CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

Applications nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07
by Lakhdar BOUMEDIENE, Hadj BOUDELAA, Mustafa AIT IDIR, Mohamed NECHLA, Belkacem BENSAYAH and Saber LAHMAR
against Bosnia and Herzegovina
lodged between 26 September and 21 December 2006

The European Court of Human Rights (Fourth Section), sitting on 18 November 2008 as a Chamber composed of:

Nicolas Bratza, *President*,
Lech Garlicki,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges*,
and Lawrence Early, *Section Registrar*,

Having regard to the above applications lodged between 26 September and 21 December 2006,

Having regard to the decision to grant priority to the above applications under Rule 41 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having regard to the comments submitted by Interights, the International Commission of Jurists and the Center for Constitutional Rights pursuant to Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Mr Lakhdar Boumediene, Mr Hadj Boudelaa, Mr Mustafa Ait Idir, Mr Mohamed Nechla, Mr Belkacem Bensayah and Mr Saber Lahmar, are Algerian citizens who were born in 1966, 1965, 1970, 1968, 1962 and 1969 respectively. Mr Boudelaa, Mr Ait Idir and Mr Nechla are also citizens of Bosnia and Herzegovina. They were represented before the Court by Mr Y. van Gerven, a member of the law firm WimerHale, Brussels. The Government of Bosnia and Herzegovina ("the Government") were represented by their Agent, Ms M. Mijić.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Arrival in Bosnia and Herzegovina

(a) Mr Boumediene

3. On 20 December 1997 Mr Boumediene was granted citizenship of Bosnia and Herzegovina ("BH") on the basis of a forged document indicating that he had joined the ranks of the Army of the Republic of Bosnia and Herzegovina ("the ARBH") during the 1992-95 war (for more information as to the relationship between the foreign Muslim fighters and the ARBH see the following judgments of the International Criminal Tribunal for the former Yugoslavia: *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, judgment of 15 March 2006, §§ 403-853, and *The Prosecutor v. Rasim Delić*, judgment of 15 September 2008, §§ 165-199 and 356-471). The applicant now claims that he actually arrived in Bosnia and Herzegovina in April 1997 to work for the Red Crescent Society of the United Arab Emirates (a member of the International Red Cross and Red Crescent Movement).

(b) Mr Boudelaa

4. Mr Boudelaa joined the ranks of the ARBH during the 1992-95 war (allegedly as a cook) and obtained BH citizenship on that basis on 2 January 1995. It would appear that he was initially employed by the Benevolence International Foundation[1] and then by Human Appeal International.

[1] On 21 November 2002 the Benevolence International Foundation (referred to in Arabic as a*l-Birr al-Dawalia*) and its office in Bosnia and Herzegovina, which operated under the name *Bosanska idealna futura*, were placed on the list of entities associated with al-Qaida maintained by the United Nations Al-Qaida and Taliban Sanctions Committee. On 10 February 2003 Mr Enaam M. Arnaout (the executive director of the Benevolence International Foundation) was convicted in the United States District Court for the

(c) Mr Ait Idir

5. Allegedly, Mr Ait Idir was working for the International Islamic Relief Organisation (Igasa) in Croatia when he obtained BH citizenship on 5 January 1995. He allegedly moved to Bosnia and Herzegovina shortly thereafter to work first for the Qatar Charitable Society and then for Taibah International[1] as an IT administrator.

(d) Mr Nechla

6. Allegedly, Mr Nechla was working for the Red Crescent Society of the United Arab Emirates in Albania when he obtained BH citizenship on 25 August 1995. He allegedly moved to Bosnia and Herzegovina in 1997.

(e) Mr Bensayah

7. On 4 January 1995 Mr Bensayah was granted BH citizenship under the name of Abdulkarim al-Sabahi from Yemen, on the basis of a forged Yemeni passport. Allegedly, he arrived in Bosnia and Herzegovina shortly thereafter to work for the Balkan Islamic Centre. After the Centre's closure he remained in Bosnia and Herzegovina, but did not work.

