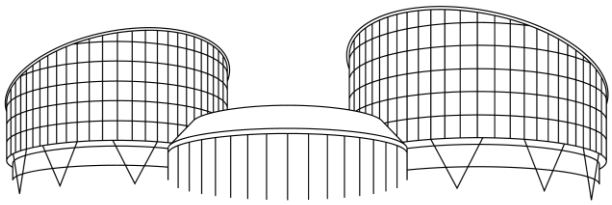

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF AL HAMDANI v. BOSNIA AND HERZEGOVINA

(Application no. 31098/10)

JUDGMENT

STRASBOURG

7 February 2012

FINAL

09/07/2012

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the case of Al Hamdani v. Bosnia and Herzegovina**,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano,
Ljiljana Mijović, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated in private on 17 January 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 31098/10) against Bosnia and Herzegovina lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr Fadhil Al Hamdani ("the applicant"), on 10 May 2010.

2. The applicant was represented by Mr O. Mulahalilović and Vaša prava, a local non-governmental organisation. The Bosnian-Herzegovinian Government ("the Government") were represented by their Agent, Ms M. Mijić.

3. The applicant alleged, in particular, that his deportation would expose him to the risk of treatment contrary to Article 3 of the Convention and that his detention amounted to a breach of Article 5 § 1 of the Convention.

4. On 4 October 2010 the President of the Fourth Section of the Court decided, in the interests of the parties and the proper conduct of the proceedings, to indicate to the Government that the applicant should not be expelled to Iraq until 21 January 2011 (Rule 39 of the Rules of Court).

5. On 16 December 2010 a Chamber of the Fourth Section of the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1) as well as to extend the interim measure mentioned above pending the termination of the proceedings before the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Relevant background to the present case

6. It would appear from the case file that the salient fact in the domestic proceedings was the applicant's association with the mujahedin in Bosnia and Herzegovina ("BH")[1]. The term mujahedin has been widely used to refer to foreigners – mainly from the Arab world – who came to BH during the war in support of Bosnian Muslims[2]. However, the same term has been used to describe local Muslims who joined the foreign mujahedin, endorsed their ideology and adjusted to their way of dressing. The phenomenon has been explained by the International Criminal Tribunal for the former Yugoslavia ("ICTY") in *Hadžihasanović and Kubura*, IT-01-47-T, §§ 411-18, 15 March 2006, and *Delić*, IT-04-83-T, §§ 166-199, 15 September 2008, as follows.

7. The first foreign mujahedin arrived in BH in the summer of 1992 via Croatia and with the assistance of the Croatian authorities. It would appear that their arrival was welcomed by the BH authorities. While the presence of at least some foreign mujahedin seems to have been motivated by a desire to provide humanitarian assistance to the Bosnian Muslim population, most of them actively supported the military struggle against the Bosnian Muslims' adversaries, ready to conduct a jihad or "holy war". As stated by Ali Hamad, an ICTY witness of Bahraini origin who came to BH in 1992, some of the mujahedin were members of al-Qaeda who had the aim of "creating a base that would allow them to increase their area of operations". Some of them also came to perform missionary work.

8. Upon arrival, foreign mujahedin settled in various locations and did not form a homogeneous entity. Towards the end of 1992, Bosnian Muslims started to join the foreign mujahedin. The locals were provided with military training and participated in combat action. They were also given religious instruction. A number of groups comprising foreign and/or local mujahedin were active. Notwithstanding instances of participation in combat alongside each other, it appears that these groups were anxious to maintain their distinct identities. There were religious and ideological differences between them, which resulted in occasional violent clashes.

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1. While the respondent State was called "the Republic of Bosnia and Herzegovina" during the 1992-95 war, the name "Bosnia and Herzegovina" is nevertheless also used in this judgment when referring to that period.

2. Bosnian Muslims are also known as Bosniacs. The term "Bosniacs" should, however, not be confused with the term "Bosnians", which is used to denote BH citizens irrespective of their ethnic origin.

9. On 13 August 1993 the foreign mujahedin were organised into a unit within the local ARBH (Army of the Republic of Bosnia and Herzegovina) forces[1]. The unit, named "*El Mujahedin*", was based in Zenica. Following its establishment, the unit significantly grew in size. By 1995, it consisted of around 1,000 fighters. Although the original idea had been to replenish the unit with foreign mujahedin only, locals soon outnumbered its foreign members. The factors that motivated locals to join it included: its stricter regimental discipline; a better degree of organisation; superior equipment and combat morale; its religious dedication; and material benefits. The unit received funds and assistance from many organisations and individuals from the Islamic world, including the Al-Haramain Islamic Foundation[2] and the Benevolence International Foundation[3]. The Islamic Cultural Institute in Milan provided logistical support.

10. *El Mujahedin* had a number of features setting it apart from regular ARBH units. It was led by foreign mujahedin who were not appointed by the ARBH. At the top of the hierarchy was an *emir*, who has been described as the highest-ranking person within the unit. Abu Haris, a Libyan, was its first *emir*. In December 1993, he was succeeded by an Algerian, Abu Maali, who remained in that position until the end of the war. A different person from the *emir*, the military commander, headed the military council and was responsible for the conduct of combat operations. In 1993, this post was held by an Egyptian named Vahidin or Wahiuddin. After his death in October 1993, another Egyptian, Muatez, succeeded him. Muatez was killed in September 1995. The unit had a religious council, the *shura*, which was its supreme decision-making body. It consisted of approximately twenty prominent members of the unit, mostly of Arab origin. The *emir* was elected by and answerable to the *shura*. At the end of 1994, Sheikh Shaban joined the leadership of the unit. He was the head of the Islamic Cultural Institute in Milan and known to be an extremist who was well-connected with Islamic fundamentalists all over the world (the ICTY relied in that regard on a judgment of the Milan Criminal Court of 1 January 2006). He facilitated the recruitment of volunteers from Arab countries for the struggle in BH. Although Sheikh Shaban did not hold an official function within the unit, its members considered him to be the political authority and even the real *emir*

1. The ARBH forces, mostly made up of the Bosnian Muslim population, were loyal to the central authorities of BH.

2. On 13 March 2002 the Al-Haramain Islamic Foundation was placed on the list of entities associated with al-Qaeda maintained by the United Nations.

3. On 21 November 2002 the Benevolence International and *Bosanska idealna futura*, its office in BH, were placed on the list of entities associated with al-Qaeda maintained by the United Nations. On 10 February 2003 Enaam M. Arnaout, its director, was convicted in the United States after he pleaded guilty to a racketeering conspiracy. In the plea agreement, he admitted that for a decade the Benevolence International Foundation had been defrauding donors by leading them to believe that donations were being used for strictly peaceful, humanitarian purposes, while some of that money was being diverted to mujahedin in BH.

within the unit. He could issue binding rulings (*fatwa*) and his authority was never challenged by the *shura*. Sheikh Shaban was killed, together with Abu Haris, at an HVO (Croatian Defence Council)[1] military checkpoint on 14 December 1995.

11. The General Framework Agreement for Peace, which ended the war in BH, was initialled at a military base near Dayton, the United States, on 21 November 1995 and signed in Paris, France, on 14 December 1995. Article III of Annex 1A to that Agreement called for the withdrawal of all foreign forces, including individual advisors, freedom fighters, trainers, volunteers, and personnel from neighbouring and other States, irrespective of whether they were legally and militarily subordinated to any of the local forces. In view of that, on 14 December 1995 the ARBH disbanded *El Mujahedin* and ordered its foreign members to leave the country by 10 January 1996. Despite initial resistance, the *shura* accepted that the unit be disbanded. It would appear that awards, such as the "Golden Lily", were given to its members as an incentive for foreigners to leave. Members of the unit were also provided with ARBH certificates of service, which assisted its foreign members to acquire BH citizenship. Whereas most of the unit's foreign members left BH, some of them (such as the present applicant) applied for BH citizenship and continue to live in BH to date.

