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

Case no. CH/02/8961

Mustafa AIT IDIR

against

BOSNIA AND HERZEGOVINA
and
THE FEDERATION OF BOSNIA AND HERZEGOVINA

The Human Rights Chamber for Bosnia and Herzegovina, sitting in plenary session on 5 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 (3) and XI of the Agreement and Rules 57 and 58 of the Chamber's Rules of Procedure:

I. INTRODUCTION

1. The applicant is of Algerian origin and obtained citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina on a date unknown to the Chamber, probably in 1995. In October 2001 the applicant together with a group of co-suspects including the applicants in the cases CH/02/8679 *et al., Boudellaa et al.,* decision on admissibility and merits of 3 September 2002 ("*Boudellaa and Others*"), was arrested and taken into custody on the suspicion of having planned a terrorist attack on the Embassies of the United States and the United Kingdom in Sarajevo. In November 2001 the Federal Ministry of Interior issued a decision revoking the applicant's citizenship of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. On 17 January 2002 the applicant was ordered to 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.

2. The applicant claims that there were no grounds for the revocation of his citizenship, nor for his expulsion from Bosnia and Herzegovina.

3. 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 family life) of the European Convention on Human Rights ("the Convention"), Article 3 of Protocol No. 4 to the Convention (prohibition of expulsion of nationals), Article 1 of Protocol No. 6 to the Convention (abolition of the death penalty) and Article 1 of Protocol No. 7 to the Convention (procedural safeguards in relation to expulsion of aliens).

II. PROCEEDINGS BEFORE THE CHAMBER

4. On 20 February 2002 the applicant's wife lodged an application with the Chamber on behalf of her husband. The applicant's wife requested the Chamber to order as a provisional measure that the applicant be treated humanely whilst in any form of detention.

5. On 6 March 2002 the Chamber decided to reject the request for provisional measures.

6. On 14 March 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 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 Article 1 of Protocol No. 6 to the Convention in particular 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.

7. On 15 April 2002 the Chamber received the written observations of the Federation of Bosnia and Herzegovina and on 8 May 2002 those of Bosnia and Herzegovina. These observations were transmitted to the applicant for his comments on 22 April and on 13 May 2002 respectively. The applicant, i.e. his wife and representative, never replied.

8. On 6 February 2003 the Chamber asked the applicant's wife and the respondent Parties whether there had been any developments in the case. On 10 February 2003 the applicant's wife

[1] Terminology: The Chamber notes that the Stabilisation Force ("SFOR") is composed of forces from 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 following this terminology and refer to the "US forces", except where reference is made to the fact that the delivery slips of the refusal of entry decisions were signed "SFOR" (see paragraph 31 below).

replied stating that her husband was still detained in Guantanamo Bay and that on 19 December 2002 the Supreme Court of the Federation of Bosnia and Herzegovina had issued a decision in the dispute about the revocation of the applicant's citizenship. On 18 and 20 February 2003 the Federation of Bosnia and Herzegovina submitted its additional information which confirms what the applicant's wife has submitted.

9. The Chamber deliberated on the admissibility and merits of the case on 6 March 2002, 5 July 2002, 7 December 2002, 4 February 2003, 4 March 2003 and on 5 March 2003. On the latter date the Chamber adopted the present decision on admissibility and merits.

III. ESTABLISHMENT OF THE FACTS

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

10. The applicant is of Algerian origin and lived with his wife and children in Bosnia and Herzegovina up until his arrest on 18 October 2001.

11. According to the statement of his wife, the applicant came to Bosnia and Herzegovina in early 1995. On a date unknown to the Chamber, probably in 1995, the applicant was granted citizenship of Bosnia and Herzegovina and citizenship of the Federation of Bosnia and Herzegovina.

12. In Bosnia and Herzegovina the applicant worked as a religious teacher and was employed by the humanitarian organisation "Taiba" and the "Quatar Humanitarian Organisation". The applicant married his wife in September 1996. She is by birth a citizen of Bosnia and Herzegovina. At the time of the application the couple had two children. Since the application was submitted a third child was born.

13. The applicant has not submitted to the Chamber any documentation explaining his exact date of 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 citizenship.

B. Initiation of criminal proceedings against the applicant

14. On 18 October 2001 a decision was issued by the Supreme Court of the Federation of Bosnia and Herzegovina ("the Supreme Court") that the applicant be taken into custody on suspicion of having attempted to commit the criminal act of international terrorism, punishable under Article 168 paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina. The applicant was arrested on the same day.

15. On 16 November 2001 the Supreme Court issued a decision extending the applicant's detention for a period of two months. The applicant appealed against this decision. However, his appeal was rejected by the Supreme Court on 22 November 2001.

