of the country seeking extradition, unless the country seeking extradition provides guarantees that the capital punishment shall not be pronounced or exercised. …"

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

1. "A proceeding for extradition of accused or convicted foreigners shall be instituted on the petition of the foreign state.
2. The petition for extradition shall be submitted through diplomatic channels.
3. The following must accompany the 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 foreigner's nationality;
    3. the indicting proposal or verdict or decision of custody or some other document equivalent to this decision, in the original or certified copy, containing the first and the last name of the person whose extradition is sought, and other data necessary to establishing his identity, a description of the crime, the legal name of the crime and evidence to support a reasonable suspicion;
    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 because of the crime for which extradition is being sought; and if the crime was committed on the territory of a third state, then an extract from the text of the criminal law on 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."

81. 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 a foreign national 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 foreign national is living or in whose jurisdiction he happens to be.
2. If the permanent or temporary residence of the foreigner whose extradition is sought is not known, The Federal Ministry of Justice shall first establish these facts through the Federal Ministry of Interior. …."

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

1. "In urgent cases, when there is a danger that the foreign national will flee or conceal himself, and if the foreign state has sought temporary custody of the foreign national, the competent law enforcement agency may arrest the foreigner 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 for establishing the foreigner's identity, the nature and name of the crime, the number of the warrant, the date, place and name of the foreign authority ordering 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 foreign national 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 foreigner 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, that period not to be more than 3 months from the date when the foreigner was taken into custody. …."

C. Relevant International and US Law

83. The present case raises issues for which international and US Law is relevant. These issues are identical to those discussed in *Boudellaa and Others* (*ibid,* paras. 93 to 98) where the relevant legislation is also contained in detail.

V. COMPLAINTS

84. The applicant complains about his expulsion from Bosnia and Herzegovina. In particular, he argues that he was not extradited to the United States in accordance with the Code of Criminal Procedure. He complains of a violation of Article 1 of Protocol No. 7 to the Convention providing for procedural safeguards in the expulsion of an alien. In particular, he claims that by not following the expulsion procedures provided for under domestic law he was practically deprived of the possibility to submit any reasons against his expulsion and to have a decision ordering his expulsion reviewed. The applicant's lawyer also argues that the revocation of the applicant's citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina was aimed exclusively at avoiding the obligation not to expel nationals arising from Article 3 of Protocol No. 4 to the Convention.

85. The applicant claims further that the respondent Parties violated his right to liberty and security as protected under Article 5 of the Convention as he was arbitrarily held in detention after the coming into force of the Supreme Court decision to terminate his pre-trial detention on 17 January 2002. Additionally, he alleges a violation of Article 5, paragraph 2 of the Convention because he was not informed of the reasons for his continued detention after the Supreme Court ordered his release on 17 January 2002. The applicant makes this complaint both in relation to his detention by domestic authorities, which according to him lacked any legal basis, and also to his detention by the US forces. In this context, the applicant's lawyer claims that the applicant was handed over to the US forces on the basis of a "common agreement". She argues that a "common agreement" is no valid reason for detention by the US forces, as it is neither foreseen as a ground of detention by domestic law nor by the Convention.

86. In addition, the applicant's lawyer complains of a violation of Article 2 of the Convention and of Article 1 of Protocol No. 6 to the Convention, alleging that being handed over to the US forces placed the applicant under the risk of facing the death penalty. She further complains of a violation of

Article 3 of the Convention arising from the fact that the applicant might face death penalty after his hand-over and also because he is allegedly subject to inhuman treatment while detained by US authorities in Camp X-Ray, Guantanamo Bay, Cuba. The applicant's lawyer claims that it is well known, according to the world media and the reports of Amnesty International, that the applicant and his co-detainees in Guantanamo Bay are detained "within a room that may be considered a cage, with masks over their faces and below minimum standards of human treatment".

87. The applicant further alleges a violation under Article 8 of the Convention with respect to his unlawful separation from his spouse and two children who live in Bosnia and Herzegovina.

88. The applicant complains in detail of a violation of his right to a fair trial, protected by Article 6 of the Convention. He lists a number of alleged violations of the Code of Criminal Procedure. In particular he argues that his right to have proceedings conducted against him in his own language and his right that he or his lawyer have insight into the files have been violated. He further complains that he was unlawfully questioned by agents of another State.

89. The applicant also complains of a violation of Article 13 of the Convention in relation to Articles 3, 5, and 8, as the illegal action of the respondent Parties meant that he had no effective remedies to address the violations that allegedly occurred to him.

90. Finally, the applicant complains of a violation of his right under Article 14 of the Convention not to be discriminated against in connection with his rights under Articles 3, 5, 6, and 8 of the Convention. He argues that the respondent Parties' arbitrary action, and in particular his hand-over to the US Forces, were based on the fact that he is of foreign descent.

VI. SUBMISSION OF THE PARTIES

A. Bosnia and Herzegovina

1. As to the facts and domestic law

91. In its written submissions of 8 May 2002 Bosnia and Herzegovina states that the applicant 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, Bosnia and Herzegovina claims, without substantiating its allegation, that the applicant had double or triple identity. Bosnia and Herzegovina further argues that the applicant's citizenship was removed at the time of the delivery of the decision on revocation to the applicant on 4 December 2001 in accordance with Article 24 of the Law on Citizenship of Bosnia and Herzegovina.

92. In respect of a possible extradition[3] of the applicant, 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 applicant if he were to be deported from Bosnia and Herzegovina.[4] On 17 January 2002, the US Embassy in Sarajevo informed Bosnia and Herzegovina in a diplomatic note that it was willing to take custody of the applicant and five more persons, including the applicants in *Boudellaa and Others*, who were all believed to be involved in international terrorism. Bosnia and Herzegovina concludes that, because Algeria, the applicant's country of origin, did not want the applicant back, it was Bosnia and Herzegovina's right under international law to extradite the applicant to the authorities of the United States of America who had asked for his extradition based on the suspicion of the applicant's involvement in terrorist activities.

2. As to the admissibility

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

[4] It is unknown whether the applicant was citizen of Algeria at this time.

93. Bosnia and Herzegovina claims that the application is inadmissible. Bosnia and Herzegovina argues that the applicant has not exhausted the available domestic remedies. Secondly, it claims that the applicant did not wait six months before submitting his application, the applicant thereby being in breach of the six-months rule under Article VIII(2)(a) of the Agreement.

3. As to the merits

94. Bosnia and Herzegovina did not submit any written observations with regard to the merits.

B. The Federation of Bosnia and Herzegovina

1. As to the facts

95. In its written observations of 19 May 2002 the Federation submitted an account of the facts pertaining to the criminal proceedings against the applicant, the revocation of citizenship and the hand-over of the applicant to the US forces which coincides in substance with the facts as established by the Chamber. In its further observations of 25 July 2002 the Federation submitted additional information including an order of the court ordering the search of the applicant's apartment on 8 October 2001 because of the suspicion that he had falsified documents. The Federation also submitted the minutes of this search according to which the applicant was present during the search.

2. As to the admissibility

96. The Federation claims that the application is inadmissible as manifestly ill-founded.

3. As to the merits

97. The Federation argues that the applicant's detention was in accordance with the law. The Federation further notes that neither the applicant nor his representative have appealed against the procedural decision on the revocation of citizenship and that the applicant did not ask for the approval of residence in the territory of Bosnia and Herzegovina or to be granted asylum. The Federation concludes that therefore the applicant was an illegal resident and his expulsion was justified.