12. After the attacks of 11 September 2001, the official attitude towards foreign mujahedin changed dramatically. Many lost their BH citizenship or were deported from BH after being declared a threat to national security.

B. The present case

13. The applicant was born in Iraq in 1960.

14. He went to Bosnia and Herzegovina to pursue his studies in 1979. He first studied in Sarajevo and in 1983 moved to Zenica. In 1987 the applicant married a citizen of Bosnia and Herzegovina. They have five children together.

15. During the 1992-95 war in Bosnia and Herzegovina, the applicant joined *El Mujahedin* unit mentioned above.

16. The applicant acquired citizenship of Bosnia and Herzegovina ("BH citizenship") on three occasions: on 23 March 1992, on 12 January 1995 (under the name of Awad Fadhil) and again on 20 February 1995. He has visited Iraq twice since the 1992-95 war, in 2003 and 2004. The applicant possesses an Iraqi passport, issued by the Iraqi Embassy in Vienna on 23 January 2007, which was valid until 22 January 2011.

1. The HVO forces were mostly made up of the local Croatian population. They were loyal to the authorities of neighbouring Croatia (see the ICTY judgments in Blaškić, IT-95-14-T, §§ 95-123, 3 March 2000, and IT-95-14-A, §§ 167-78, 29 July 2004).

17. On 30 August 2006 the competent administrative authorities established that the applicant's BH citizenship had been acquired by means of fraudulent conduct, false information and concealment of some relevant facts (notably, the fact that he already possessed BH citizenship when he lodged the second application for naturalisation and that he had used documents issued in two different names) and quashed the decisions of 23 March 1992 and 20 February 1995. On 12 January 2007 the Court of Bosnia and Herzegovina ("the State Court") quashed the part of the decision of 30 August 2006 concerning the decision of 20 February 1995 and remitted the case for retrial.

18. Meanwhile, on 6 June 2007 the applicant filed a request for a temporary residence permit. On 28 September 2007 the Aliens Service suspended those proceedings pending the final resolution of the applicant's citizenship status.

19. On 27 November 2008 the competent administrative authorities quashed the decision of 20 February 1995 again. On 3 December 2009 the State Court upheld that decision. On 1 February 2010 the applicant appealed to the Constitutional Court of Bosnia and Herzegovina ("the Constitutional Court"). It appears that those proceedings are still pending. This does not, however, prevent the applicant's potential deportation, as he became an unlawful resident from the moment of the notification of the decision of 27 November 2008. The applicant, on the other hand, claimed that he still possesses BH citizenship based on a decision of 12 January 1995 (see paragraph 16 above). That decision was, however, issued in the name of another person (Awad Fadhil) and cannot, therefore, confer any rights on the applicant, as was confirmed in the Government's observations on the admissibility and merits of the case.

20. On 23 June 2009 the Aliens Service established that the applicant was a threat to national security and placed him in Istočno Sarajevo Immigration Centre. It relied on secret intelligence reports. On 30 June 2009 the State Court, having assessed the secret evidence, upheld that decision. On 17 September 2009 the Constitutional Court dismissed the applicant's appeal as manifestly ill-founded. The initial detention period had been extended on a monthly basis until April 2011 when the applicant was released (see paragraph 26 below).

21. After the decision revoking the applicant's citizenship of 27 November 2008 had become final, the proceedings before the Aliens Service concerning a request for a temporary residence permit were resumed at the applicant's request (see paragraph 18 above). On 8 January 2010 the Aliens Service refused his request and granted him a period for voluntary departure of fifteen days. On 2 March 2010 the Ministry of Security upheld that decision. On 1 June 2010 the State Court upheld the decision of 2 March 2010. On 21 April 2011 the applicant appealed to the

Constitutional Court. It would appear that those proceedings are still pending.

22. On 17 February 2010 the applicant claimed asylum. He maintained that Iraqi citizens who had joined the foreign mujahedin during the war in Bosnia and Herzegovina were treated in Iraq as suspected terrorists and were subjected to ill-treatment. He added that his friend had informed him that his name was on a "black list" and that his family was subjected to threats and ill-treatment due to their affiliation with the Ba'ath Party. The applicant also claimed that he would be persecuted by Shia Muslims and Kurds upon his return to Iraq (Kirkuk) because he is a Sunni Muslim.

23. On 23 February 2010 the Asylum Service interviewed the applicant in the presence of his lawyer and a UNHCR representative. It also had regard to reports of the US Department of State, the UNHCR, the International Organization for Migration and the UK Border Agency on Iraq. At the interview the applicant stated that he has visited Iraq twice since the change of regime, in 2003 and 2004. During both visits he stayed with his family in Kirkuk. In 2003 he went to visit his sick father and stayed for one and a half months. He took care of his father and accompanied him to the hospital on several occasions. In 2004 the applicant went to Kirkuk to hold a commemoration for his father and remained there for the whole month of Ramadan and the Bayram holiday. However, he claimed that during these visits he had been forced to hide in fear of the Kurdish authorities as his friend had told him that he was under surveillance and that his name was on a "black list". The applicant further claimed that in his subsequent contact with his family, after he had returned to Bosnia and Herzegovina, they had told him that the Kurds had searched their home looking for him. On 4 March 2010 the Asylum Service refused the asylum claim and granted him a period for voluntary departure of fifteen days. The Asylum Service held that the applicant's statements were contradictory and that he had not provided any evidence in support of his claims.

24. On 26 May 2010 the State Court quashed that decision and remitted the case for a retrial stating that the Asylum Service should make a more thorough assessment of the applicant's claim. On 21 June 2010 the Asylum Service refused the applicant's request for asylum and granted him a period for voluntary departure of fifteen days. On 22 September 2010 the Court of Bosnia and Herzegovina upheld that decision. On 19 November 2010 the applicant appealed to the Constitutional Court against that decision. On 9 February 2011 the Constitutional Court dismissed the applicant's appeal as manifestly ill-founded. It held that, although the general situation in Iraq was insecure and problematic, the applicant had not proved that there was a real risk of treatment contrary to Article 3 of the Convention on account of his personal circumstances.

25. On 8 November 2010 the Aliens Service issued a deportation order accompanied with an entry ban for a period of five years. It stated, however,

that removal directions would not be issued for as long as the Court's interim measure was in force. On 3 December 2010 the Ministry of Security upheld that decision. On 16 March 2011 the State Court also upheld the deportation order. An appeal is pending before the Constitutional Court.

26. On 5 April 2011 the State Court ordered the applicant's immediate release from the immigration centre, quashing the last extension order (of 21 March 2011) as unlawful. It held that the relevant authorities had not provided any new evidence as a basis for the applicant's continued detention. Furthermore, it prescribed the lesser measure of surveillance limiting the applicant's freedom of movement to his home address in Zenica with the obligation to report daily to the Aliens Service field office in Zenica. It also ordered the confiscation of the applicant's Iraqi passport and other personal documents he might use in an attempt to leave the country. The applicant was released from detention on 7 April 2011.