16. 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 a termination of the proceedings rather than a suspension. On 8 May 2002 the Supreme Court refused the appeal of the applicant.

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

17. 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.

18. The relevant parts of the decisions were in the following terms:

> "...it has been established that, ... when the request for granting citizenship of the Republic of Bosnia and Herzegovina was filed, the named person stated that he shall respect the Constitution, laws and other provisions of the Republic of Bosnia and Herzegovina."
> "In the act of the Department of the Criminal Police within this Ministry... of 13 November 2001, it was stated that the criminal charges were brought to the Federal Prosecution against the named person based on the suspicion that he had committed an attempted criminal offence punishable under Article 168 paragraph 1 (international terrorism) of the Criminal Code of the Federation of Bosnia and Herzegovina. Accordingly it can be concluded that named person had hidden intentions 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."

19. This decision was delivered to the applicant on 4 December 2001. On 28 December 2001 the Ministry of Civil Affairs and Communications approved the procedural decision on revocation of the citizenship.

20. 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") replied to a request of the Supreme Court that it was not competent to consider the case of the applicant.

21. On 20 December 2001 the applicant initiated an administrative dispute before the Supreme Court against the decision of the Federal Ministry of Interior of 16 November 2001 revoking his citizenship.

22. On 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.

23. 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.

24. On 19 December 2002 the Supreme Court decided upon the applicant's administrative dispute (see paragraph 21 above). This decision was delivered to the applicant's representative on 16 January 2003. In its decision the Supreme Court annulled the procedural decision revoking the applicant's citizenship and returned the case to the competent body for renewed proceedings. It stated:

> "Therefore, the court does not accept the respondent's reasons stated in the disputed procedural decision (i.e. the plaintiff's intention at the time of his admission to the citizenship to violate the Constitution, the laws and other regulations and damage the international reputation of BiH) as legal reasons for revocation of the plaintiff's citizenship. Particularly, because the given reasons are not precisely and logically explained, nor do they have a factual background in the evidence whose content is quoted in the procedural decision, because the respondent's conclusion on the plaintiff's existing intention in the stated terms is drawn from the fact that criminal charges were brought against him for the above mentioned reasons, which does not have the importance given to it by the respondent, considering the fact that the provision of Article 6(2) of the European Convention on the Protection of Human Rights and Fundamental Freedoms provides that everybody charged with a criminal offence is presumed innocent until his guilt is proved under the law."

25. To the Chamber's knowledge, as of to date the Federal Ministry of Interior has not issued any new decision on the applicant's citizenship.

D. Diplomatic contacts concerning the applicant

26. On 10 April 2002 the Chamber held a public hearing in *Boudellaa 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-ranking 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 i Dokumentaciju* ("AID"), one of Bosnia and Herzegovina's secret services.

27. 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 in *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.

28. 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.

E. The Events of 17 and 18 January 2002

29. On 17 January 2002 the investigative judge of the Supreme Court issued a decision terminating the applicant's pre-trial detention on the ground that there were no further reasons or circumstances upon which pre-trial detention could be based. This decision refers to the applicant as a 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*, at approximately 5 p.m. on 17 January 2002 the decision was brought to the prison of the Cantonal Court in Sarajevo, where the applicant was being held. It remains unclear whether the applicant ever personally received the decision ordering his release.

30. 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.

31. On 17 January 2002 the investigative judge of the Supreme Court issued a decision to end the applicant's pre-trial detention. As a consequence of this order, according to the submissions of the respondent Parties, the applicant's pre trial detention was ended at 11.45 p.m. on 17 January 2002. However, instead of being released, he was at the same moment 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 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.

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

32. On 31 December 2002 the US Embassy in Sarajevo informed the applicant's wife 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 in *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 wife 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 she could correspond with her husband but that visits by family members, attorneys and members of international organisations or public interest groups were prohibited. On 10 February 2002 the applicant's wife informed the Chamber that she is in contact with her husband with the assistance of the International Committee of the Red Cross and that on 15 October 2002 she received a letter from him, dated 13 October 2002, according to which he had not been questioned by the US authorities until then and was on hunger strike.

IV. RELEVANT LEGISLATION

A. The issue of citizenship

1. Law on Citizenship of Bosnia and Herzegovina

33. Article 1 of the Law on Citizenship of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina— hereinafter "OG BiH"— no. 13/99, 6/03) 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."

34. 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, (…)"

35. 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. (…)"

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

> " (…)

[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".

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

37. 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

38. 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)."

39. 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; (…)"

40. 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."

41. 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."