(f) Mr Lahmar

8. On 4 April 1997 the BH authorities issued Mr Lahmar with a permanent residence permit on the basis of a document indicating that he had arrived in Bosnia and Herzegovina during the 1992-95 war. The applicant now claims that he actually arrived in Bosnia and Herzegovina in 1997 to work for the Saudi High Commission.

9. On 24 February 1998 the applicant was convicted on two counts of aggravated assault and robbery and sentenced to imprisonment for five years and eight months. One of his victims was a citizen of the United States ("the US"). On 7 January 2000 the applicant was released on parole.

2. From 8 October 2001 to the present

10. On 8 October 2001 the home of Mr Bensayah was searched and he was arrested on suspicion of residing in Bosnia and Herzegovina under a false name (Mr Abdulkarim al-Sabahi from Yemen). He was then interrogated by US officials. They confronted Mr Bensayah with allegations

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Northern District of Illinois after he pleaded guilty to a racketeering conspiracy. In the plea agreement, he admitted that for approximately a decade the Benevolence International Foundation had been defrauding donors by leading them to believe that all donations were being used for strictly peaceful, humanitarian purposes, while some of that money was being diverted to foreign Muslim fighters in Bosnia and Herzegovina.

[1] On 11 May 2004 Taibah International was placed on the list of entities associated with al-Qaida maintained by the United Nations Al-Qaida and Taliban Sanctions Committee.

that a note with a phone number belonging to Mr Zayn Hussein[1] had been found during the home search and that the two had discussed passport procurement over the phone on many occasions since the attacks of 11 September 2001.

11. On 16 October 2001 the US intelligence reportedly tapped a conversation on Mr Lahmar's phone which included a coded reference to a forthcoming attack on the US and United Kingdom ("UK") embassies in Sarajevo. Furthermore, the local police discovered that Mr Lahmar's father-in-law worked as a janitor in the US embassy in Sarajevo.

12. On 17 October 2001 the US and UK authorities closed their embassies in Sarajevo, citing "credible security threats".

13. On 18 October 2001 the local police arrested Mr Lahmar. On 20 October 2001 the local police arrested Mr Boumediene, after he had retained a lawyer for Mr Bensayah. Mr Boumediene had allegedly first heard of Mr Bensayah when Mr Bensayah's wife contacted him and asked for assistance in finding a lawyer for her husband. Mr Boudelaa, Mr Ait Idir and Mr Nechla, acquaintances of Mr Boumediene, were also arrested. The applicants were suspected of having planned a terrorist attack on the US and UK embassies in Sarajevo.

14. On 22 October 2001 the US and UK embassies were reopened.

15. In November 2001 (while the applicants were in pre-trial detention) the competent administrative authorities stripped Mr Boumediene, Mr Boudelaa, Mr Ait Idir, Mr Nechla and Mr Bensayah of their BH citizenship. Following appeals by Mr Boumediene, Mr Boudelaa, Mr Ait Idir and Mr Nechla, their BH citizenship was subsequently restored. Mr Bensayah did not appeal.

16. In November 2001 the competent administrative authorities also terminated the BH residence permit of Mr Lahmar. He appealed, but it would appear that no decision was taken.

17. On 10 January 2002 all six applicants were banned from entering Bosnia and Herzegovina for ten years.

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[1] On 25 January 2001 Mr Zayn Hussein (who is also known as Abu Zubaida and Abu Zubaydah) was added to the list of individuals associated with al-Qaida maintained by the United Nations Al-Qaida and Taliban Sanctions Committee. He is currently at the United States detention centre at Guantánamo Bay. On 27 March 2007 Mr Zayn Hussein appeared before a Combatant Status Review Tribunal at Guantánamo Bay. He stated that those who wanted to engage in a "defensive Jihad" (which in his opinion included joining the ranks of the ARBH during the 1992-95 war in Bosnia and Herzegovina) could undergo military training at the Khalden camp in Afghanistan. His responsibilities, as the person in charge of two guest houses in Pakistan, were to facilitate arrival at the Khalden camp and departure from that camp to, for example, Bosnia and Herzegovina, by procuring passports (either genuine passports with the assistance of corrupt State officials or forged passports) and providing money (see the Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016 of 27 March 2007).