98. With respect to the alleged violation of Articles 3, 5 and 6, paragraph 1 of the Convention and Article 1 of Protocol No. 6 to the Convention, the Federation claims that its organs have not issued any decision as to which country the applicant would be expelled to. The Federation argues that its organs have not been able to make any independent assessment of the circumstances the applicant would be faced with in the country to which he was to be expelled. Moreover, the Federation was not in the position to make an independent assessment of the circumstances the applicant would be confronted with in the United States, because of the specific economical, political conditions and other global conditions.

C. The applicant

99. The applicant maintains his complaints.

VII. OPINION OF THE CHAMBER

A. Admissibility

1. Exhaustion of domestic remedies

100. Bosnia and Herzegovina has challenged the admissibility of the application on the ground that the applicant did not exhaust domestic remedies, referring to the possibility of initiating an administrative dispute against the decision on revocation of citizenship before the Supreme Court.

101. The Chamber notes that in the present case the applicant did not appeal to the Supreme Court against the revocation of his citizenship. The Chamber considers, however, that the alleged violation of the rights of the applicant is not directly the revocation of his 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 case before the Chamber. The impugned acts in the present case are the search of the applicant's apartment, the applicant's detention, the order of refusal of entry and the handing-over of the applicant into the custody of the US forces.

102. Neither respondent Party has substantiated how any remedies would have proved effective against the impugned acts.

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

2. The six-months rule

104. Bosnia and Herzegovina objects to the admissibility of the application in that the applicant failed to wait for six months after the final decision in his case, as allegedly required by Article VIII(2)(a) of the Agreement. As the Chamber has explained in *Boudellaa and Others* (*ibid,* paras. 154 to 155) the applicant was not obliged to wait for six months before submitting an application; on the contrary, he was obliged to file an application within six months. The applicant hence complied with Article VIII(2)(a) of the Agreement.

3. Discrimination complaint

105. The applicant complains of discrimination in connection with his rights under Articles 3, 5, 6, and 8 of the Convention on the ground that the he is of foreign descent. The applicant does not substantiate his discrimination claim any further. It follows that this part of the application is inadmissible as manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement.

4. Complaint under Article 6, paragraph 3 of the Convention - minimum procedural safeguards of a person charged with a criminal offence

106. The applicant complains of a violation of his rights as protected by Article 6 of the Convention. He lists a number of alleged procedural violations in the criminal proceedings initiated against him for the suspicion of terrorism without substantiating these points any further. In particular, he claims that his right to be informed in his own language during the criminal proceedings was violated as well as his lawyer's right to have insight into the files. On the factual level, the Chamber notes that from the submissions of the applicant's lawyer it appears that she had the possibility to have insight into the applicant's files on several occasions and that an interpreter was present at many of the hearings before the investigative judge.

107. As to the legal aspects of this complaint, the Chamber interprets this particular claim of the applicant to be a claim of a violation of Article 6, paragraph 3 of the Convention. Article 6, paragraph 3 of the Convention guarantees to anyone who is subject of a criminal trial certain rights necessary to enable him to prepare and conduct defense on equal terms with the prosecution. The special "minimum guarantees" listed in Article 6, paragraph 3 of the Convention in the context of a fair trial for "everyone charged with a criminal offence" include the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him" and the right "to have adequate time and facility to prepare his defense."

108. The Chamber recalls that the safeguards of Article 6, paragraph 3 of the Convention must be understood in the context of the guarantee of a fair trial set out in Article 6 of the Convention as a whole. The Chamber notes that in the present case the applicant, although under the suspicion of being involved in terrorist activities, was never formally charged with this offence. No indictment was ever issued and no trial before a domestic court at which the applicant must defend himself appears

probable in the near future. The Chamber notes that the right to be promptly informed about the reasons for detention in a language understandable to the applicant, as opposed to the right to be promptly informed in a language understandable to the applicant in the context of Article 6, is contained in Article 5, paragraph 2 of the Convention which will be discussed on the merits. The Chamber therefore finds that, the investigations against the applicant having been suspended before an indictment was filed, the complaints under Article 6 of the Convention are premature. It follows that this part of the application is inadmissible as manifestly ill-founded, within the meaning of Article VIII(2)(c) of the Agreement.

5. Conclusion on admissibility

109. The Chamber decides to declare inadmissible the applicant's claim that he has been discriminated against and his claim of a violation of Article 6, paragraph 3 of the Convention. It further decides to declare the remainder of the application admissible against both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, in its entirety, as no other grounds for declaring the case inadmissible have been established.

B. Merits

110. Under Article XI of the Agreement the Chamber must address the question whether the facts established above disclose a breach by the respondent Parties of their obligations under the Agreement.

1. Article 1 of Protocol No. 7 - procedural safe-guards in the expulsion proceedings

111. Article 3 of Protocol No. 4 prohibits the expulsion of nationals and Article 1 of Protocol No. 7 provides for procedural safeguards in the expulsion of aliens. Article 3 of Protocol No. 4 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."

and Article 1 of Protocol No. 7 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."

112. With regard to the rights protected by Article 3 of Protocol No. 4 and Article 1 of Protocol No. 7, the Chamber preliminarily notes 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.

113. 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.

114. The applicant obtained both the citizenship of Bosnia and Herzegovina and that 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.

115. On 16 November 2001 the Federal Ministry of Interior passed a decision against the applicant revoking his citizenship of Bosnia and Herzegovina and the citizenship of the Federation on the grounds that the applicant "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 he "shall harm international and other interests of Bosnia and Herzegovina".

116. The last paragraph of the decision of 16 November 2001 states that the decision is "final" and cannot be appealed against, but an administrative dispute may be initiated before the Supreme Court. The Chamber notes that the applicant, although he disagreed with the reasoning given in the decision of 16 November 2001, chose not to initiate an administrative dispute against the revocation of citizenship.

117. According to Article 24 of the State law, the citizenship is lost on the day of notification of the decision to the person concerned, i.e. in the present case on 4 December 2001. Article 26 of the Federation law states that the citizenship of the Federation ceases to exist when the valid decision is delivered to the person. In the present case, the applicant did not challenge the revocation of his citizenship before a court. Article 33 of the Federation law provides for a further requirement for the entry into force of the decision on revocation of citizenship. It states that the procedural decision on revocation of citizenship must be submitted to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina for its consent. It shall enter into force two months after being submitted to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina unless the Ministry determines that conditions for withdrawal or deprivation of citizenship under the Law on Citizenship of Bosnia and Herzegovina are not fulfilled. The Ministry of Civil Affairs and Communications of Bosnia and Herzegovina received the procedural decision on revocation of citizenship of 16 November 2001 on 20 November 2001 and gave its consent on 28 December 2001.

118. In light of the uncertainty which results from a lack of clarity in the legislation of the respondent Parties and in the action of their organs, the Chamber will not decide whether the applicant had lost his citizenship on the date of his being handed over to the US forces, i.e. 18 January 2002. It will give the respondent Parties the benefit of the uncertainty in this respect and proceed to consider the application under Article 1 of Protocol No. 7 to the Convention, which provides aliens with procedural safeguards in case of expulsion.