II. RELEVANT DOMESTIC LAW

A. Secret Data Act 2005

27. The Secret Data Act 2005 (*Zakon o zaštiti tajnih podataka*, Official Gazette of Bosnia and Herzegovina nos. 54/05 and 12/09) entered into force on 17 August 2005. Section 5 of that Act provides that the judges of the State Court and the Constitutional Court have access to all levels of secret data without any formalities (such as security clearance or special authorisation), if such access is required for exercising their duties.

B. Aliens Act 2008

1. Eligibility for international protection (refugee status and subsidiary protection) and for leave to remain on humanitarian grounds

28. The Aliens Act 2008 (*Zakon o kretanju i boravku stranaca i azilu*, Official Gazette of Bosnia and Herzegovina no. 36/08) entered into force on 14 May 2008. Section 105 thereof provides that a refugee is an alien who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside the country of former habitual residence, is unable or, owing to such fear, is unwilling to return to it. The same provision defines a person eligible for subsidiary protection as an alien who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that he or she would face a real risk of the death penalty or execution, torture or inhuman or degrading

treatment or punishment in the country of origin or in the country of habitual residence, or there is a serious, individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict, and who is unable, or, owing to fear, is unwilling to avail himself or herself of the protection of that country.

The principle of *non-refoulement* is incorporated in section 91 of the Act, which reads as follows:

> "An alien shall not be returned or expelled in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion, regardless of whether or not the person concerned has been granted international protection. The prohibition of return or expulsion (*non-refoulement*) shall also apply to persons in respect of whom there is a reasonable suspicion for believing that they would be in danger of being subjected to torture or other inhuman or degrading treatment or punishment. An alien may not be returned or expelled to a country where he or she is not protected from being sent to such a territory either."

Pursuant to section 118 of the Act, an alien whose claim for international protection has been refused will nevertheless be granted leave to remain on humanitarian grounds, if his or her removal would breach the principle of *non-refoulement*. However, the alien concerned must be placed in detention if it has been established that he or she constitutes a threat to public order or national security.

2. Deportation order and removal directions

29. Under section 88(1)(h) of the Aliens Act 2008 the deportation of an alien can be ordered if it has been established that he or she constitutes a threat to public order or national security. An appeal against a deportation order suspends deportation (section 87 of that Act). A claim for international protection and an application for judicial review against a refusal of such a claim equally suspend deportation (sections 92, 109(9) and 117 of that Act). Pursuant to section 93 of that Act, once an alien has become expellable, removal directions are issued within seven days. An appeal against removal directions does not suspend deportation.

3. Detention of aliens

30. In accordance with section 99(2)(b) of the 2008 Act, an alien must be detained if it has been established that he or she constitutes a threat to public order or national security, irrespective of whether a deportation order has been issued. Once a deportation order has been issued, the alien concerned may also be detained under section 99(1)(a) of that Act. An initial detention order is valid for 30 days (section 100(3) of that Act). It may be extended any number of times for up to 30 days at a time. However, the total period of detention may only exceed 180 days in exceptional circumstances, such

as if an alien prevents his or her removal or if it is impossible to remove an alien within 180 days for other reasons (see section 102 of that Act).

III. INTERNATIONAL TEXTS

A. Concerning Bosnia and Herzegovina

31. The General Framework Agreement for Peace, which put an end to the 1992-95 war in Bosnia and Herzegovina, was initialled at a military base near Dayton, the United States, on 21 November 1995 and signed in Paris, France, on 14 December 1995. It entered into force on the latter date.

32. Pursuant to Article III of Annex 1A to that Agreement, all foreign forces, including individual advisors, freedom fighters, trainers, volunteers, and personnel from neighbouring and other States, irrespective of whether they were legally and militarily subordinated to any of the local forces, had to be withdrawn from Bosnia and Herzegovina by 13 January 1996.

B. Concerning Iraq

33. The relevant part of the 2010 Human Rights Report on Iraq, published by the Human Rights Office of the United Nations Assistance Mission in Iraq (UNAMI), reads as follows:

> "The human rights situation in Iraq remains fragile as the country continues to emerge from years of dictatorship, warfare and violence. While the government continues to take some measures aimed at improving the protection and provision of human rights and its citizens, given the challenges that the country faces, progress is slow. Iraq continues to transition from a conflict to post-conflict country which faces enormous development challenges that the Government and people of Iraq must now address. Widespread poverty, economic stagnation, lack of opportunities, environmental degradation and an absence of basic services constitute "silent" human rights violations that affect large sectors of the population. Other factors that affected the human rights environment in 2010 included the inconclusive results of the general elections leading to a long process of government formation that was not concluded until December 2010. It is believed that this fuelled instability, but also led to a degree of inactivity in relation to implementing reforms and other measures aimed at ensuring the respect, protection and provision of human rights to the Iraqi population. Also affecting security was the withdrawal of all USF-I combat troops during the year which was completed in August 2010.
>
> ...
>
> Armed violence continued to impact negatively on civilians and civilian infrastructure. Civilians were subjected to arbitrary loss of life and injury, but also limiting access to, and enjoyment of, other basic rights, including, but not limited to, the right to access basic humanitarian services, and the right of assembly, freedom of expression, freedom of religion, etc. It also negatively impacted on economic development. Arbitrary or deliberate targeting of civilians also constitutes serious violations of applicable rules of human rights law and international humanitarian law.

> The number of civilians who died from armed violence in 2010 range from 2,953 killed and 14,398 wounded according to UNAMI to 3,254 dead and 13,788 wounded according to figures provided by the Ministry of Human Rights (MoHR) of the Government of Iraq.
>
> ...
>
> Minorities suffered from various attacks throughout Iraq during 2010. In particular Christians, Yezidi and Shabaks, among other minorities, continued to be directly targeted during the year – resulting in some displacement of members of minority groups within the country and internationally, particularly of Christians."

34. The United Nations and the International Organisation for Migration (IOM) have stated that, although they "do not necessarily encourage return at this time because of security concerns, both are committed to providing assistance to those who do decide to return" (IOM, *Assessment of Iraqi Return*, August 2008). Moreover, the Iraqi Government have initiated a financial incentive and subsidy programme for returnee families and they are working to develop their capacity to register and assist the increasing number of returnees (IOM, cited above). The IOM has further noted that the rate of displacement in Iraq has slowed and that the rate of return has accelerated, mostly to Baghdad (IOM, *Review of Displacement and Return in Iraq*, February 2011). According to the IOM, general insecurity is the primary reason preventing Iraqis from returning home.

C. Reports on the security situation in Kirkuk

35. According to a report of 18 December 2006 by the United Nations High Commissioner for Refugees (UNHCR Return Advisory and Position on International Protection Needs of Iraqis Outside Iraq), no forcible return of Iraqis from Southern or Central Iraq should take place until there was a substantial improvement in the security and human rights situation in the country.