18. On 12 January 2002 the Algerian authorities refused the request by Bosnia and Herzegovina to accept the applicants.

19. Between 14 and 16 January 2002 Mr Boumediene, Mr Boudelaa, Mr Nechla and Mr Lahmar requested the domestic Human Rights Chamber to prevent their removal from BH territory.

20. On 17 January 2002 the United States informed Bosnia and Herzegovina that it was willing to take custody of the applicants.

21. On 17 January 2002 at about 3 p.m. the competent court ordered the applicants' release.

22. On 17 January 2002 at about 6 p.m. the Human Rights Chamber ordered that all necessary steps be taken to prevent the forcible removal of Mr Boumediene, Mr Boudelaa, Mr Nechla and Mr Lahmar.

23. On 18 January 2002 at about 6 a.m. the applicants were handed over to US forces operating as part of SFOR[1]. It would appear that the applicants arrived at the US Naval Base at Guantánamo Bay (in Cuba) on 20 January 2002, stopping at the US Air Force Base at Incirlik (in Turkey).

24. On 20 February 2002 applications were filed before the Human Rights Chamber on behalf of Mr Ait Idir and Mr Bensayah.

25. On 11 October 2002 the Human Rights Chamber delivered its decision in the case of Mr Boumediene, Mr Boudelaa, Mr Nechla and Mr Lahmar. It found numerous violations of the European Convention on Human Rights and ordered Bosnia and Herzegovina, among other things:

(a) "to use diplomatic channels in order to protect the basic rights of the applicants" and, in particular, "to take all possible steps to establish contacts with the applicants and to provide them with consular support";

(b) "to take all possible steps to prevent the death penalty from being pronounced against and executed on the applicants, including attempts to seek assurances from the US via diplomatic contacts that the applicants [would] not be subjected to the death penalty"; and

(c) "to retain lawyers authorised and admitted to practice in the relevant jurisdictions and before the relevant courts, tribunals or other authoritative bodies in order to take all necessary action to protect the applicants' rights while in US custody and in case of possible military, criminal or other proceedings involving the applicants".

26. On 18 October 2002 the BH Deputy Minister of Foreign Affairs informed the US Ambassador to Bosnia and Herzegovina of the legal obligations of Bosnia and Herzegovina deriving from the Human Rights Chamber's decision, and requested cooperation from the United States.

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[1] On 12 December 1996 the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, authorised the Member States acting through or in cooperation with the North Atlantic Treaty Organisation to establish a multinational stabilisation force (SFOR) under unified command and control in Bosnia and Herzegovina (Resolution 1088).

27. On 7 November 2002 the competent administrative authorities quashed the decisions of 10 January 2002 banning Mr Boumediene, Mr Boudelaa, Mr Nechla and Mr Lahmar from entering Bosnia and Herzegovina.

28. On 4 April 2003 the Human Rights Chamber delivered its decisions concerning Mr Ait Idir and Mr Bensayah. They were largely in line with the decision concerning Mr Boumediene, Mr Boudelaa, Mr Nechla and Mr Lahmar, with an additional order that all possible steps be taken to obtain the release of Mr Ait Idir and his return to Bosnia and Herzegovina.

29. On 18 April 2003 the competent administrative authorities quashed the decisions of 10 January 2002 banning Mr Ait Idir and Mr Bensayah from entering Bosnia and Herzegovina.

30. In response to the request of 18 October 2002, the US authorities sent a non-paper to the BH authorities on 20 May 2003. Its relevant part reads as follows:

> "For governments wishing access to their nationals in Guantánamo, the following information may be provided:
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> ...
>
> -- Requests for access to US Naval Base Guantánamo will be granted only for law enforcement or intelligence collection purposes. Issues pertaining to conditions of detention are to be addressed through the International Committee of the Red Cross.
>
> -- Official requests from foreign governments for access to their nationals detained at Guantánamo will be made to the Department of State.
>
> ...
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> -- Department of Defense security, law enforcement and/or intelligence personnel will be present at all times during the interviews and may end the interview at any time when, in the opinion of the senior Defense representative, the security of US personnel, facilities, or detainees is at risk.
>
> -- Foreign government officials will normally be permitted access to their nationals and will not to detainees of other nationalities."