119. 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 12 of Protocol No. 7 to the Convention). Article 1, paragraph 1, of Protocol No. 7 to the Convention provides that no alien lawfully resident in the territory of a Contracting State may be expelled therefrom except in pursuance of a decision reached in accordance with the law.

120. The Chamber therefore must examine whether the expulsion of the applicant 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 regard to the applicant. The Federal Ministry of Interior submitted an initiative to the Ministry of Civil Affairs and Communications to issue such an order, but the Ministry of Civil Affairs and Communications took no action.

121. Nonetheless, the Chamber notes that on 10 January 2002 the Federal Ministry of Interior issued a decision on refusal of entry to the applicant on the territory of Bosnia and Herzegovina on the basis of Article 27, paragraph 1(b) of the Law on Immigration and Asylum. This is – technically speaking – a decision of "refusal of entry" and not an "expulsion" order. However, this decision also ordered the applicant to leave the territory of Bosnia and Herzegovina immediately. The Chamber will examine whether this decision 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 an order of refusal of entry was a sufficient basis for an expulsion.
(b) The Federal Ministry of Interior asked the Ministry of Civil Affairs and Communications to issue an expulsion order against the applicant.
(c) 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 regard to the issuance of refusal of entry orders. As a result, if a refusal of entry order could substitute a decision on expulsion, these limitations could be easily circumvented.

122. The Chamber therefore finds that the decision of 10 January 2002 on refusal of entry, which also orders the applicant to leave the territory of Bosnia and Herzegovina immediately, does not provide a sufficient legal basis in accordance with the Law on Immigration and Asylum for the expulsion of the applicant.

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

124. It is submitted by the respondent Parties that on 18 January 2002 the applicant received, from the US forces, the decision of 10 January 2002 on refusal of entry. The Federation has not explained why the decision was delivered to the applicant by members of a foreign military force at the moment of his being taken out of the country, considering that the applicant had previously been detained by the Federation in the eight days between issuance and delivery of the decision. The decision of 10 January 2002 states 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 the 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* governed this issue, and that therefore an appeal would have had suspensive effect.

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

126. 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 the law". There is no need to examine whether in the applicant's case such circumstances prevailed as to allow the respondent Parties under paragraph 2 of Article 1 to rely on the permission to expel the applicant before he could exercise the procedural rights set out in Article 1, paragraph 1 (a), (b) and (c) of Protocol No. 7 to the Convention.

127. The Chamber also finds that these violations fall within the responsibility of both respondent Parties. The law and also the factual action taken by both respondent Parties in regard to the revocation of citizenship, the decision on refusal of entry and also the handing-over the applicant for expulsion to the US forces, after making sure in diplomatic contact that those forces would take him into custody and bring him out of the country, involved action of both Parties which constitutes a violation of the applicant's rights.

2. Article 8 of the Convention - right to respect for home with respect to the search of the applicant's apartment on 8 October 2001

128. The applicant complains that the search of his apartment on 8 October 2001 by members of the Ministry of Interior of the Zenica-Doboj Canton constitutes a violation of his right to respect for his home as protected by 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."

129. The search of the applicant's apartment on 8 October 2001 by members of the Ministry of Interior of the Zenica-Doboj constitutes an interference with the applicant's right to respect for his private life and home. However, according to the well-established case law of the European Court of Human Rights, the search of a private house as a part of a criminal investigation may be justified. To this end it must be in accordance with the law and the law has to provide for effective and adequate safeguards against abuse. In addition, the reasons adduced to justify such measures must be relevant and sufficient and must not be disproportionate to the aim pursued (see Eur. Court, *Camenzind v. Switzerland,* judgment of 16 December 1997, Reports 1997-VIII, para. 45).

130. The Chamber notes that the search was carried out in accordance with a search warrant which the investigative judge of the Municipal Court in Zenica issued in connection with the criminal proceedings concerning the suspicion that the applicant had "certified untrue matters". It is undisputed between the Parties that such criminal proceedings against the applicant were ongoing. As prescribed by the Code of Criminal Procedure the applicant and several witnesses were present during the search and the applicant signed a copy of the minutes of the search. In accordance with Article 198 of the Code of Criminal Procedure it was in accordance with the law to seize articles found during the search of an apartment which were not related to the crime for which the search warrant had been issued. The applicant received a list of the articles seized during the search, which he identified the next day before the investigative judge. Therefore, the Chamber finds that in the present case the search was in accordance with the law as set out in the Code of Criminal Procedure in the Articles 195 to 210.

131. With respect to the requirement that the interference with a right protected under Article 8 of the Convention must be "necessary in a democratic society" the Chamber recalls the jurisprudence of the European Court. The European Court has acknowledged that "the Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences." (see Eur. Court, *Camenzind v. Switzerland, ibid* , para. 45). Whether it is necessary in a democratic society to interfere with the applicant's right is a matter of whether the aim and the interference are proportionate.

132. In the present case the search had a legitimate aim, namely to find evidence in respect to the ongoing criminal proceedings concerning the offence of "certifying untrue matter". In light of the safeguards provided for in the Code of Criminal Procedure, the Chamber also accepts that the interference with the applicant's right to respect for his home, a search in the presence of the applicant and other witnesses, can be considered to have been proportionate to the aim pursued and thus "necessary in a democratic society" within the meaning of Article 8 of the Convention. Consequently, there has not been a violation of Article 8 of the Convention with respect to the search of the applicant's apartment on 8 October 2001.

133. Finally, the Chamber observes that it is disputed between the Parties whether the slip of paper with the phone number of the liaison officer of Osama Bin Laden, allegedly found during the search of the applicant's apartment, was among the seized objects put before the applicant and identified by him during the hearing before the investigative judge on 9 October 2001 (see para. 21 above). The Chamber is of the opinion that this circumstance might affect the admissibility and the evidentiary value of this slip, in the event it was to be introduced as evidence against the

applicant in a criminal trial. It does not, however, affect the lawfulness of interference with the applicant's right to respect for his home and private life.

3. Article 5 of the Convention – right to liberty and security of the applicant

134. Article 5, paragraph 1 reads in the relevant parts as follows:

> "(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 applicant's detention ordered by the Municipal Court in Zenica because of "certification of untrue matters" which ended 16 January 2002

135. The applicant was arrested on 8 October 2001 and held in pre-trial detention in Zenica prison until his release from that prison on 16 January 2002, when he was transferred to the prison in Sarajevo. On 9 October 2001 the investigative judge of the Municipal Court in Zenica issued a procedural decision ordering the applicant's detention for a period of one month which was extended further on 29 October 2001 for a maximum period of an additional two months or until completion of the main hearing**.** The procedural decision was based on the suspicion that the applicant had committed the criminal offence "certification of untrue matter", as held punishable under Article 353 of the Criminal Code of the Federation of Bosnia and Herzegovina.

136. On 10 October 2001 the applicant's lawyer filed an appeal with the Criminal Panel of the Municipal Court against this procedural decision which was rejected on 12 October 2001.

137. On 16 October the investigative judge of the Municipal Court in Zenica issued a procedural opening an investigation against the applicant in the criminal proceedings. At a hearing, the applicant fully admitted that he had committed the criminal act of certifying an untrue matter as set out in the indictment. All the same, the main hearing was postponed for an indefinite period in order to establish the real identity of the applicant, requesting legal assistance in this respect from the Republic of Algeria. On 24 September 2002 the Municipal Court received a photograph of the applicant from Interpol in Algeria. However, it appears that the applicant's identity has not been finally established and that investigation is still continued by Interpol.