36. In a follow-up report of August 2007 (UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers), the UNHCR encouraged the adoption of a *prima facie* approach for Iraqi asylum-seekers from Central and Southern Iraq and stated that they should be considered as refugees based on the 1951 Convention relating to the Status of Refugees in signatory countries. In its more recent Eligibility Guidelines of April 2009, the UNHCR observed that in view of the serious human rights violations and ongoing security incidents which were continuing in the country, most predominantly in the five Central Governorates of Bagdad, Diyla, Kirkuk, Ninewa and Salah-Al-Din, the UNHCR continued to consider all Iraqi asylum seekers from these five Central Governorates to be in need of international protection and stated that, in signatory countries, they should

be considered as refugees based on the 1951 Convention criteria (see paragraph 12 of the Guidelines). The Guidelines observed inter alia:

> "27. In the context of the Central Governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al-Din where, even though the security situation has improved in parts, there is still a prevalence of instability, violence and human rights violations by various actors, and the overall situation is such that there is a likelihood of serious harm. Armed groups remain lethal, and suicide attacks and car bombs directed against the MNF-I/ISF [Multinational Forces in Iraq/Iraqi Security Forces], Awakening Movements and civilians, in addition to targeted assassinations and kidnappings, continue to occur on a regular basis, claiming the lives of civilians and causing new displacement. These methods of violence are usually targeted at chosen areas where civilians of specific religious or ethnic groups gather, including places of worship, market places, bus stations, and neighbourhoods. Violence appears often to be politically motivated and linked to ongoing struggles over territory and power among various actors. As clarified above, even where an individual may not have personally experienced threats or risks of harm, events surrounding his or her areas of residence or relating to others, may nonetheless give rise to a well-founded fear. There is also more specific targeting of individuals by extremist elements of one religious or political group against specific individuals of another, through kidnappings and execution-style killings."

As regards Kirkuk, the Guidelines included the following observations (footnotes omitted):

> "202. Most violence in the Governorate is linked to the yet unresolved administrative status of Kirkuk and related power struggles between the various Arab, Kurdish and Turkmen actors. Security conditions in Kirkuk Governorate, and in particular in Kirkuk City, tend to worsen during political events related to the status of Kirkuk as armed groups aim at influencing political decisions. For example, during intense negotiations over a provincial elections law in summer 2008, a suicide attack on demonstrating Kurds resulted in an outbreak of inter-communal violence, in which more than 25 people were killed and over 200 injured. Conversely, tensions and sporadic violence can complicate future status negotiations. With the postponing of provincial elections in Kirkuk, the security situation has somewhat stabilized. However, simmering inter-communal tensions are prone to erupt into new violence ahead of decisions to be taken in relation to Kirkuk's unresolved status. Some observers note that tensions among ethnic groups over the unresolved status of Kirkuk could turn into another civil war. Insurgent groups such as AQI [Al-Qaeda in Iraq] also aim at stirring inter-communal violence by attacking proponents of ethnic/religious groups. Furthermore, it has been reported that community groups in Kirkuk are arming themselves in preparation for future clashes.
>
> 203. Kirkuk's Arab and Turkmen communities complain of harassment, intimidation, arbitrary arrests and demographic manipulation at the hands of the Kurds, who dominate the Governorate's political and security institutions. Kurdish law enforcement personnel and political leaders are in turn popular targets for assassination. PUK and KDP offices are also a regular target of attacks. Recently, two members of the Kurdistan Communist Party have been killed in their homes in Kirkuk. The brother of a high-ranking member of the same party was also killed. Religious and ethnic minorities often find themselves caught up in the middle of struggles for power and territory.
>
> 204. In Kirkuk Governorate, there are regular roadside bombings, shootings, and occasional car bombs and suicide attacks. On 11 December 2008, a suicide bomber

killed 46 people and wounded nearly 100 when he detonated his explosive vest in a restaurant packed with government officials, women and children during lunch near Kirkuk City. There are also targeted kidnappings and assassinations, including of security officials, tribal leaders/SoI [Sons of Iraq], government officials and employees, (mostly Kurdish) party officials, members of minority groups [referring notably to two incidents of attacks against Christians], journalists and other professionals. Dead bodies continue to be found occasionally in Kirkuk Governorate."

37. In July 2010 the UNHCR issued a Note on the Continued Applicability of the April 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers. It contained the following information on security developments (footnotes omitted):

"Under the Status-of-Forces Agreement (SOFA) of 30 June 2009, the Iraqi authorities have taken over full responsibility for the security of the country. The former Multinational Forces-Iraq/United States Forces-Iraq (former MNF-I/USF-I) have withdrawn from Iraqi cities, towns and villages and operate from their military bases at the request of the Iraqi Government. Currently, the US is drawing down all combat forces and is expected to complete this process by 31 August 2010. The Iraqi Security Forces (ISF) have almost reached their intended end strength of about 680,000 members. Since spring 2009 the Iraqi Government has been fully responsible for managing and integrating the largely Sunni Awakening Councils or Sons of Iraq (SoI) groups into the ISF and Iraqi government employment. This process is still ongoing and by April 2010, of the 94,000 SoI, some 9,000 had transitioned into the ISF and over 30,000 into other government employment.

The Iraq Body Count (IBC), a project which maintains data on civilian deaths, reported that in 2009 the annual civilian death toll was 4,644. Reports for 2010 indicate that some 2,000 Iraqis were killed and some 5,000 others were injured during the first five months of 2010. An upsurge in violence was noted since the 7 March 2010 elections and casualty statistics for the months of April and May 2010 reflect an increase in the numbers of Iraqis killed and wounded in violence. Reports show that in 2009 and early 2010, insurgents carried out several mass-casualty attacks, including on high-profile, highly guarded targets such as Iraqi government institutions, prominent hotels and foreign embassies. The assaults resulted in hundreds of civilians killed or injured in the attacks. Al-Qa'eda in Iraq claimed responsibility for the attacks against embassies in Baghdad and residential targets in mainly Shi'a districts of the capital in early April 2010. The reported incidents mostly took place in the central governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al-Din as well as in Al-Anbar, which has seen an increase in violence since the summer of 2009. The relatively stable security situation in the Southern governorates is reportedly occasionally disrupted by mass-casualty attacks and low level violence mainly in areas close to Baghdad. The Kurdistan Region remains relatively stable, though there have been reported assaults on journalists and political opponents.

Among other security related developments worth noting is the start of the implementation of an interim joint security plan for Kirkuk and other internally disputed areas by the USF-I. The plan is based on joint action and coordination by the Iraqi Army and Police as well as the Kurdistan Regional Government (KRG) Peshmerga. Thus far, the joint security plan has resulted in the establishment of a network of checkpoints and joint patrols around major cities, and the training of security personnel. Addressing the overall issue of the status of the "disputed areas" is among the challenges that await the new Government. Crucial matters to be resolved

in this area include administrative boundaries, the control of oil resources, minority rights and other matters.

Since early 2010, the ISF, with the help of the USF-I, have arrested or killed a large number of senior insurgent leaders, in particular members of Al-Qa'eda in Iraq. Ongoing attacks illustrate that the groups are still intent on, and capable of, attacks.

Reports indicate that the targeting of Government of Iraq officials, members of the Iraqi security forces, Awakening Council members and prominent citizens continue unabated. Among the frequently targeted are Shiite civilians and pilgrims as well as religious sites in different areas, religious and ethnic minority groups mainly in Ninewa and Kirkuk Governorates (Yazidis, Turkmen, Shabak and Kaka'i), and the Christian minority, mainly in Ninewa, which includes 5,000 Christians displaced from Mosul in early 2010. Compared to 2008, there has been a significant increase in the use of magnetic and adhesive bombs attached to vehicles as a weapon to assassinate particular individuals. Profiles targeted include, in particular, government officials and employees, party officials, members of the Awakening Councils or Sons of Iraq (SoI), members of the ISF (including off-duty members), religious and ethnic minorities [referring to several incidents of attacks against Christians and a suicide truck bomber in, a Shi'ite Turkmen town 20 km south of Kirkuk destroying homes and damaging another 100 homes, affecting 600 people], Sunni and Shi'ite clerics, journalists, academics, doctors, judges and lawyers, human rights activists and Iraqis working for NGOs or the USF-I and foreign companies, alcohol vendors (which are commonly Christians or Yazidis), women and LGBT individuals.