31. Shortly thereafter, the BH authorities received another non-paper from the US authorities. It reads as follows:

> "Release of Guantanamo detainees from USG Control:
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> -- The US is in the process of transferring for release 27 detainees from Guantánamo. Your nationals are not among this group, although we continue to review their individual cases.
>
> -- The decision to release these detainees is the result of an on-going screening process at GTMO where we determine whether a detainee is to be prosecuted and/or detained by the USG, transferred to his home country for continued detention and/or prosecution, or released.
>
> -- In order to maintain security at the US detention facilities at Guantánamo, and in order to protect the safety of any detainees who may be transferred or released, the US

Government does not intend to comment publicly on the details of any such movements.

-- We intend to limit our public comments on such matters to responding to inquiries from the press, only after a transfer or release from Guantánamo has occurred. At this time we do not intend to identify individuals or the countries to which they have been moved.

-- Details regarding transfers or releases are communicated to the governments whose nationals are concerned, and/or to whose control detainees may be transferred.

-- Please be assured that we will notify you promptly if the US Government decides to transfer or release any of your country's nationals presently detained at Guantánamo. In such event, we would work with you to arrange the details of any transfer or release."

32. On 30 June 2003 the BH Council of Ministers assigned A.H., the BH Vice-Consul in New York, to visit the applicants.

33. On 19 July 2003 the BH Ministry of Foreign Affairs informed the BH Council of Ministers that the United States did not permit visits from consular authorities to the detention centre at Guantánamo Bay. It suggested that a terrorism expert from the BH Ministry of Security or the BH Ministry of Justice be assigned.

34. On 15 September 2003 the BH authorities assigned A.P., of the BH Ministry of Justice, to visit the applicants.

35. On 15 December 2003 a BH official held a meeting with the applicants' wives at which they were informed about the intention of the BH authorities to visit the applicants.

36. On 26 December 2003 the BH Ministry of Foreign Affairs formally requested access to four BH citizens (namely Mr Boumediene, Mr Boudelaa, Mr Ait Idir and Mr Nechla). A list of intended questions was attached as requested. In addition, the BH Ministry of Foreign Affairs requested access to Mr Bensayah and Mr Lahmar, although Mr Bensayah was no longer and Mr Lahmar never had been a BH citizen.

37. On 21 April 2004, following a complaint by N.D., Mr Boudelaa's wife under Islamic law, a parliamentary committee of the BH Parliament requested all the competent authorities to promptly take all possible steps to obtain the applicants' return to Bosnia and Herzegovina.

38. On 24 June 2004 the BH prosecution authorities formally ended all investigations against the applicants with regard to any suspicion of terrorism.

39. On 15 July 2004 the US authorities, in a diplomatic note, invited A.P., of the BH Ministry of Justice, to visit four BH citizens at the detention centre at Guantánamo Bay from 26 to 29 July 2004, for intelligence and law enforcement purposes. The diplomatic note did not address the request of the BH authorities concerning Mr Bensayah and Mr Lahmar.

40. On 27 and 28 July 2004 A.P., of the BH Ministry of Justice, visited Mr Boumediene, Mr Boudelaa, Mr Ait Idir and Mr Nechla at the detention

centre at Guantánamo Bay. A.P. had authorisation to ask fifteen questions to which the US authorities had previously agreed. They primarily concerned the applicants' activities in Bosnia and Herzegovina. Mr Ait Idir and Mr Boudelaa refused to respond. The last question was in relation to the applicants' treatment in US custody. They all complained of inadequate medical attention. The request by the BH official for permission to visit the applicants' cells was refused.

41. In October 2004 the applicants were designated as "enemy combatants" by the competent Combatant Status Review Tribunals. The US Secretary of Defence established a Combatant Status Review Tribunal process to determine whether the individuals detained at Guantánamo Bay were enemy combatants and to give each detainee the opportunity to contest that designation. An "enemy combatant" is defined as "an individual who was part of or supporting Taliban or al-Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces" (see the Memorandum of 14 July 2006 on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at US Naval Base Guantánamo Bay).