138. On 16 January 2002 the Municipal Court in Zenica, terminated the applicant's detention.

139. The applicant in the proceedings before the Chamber does not appear to allege that his detention, as ordered by the Municipal Court in Zenica, in connection with the investigation of "certification of an untrue matter", was unlawful. However, he has challenged his detention before the domestic courts and the Municipal Court in Zenica has upheld the order for custody. The Chamber further notes that the applicant in the pre-trial proceedings has admitted to having committed the offence of certifying an untrue matter as set out in the indictment against him.

140. The Chamber finds that the detention ordered by the Municipal Court in Zenica until 16 January 2002 was lawful in accordance with Article 5 paragraph 1(c) of the Convention, as the arrest and detention were based on a reasonable suspicion that the applicant had committed an offence, and were in accordance with the requirements of domestic law. Accordingly, the Chamber finds no violation of Article 5 of the Convention for the period from the time of the initial arrest until the decision of the Municipal Court in Zenica to release the applicant on 16 January 2002 entered into force.

b. As to the applicant's detention from 16 January 2002 based on the procedural decision of the Supreme Court of 25 October 2001 until the entering into force of the Supreme Court decision to release him on 17 January 2002

141. The Chamber recalls that on 16 January 2002 the applicant was ordered to be released from Zenica prison where he had been held in pre-trial detention based on the suspicion that he had committed the criminal offence of certifying an untrue matter. However, he was immediately transferred to the prison in Sarajevo where he continued to be held in pre-trial detention.

142. According to the submissions of the Federation this new period of pre-trial detention in the Sarajevo prison was based on the procedural decision of 25 October 2001 issued by an investigative judge of the Supreme Court in relation to the suspicion that the applicant was involved in terrorism. The Chamber recalls that, parallel to the proceedings in Zenica because of the certification of untrue matters in October 2001, the Supreme Court initiated proceedings against the applicant and other persons from the so called "Algerian Group" (including the applicants in *Boudellaa and Others*) on grounds of suspicion of having attempted to commit the criminal act of international terrorism.

143. The Chamber notes that the decision of 25 October 2001 ordering the applicant's pre-trial detention based on his alleged involvement in terrorist activities states that the period of pre-trial detention shall start to run from the day of the termination of the detention ordered by the Municipal Court in Zenica in the proceedings regarding the suspicion of certifying an untrue matter. The relevant part of the decision reads as follows:

> "On the basis of Article 183, paragraph 2, subparagraphs 2, 3, and 4 of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina custody is ordered in the duration of 1 (one) month, which will start to run from the date of the termination of the custody ordered pursuant to the procedural decision of the Municipal Court in Zenica no. Kri:659/01, under which the custody was last ordered as of 8 October 2001 starting from 5.30 p.m.."

144. The applicant and his lawyer allege that they were not delivered the Supreme Court decision of 25 October 2001 after it had been issued and that the applicant's lawyer only by coincidence found the decision much later when examining the case-file at an unspecified later date. The Federation claims that the procedural decision was delivered to the applicant on 16 January 2002 at 20.30. However, there was no delivery note to be signed by the applicant. The delivery was merely recorded in the book of daily events of the detention department of the Maximum Security Correctional Institute in Zenica. The excerpt of the delivery book submitted by the Federation reads as follows:

> "…At 20.30 court mail was delivered to him (*Belkasem Bensayah, the applicant)*. He returned all things he had been given when entering the prison and was taken to the gate of the detention unit."…

145. The Chamber will examine whether the procedural decision by the investigative judge of the Supreme Court of 25 October 2001 is a sufficient basis to lawfully detain the applicant after 16 January 2002.

146. The Chamber recalls that Article 5 guarantees the fundamental right to liberty of person. In light of the principle of presumption of innocence, pre-trial detention as an exception to the right of liberty must be applied as restrictively as possible. Pre-trial detention may be ordered to prevent the suspect of committing an offence, to prevent his fleeing and in order to make the conduct of pre-trial investigation in preparation of the criminal trial possible. Article 5 of the Convention obliges the authorities, which order pre-trial detention, to examine at regular intervals whether the reasons for the detention are still existent. Article 5, paragraph 1 (c) and Article 5, paragraph 3 of the Convention, which complement each other, "ensure that no one shall be arbitrarily deprived of his liberty and, to ensure that any arrest and detention will be kept as short as possible." (see Opinion of the European Commission of Human Rights in the *Skoogström* case of 15 July 1983, *Series A 83, p.13)*.

147. The Chamber notes that the Code of Criminal Procedure reflects the spirit of Article 5 of the Convention. It provides *inter alia* that the suspect can only be held in custody for the shortest necessary time (Article 182) and must be informed immediately of the reasons of his detention by the investigative judge (Article 186). In Article 188 the Code of Criminal Proceedure also sets out the maximum length of pre-trial detention. Initially pre-trial detention can only be ordered for one month. In accordance with Article 188, paragraph 2, pre-trial custody can generally be extended only for two more months. For crimes carrying a sentence of more than five years of imprisonment the pre-trial detention may exceptionally be extended for another three months if there are important reasons. The Chamber notes also that the Code of Criminal Procedure does not explicitly provide for the possibility to order the period of pre-trial detention to start at the moment when another period of pre-trial detention ordered in parallel criminal proceedings against the same applicant is ended.

148. The Chamber notes that the decision of 25 October 2001 ordered pre-trial custody on the grounds that there was warranted fear that the applicant might destroy evidence (Article 183, paragraph 2, subparagraph 2), that there were particular circumstances that justify the fear that he will commit a threatened crime (Article 183, paragraph 2 subparagraph 3) and because detention was deemed necessary for public safety and the crime of international terrorism is included in the catalogue of Article 183, paragraph 2, subparagraph 4 (see para. 76 above).

149. The Chamber finds that the investigative judge, when he ordered the applicant's pre-trial detention on 25 October 2001, could not possibly have assessed the applicant's situation or the status of the criminal proceedings at the future time when the pre-trial detention ordered by the Municipal Court in Zenica would end. The end of the Zenica pre-trial detention depended on factors that were unforeseeable on 25 October 2001, and the date was uncertain. The Chamber concludes that the 25 October 2001 decision could not reasonably be based on warranted fears that the applicant might destroy evidence (Article 183, paragraph 2, subparagraph 2) or on a warranted suspicion of particular circumstances justifying a fear that he would commit a crime (Article 183, paragraph 2 subparagraph 3).

150. With respect to the last ground given in the decision of 25 October 2001— that the detention was deemed necessary for public safety in light of the suspicion of the crime of international terrorism (Article 183, paragraph 2, subparagraph 4)— the Chamber recalls its jurisprudence in the *Buzuk* case (case no. CH/01/7488, decision on admissibility and merits of 3 July 2002, para. 104). There, the Chamber found that "the reasons given by the national authorities as acceptable reasons for detention cannot be gauged solely on the basis of the severity of the sentence risked, as other factors must be considered too." In the present case, therefore, pre-trial detention cannot be based solely on the fact that there is a warranted suspicion that the applicant was involved in the offence of international terrorism.