42. 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 of the Federation of Bosnia and Herzegovina

43. 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 enforcement of a contested administrative act shall postpone the enforcement until the issuance of a valid court decision if the enforcement would inflict damage to the plaintiff that would be irreparable, and if the postponement is neither contrary to the public interest nor would inflict major irreparable harm to the opposite party. The evidence on the filed action shall be enclosed with the request for postponement. The competent body must issue a procedural decision on any request at the latest three days after receipt of the request to postpone enforcement.
>
> The competent body under paragraph 2 of this Article may, for other reasons, postpone enforcement of a contested administrative act until the issuance of a valid court decision, provided this complies with the public interest.
>
> The competent court to which the lawsuit has been filed may decide on the postponement of the enforcement of the administrative act against which the lawsuit has been filed on the conditions of paragraphs 2 and 3 of this Article, if requested so in writing by the plaintiff. The plaintiff may only file this request, provided that he has not previously requested the postponement of the enforcement of the procedural decision from the body specified in paragraph 2 of this Article."

44. Article 64 provides as follows:

> "When a court annuls an administrative act against which an administrative dispute was initiated, the case shall return to the state in which it was before the annulled act was issued. If the nature of a matter that was the subject of the dispute makes it necessary to issue a new administrative act instead of the annulled administrative act, the competent body is obliged to issue it without delay, not later than within 15 days from delivery of the judgement. In doing so, the competent body is tied by a legal findings of the court and the remarks of the court with regard to the proceedings."

C. The refusal of entry

1. The Law on Immigration and Asylum of Bosnia and Herzegovina

45. 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; (...)"

46. 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."

47. 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. (...)"

48. 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.”

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

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

50. Article 36 provides as follows:

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

51. 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).

52. 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.

53. 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.”

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

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

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

55. Article 139 of the Law on Administrative Procedures (OG FBiH no. 2/98) 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.”

56. 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."

57. 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

58. The Code of Criminal Procedure (OG FBiH no. 43/98 of 20 November 1998, 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).

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

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

1. "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. …."

61. 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 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. …"

62. 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."

63. 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. …."

64. 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

65. 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

66. The applicant complains of a violation of his right protected by Article 3 of the Convention, as the hand-over to the US forces exposes him to torture, inhuman and degrading treatment. He further complains of a violation of Article 5 paragraph 1 of the Convention as the decision of the Supreme Court ordering the applicant's release from pre-trial detention has not been complied with. In addition, he complains of a violation of the right to hearing within a reasonable time in respect to his appeal for annulment of the decisions on revocation of citizenship (the applicant brings this complaint under Article 5 paragraph 3 of the Convention). Further he complains of a violation of Article 8 of the Convention, the right to respect for private and family life.

VI. SUBMISSION OF THE PARTIES

A. Bosnia and Herzegovina

1. As to the facts and domestic law

67. In its written submissions of 25 April 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.

68. In respect to 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. 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 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, as 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 United States of America who had asked for his extradition for the suspicion that the applicant was involved in terrorist activities.

2. As to the admissibility

69. 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

70. Bosnia and Herzegovina makes no observations with regard to the merits.

B. The Federation of Bosnia and Herzegovina

1. As to the facts

71. In its written observations of 15 April 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.

72. The Federation in its observations admits that the Law on Citizenship of the Federation of Bosnia and Herzegovina and the Law on Citizenship of Bosnia and Herzegovina are not harmonised. It states that in general it is up to the Constitutional Court to decide any dispute arising between the Federation of Bosnia and Herzegovina and Bosnia and Herzegovina from the fact that there is a contradiction between the law of the State and the law of an Entity. In the present case, however, the respondent Party argues that it agrees with Bosnia and Herzegovina that the applicant has lost his citizenship with the delivery of the decision of the Ministry of Interior revoking the citizenship on 4 December 2001. Hence, in the present case the need for the Constitutional Court to decide the

[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.

matter does not arise. The Federation in its observations also expressed the opinion that the Chamber should not decide on the issue of legality of the revocation of citizenship because this very issue is pending before the Supreme Court, which should have priority to decide. The Federation made no arguments as to what effect the decision of the Supreme Court of 19 December 2002 annulling the procedural decision on revocation of the applicant's citizenship has for the case.

2. As to the admissibility

73. The Federation claims that in the legal system of the Federation of Bosnia and Herzegovina effective remedies exist both in theory and practise, which have not been exhausted by the applicant. In particular, the applicant failed to request from the domestic organs a provisional measure to suspend the enforcement of the decision on revocation of citizenship. The Federation also points out that the case of the applicant before the Supreme Court, which shall clarify the legality of the decision on revocation of citizenship, is still pending. Therefore, the Federation argues that the application is inadmissible as it is premature.