...

III. Conclusion

The situation in Iraq is still evolving. UNHCR will continue to monitor developments in the country and will update the April 2009 UNHCR Guidelines once it judges that the situation is sufficiently changed. In the interim, UNHCR advises those involved in the adjudication of international protection claims lodged by asylum-seekers from Iraq and those responsible for establishing government policy in relation to this population continue to rely on the April 2009 UNHCR Guidelines. Accordingly, the current UNHCR position on returns to Iraq also remains unchanged."

38. The Country of Origin Information Centre (*Landinfo*), an independent human rights research body set up to provide the Norwegian immigration authorities with relevant information, has in a report of 28 October 2008 stated the following about the security situation in Kirkuk city (footnotes and references omitted):

"It is generally recognized that the level of violence in Kirkuk is by far lower than that in Baghdad and Mosul.

The majority of the security incidents in the city appear to be attacks against police and military. Most frequent are attacks against road patrols, and against checkpoints and personnel. These attacks both take place on the roads between Kirkuk and surrounding areas and inside the city. Occasional civilian casualties result from such attacks ... .

There are also occasional indiscriminate attacks aimed directly at civilians, such as suicide attacks at crowded places inside the city.

> Additional types of targets have been recorded by *Landinfo* since October 2005. These targets are very diverse. There have been attacks on local Kurdish political leaders and their families, on engineers and building contractors, oil business executives, private security guards, gas station workers, churches, Shiite mosques, polling stations, and at a Turkmen political party office. In October 2008 an Iraqi journalist was killed.
>
> The intensity of attacks against all target groups seems to have remained quite stable over the years. Between September 2005 and March 2006, 44 reported incidents were recorded ... . During November and December 2006, a total of 30 individuals were reported killed in violent incidents (DMHA 2006).
>
> In March 2008, it was reported that violence had gone up since 2006, and that security remained highly unstable ... . According to the US military commander in Kirkuk, by the summer of 2008 violence had dropped by two thirds as compared to the summer of 2007 ... . Figures indicate that since August 2008, violence remains stable through October ... .
>
> We do not have figures for the summer of 2007, nor do we know for how long period of time 'summer' refers to. What the sources indicate, however, is that violence went up by March 2008, then down again by summer the same year, and that it seems to have stabilized somewhat afterwards. With the reservation that we don't have exact figures to substantiate this trend, we do see, however, that the occurrence of violence is unstable through a fairly short period of time.
>
> The factors accounting for the security problems continue to be present for the foreseeable future. Accordingly, an unstable level of violence may be expected to continue".

39. A Thematic Note by *Landinfo* on the Security Situation in Kirkuk City and the Surrounding Areas (*Temanotat IRAK: Sikkerhetssituasjonen i Kirkuk by og områdene rundt*), dated 16 March 2010, summarised the situation as follows:

> "During the last two years, the security situation in Kirkuk has shown a decreasing level of activity on the part of armed groups, in spite of a persistent high level of political tension connected to the disputed political status of the city. Still, both Kirkuk city and Kirkuk province continue to be plagued by persistent political violence. There are no clear signs of open conflict between the Kurds, Arabs and Turkmen population groups, but widespread mutual mistrust seems to prevail along with a possibly increasing physical segregation between them. In this environment, militants continue to carry out attacks.
>
> The armed groups operating in Kirkuk, Hawija and Tuz Khormatu are all Sunni Moslem. They appear as periodically connected to each other logistically, and to be coalescing over time."

In Section 2 of the Note it was observed inter alia that the conflict related violence in Kirkuk had continuously decreased since 2007 and had in 2009 reached its lowest level since 2004. Nonetheless, politically motivated violence still occurred on a daily basis. There were otherwise no new patterns of acts of violence. It was still the situation that such acts were primarily targeting authorities, the army and the political milieu. However, the casualties among the civilian population were considerably higher than

those of the target groups. The level of political violence appeared relatively low in view of the continuous political tensions related to the unclear political status of the city. At the same time, the political violence was directly linked to unresolved political questions. Both Kurdish regional authorities and the national central authorities claimed a right to governance in the city. There was little information available which systematically presented the situation in the province for each of the three ethnic groups – Kurds, Arabs and Turkmens. According to the newspaper Today's Zaman of 10 February 2010, the local police was composed of 36% Kurds, 39% Arabs and 26% Turkmens. In the Kurdish areas of the city there were both Kurdish and Turkmen officers. In the Hawija district west of Kirkuk, the officers were Arabs. Even though the different groupings were reasonably well represented within public administration and education, distrust between them had frequently been reported since 2003.

40. The UK Border Agency (Home Office) Country of Origin Information Report of 30 August 2011 provided the following information (footnotes omitted):

> "8.80 The UNSC [United Nations Security Council] Report July 2010, dated 29 July 2010, covering events since 14 May 2010 noted that: 'Kirkuk has been generally stable since the previous reporting period. On 8 June [2010], shots were fired at a USF-I/United Nations convoy travelling in Kirkuk, resulting in one USF-I soldier being wounded. No UNAMI staff members were injured and the convoy immediately returned to Forward Operating Base Warrior.'
>
> However the subsequent UNSC Report November 2010, published 26 November 2010, observed that: '[t]he withdrawal of the United States Forces in Iraq is likely to have a short- to medium-term effect on the security situation'.
>
> 8.81 The Danish FFM Report on Security and Human Rights in South/Central Iraq conducted February – April 2010, published 10 September 2010 citing a reliable source in Iraq stated: '... that Kirkuk, with its unique status, is a completely different matter. The situation is fragile and Iraqi Security Forces (ISF) and US forces have a strong presence in the area. AQIs [Al Qaeda in Iraq] and insurgent groups' presence contribute to making the situation particularly volatile, and there are reports that AQI is using children as suicide bombers or combatants in Kirkuk.'
>
> See also the section heading on Northern Iraq which highlighted that in February 2011 Kurdish Peshmerga troops entered Kirkuk governorate in violation of agreed security procedures in place between Kurdish and Iraqi forces."

41. The third report of the UN Secretary-General to the UNSC, pursuant to paragraph 6 of resolution 1936 (2010), included inter alia the following observations:

> "**II. Summary of key political developments pertaining to Iraq**
>
> **A. Political developments**
>
> ...
>
> 8. In Kirkuk, Kurdish parties holding the two most senior political posts, Governor and Chairman of the Provincial Council, agreed to give up the latter, as a gesture of

goodwill in order to move the political process forward and to accommodate a long-standing demand by Turkmen and Arab components. Hassan Turan (Turkmen) was elected to the post of Chairman, Najmaldin O. Karim (Kurdish) was appointed as the new Governor and Rakan Sa'id al-Jubouri (Arab) remained Deputy Governor.

9. On 31 March, Kurdish Peshmerga troops that had been deployed around the city of Kirkuk since 25 February 2011 withdrew and returned to the Kurdistan region. The incident served as a reminder of the challenges that remain as the United States Forces in Iraq draw down and the combined security mechanism comes to an end. The combined security mechanism was established to encourage Iraqi security forces and Kurdish Peshmerga troops to coordinate their operations, set up joint patrols and checkpoints and exchange information under the auspices of the United States Forces. The Government of Iraq and the Kurdistan Regional Government have yet to agree on the future of the combined security mechanism or any successor arrangements that could be put into place after the departure of the United States Forces.