151. In conclusion the decision of 25 October 2001 was not based on sufficient grounds as required by Article 5 of the Convention. In light of this finding the Chamber will leave open whether the Supreme Court in issuing the order of 25 October 2001 correctly applied domestic law and in particular the provisions of the Code of Criminal Procedure.

152. The Chamber concludes that the detention of the applicant from 16 January 2002 until the Supreme Court order to release him came into effect on 17 January 2002 cannot be based on the Supreme Court decision of 25 October 2001 because this decision is not in accordance with Article 5 of the Convention. As there are no other procedural decisions to justify the applicant's detention, the pre-trial detention from 16 January 2002 until the Supreme Court order to release him came into effect on 17 January 2002 was not in accordance with the Code of Criminal Procedure. Hence, the Chamber finds that there was no justification under Article 5 paragraph 1 of the Convention for the Federation to keep the applicant in detention after the order of the Municipal Court to release the applicant from pre-trial detention entered into force on 16 January 2002. The detention in that period of time constitutes a violation of the applicant's rights as protected by Article 5 paragraph 1 of the Convention. The Chamber finds that this particular violation falls within the sole responsibility of the Federation and cannot establish from the facts any responsibility of Bosnia and Herzegovina.

c. As to the applicant's detention after the entering into force of the Supreme Court decision to release him on 17 January 2002 until the hand-over to the US forces

153. The Chamber recalls that the Supreme Court on 17 January 2002 ordered that the applicant was "to be immediately released from detention". It appears that 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 applicant was held in detention. Mr. Fahrija Karkin, the lawyer of Boumediene Lakhdar, one of the applicants in *Boudellaa and Others*, who was standing outside the prison gates on 17 January 2002, claims that he saw the messenger of the Supreme Court entering the prison at around 5 p.m. He claims that from that time onwards 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.

154. The Chamber notes that according to the submissions of the Federation of Bosnia and Herzegovina the applicant was only released from pre-trial detention at 11.45 p.m. on 17 January 2002 and not immediately after the receipt of the order by the prison. Neither respondent Party submits any reasons for the delay of execution of the Supreme Court order.

155. The Chamber further notes that, despite the delivery of a legitimate order for the applicant's release, and despite the lack of any further order for detention, the applicant was immediately taken into custody by members of the Federation Police and remained in their custody until 6.30 a.m. the following day when he was handed over to the US forces. It remains unclear in this context whether the applicant was informed about his release from pre-trial detention and hence whether he learnt that his detention now had a different quality as it was based on different grounds.

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

156. The Federation states that it has complied with the Supreme Court order by releasing the applicant at 11.45 p.m. on 17 January 2002, the same day the Supreme Court issued the order.

157. The Chamber notes that by 11.45 p.m. on 17 January 2002 the applicant had been held in detention for some six to eight hours after the Supreme Court had ordered his "immediate" release. The Chamber finds that the Supreme Court decision to order the applicant's 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. The release 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

158. The Chamber must now examine whether the applicant's 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…of a person against whom action is being taken with a view to deportation or extradition".

159. 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 applicant the respondent Parties need to fulfil two conditions: the arrest and detention must be "lawful" and, in addition, against the person arrested and detained action must be taken "with a view to deportation and extradition".

160. Firstly, therefore, the respondent Parties must demonstrate that the detention was "lawful". The detention of the applicant can only be considered as being "lawful" under the condition that it

complies with the procedure prescribed by law and that it is in conformity with the purpose of Article 5, namely to protect individuals from arbitrariness.

161. At least one of the respondent Parties must have shown that it issued a detention order grounded on a legal basis and informed the applicant about the reasons for his detention and that there was a possibility for the applicant 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 applicant in view of a possible expulsion. The respondent Parties have further failed to substantiate that they followed proper legal procedures when keeping the applicant in detention subsequent to Supreme Court's procedural decision.

162. A minimum requirement of legal procedure for a legal detention is the requirement to inform the person subject to the detention, here the applicant, about the reasons for detention. In light of the fact that the decision, in which the applicant was ordered to leave the country immediately, was delivered to him by the US forces at the airport, when he was about to board the aeroplane that took him out of the country on 18 January 2002, it seems highly unlikely that he was duly informed that he was now held in detention in order to be expelled. Certainly, he would have had no opportunity to challenge the decisions ordering his detention for expulsion purposes.

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

164. There is no evidence to suggest that the hand-over of the applicant can be interpreted to be an extradition. In particular, the diplomatic note of 17 January 2002 from the Embassy of the United States 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 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 a person who has been charged or convicted as provided for in Chapter XXXI of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina. In particular, it includes neither the indicting proposal against the applicant 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 or a Federation national and that the crime for which extradition is requested "has not been committed in the Federation …".

165. 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 case the detention of the applicant was not aimed to carry out a legal expulsion in accordance with the rules and procedure as prescribed in the domestic law. The detention was aimed at keeping the applicant under control until his hand-over to the US forces. The Chamber considers that in the present case the detention for an aim other than a legal expulsion renders the detention arbitrary and incompatible with Article 5 paragraph 1 (f) of the Convention.

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

d. As to the hand-over the applicant to the US forces and his detention thereafter until his forced removal from Bosnia and Herzegovina

167. 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."

168. From Article 1 of the Convention a positive obligation arises 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 applicant. The Chamber notes that in this context the term "jurisdiction" is to be interpreted broadly (see e.g. Eur. Court HR, *Loizidou Case,* judgment of 23 March 1995, Series A no. 310, paragraph 62). In the present case, the obligation implies that before handing over the applicant 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.

169. The hand-over of the applicant to the custody of the 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 applicant 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 the US forces stationed in Bosnia and Herzegovina.

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

171. Bosnia and Herzegovina received the diplomatic note of 17 January 2002 from the US Embassy in which 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 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 applicant to the US forces and the intention of the US forces to keep the applicant detained. Bosnia and Herzegovina has 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 applicant's rights in form of an illegal detention by the US forces on the territory of Bosnia and Herzegovina could occur and had the positive obligation to prevent such a possible violation.

172. 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 applicant. The Federation of Bosnia and Herzegovina in *Boudellaa and Others* claimed that it just 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 any act that would result in a violation of the applicant's rights that are protected by the Convention.

173. The Chamber therefore finds that both respondent Parties have violated Article 5 paragraph 1 of the Convention by the applicant's hand-over into illegal detention by the US forces.

e. Article 5, paragraph 2 - right to be informed promptly of the reasons for his detention

174. The applicant complains that after the decision of the Supreme Court to end his pre-trial detention became valid on 17 January 2002 he was kept in detention and not informed immediately about the reasons for his new arrest. In the context of a discussion of Article 5, paragraph 1 the applicant's lawyer in the application form also points out that the lack of promptly informing the applicant for the reasons of this new arrest amounts to a violation of Article 5, paragraph 2.

175. Article 5, paragraph 2 provides as follows:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

176. The Chamber notes, that Article 5, paragraph 2 of the Convention also applies in cases of continued detention if the ground for a detention changes or if new relevant fact present themselves. In the present case, the applicant was kept in detention after his pre-trial detention had ended on the basis of new grounds.

177. The Chamber has already found a violation under Article 5, paragraph 1 of the Convention for the fact that the applicant continued to be detained after the decision of the Municipal Court in Zenica to end his pre-trial detention on 16 January 2002 became effective (see paras. 141 to 152 above) and also a violation for the detention after the coming into force of the decision of the Supreme Court on 17 January 2002 (see paras. 153 to 166 above). It based its findings for both periods of continued detention on the fact that there was no valid decision issued that allowed for a continued detention of the applicant.