3. As to the merits

74. The Federation makes no observations as to the merits.

VII. OPINION OF THE CHAMBER

A. Admissibility and strike out

1. Exhaustion of domestic remedies

75. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina have challenged the admissibility of the application on the ground that the applicant did not exhaust domestic remedies. In this respect they refer to the procedure before the Supreme Court regarding the applicant's complaint against the administrative act on revocation of citizenship. The respondent Parties further claim that in filing a court action against the revocation of citizenship, the applicant has failed to request the Supreme Court to postpone the execution of the administrative act of revocation of citizenship. In accordance with Article 19 of the Law of Administrative Disputes (see paragraph 43 above) this claim would have been examined within three days.

76. The Chamber considers 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. The Chamber notes on this point 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 applicant's detention, the order of refusal of entry and the hand-over of the applicant into the custody of the US forces.

77. The respondent Parties could also be understood to be arguing that a request by the applicant to the competent body, under Article 19 of the Law on Administrative Disputes, to "postpone the execution of the administrative act" of revocation of citizenship until completion of the administrative dispute before the Supreme Court, would have been an effective remedy in relation to the impugned acts that occurred subsequently, i.e. his being handed-over into the custody of the US forces. The Chamber finds this argument fallacious as well.

78. The Chamber notes that a decision on revocation of citizenship is a decision on the applicant's status. It has constitutive nature. Such a decision cannot be "executed" within the meaning of Article 19 of the Law on Administrative Disputes. It does not lend itself to any further specific enforcement action. In particular, any proceedings concerning the termination of the applicant's permit to stay in Bosnia and Herzegovina, the refusal of entry to him or his expulsion are not the "execution of the administrative act" of revocation of citizenship, but a separate set of administrative proceedings. Accordingly, the remedy provided in Article 19 of the Law on Administrative Disputes cannot be applied to the revocation of the applicant's citizenship. The

applicant could have theoretically used this remedy in respect of the decision on refusal of entry, but the circumstances under which this decision was delivered to the applicant made the use of any remedy impossible in practice (see paragraph 31 above).

79. The Chamber also notes that under Article 26 of the Law on Citizenship of the Federation of Bosnia and Herzegovina, the deprivation of citizenship shall take effect only with the date of the delivery of the valid decision, i.e. after exhaustion of all ordinary judicial remedies. Article 24 of the Law on Citizenship of Bosnia and Herzegovina is less precise, in that it provides that "the citizenship of Bosnia and Herzegovina is lost ... on the day of notification to the person concerned of the legal decision". However, the facts of the present case show that Article 24 of the Law on Citizenship of Bosnia and Herzegovina can only be interpreted along the lines of Article 26 of the Law on Citizenship of the Federation. A decision changing the legal status of a person (citizenship, marriage etc.) can only take effect with the delivery of a final and legally binding decision. Any other interpretation would lead to absurd results, such as that the person might become stateless and then return to citizen status, or that a person might be divorced and then, the divorce having been annulled, return to be married.

80. As a consequence, in the case presently before the Chamber, the applicant has, *ex lege*, remained a citizen during all the proceedings before the domestic authorities. He therefore had no reason to apply for a "postponement of the execution" of the decision on revocation of citizenship. Finally, he certainly could not anticipate in November 2001 that the respondent Party would in January 2002 hand him over to the US forces without complying with any legal safeguards provided for in expulsion or extradition proceedings, and without granting him the possibility to take further legal action.

81. 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

82. 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 required by Article VIII(2)(a) of the Agreement. As the Chamber has explained in *Boudellaa and Others* (*ibid,* paragraphs 154 and 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. Admissibility of the alleged violation of "reasonableness of time"

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

84. The applicant alleges that there was a violation of his right to a trial within a reasonable time as protected by Article 5 paragraph 3 of the Convention. He claims that this violation arises from the fact that the Supreme Court did not decide in the administrative dispute regarding the revocation of citizenship before the applicant was physically removed from the territory of Bosnia and Herzegovina.

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

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

86. The Chamber notes that Article 5 paragraph 3 of the Convention provides for safeguards in respect to persons detained pending criminal proceedings. However, it appears that the applicant does not complain about his detention in the criminal proceedings. As noted above he complains under the heading of Article 5, paragraph 3 of the Convention about the fact that the Supreme Court did not decide in the administrative dispute regarding the revocation of his citizenship before he was physically removed from the territory of Bosnia and Herzegovina. Therefore Article 5, paragraph 3 of the Convention is not applicable in the present case.

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

88. Therefore, as in *Boudellaa and Others* (*ibid*, paragraphs 157 to 162), the Chamber finds that the right to have one's status as a citizen determined within a reasonable time is not a right which is included among the rights and freedoms guaranteed under the Agreement. It follows that this part of the application is incompatible *ratione materiae* with the provisions of the Agreement, within the meaning of Article VIII(2)(c). The Chamber therefore decides to declare the application inadmissible, in this respect.