10. The United States Forces in Iraq have continued their planned withdrawal from the country with the intention of completing their departure by 31 December 2011, as envisaged under the status-of-forces agreement signed between the Governments of Iraq and the United States of America. Discussions have been ongoing regarding the possibility of some United States forces remaining beyond 2011 to provide training and support. The Prime Minister has stated that the issue would be decided on a consensus basis through dialogue among the political blocs, as formal agreement would require approval by the Council of Representatives.

...

III. Activities of the United Nations Assistance Mission for Iraq

A. Political activities

21. The standing consultative mechanism met several times during the reporting period. This initiative, which was launched in March 2011 under the auspices of UNAMI, brings together representatives of key political blocs to discuss outstanding issues related to disputed internal territories, including Kirkuk. The participants include representatives of the three main political blocs: Deputy Prime Minister Rowsch Shaways (Kurdistan Alliance), Member of Parliament Hassan al-Sunaid (National Alliance) and Finance Minister Rafi al-Issawi (Iraqiya). The participants agreed to focus on the following issues: (a) Kirkuk, including powersharing issues and conducting provincial council elections; (b) Ninewa, the current political stalemate, power-sharing and security issues; (c) the future of the combined security mechanism; and (d) the census. On 25 April, participants agreed that subsequent meetings would be expanded to include local stakeholders from the Kirkuk and Ninewa governorates. On 16 June, a meeting was held that brought together for the first time all members of the Council of Representatives from Kirkuk in order to discuss issues related to power-sharing and the prospects of holding provincial council elections in Kirkuk.

...

E. Human rights activities

41. The reporting period witnessed a significant rise in assassinations of political leaders, government officials and security personnel. ... Assassination attempts were carried out against a Turkmen Member of Parliament from Kirkuk ... on 12 ... May ....

42. Honour crimes committed against women are a continuing source of concern. UNAMI recorded the deaths in suspicious circumstances of nine women between April and May in Kirkuk. Police informed UNAMI that three of the deaths were listed

as suicides and four as murders carried out by unknown persons, while the causes of death of the other two women were unconfirmed but regarded as suspicious. ...

43. There continue to be sporadic reports of children experiencing acts of indiscriminate violence and abductions. ... On 2 April, in Kirkuk, criminal gangs abducted a 6-year-old girl who was later released after a ransom was paid. On 21 April, a 12-year-old boy was abducted in Kirkuk; his fate remains unknown.

44. During the reporting period, a number of public demonstrations were held, most of them peaceful. ...

F. Security, operational and logistical issues

50. During the reporting period, the United Nations continued to operate in a challenging security environment. On 5 May, a car bomb targeted the Iraqi police headquarters in Hilla, killing 30 policemen. In another incident on 19 May, a complex attack on the Kirkuk Provincial Joint Coordination Centre left 20 people dead and 80 injured, including Iraqi police and civil defence members. This particular attack is believed to have been in response to the recent successful efforts by Iraqi security forces to locate weapons caches and key personnel wanted for terrorist attacks. ...

52. During the reporting period, UNAMI has been working on the transition of security support from the United States Forces to the Iraqi security forces. On 24 April, the Iraqi National Security Council requested that the Office of the High Commander of the Armed Forces, in coordination with the Ministry of Defence and the Ministry of the Interior, support UNAMI protection requirements.

53. During the reporting period, UNAMI also took steps to put in place the necessary logistical arrangements to substitute the support of the United States Forces. UNAMI is also continuing preparations to ensure that it is able to sustain its presence in Kirkuk and Basra.

54. With support from the United Nations standing police capacity, a start-up team of four UNAMI police liaison personnel have been deployed to Baghdad, Erbil and Kirkuk to engage and coordinate UNAMI operations with the Ministry of the Interior and Iraqi police.

...

IV. Observations

...

60. Although the status of Kirkuk and other disputed internal territories remain divisive issues, I am encouraged by recent efforts by key Iraqi stakeholders to find common ground. Through the standing consultative mechanism under UNAMI auspices, political leaders, members of parliament and local representatives of Kirkuk have engaged in a dialogue on critical issues that will affect the future of Kirkuk and other disputed areas, including future security arrangements. I encourage the Government of Iraq and the Kurdistan Regional Government to continue to use this important forum to find mutually acceptable solutions that ultimately serve the interests of national reconciliation and long-term stability. The United Nations stands ready to assist in this process upon the request of the Government."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

42. The applicant alleged that his deportation to Iraq would expose him to a risk of treatment contrary to Article 3, which reads as follows:

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

43. The Government maintained that this complaint should be rejected as premature as the case was still pending before the Constitutional Court.

44. The Court notes that, in the meantime, the Constitutional Court examined the applicant's complaint concerning Article 3 of the Convention and dismissed it as manifestly ill-founded (see paragraph 24 above). The Government's objection must therefore be dismissed.

45. The applicant alleged that he would be perceived as a terrorist and a traitor by the Iraqi authorities because of his association with the foreign mujahedin in Bosnia and Herzegovina, the fact that he had been declared a threat to national security in Bosnia and Herzegovina and because he had refused to join the Iraqi army during the war with Iran. In his observations of June 2011, the applicant claimed that his father had died in 2003 as a result of beatings inflicted by Peshmerga, Kurdish security forces. He also claimed that his brother, a war invalid since 1984, had died because the Kurdish authorities had prevented him from receiving his medication. Some other members of his family had also allegedly been beaten to death by Peshmerga or had had to flee the country to an unknown location owing to their affiliation with the Ba'ath party. The applicant further alleged that his family was constantly subjected to ill-treatment and threats on account of being Sunni Arabs and that the Kurds had forcibly entered their house on several occasions. The applicant claimed that, being a Sunni Muslim, he feared both Shia Muslims and Kurds, who are in the majority in Kirkuk.

46. The Court reiterates that as a matter of well-established international law and subject to its treaty obligations, including those arising from the Convention, a Contracting State has the right to control the entry, residence and expulsion of aliens (see, among many other authorities, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII). The right to asylum is not contained in either the Convention or its Protocols (*Salah Sheekh v. the Netherlands*, no. 1948/04, § 135, 11 January 2007). Expulsion by a Contracting State may, however, give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if expelled, faces a real risk of being subjected to ill-treatment. In such a case, Article 3 implies an obligation not to expel that person to the country in question (see *Saadi v. Italy* [GC], no. 37201/06,

§ 125, 28 February 2008). Since the prohibition of torture or inhuman or degrading treatment or punishment is absolute, the conduct of applicants, however undesirable or dangerous, cannot be taken into account (ibid., §§ 127 and 138).

47. The assessment of the existence of a real risk must be rigorous (see *Chahal v. the United Kingdom*, 15 November 1996, § 96, *Reports of Judgments and Decisions* 1996-V). As a rule, it is for applicants to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to treatment contrary to Article 3 (*N. v. Finland*, no. 38885/02, § 167, 26 July 2005). Where such evidence is adduced, it is for the Government to dispel any doubts about it. The Court will take as its basis all the material placed before it or, if necessary, material obtained on its own initiative. It will do so particularly when an applicant – or a third party within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government. The Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials, as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, the United Nations' agencies and reputable non-governmental organisations (*NA. v. the United Kingdom*, no. 25904/07, § 119, 17 July 2008).

48. If an applicant has not yet been deported when the Court examines the case, the relevant time will be that of the proceedings before the Court (*Saadi v. Italy*, cited above, § 133). A full and up-to-date assessment is called for, as the situation in a country of destination may change in the course of time. While the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive and it is hence necessary to take into account information that has come to light after the final decision taken by domestic authorities (see *Salah Sheekh*, cited above, § 136).