42. Following their meeting in Washington, on 2 February 2005 the BH Prime Minister sent a letter to the US Secretary of State seeking the return to Bosnia and Herzegovina of Mr Boumediene, Mr Boudelaa, Mr Ait Idir and Mr Nechla. The response dated 3 March 2005 reads as follows:

> "Thank you for your letter concerning the continued detention of the Bosnian-Algerian nationals by US authorities at the US Naval Base, Guantánamo Bay, Cuba.
>
> The United States continues to evaluate the possibility of transferring individuals presently detained at Guantánamo to their countries of nationality. Options available to the United States include: (1) release if the detainee no longer poses a threat; (2) transfer to the detainee's home country for monitoring, investigation, detention, and/or prosecution as appropriate; or (3) continued detention or prosecution by the United States. The objective of the US transfer policy is to reduce the number of individuals under US control in the course of the war on terrorism, consistent with the national security, intelligence and law enforcement interests of the United States.
>
> Detainees also receive due process and have access to our federal courts to contest their continued detention by US authorities in Guantánamo. As of February 2005, the status of each detainee at Guantánamo Bay has been reviewed by a Combatant Status Review Tribunal (CSRT) to determine, in a fact-based proceeding, whether the individual is still properly classified as an enemy combatant. Your Government has been informed of these proceedings and notified of tribunal results in each case.
>
> The detention of each detainee will also be reviewed annually by an Administrative Review Board (ARB). The ARB assesses whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or its allies and to provide factual

information to support the detainee's release. We would welcome any information your Government would like to submit for consideration in this process.

Detainees also have the option of filing a petition, called a writ of habeas corpus, in US federal courts. This petition enables detainees to contest their continued detention, with the assistance of a legal representative, by requesting an independent judicial review of the circumstances of their detention at Guantánamo.

The current assessment of the Bosnian-Algerian nationals indicates that each continues to possess significant intelligence value and pose a continuing threat to US security interests.

We will inform your Government at such a time when this assessment changes and we can consider the possibility of transferring them to Bosnia and Herzegovina under certain conditions."

43. In an undated response to a formal enquiry from US Senator Jeffords, the US Department of State declared on 15 June 2005 that the BH Government had not indicated that they were prepared or willing to accept responsibility for the applicants upon transfer.

44. On 28 November 2005 the BH Ministry of Foreign Affairs confirmed to the law firm WilmerHale (the applicants' representatives) that the BH authorities were willing to accept all their citizens detained at Guantánamo Bay and that their return to Bosnia and Herzegovina had been sought unsuccessfully from the US authorities.

45. In November and December 2005 the competent Administrative Review Boards recommended the continued detention of the applicants. The US Secretary of Defence established Administrative Review Procedures to determine annually whether enemy combatants detained at the US Naval Base at Guantánamo Bay should be released, transferred or continue to be detained (see the Memorandum of 14 July 2006 on Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at US Naval Base Guantánamo Bay).

The law firm WilmerHale made submissions to those Boards on behalf of the applicants. Among other things, WilmerHale contested the credibility of the statements made by Mr Ali Ahmed Ali Hamad (Mr Lahmar's ex-brother-in-law and a presumed informant for the US authorities)[1]. They also maintained that an expert analysis of Mr Bensayah's telephone records – conducted by order of the Supreme Court of the Federation of Bosnia and Herzegovina – had failed to find any support for the allegation that Mr Bensayah had been in contact with Mr Zayn Hussein (see paragraph 10 above). Lastly, WilmerHale stressed that the BH authorities had clearly

[1] Mr Ali Ahmed Ali Hamad, a Bahraini citizen and a former citizen of Bosnia and Herzegovina, was a prosecution witness in a case before the International Criminal Tribunal for the former Yugoslavia (*The Prosecutor v. Rasim Delić*). He stated, among other things, that he was an al-Qaida member and had been the commander of a unit of foreign Muslim fighters during the war in Bosnia and Herzegovina. He is currently serving a twelve-year sentence in Zenica Prison for involvement in a 1997 terrorist attack.

demonstrated their "unequivocal commitment to repatriating the six men to Bosnia".