178. The Chamber finds that the interference which amounted to a violation of Article 5, paragraph 1, not to present a legal basis for the applicant's detention and the possible interference in accordance with Article 5, paragraph 2 not to inform the applicant of the basis for his detention in essence coincide. The Chamber also notes, that the applicant does not complain that he was not informed properly in accordance with Article 5, paragraph 2 in a language understandable to him about the reasons for his first arrest on 8 October 2001. Therefore the Chamber does not find it necessary to make a separate finding under Article 5, paragraph 2 of the Convention.

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

179. In his applications to the Chamber, the applicant claimed that the separation from his family caused by his expulsion makes him a victim 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."

180. In view of its findings in respect to the illegal expulsion of the applicant, the Chamber does not consider it necessary to examine the cases separately under Article 8 of the Convention.

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

a. Application of the Human Rights Agreement in expulsion cases

181. The applicant alleges that his rights to life and to freedom from torture, inhuman and degrading treatment are at risk of being violated outside of the territory of Bosnia and Herzegovina and that the respondent Parties are liable by handing him over to US forces.

182. The Chamber recalls that it is a well-established principle of the case law of the European Court of Human Rights that the extradition or expulsion of a person by a Contracting State may engage the responsibility of that State under the Convention. Such liability arises for the respondent Parties 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 or expel an individual to another State where there was a substantial risk of a violation the Convention (see *Boudellaa and Others*, paras. 257 to 259).

183. At the same time, the Chamber fully acknowledges the seriousness and utter importance of the respondent Parties' obligation, as set forth in the UN Security Council resolution 1373 to participate in the fight against terrorism. The Chamber notes, however, that it is absolutely necessary to respect human rights and the rule of law while fighting terrorism. 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 applicant to US forces was in violation of Article 1 of Protocol No. 6 to the Convention or Article 3 of the Convention (see *Boudellaa and Others ibid,* paras. 263 to 267).

184. The Chamber will examine therefore whether the respondent Parties, by handing over the applicant to the US forces, have violated the applicant's rights not to be subject to the death penalty and not to be subject to torture, inhuman or degrading treatment.

b. Article 1 of Protocol No. 6 - the death penalty

185. The applicant complains that his delivery to the US forces places his life at substantial risk, as he might face capital punishment. He alleges that this amounts to a violation of his 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.

186. Article 2, paragraph 1 of the Convention provides:

> "(1) 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."

187. 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."

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

(i) the failure to follow extradition proceedings

189. The Chamber notes that, according to the submission of both respondent Parties, the applicant, at the time of his hand-over to the US forces, was under suspicion of participating in acts of international terrorism. The Federation in its written submission of 15 April 2002 states that "after all consultations and considerations, the competent organs of Bosnia and Herzegovina issued a decision permitting the United States to take supervision over the applicant" as a result of which the applicant was handed over to the US forces.

190. The Chamber notes that the laws of Bosnia and Herzegovina and of the Federation of BiH do not provide for individuals suspected of criminal activities to be "put under the supervision" of a foreign state by any other procedure than the extradition procedure governed by the Code of Criminal Procedure. The Chamber recalls Article 508 of the Code of Criminal Procedure requires that the 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 criminal law to be applied by the foreign state seeking extradition must accompany the petition for extradition. Reading Article 508 in

conjunction with Article 507(1)(10), the Chamber notes that in the applicant's case the petition for extradition would have had to include a statement as to whether the death penalty is applicable to the offences the applicant is suspected of and, if so, whether the death penalty will be sought.

191. As in *Boudellaa and Others* (*ibid,* paras. 275 to 277) no extradition proceedings pursuant to the Federation Code of Criminal Procedure were initiated in the applicant's case. The respondent Parties did not obtain any statement from the US government as to whether custody was sought for the purpose of putting the applicant on trial, and if so, what law the applicant would be tried under and what penalties would be applied in case of conviction. The answer to these questions is crucial in order to assess whether the applicant faces a real risk of being subject 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, this lack of information being the 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 the imposition and execution of the death penalty on the applicant. The Chamber will now proceed to assess the risk 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 applicant

192. The Chamber notes that in *Boudellaa and Others* (*ibid,* paras. 278 to 283*)* it has examined at length the risk of an imposition of the death penalty against the applicants in those cases. The same considerations apply to the applicant Belkasem Besayah. It will therefore be sufficient to briefly summarise these considerations here.

193. It appears that most probably, if tried, the applicant will be tried for "violations of the laws of war". The death penalty is applicable for these offences, if tried before US military commissions. No detailed provision restricts the applicability of death penalty to certain violations of the law of war, the only requirement being that the military commission find that the offence is serious.

194. In the alternative, the applicant could be tried under US federal law. In this event, the death penalty would be available if he was found to be guilty of conspiracy to wage a terrorist war against the US, resulting *inter alia* in the September 11, 2001, attacks.

(iii) relationship between fair trial guarantees and the imposition of death penalty

195. The Chamber has further noted in *Boudellaa and Others* (*ibid,* paras. 286-299) that courts that are not fully independent from the executive power, 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. The Chamber has therefore examined the procedure before the military commissions that are likely to try the applicant, should he be brought to trial, in the light of Article 6 of the Convention.

(iv) Defendants' rights in a trial before a military commission

196. The Chamber notes that the applicant was taken to the US detention center known as "Camp X-Ray" in Guantanamo Bay, Cuba. There, pursuant to a Military Order of the President of the United States dated 13 November 2001, it appears that the applicant would not stand trial before a regular US court, but would instead face prosecution before a military commission.

197. The provisions of the Military Commission Order Number 1 were discussed in so far as relevant before the Chamber in detail in *Boudellaa and Others* (*ibid,* paras. 286 to 299). The Chamber found that the independence from the executive power of the tribunals established by the US President's Military Order and the Military Commission Order No. 1 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 in *Boudellaa and Others* are discriminatorily deprived of the guarantees enshrined in the Bill of Rights of the US Constitution. The same would apply to the applicant in the present case.

198. The Chamber finds that all these elements considerably increase the risk of the death penalty being imposed and executed on the applicant.

(v) Conclusion as to imposition of the death penalty

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

c. Article 3 of the Convention - prohibition of torture, inhuman and degrading treatment

200. The Chamber will examine whether the respondent Parties violated Article 3 of the Convention by handing-over the applicant to the 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, the Chamber is not making any assessment as to the responsibility of the US authorities regarding the treatment of detainees at Camp X-Ray, Guantanamo Bay, Cuba. The Chamber is solely concerned with the question whether the authorities of the respondent Parties have failed to comply with their obligations under the Agreement when they handed the applicant over to the US forces.

201. Article 3 of the Convention reads:

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

202. The applicant, i.e. his representative, claims that the conditions of detention after his hand-over to the US forces are such as to violate his rights under Article 3. The applicant's lawyer claims that it is well known, according to the world media and the reports of Amnesty International, that the applicant and his co-detainees in Guantanamo Bay are detained "within a room that may be considered a cage, with masks over their faces and below minimum standards of human treatment." The Chamber notes that the applicant does not provide any further substantiation on this point.