49. The Court further notes that a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion (see *H.L.R. v. France*, 29 April 1997, § 41, *Reports of Judgments and Decisions* 1997-III). However, the Court has never excluded the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *NA v. the United Kingdom*, cited above, § 115, and *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, §§ 217-218 and §293, 28 June 2011).

50. Turning to the present case, the Court notes that the applicant has visited Iraq twice since the change of regime, in 2003 and 2004. However, the applicant claimed that during these visits he had been forced to hide in fear of the Kurdish authorities as his friend had told him that he was under surveillance and that his name was on a "black list", and that, after he had left Iraq, the Kurds searched his family's home looking for him. On the other hand, not only did he not provide any evidence in support of these statements, they also seem to be in contradiction to what he previously said about his visits (see paragraph 23 above). From his previous statements it would appear that he moved freely in and out of public buildings and on the streets during his visits (taking his sick father to hospital and, afterwards, holding a commemoration for him). Moreover, on both visits the applicant stayed in Kirkuk for more than one month. It should be noted that the security situation in Iraq was much more dangerous at the time of the applicant's visits than it is now (according to Iraq Body Count there were 12,087 civilian deaths reported in 2003, 11, 072 in 2004 and 4,045 in 2010; www.iraqbodycount.org as downloaded on 16 November 2011). The Court has already had an opportunity to assess the general security situation in Iraq (see *F.H. v. Sweden*, no. 32621/06, § 9320, January 2009). In that case, the Court held that while the general situation in Iraq was insecure and problematic, it was not so serious as to cause, by itself, a violation of Article 3 if that applicant, a Christian and a member of the Ba'ath party, were to be returned there (see also *Müslim v. Turkey*, no. 53566/99, 26 April 2005; for a recent assessment of the security situation in Kirkuk, see *Agalar v. Norway* (dec.), no. 55120/09, 8 November 2011).

51. Furthermore, the applicant's asylum claim was considered in detail and rejected by the domestic authorities. The Court notes that their assessment was adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources. Although the Court is aware that the UNHCR, the UN and the IOM recommend that countries refrain from forcibly returning refugees to Iraq, they have stated that they are committed to providing assistance to those who return. Moreover, the Court observes that their recommendations are partly based on the security situation and partly due to practical problems for returnees such as shelter, health care and property restitution. In this connection, the Court stresses that it attaches importance to information contained in recent reports from independent international human rights organisations or governmental sources (see, among others, *Saadi v. Italy*, cited above, § 131). However, its own assessment of the general situation in the country of destination is carried out only to determine whether there are substantial grounds for believing that the applicant would be at a real risk of being subjected to treatment prohibited by Article 3 if he were to be returned to that country. Consequently, where reports are focused on general socio-economic and humanitarian conditions, the Court has been inclined to

accord less weight to them, since such conditions do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3 (see *NA*, cited above, § 122).

52. Hence, in the present case, having regard to the above considerations and the fact that the applicant visited Iraq twice, at the time of the upsurge of violence in that country, without any consequences, the Court concludes that he did not adduce any evidence capable of proving that there are substantial grounds for believing that, if deported, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Therefore, this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention. In view of this conclusion, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

53. The applicant also contested the lawfulness of his detention relying on Article 5 § 1 of the Convention, the relevant part of which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

54. The Government submitted that the applicant's detention was in keeping with domestic law, pursuant to which an alien must be detained if it has been established that he or she constitutes a threat to national security (see paragraph 30 above), and with Article 5 § 1 (f) of the Convention. They further argued that the period complained of was partly covered by the Court's interim measure under Rule 39 of the Rules of Court.

A. Admissibility

55. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

56. Article 5 enshrines a fundamental human right: the protection of the individual against arbitrary interference by the State with his or her right to

liberty. The text of Article 5 makes it clear that the guarantees it contains apply to "everyone". Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. One of the exceptions, contained in sub-paragraph (f), permits the State to control the liberty of aliens in an immigration context (see, among other authorities, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 162-63, 19 February 2009).

57. Sub-paragraph (f) of Article 5 § 1 does not demand that the detention be reasonably considered necessary, for example to prevent a person from committing an offence or fleeing. In this respect, it provides a different level of protection from sub-paragraph (c) of Article 5 § 1. All that is required under this provision is that deportation proceedings be in progress and prosecuted with due diligence (see *Chahal*, cited above, §§ 112-13). The deprivation of liberty must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: any deprivation of liberty should, in addition, be in keeping with the purpose of protecting the individual from arbitrariness – and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and contrary to the Convention (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008).

58. The Government contended that the present applicant was lawfully detained as a person against whom action was being taken with a view to deportation under the second limb of Article 5 § 1 (f). However, the Court notes that deportation proceedings against the applicant were instituted on 8 November 2010 (see paragraph 25 above), whereas the applicant was detained on 23 June 2009. Since detention under Article 5 § 1 (f) is justified only for as long as deportation proceedings are pending, the first period of the applicant's detention (lasting from 23 June 2009 until 8 November 2010) was clearly not justified under Article 5 § 1 (f).

59. The Government emphasised that it had been established that the applicant posed a threat to national security and that the domestic authorities had therefore had no other option but to detain him pursuant to section 99(2)(b) of the Aliens Act 2008 (see paragraph 30 above). However, the Court has held that sub-paragraphs (a) to (f) of Article 5 § 1 amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5: detention on security grounds only is accordingly not permitted (*A. and Others*, cited above, § 171). In any event, at the time of his arrest the domestic authorities had the ability to issue a deportation order against the applicant under section

88(1)(h) of the Aliens Act 2008 and then detain him for deportation purposes under section 99(1)(a) of that Act (see paragraphs 29 and 30 above). The Government failed to offer any explanation as to why this was not done.

60. The matter has also been examined under the other sub-paragraphs of Article 5 § 1, which were not pleaded by the Government. The Court reiterates in this connection that sub-paragraph (c) does not permit a policy of general prevention directed against a person or a category of persons who are perceived by the authorities, rightly or wrongly, as being dangerous or having propensity to unlawful acts. It does no more than afford the Contracting States a means of preventing offences which are concrete and specific as regards, in particular, the place and time of their commission and their victims (see *Guzzardi v. Italy*, 6 November 1980, § 102, Series A no. 3; *M. v. Germany*, no. 19359/04, § 89 and 102, 17 December 2009; and *Shimovolos v. Russia*, no. 30194/09, § 54, 21 June 2011). Detention to prevent a person from committing an offence must, in addition, be "effected for the purpose of bringing him before the competent legal authority" (see *Lawless v. Ireland (no. 3)*, 1 July 1961, § 14, Series A no. 3). Sub-paragraph (c) thus permits deprivation of liberty only in connection with criminal proceedings (see *Ciulla v. Italy*, 22 February 1989, § 38, Series A no. 148, and *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 72, 1 December 2011, not yet final). Since neither the domestic authorities nor the Government mentioned any concrete and specific offence which the applicant had to be prevented from committing, his detention was not covered by sub-paragraph (c). The other sub-paragraphs of Article 5 § 1 are obviously not relevant.

61. The Court therefore concludes that there was a violation of Article 5 § 1 of the Convention with regard to the period of the applicant's detention from 23 June 2009 to 8 November 2010.