46. On 5 April 2006 the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina ("the Human Rights Commission"), the legal successor to the Human Rights Chamber, examined a complaint by Mr Boudelaa's wife under Islamic law. It held that the domestic authorities had failed to take all possible steps to protect the basic rights of the applicants and to prevent the death penalty from being pronounced against them. The decision criticised the authorities for taking a "particularly passive attitude" towards the entire matter, including failing even to make a written submission to the Human Rights Commission. The Human Rights Commission considered the complaint concerning non-enforcement of the order to retain lawyers for the applicants to be premature, because no military, criminal or other proceedings had been instituted against them.

47. On 9 October 2006 the competent administrative body stripped Mr Boumediene of his BH citizenship on the ground that it had been obtained on the basis of a forged document.

48. In October and November 2006 the competent Administrative Review Boards again recommended the continued detention of the applicants. The unclassified summary of evidence contains numerous allegations against the applicants, including the following:

(a) that Mr Boudelaa had fought with the Taliban and come into contact with several al-Qaida fighters and operatives;

(b) that Mr Ait Idir had made threats against SFOR personnel in 1999 and exhorted others to kidnap and kill SFOR soldiers and western civilians;

(c) that Mr Bensayah had been the primary al-Qaida facilitator in Bosnia and Herzegovina, had almost two million euros deposited in a bank in Sarajevo and had applied for an Iranian visa in September 2001 for onward travel to Afghanistan; and

(d) that Mr Lahmar had been attempting to assume leadership of the Armed Islamic Group (GIA) in Bosnia and Herzegovina, had proposed attacks on US troops to a local religious council (the *shura*), had expressed a desire to blow up US soldiers, made threats against the international community in Bosnia and Herzegovina and applied for an Iranian visa in September 2001.

The applicants denied the allegations.

49. On 7 March and 17 April 2007 Mr M.D. Fooks of the US Department of State and Mr D. Zelenika of the BH Embassy in Washington discussed the applicants' status at meetings in Washington.

50. On 6 August 2007 the BH authorities sent a diplomatic note to the US authorities, the relevant part of which reads as follows:

> "Appreciating the hitherto cooperation with the Government of the United States of America regarding these cases, and having in mind the intention of Bosnia and

Herzegovina to fulfil its international obligations, as well as obligations that follow from rulings of domestic courts, the Council of Ministers of Bosnia and Herzegovina is asking the Government of the United States of America for guarantees that the above-mentioned persons will not be sentenced to death or executed, as well as that the above-mentioned persons will not be subjected to torture, degrading, and inhuman treatment.

The Ministry of Foreign Affairs of Bosnia and Herzegovina reminds once again of the before mentioned Resolution of the Council of Europe which invites member states 'to enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantánamo Bay, whether legally obliged to do so or not'."

The relevant part of the response of the US embassy in Sarajevo dated 4 September 2007 reads as follows:

"The Embassy has the honor to inform the Ministry that the United States is a party to the Geneva Conventions of 1949, and notes that Common Article 3 of those Conventions specifically prohibits 'violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,' as well as 'humiliating and degrading treatment' of detainees in an armed conflict not of an international character. The Embassy also notes that US domestic law prohibits torture of any detainee in US custody, and also prohibits cruel, humiliating or degrading treatment as defined by the US reservation to the Convention Against Torture. The Embassy assures the Government of Bosnia and Herzegovina that the United States strictly adheres to Common Article 3 and US domestic law in its treatment of all detainees at Guantánamo Bay.

The Embassy also informs the Ministry that the Military Commissions Act of 2006, which authorized the President to establish military commissions to try unlawful enemy combatants for crimes including the laws of war, does contemplate the death penalty as a potential sentence for those convicted of the most serious crimes. With regards to the specific detainees referenced in the Ministry's note, the Embassy understands that the United States Department of Defense does not intend to seek the death penalty in those cases."

51. On 12 June 2008 the US Supreme Court, by a majority, held that the applicants had illegally been denied access to *habeas corpus* (*Boumediene v. Bush*, 553 U.S. __ (2008)). The concluding paragraphs of the majority opinion read as follows:

"In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. See *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936). Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not. Security depends upon a sophisticated intelligence

apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek."