203. The Chamber has discussed in detail the jurisprudence of the European Court of Human Rights in expulsion cases in *Boudellaa and Others,* in which the Chamber found no violation of Article 3 of the Convention. The Chamber considers that the detention of supposedly highly dangerous individuals requires the authorities to strike a very delicate balance between the requirements of security and basic individual rights. This determination will require a case-specific, ongoing assessment of the danger of flight, of collusion, of the detainees harming themselves, of the security situation inside and outside the detention facility. Therefore, the Chamber finds that an extraditing or expelling state is not in a position and cannot be required to carry out this balancing exercise.

204. In addition, the Chamber observes that, as in *Boudellaa and Others,* it has not been alleged that there is a consistent pattern of gross human rights violations in the United States of America. The threshold for finding a violation of Article 3 due to conditions of detention dictated by security concerns is very high. The Chamber also 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.

205. Since the Chamber has delivered its decision in *Boudellaa and Others,* additional information about the circumstance of the detention in Guantanamo Bay has emerged. The Chamber recalls the letter of the US Embassy in Sarajevo of 31 December 2002 (see para. 51 above) which states that the applicant and his co-detainees have the status of enemy combatants and that the applicant may be held in detention until the cessation of the "on-going armed conflict and related attacks against the United States, its citizens and citizens of numerous other nations". The letter further states that the applicant like all other detainees in Guantanamo Bay cannot receive any visits by family members, attorneys and members of international organisations or public interest groups. The Chamber believes that the applicant's limited contact with the outside world and the uncertainty of his future may cause severe psychological damage, particularly when imposed long-term or indefinitely. The Chamber also notes that in recent months, a series of attempted suicides amongst the detainees of camp X-Ray in Guantanamo Bay have been reported. However, there is no indication that these additional facts about the conditions of detention were known to the respondent Parties at the time of the applicant's hand-over in January 2001, and the respondent Parties could not reasonably be expected to foresee them.

206. On the basis of the above considerations, the Chamber concludes that the respondent Parties did not violate their duty to protect the applicant 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.

d. Article 6 of the Convention - fair trial

207. The respondent Parties by handing the applicant over to the US authorities may have contributed to a violation of Article 6 of the Convention.

208. In view of all its findings, and in particular 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 case separately under Article 6 of the Convention.

6. Article 13 of the Convention in conjunction with Articles 3, 5 and 8 of the Convention – right to effective remedy

209. The applicant complains of a violation of Article 13 of the Convention in relation to Articles 3, 5, and 8, as the illegal acting of the respondent Parties meant that he had no effective remedies to address the violations that allegedly occurred to him.

210. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

211. As discussed above, the applicant was illegally held in detention in order to be handed over to the US authorities, then in fact handed over in spite of his fear of ill-treatment and the possibility of being subject to death penalty and as a consequence separated from his family. All those alleged violations of rights protected under Articles 3, 5 and 8 of the Convention arose from the hand-over of the applicant to the US forces. The Chamber notes that, although in the present case effective remedies might not have been available to the applicant to protect him from violations that arose in the context of the hand-over of the applicant to the US forces, the procedural safeguards required under Article 1 of Protocol No. 7 constituted exactly the remedy required under Article 13. Under the circumstances of the case, therefore, Article 1 of Protocol No. 7 constituted a *lex specialis* with regard to Article 13. The Chamber therefore, in light of these reasons and its findings of a violation of Article 1 of Protocol No. 7 to the Convention, Article 5, paragraph 1 of the Convention and the positive obligation arising under Article 1 of Protocol No. 6 to the Convention, does not find it necessary to examine the case under Article 13.

7. Conclusions as to the merits

212. In conclusion, in its discussion on the merits of the application, the Chamber has found that with respect to the expulsion of the applicant, 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 not found that the search of the applicant's apartment on 8 October 2001 constitutes a violation of Article 8 of the Convention. As to the detention of the applicant in Bosnia and Herzegovina, the Chamber has found that the Federation violated the right of the applicant protected by Article 5 paragraph 1 of the Convention for the time period of pre-trial detention after the entry into force of the Zenica Municipal Court decision to release him on 16 January 2002 until the decision of the Supreme Court to end the applicant's pre-trial detention came into force on 17 January 2002. For the period after the coming into force of the Supreme Court's decision on 17 January 2002 until and including his hand-over to US forces and his subsequent detention on the territory of Bosnia and Herzegovina by US forces, the Chamber has found that both respondent Parties violated the right of the applicant protected by Article 5 paragraph 1 of the Convention. In light of the findings of a violation of Article 5, paragraph 1 of the Convention, the Chamber has not considered it necessary to examine the application separately under Article 5, paragraph 2 of the Convention. The Chamber also has not considered it necessary to examine whether the applicant's separation from his family gives rise to a violation of Article 8 of the Convention. Next the Chamber has examined the obligations of the respondent Parties in handing over the applicant to US forces, which lead to his 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 applicant, the Chamber has found that the respondent Parties should have sought assurances from the United States prior to handing over the applicant to US forces that the death penalty would not be imposed upon him; 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 applicant from torture or inhuman or degrading treatment or punishment by handing him over to US forces. The Chamber has not considered it necessary to examine the application separately under Article 6 of the Convention with respect to a possible trial conducted by the US authorities outside the territory of Bosnia and Herzegovina. Lastly the Chamber

has not considered it necessary to examine the application separately under Article 13 in conjunction with Articles 3, 5 and 8 of the Convention.

VIII. REMEDIES

213. 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.

214. The applicant has made compensation claims in the amount of altogether more than seven million convertible marks (*Konvertibilnih Maraka*, "KM") in relation to the pecuniary and non-pecuniary damages suffered by him and his family. These claims include compensation for lost income, compensation for mental suffering of both the applicant and his family, and reimbursement of his lawyer's fees. Both respondent Parties summarily reject the compensation claims as ill-founded and in any event excessive.

215. The Chamber found violations of Article 1 of Protocol No. 7 to the Convention (expulsion); Article 5, paragraph 1 of the Convention (unlawful detention), and Article 1 of Protocol No. 6 to the Convention (abolition of death penalty).

216. Considering its findings regarding the delivery of the decision on refusal of entry to the applicant, made in the context of the discussion under Article 1 of Protocol No. 7 to the Convention, the Chamber will order the Federation to take all necessary steps to annul the decision on refusal of entry of 10 January 2002.

217. The Chamber further will order Bosnia and Herzegovina to use diplomatic channels in order to protect the applicant's internationally recognised human rights, including his right to liberty and security of person and his right not to be subject to torture or to inhuman and degrading treatment. In particular, the Chamber will order Bosnia and Herzegovina to take all possible steps to establish contacts with the applicant. Bosnia and Herzegovina will be further ordered to take all possible steps to prevent a death penalty from being pronounced against and executed on the applicant, including attempts to seek assurances from the United States via diplomatic contacts that the applicant will not be subjected to the death penalty.

218. The respondent Parties will also be ordered to retain a lawyer 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 applicant's rights while in US custody and in case of possible military, criminal or other proceedings involving the applicant. The respondent Parties will each bear half the cost of the attorney fees and expenses of such a lawyer.