4. Alleged violation of the presumption of innocence, Article 6, paragraph 2 of the Convention

89. In accordance with Article VIII(3) of the Agreement, "the Chamber may decide at any point in its proceedings to suspend consideration of, reject or strike out, an application on the ground that (b) the matter has been resolved; … provided that such a result is consistent with the objective of respect for human rights."

90. The Chamber recalls that in *Boudellaa and Others* (*ibid,* paras. 238 to 250) the Ministry of Interior, in its decision to revoke the citizenship of the applicants Boudellaa, Lakhdar and Nechle, had reached conclusions of fact adverse to the applicants solely on the basis of the fact that they had been charged with certain offences in criminal proceedings. It treated the criminal charges as evidence of the applicants' guilt. The Chamber found that, in so acting, the Ministry of Interior misused the criminal charges pending against the three applicants in question and violated their rights under Article 6 paragraph 2 of the Convention, which provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

91. The applicant in the present case, Ait Idir, received a decision on revocation of his citizenship that is identical to the decisions of the applicants Boudellaa, Lakhdar and Nechle. Therefore, although the applicant did not raise the issue of presumption of innocence, the Chamber transmitted the case to the respondent Parties for their observations also under Article 6, paragraph 2 of the Convention.

92. The Chamber recalls that the applicant initiated an administrative dispute against the decision on revocation of citizenship. On 19 December 2002 the Supreme Court of the Federation annulled the procedural decision revoking the applicant's citizenship, *inter alia* because it was based on reasons which violated the presumption of innocence as protected by Article 6, paragraph 2 of the Convention. It thereby remedied the violation of the presumption of innocence. The Chamber finds that the decision of the Supreme Court has resolved the issue of a possible violation of the presumption of innocence as protected under Article 6, paragraph 2. The Chamber therefore decides to strike out the part of the application concerning a possible violation of the presumption of innocence as protected under Article 6, paragraph 2 of the Convention, the matter having been resolved.

5. Conclusion as to admissibility and strike out

93. The Chamber decides to declare inadmissible the claim of a violation of the "reasonable time requirement" in regard to the proceedings before the Supreme Court in the administrative dispute against the revocation of citizenship. The Chamber further decides to strike out the part of the application concerning a possible violation of the presumption of innocence as protected under Article 6, paragraph 2 of the Convention, the matter having been resolved. The remainder of the application is to be declared admissible against both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, in its entirety as none of the other grounds for declaring the case inadmissible have been established.

B. Merits

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

1. Article 3 of Protocol No. 4 - prohibition of the expulsion of nationals

95. Article 3 of Protocol No. 4 prohibits the expulsion of nationals and 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."

96. With regard to the rights protected by Article 3 of Protocol No. 4, the Chamber preliminarily notes that, while the Convention uses the term "expulsion", the application of this provision 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 provision 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.

97. 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, at a date unknown to the Chamber, probably sometime in 1995.

98. On 16 November 2001 the Federal Ministry of Interior issued a decision against the applicant revoking his citizenship on the grounds that, at the time of applying for his citizenship of Bosnia and Herzegovina, the applicant had "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"(see paragraph 18 above).

99. The applicant initiated an administrative dispute against the procedural decision of 16 November 2001 revoking his citizenship. On 19 December 2002 the Supreme Court of the Federation annulled the procedural decision revoking the applicant's citizenship because it was based on reasons which violated the presumption of innocence as protected by Article 6, paragraph 2 of the Convention. The Supreme Court established further that the purported hiding of his intention to carry out a crime could not be considered to be "fraud, false information or … hiding any relevant fact" for the purposes of Article 24, paragraph 1 of the Law on Citizenship of the Federation of Bosnia and Herzegovina and Article 23, paragraph 1 of the Law on Citizenship of Bosnia and Herzegovina.

100. The Chamber finds that the decision of the Supreme Court clarifies the question whether the applicant had lost his citizenship at the time of being handed over to the US Forces. In accordance with Article 64 of the Law on Administrative Disputes, the Supreme Court decision annulled the decision on revocation of citizenship *ex tunc.* That means that the applicant never lost his citizenship

of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, but must be considered a citizen of Bosnia and Herzegovina for the entire time period since he was granted that citizenship until to date (see also paragraph 80 above). Accordingly the applicant must be considered to have been a national of Bosnia and Herzegovina at the time of his expulsion. Hence, Article 3 of Protocol No. 4 to the Convention is applicable.

101. Article 3 of Protocol No. 4 to the Convention prohibits any expulsion of nationals and contains no exceptions. The Chamber finds that both respondent Parties share the responsibility for the fact that the applicant, in spite of being a national of Bosnia and Herzegovina, was handed over to the US Forces and subsequently forcibly removed from the territory of Bosnia and Herzegovina. Therefore both respondent Parties violated Article 3 of Protocol No. 4 of the Convention.