62. As regards the subsequent period, the Court notes that a deportation order was issued on 8 November 2010. The Court further notes that since 4 October 2010 the Government have refrained from deporting the applicant in compliance with the request made by the Court under Rule 39 of the Rules of Court (see *Chahal*, cited above, § 114). The Court reiterates in that regard that the Contracting States are obliged under Article 34 of the Convention to comply with interim measures indicated under Rule 39 (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, §§ 99-129, ECHR 2005-I).

63. That being said, the implementation of an interim measure following an indication by the Court to a State Party that it would be desirable not to return an individual to a particular country does not in itself have any bearing on whether the deprivation of liberty to which that individual may be subject complies with Article 5 § 1 (see *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 74, ECHR 2007-II). In other words, the domestic

authorities must still act in strict compliance with domestic law (ibid., § 75). The Court notes that it has been established by the domestic authorities that the present applicant constitutes a threat to national security. His detention was accordingly authorised and was indeed mandatory pursuant to section 99(2)(b) of the Aliens Act 2008 (see paragraph 30 above). Furthermore, the applicant's detention has been extended on a monthly basis, as envisaged by domestic law.

64. Having regard to the above, the Court concludes that the deportation proceedings, although temporarily suspended pursuant to the request made by the Court, have nevertheless been in progress and are in strict compliance with domestic law (compare *S.P. v. Belgium* (dec.), no. 12572/08, 14 June 2011; contrast *Ryabikin v. Russia*, no. 8320/04, § 132, 19 June 2008, and *Abdolkhani and Karimnia v. Turkey*, no. 30471/08, § 134, ECHR 2009-...). Since there is no indication that the authorities have acted in bad faith, that the applicant has been detained in unsuitable conditions or that his detention has been arbitrary for any other reason (see *Saadi v. the United Kingdom*, cited above, §§ 67-74), there has been no violation of Article 5 § 1 in respect of the applicant's detention from 8 November 2010 until 7 April 2011.

III. ALLEGED VIOLATION OF ARTICLES 5 § 4 AND 13 OF THE CONVENTION

65. The applicant further complained that he did not have at his disposal an effective procedure by which he could challenge the lawfulness of his detention, as required by Articles 5 § 4 and 13 of the Convention. Article 5 § 4 reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

Article 13 reads as follows:

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

66. The Government contested that argument.

67. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

68. Having regard to its above finding under Article 5 § 1, the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Articles 5 § 4 and 13 of the Convention (see, among other authorities, *Tokić and Others v. Bosnia and Herzegovina*, nos. 12455/04, 14140/05, 12906/06 and 26028/06, § 70, 8 July 2008).

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

69. The applicant further complained that his right to respect for his family life would be violated in the event of his deportation to Iraq. He relied on Article 8 of the Convention, which provides:

> "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."

70. The Court has earlier established that an appeal to the Constitutional Court of Bosnia and Herzegovina is, in principle, an effective remedy for the purposes of Article 35 § 1 of the Convention (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006, and *Alibašić v. Bosnia and Herzegovina* (dec.), no. 18478/08, 29 March 2011). Since this complaint is still pending before that court and the Convention does not require that an applicant complaining about his or her deportation under Article 8 should have access to a remedy with automatic suspensive effect (in contrast to such complaints under Article 3), the complaint is premature. It must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

71. The applicant further complained of the unfairness of the proceedings concerning his citizenship, residence permit and asylum. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

72. The Court observes that this complaint was not included in the initial application, but was raised in the applicant's observations of June 2011. It was thus not raised early enough to allow an exchange of observations between the parties (see *Melnik v. Ukraine*, no. 72286/01, §§ 61-63, 28 March 2006; *Maznyak v. Ukraine*, no. 27640/02, § 22, 31 January 2008; *Kuncheva v. Bulgaria*, no. 9161/02, § 18, 3 July 2008; *Lisev v. Bulgaria*, no. 30380/03, § 33, 26 February 2009; and *Tsonyo Tsonev v. Bulgaria*, no. 33726/03, § 24, 1 October 2009). Nevertheless, the Court does not have to decide whether it is appropriate to take this matter up separately at this stage as the complaint is in any event inadmissible for the following reason.

The Court reiterates that Article 6 § 1 of the Convention does not apply to proceedings regulating a person's citizenship and/or the entry, stay and deportation of aliens, as such proceedings do not involve either the "determination of his civil rights and obligations or of any criminal charge against him" within the meaning of the this Article of the Convention (see, among other authorities, *S. v. Switzerland* no. 13325/87, Commission decision of 15 December 1988, Decisions and Reports 59, p. 256, at p. 257; *Šoć v. Croatia* (dec.), no. 47863/9, 29 June 2000; *Naumov v. Albania* (dec.), no. 10513/03, 4 January 2005; *Maaouia v. France* [GC], no. 39652/98, §§ 36-40, ECHR 2000-x). This complaint is accordingly incompatible *ratione materiae* with the provisions of the Convention and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

74. The applicant claimed 10,500 euros (EUR) in respect of pecuniary damage (lost earnings in the amount of EUR 500 per month spent in detention) and EUR 189,000 in respect of non-pecuniary damage. The applicant also claimed EUR 60,000 to be paid to his wife and two daughters in respect of non-pecuniary damage and EUR 4,200 in respect of the travel expenses they incurred by coming from Zenica to visit him in detention.

75. The Government considered the amounts claimed to be excessive and unsubstantiated.

76. As regards compensation in respect of pecuniary damage, the Court notes that the applicant did not submit any evidence about his employment prior to detention or about the monthly income he would have made had he not been detained. Therefore, in the absence of any evidence that he would have indeed earned EUR 500 per month, the Court rejects this claim. On the other hand, the Court accepts that the applicant suffered distress as a result of the breach found, which justifies an award in respect of non-pecuniary damage. Making its assessment on an equitable basis, as required by the Convention, the Court awards the applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

77. As regards compensation claimed in respect of the applicant's wife and daughters, the Court recalls that they were not parties in the present case before it; thus, it rejects this claim.

B. Costs and expenses

78. The applicant also claimed EUR 65,000 for the costs and expenses incurred before the domestic courts and the Court.

79. The Government considered that amount to be excessive.

80. In accordance with the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the breaches found or to obtain redress. The Court requires itemised bills and invoices that are sufficiently detailed to enable it to determine to what extent the above requirements have been met. In the present case, regard being had to the fact that one of the applicant's representatives is a non-profit organisation providing free legal aid and that no bills and invoices have been submitted in relation to the other applicant's representative, the Court rejects the claim for costs and expenses.

C. Default interest

81. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaints concerning Article 5 §§ 1 and 4 and Article 13 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* by six votes to one that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's detention from 23 June 2009 until 8 November 2010;

3. *Holds* unanimously that there has been no violation of Article 5 § 1 of the Convention in respect of the applicant's detention from 8 November 2010;

4. *Holds* unanimously that there is no need to examine the complaints under Articles 5 § 4 and 13 of the Convention;

5. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage, to be converted into convertible marks at the rate applicable on the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Lech Garlicki
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Mijović is annexed to this judgment.

L.G.
T.L.E.

DISSENTING OPINION OF JUDGE MIJOVIĆ

The applicant, contesting the lawfulness of his detention, relied on Article 5 § 1 of the Convention.

As emphasised in my dissenting opinion in *Al Husin v. Bosnia and Herzegovina*, no. 3727/08, 7 February 2012, this complaint should have been dealt with under Article 5 § 1 (c), whereas the Chamber chose to deal with it under Article 5 § 1 (f). To avoid repetition, I refer to the detailed reasoning contained in that opinion.