219. The Chamber further will order the respondent Parties to compensate the applicant for the non-pecuniary damage suffered and in particular for the damage 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 applicant will not face the death penalty under Article 1 of Protocol No. 6 in the amount of 10,000 KM. The respondent Parties will each bear half of this compensation and will be ordered to pay a simple interest of ten percent in case they do not pay the compensation within the time-limit set forth in conclusion number 20 below. As the applicant is currently not able to receive such compensation, the compensation shall be placed on an account for the applicant. If the applicant does not return to Bosnia and Herzegovina until 31 August 2003 the non-pecuniary compensation is to be paid to his wife and children living in Bosnia and Herzegovina.

IX. CONCLUSIONS

220. For these reasons, the Chamber decides,

1. unanimously, to declare inadmissible the complaint in regard to a violation of Article 6, paragraph 3 of the Convention;

2. unanimously, to declare inadmissible the complaint in regard to discrimination against the applicant on the basis that he is of foreign descent;

3. by 9 votes to 5, to declare admissible the remainder of the application;

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

5. unanimously, to find that the search of the applicant's apartment does not constitute a violation of Article 8 of the Convention;

6. unanimously, that there has been no violation of the applicant's right to liberty and security of person as guaranteed by Article 5 paragraph 1 of the Convention, with regard to the period of time from the initial arrest until the entry into force of the decision of the Municipal Court in Zenica to release the applicant on 16 January 2002;

7. by 8 votes to 6, that the Federation of Bosnia and Herzegovina, violated the applicant's right to liberty and security of person 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 Municipal Court in Zenica to release the applicant on 16 January 2002 until the entry into force on 17 January 2002 of the decision of the Supreme Court of the Federation of Bosnia and Herzegovina to release the applicant, the Federation of Bosnia and Herzegovina thereby being in breach of Article I of the Agreement;

8. by 8 votes to 6, that both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, violated the applicant's right to liberty and security of person 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 applicant on 17 January 2002 until the hand-over of the applicant to the United States forces, the respondent Parties thereby being in breach of Article I of the Agreement;

9. 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 applicant's right to liberty and security of person as guaranteed by Article 5 paragraph 1 of the Convention, with regard to the period from the hand-over of the applicant to the United States forces until his forceful removal from the territory of Bosnia and Herzegovina, the respondent Parties thereby being in breach of Article I of the Agreement;

10. unanimously, that it is not necessary to consider the case under Article 5, paragraph 2 of the Convention;

11. 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 applicant's right not to be subjected to 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 applicant would not be subjected to death penalty, the respondent Parties thereby being in breach of Article I of the Agreement;

12. by 10 votes to 4, to find 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;

13. by 11 votes to 3, that it is not necessary to consider the case under Article 8 of the Convention in relation to the right to respect for the applicant's family life;

14. by 8 votes to 6, that it is not necessary to consider the applicant's complaint that he will not receive a fair trial after his hand-over to the United States forces under Article 6 of the Convention;

15. unanimously, that it is not necessary to consider the case under Article 13 of the Convention in conjunction with Articles 3, 5 and 8 of the Convention;

16. 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 decision on refusal of entry to the applicant of 10 January 2002;

17. by 10 votes to 4, to order Bosnia and Herzegovina to use diplomatic channels in order to protect the applicant's internationally recognised human rights, including his right to liberty and security of person and his right not to be subject to torture or to inhuman and degrading treatment, taking all possible steps to establish contacts with the applicant;

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

19. by 9 votes to 5, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to retain a lawyer 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 applicant's rights while in US custody and in case of possible military, criminal or other proceedings involving the applicant, each of the respondent Parties bearing half the cost of the attorney fees and expenses;

20. by 7 votes to 7, with the casting vote of the President, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to pay to the applicant 10,000 Convertible Marks (*Konvertiblinih Maraka*, "KM") in compensation for non-pecuniary damage suffered no later than 4 May 2003, each of the respondent Parties bearing half of the compensation;

21. by 7 votes to 7, with the casting vote of the President, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to place the compensation awarded in conclusion no. 20 above in an account for the applicant. If the applicant does not return to Bosnia and Herzegovina by 31 August 2003, the respondent Parties are ordered to pay the non-pecuniary compensation established in conclusion no. 20 above to his wife and children in Bosnia and Herzegovina; and

22. by 7 votes to 7, with the casting vote of the President, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to pay to pay simple interest at the rate of 10 (ten) per cent per annum over the sum awarded in conclusion no. 20 above or any unpaid portion thereof from 4 May 2003 until the date of settlement in full; and

23. by 9 votes to 5, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to report to it no later than 31 August 2003, 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)	(signed)
Ulrich GARMS	Michèle PICARD
Registrar of the Chamber	President of the Chamber

Annex I Partly dissenting opinion of Mr. Dietrich Rauschning
Annex II Partly dissenting opinion of Mr. Viktor Masenko-Mavi and Mr. Giovanni Grasso

ANNEX I

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. The decision follows the Chamber's decision on admissibility and merits in case nos. CH/02/8679 *et al.*, *Boudellaa and Others v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, delivered on 11 October 2002. I dissented partly from that decision, and consequently, I dissent partly from the present decision as well. For my reasons, I refer to Annex II of the *Boudellaa and Others* decision, containing my partly dissenting opinion.

2. The reasons given for conclusion no. 11 of the present decision that the respondent Parties violated the applicant's right not to be subjected to the death penalty, stated in paragraphs 185 to 199 above, are no more convincing than the reasons contained in the *Bouddellaa and Others* decision of 11 October 2002, to which the majority's reasoning refers. The applicant is detained by US forces as a member of enemy forces, and it seems unlikely that he will be tried. As I have explained in my previous partly dissenting opinion annexed to the *Boudellaa and Others* decision, there will not be a real risk to the applicant to be sentenced to death if he would be tried by organs of the United States.

3. According to the jurisprudence of the European Court of Human Rights, the respondent Parties would have violated the rights of the applicant by handing him over to US forces,

> *"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"* (see partly dissenting opinion of Mr. Dietrich Rauschning, Annex II to *Boudellaa and Others,* paragraph 18).

4. The conclusion of the reasoning, stated in paragraph 199 above of the present decision, reads as follows:

> "The Chamber finds that considerable uncertainty exists as to whether the applicant will be charged, what charges will be brought against him, which law will be deemed applicable and what sentence sought. This uncertainty does not exclude the imposition of the death penalty against the applicant. On the contrary, the international and US criminal law most likely applicable to the applicant provides for the death penalty for the criminal offences with which the applicant could be charged. This risk is compounded by the fact that the applicant faces a real risk of being tried by a military commission that is not independent from the executive power and operates with significantly reduced procedural safeguards. Hence, the uncertainty as to whether, when and under what circumstances the applicant would be put on trial and what punishment he may face at the end of this trial gave rise to an obligation on the respondent Parties to seek assurances that the death penalty would not be imposed. …"

5. In my opinion the stated uncertainty as to imposition of the death penalty is not sufficient to establish "substantial grounds for believing that the applicant faced a real risk."

(signed)
Dietrich Rauschning

ANNEX II

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

We cannot agree with the conclusions nos. 12 and 14 of the decision for the reasons stated in our dissenting opinion in the case *Boudellaa and Others vs. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina* (decision of 3 September 2002). In fact, the developments following the hand-over of the applicant (summarized in paragraph 51 of this decision) confirm the seriousness of our concern about the inhuman and degrading treatment the applicant was going to suffer after the illegal hand-over to the United States Authorities.

(signed)
Viktor Masenko-Mavi

(signed)
Giovanni Grasso