2. Article 5 of the Convention – right to liberty and security of person

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

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

a. As to the applicant's detention until the entering into force of the Supreme Court decision to release him on 17 January 2002

103. The Chamber notes that the applicant was held in pre-trial detention until the entry into force of the release order on 17 January 2002. This pre-trial detention was based on a procedural decision by the investigative judge of the Supreme Court of the Federation ordering the applicant's arrest. The procedural decision was based on the suspicion that the applicant had committed criminal acts of international terrorism as prohibited by Article 168 paragraph 1 in conjunction with Article 20 paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina. The decision regarding the applicant was issued on 18 October 2001. The Chamber notes that the reasons on which the pre-trial detention is based are not set out in great detail in this procedural decision.

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

105. On 17 January 2002 the Supreme Court ordered the release of the applicant, as the conditions for continued investigative custody were no longer satisfied. According to the submission of the Federation of Bosnia and Herzegovina, the applicant was released from pre-trial detention at 11.45 p.m. on the same day. He was taken into custody by forces of the Ministry of Interior Police.

106. The applicant does not appear to allege that his detention, as ordered by the Supreme Court, in connection with the investigation into his involvement of the alleged terrorist activities, was unlawful. However, he has challenged his detention before the domestic courts and the Supreme Court has upheld the orders for custody. Also, the Chamber notes the lack of detail and reasoning in the procedural decisions ordering the applicant's arrest.

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

108. The Chamber recalls that the case law of the European Court of Human Rights ("the European Court") has allowed a wider margin of appreciation in the manner of the application of Article 5 where issues arise relating to terrorism as long as the essence of the safeguard provided for by subparagraph (c) is left intact.

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

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

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

b. 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

111. 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.

112. 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 in the execution of the Supreme Court order.

113. The Chamber further notes that, despite the delivery of a legitimate order for the applicant's release, and despite no issuance of a 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)

114. 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.

115. 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

116. 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 against whom action is being taken with a view to deportation or extradition".

117. 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".

118. 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.

119. 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 upon which the detention of the applicant was based. 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.

120. 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 decision ordering his detention for expulsion purposes.

121. 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.

122. There is no evidence to suggest that the hand-over of the applicant can be interpreted to be an extradition. The Chamber 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 citizen of Bosnia and Herzegovina or of the Federation and that the crime for which extradition is requested "has not been committed in the Federation ...". Because the applicant was a national of Bosnia and Herzegovina at the time when he was handed over to the US forces (see paras. 80 and 100 above) his extradition would have been contrary to Article 507 of the Code of Criminal Procedure. The applicant could thus not be lawfully detained "with a view to ... extradition".

123. In addition, 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.

124. 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.

125. 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 the applicant 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.

c. As to the hand-over of the applicant to the US forces and his detention thereafter until his forcible removal from Bosnia and Herzegovina

126. 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."

127. 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 Casev. Turkey,* judgment of 23 March 1995, Series A no. 310, p. 23-24, 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.

128. 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.

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

130. 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.

131. 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 that 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.

132. 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.

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

133. In his application to the Chamber, the applicant claimed to be 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."

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

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

a. Application of the Human Rights Agreement in expulsion cases

135. 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.

136. 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*, paragraphs 257 to 259).

137. 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*, paragraphs 263 to 267).

138. 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 to the Convention - the death penalty

139. 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.

140. 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."

141. 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."

142. 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

143. The Chamber notes that, according to the submissions 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. Neither in the applicant's case nor in the cases of *Boudellaa and Others* were extradition proceedings pursuant to the Code on Criminal Procedure initiated (*ibid,* paragraphs 275 to 277).

144. The Chamber notes that the laws of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina do not provide for individuals suspected of criminal activities to be "put under the supervision" of a foreign State by any procedure other than the extradition procedure governed by the Federation Law on Criminal Procedure. The Chamber recalls that Article 508 of the Code of Criminal Procedure requires that a petition for extradition shall include the indictment or the decision ordering custody against the person to be extradited. In addition, an extract of the text of the criminal law to be applied by the foreign State seeking extradition must accompany a petition for extradition. Reading Article 508 in conjunction with Article 507(1)(10), the Chamber notes that in the 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.

145. No extradition proceedings pursuant to the Federation Code of Criminal Procedure were initiated in the applicant's case, nor could any extradition proceedings have been lawfully initiated before the applicant was deprived of his citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina (see para. 122 above). The respondent Parties did not obtain any statement from the United States as to whether custody was sought for the purpose of bringing the applicant to trial, and if so, which law the applicant would be tried under and what penalties would be applied in the event of a conviction. Answers to these questions are crucial in order to assess whether the applicants face a real risk of being subjected to the death penalty. The facts that have emerged during the proceedings before the Chamber, the submissions of the Parties and the information obtained by the Chamber *proprio motu* have not been able to dispel the uncertainty clouding these matters. The Chamber finds that since this lack of information is a consequence of the respondent Parties' failure to follow extradition proceedings, the resulting uncertainty can only be weighed to the disadvantage of the respondent Parties when assessing the risk of imposition and execution of the death penalty against the applicants. The Chamber will now proceed to assess the risk of imposition of the death penalty on the basis of the available elements, keeping this principle in mind.

(ii) substantive criminal law applicable to possible charges against the applicant

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

147. It appears that most probably, if tried, the applicant will be tried for "violations of the laws of war". The death penalty is available 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.

148. 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

149. The Chamber has further noted in *Boudellaa and Others* 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

150. 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.

151. 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,* paragraphs 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 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.

152. 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

153. 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

154. 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 any responsibility of the US authorities arising from 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.

155. Article 3 of the Convention reads:

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

156. 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 Chamber notes that the applicant does not provide any further substantiation on this point.

157. 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.

158. 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.

159. 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.

160. 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

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

162. In view of all its findings and in particular in view of its findings 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.

5. Conclusions as to the merits

163. 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 3 of Protocol No. 4 to the Convention because the applicant must be considered to have been a citizen of Bosnia and Herzegovina at the time of his expulsion. As to the detention of the applicant in Bosnia and Herzegovina, the Chamber has found that both respondent Parties 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 Supreme Court decision to release them on 17 January 2002 until and including his hand-over to US forces. In light of these findings, the Chamber has not considered it necessary to examine the application separately under 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. Lastly, the Chamber has not considered it necessary to examine the application separately under Article 6 of the Convention.

VIII. REMEDIES

164. 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.

165. The Chamber found violations of Article 3 of Protocol No. 4 of the Convention (expulsion); Article 5, paragraph 1 of the Convention (unlawful detention), and Article 1 of Protocol No. 6 to the Convention (prohibition of death penalty).

166. The Chamber will order the Federation to take all necessary steps to annul the decision on refusal of entry of 10 January 2002 because the applicant must be considered to have been citizen of Bosnia and Herzegovina at that time.

167. 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 and to provide him with consular support, bearing in mind that it is now established that he never lost his citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina.

168. Moreover, the Chamber will order Bosnia and Herzegovina to take all possible steps to obtain the release of the applicant and his return to Bosnia and Herzegovina.

169. Bosnia and Herzegovina will further be ordered to take all possible steps to prevent a death penalty from being pronounced against and executed on the applicant, including the attempts to seek assurances from the United States via diplomatic contacts that the applicant will not be subjected to the death penalty.

170. 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.

171. The Chamber will further order the respondent Parties to compensate the applicant for the non-pecuniary damage suffered, in particular for the damage arising from the violations found with respect to the illegal detention under Article 5, the expulsion in violation of Article 3 of Protocol No. 4 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 15,000 KM. The respondent Parties will each bear half of this compensation. 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

172. For these reasons, the Chamber decides,

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

2. unanimously, to strike out the application insofar as it regards the presumption of innocence as protected under Article 6, paragraph 2 of the Convention, the matter having been resolved;

3. by 8 votes to 6, to declare admissible the remainder of the application;

4. by 9 votes to 5, that both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, violated the applicant's right as a national of Bosnia and Herzegovina not to be expelled, as guaranteed by Article 3 of Protocol No. 4 to the Convention, the respondent Parties thereby being in breach of Article I of the Human Rights Agreement;

5. by 13 votes to 1, 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 Supreme Court of the Federation of Bosnia and Herzegovina to release the applicant on 17 January 2002;

6. by 9 votes to 5, 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;

7. by 7 votes to 7, with the casting vote of the President, that both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, 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;

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 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;

9. by 9 votes to 5, 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;

10. by 11 votes to 3, that it is not necessary to consider the case under Article 8 of the Convention;

11. 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;

12. by 8 votes to 6, 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;

13. by 9 votes to 5, to order Bosnia and Herzegovina to use diplomatic channels in order to protect the internationally recognised human rights of the applicant and, in particular, his right to liberty and security of person and his right not to be subject to inhuman and degrading treatment and to torture, taking all possible steps to establish contacts with the applicant, and to provide him with consular support;

14. 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;

15. by 9 votes to 5, to order Bosnia and Herzegovina to take all possible steps to obtain the release of the applicant and his return to Bosnia and Herzegovina;

16. 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;

17. by 8 votes to 6, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to pay to the applicant 15,000 Convertible Marks (*Konvertibilnih Maraka*, "KM") no later than 4 May 2003, each of the respondent Parties bearing half of the compensation;

18. by 8 votes to 6, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to place the compensation awarded in conclusion no. 17 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. 17 above to his wife and children in Bosnia and Herzegovina;

19. by 8 votes to 6, to order both respondent Parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to pay simple interest at the rate of 10 (ten) per cent per annum over the above sum or any unpaid portion thereof from 4 May 2003 until the date of settlement in full; and

20. 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)
Ulrich GARMS
Registrar of the Chamber

(signed)
Michèle PICARD
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 III Partly dissenting opinion of Mr. Manfred Nowak

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. 8 of the present decision that the respondent Parties violated the applicant's right not to be subjected to the death penalty, stated in paragraphs 139 to 153 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 153 above of the present decision, reads as follows:

> "153. 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. 9 and 11 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 32 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

ANNEX III

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

PARTLY DISSENTING OPINION OF MR. MANFRED NOWAK

1. I voted against conclusions nos. 9, 10 and 11 since I am deeply convinced that the authorities of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina also violated the rights of the applicant not to be subjected to torture or inhuman or degrading treatment under Article 3 of the Convention, the right to a fair trial under Article 6 of the Convention, and the right to the protection of private and family life under Article 8 of the Convention. Although the Government of the United States of America bears responsibility for these human rights violations, the principle of non-refoulement, which is an important general principle of international law, obliges States not to expel, extradite, return or deport any person to another State where he or she faces the real risk of being subjected to treatment which seriously violates his or her most fundamental human rights. Since the European Court of Human Rights derives the principle of non-refoulement from the obligation of States Parties to the Convention to ensure to persons under their jurisdiction the rights protected by the Convention (above all in Article 3), European States are bound by these comparatively high standards when deciding to deport a person to another country where the respective standards might be different.

2. In my mind, there can be no doubt that the United States, with the establishment of the so-called Camp X-Ray at Guantanamo Bay in Cuba, is seriously violating the most fundamental human rights of persons they suspect of being involved in terrorism. As the US Ambassador in Bosnia and Herzegovina clearly expressed in a letter to the applicant's wife, her husband is detained for an unlimited period of time (until the US led "war against terrorism" is over), without any charges brought against him, as an "enemy combatant" (although it is undisputed that he lived as a citizen of Bosnia and Herzegovina in Bosnia and Herzegovina at the time the United States engaged in armed conflict against the Taliban and al-Quaida forces in Afghanistan). This unlimited preventive detention without any possibility of judicial review constitutes a violation of the minimum standards of the right to personal liberty, as laid down not only in Article 5 of the Convention, but also in Article 9 of the International Covenant on Civil and Political Rights (CCPR), to which the United States is a party. According to Amnesty International, Human Rights Watch and other major international human rights organisations, the conditions of detention at Guantanamo Bay are clearly violating the minimum United Nations standards of human treatment and have led to the fact that an increasing number of detainees have attempted suicide. The applicant has been held for more than one year in complete isolation from the outside world, and, as the US Ambassador has confirmed, he is prevented for an unlimited time from being visited by family members, attorneys and members of international organisations. According to European and international human rights standards, this amounts, in addition to inhuman treatment, to a serious violation of his right to respect for his private and family life under Article 8 of the Convention. Should he finally be indicted for any criminal charge, he would be brought before military commissions which cannot be considered as independent courts and which do not apply the minimum standards of the rule of law and a fair trial set forth in Article 6 of the Convention and Article 14 of the CCPR. As US courts have held in several judgments, even the human rights guarantees laid down in the US Constitution and judicial review by ordinary US federal courts are denied to the Guantanamo Bay detainees.

3. Although not all the details of these human rights violations by the present US Government against the Guantanamo Bay detainees were known to the authorities of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina at the time of handing over the applicant to US forces in January 2002, there was, nevertheless, plenty of information available already at that time requiring the authorities of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina to act with utmost caution. It must have been clear to them that by allowing and facilitating the applicant's deportation to Guantanamo Bay, they would separate the applicant from his wife and three children in Bosnia and Herzegovina for a prolonged and probably indefinite period of time. Since he had neither been convicted of any crime nor even indicted or suspected of any crime which could have justified any further pre-trial detention under domestic law, the authorities of Bosnia and Herzegovina and the

Federation of Bosnia and Herzegovina failed to strike any balance between the public interests listed in Article 8 paragraph 2 and the applicant's human right not to be separated from his family. Therefore, they clearly violated the applicant's right to respect for his family life under Article 8 of the Convention. In addition, there was enough information available about the deplorable conditions of detention at Guantanamo Bay and the risk of future serious violations of fundamental human rights and the rule of law (apart from the risk of being subjected to the death penalty) in order for the authorities of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina not to hand over the applicant to US forces without even asking for a formal extradition request or any legal guarantees from US authorities.

4. For these reasons, I respectfully dissent with respect to Articles 3, 6 and 8 of the Convention.

(signed)
Manfred Nowak