B. Relevant law and practice

1. United Nations

52. On 27 February 2006 five holders of mandates of special procedures of the former Commission on Human Rights submitted a joint report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120). The conclusions read as follows:

"83. International human rights law is applicable to the analysis of the situation of detainees in Guantánamo Bay. Indeed, human rights law applies at all times, even during situations of emergency and armed conflicts. The war on terror, as such, does not constitute an armed conflict for the purposes of the applicability of international humanitarian law. The United States of America has not notified to the Secretary-General of the United Nations or other States parties to the treaties any official derogation from the International Covenant on Civil and Political Rights [hereinafter 'ICCPR'] or any other international human rights treaty to which it is a party.

84. The persons held at Guantánamo Bay are entitled to challenge the legality of their detention before a judicial body in accordance with article 9 of ICCPR, and to obtain release if detention is found to lack a proper legal basis. This right is currently being violated, and the continuing detention of all persons held at Guantánamo Bay amounts to arbitrary detention in violation of article 9 of ICCPR.

85. The executive branch of the United States Government operates as judge, prosecutor and defence counsel of the Guantánamo Bay detainees: this constitutes serious violations of various guarantees of the right to a fair trial before an independent tribunal as provided for by article 14 of the ICCPR.

86. Attempts by the United States Administration to redefine 'torture' in the framework of the struggle against terrorism in order to allow certain interrogation techniques that would not be permitted under the internationally accepted definition of torture are of utmost concern. The confusion with regard to authorized and unauthorized interrogation techniques over the last years is particularly alarming.

87. The interrogation techniques authorised by the Department of Defence, particularly if used simultaneously, amount to degrading treatment in violation of

article 7 of ICCPR and article 16 of the Convention against Torture. If in individual cases, which were described in interviews, the victim experienced severe pain or suffering, these acts amounted to torture as defined in article 1 of the Convention. Furthermore, the general conditions of detention, in particular the uncertainty about the length of detention and prolonged solitary confinement, amount to inhuman treatment and to a violation of the right to health as well as a violation of the right of detainees under article 10, paragraph 1, of ICCPR to be treated with humanity and with respect for the inherent dignity of the human person.

88. The excessive violence used in many cases during transportation, in operations by the Initial Reaction Forces and force-feeding of detainees on hunger strike must be assessed as amounting to torture as defined in article 1 of the Convention against Torture.

89. The practice of rendition of persons to countries where there is a substantial risk of torture, such as in the case of Mr Al Qadasi, amounts to a violation of the principle of non-refoulement and is contrary to article 3 of the Convention against Torture and article 7 of ICCPR.

90. The lack of any impartial investigation into allegations of torture and ill-treatment and the resulting impunity of the perpetrators amount to a violation of articles 12 and 13 of the Convention against Torture.

91. There are reliable indications that, in different circumstances, persons detained in the Guantánamo Bay detention facilities have been victims of violations of the right to freedom of religion or belief, contrary to article 18 of ICCPR and the 1981 [Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief]. It is of particular concern that some of these violations have even been authorised by the authorities. In addition, some interrogation techniques are based on religious discrimination and are aimed at offending the religious feelings of detainees.

92. The totality of the conditions of their confinement at Guantánamo Bay constitute a right-to-health violation because they derive from a breach of duty and have resulted in profound deterioration of the mental health of many detainees.

93. There are also serious concerns about the alleged violations of ethical standards by health professionals at Guantánamo Bay and the effect that such violations have on the quality of health care, including mental health care, the detainees are receiving.

94. The treatment of the detainees and the conditions of their confinement have led to prolonged hunger strikes. The force-feeding of competent detainees violates the right to health as well as the ethical duties of any health professionals who may be involved."

2. Council of Europe

53. On 26 April 2005 the Parliamentary Assembly of the Council of Europe adopted Resolution 1433 (2005), the relevant part of which provides:

"1. The Parliamentary Assembly recalls and restates its outrage and disgust at the terrorist attacks on the United States of America of 11 September 2001, the horror of which has not been dimmed by the passage of time. It shares the United States' determination to combat international terrorism and fully endorses the importance of

detecting and preventing terrorist crimes, prosecuting and punishing terrorists and protecting human lives.

2. Whilst the Assembly therefore offers its full support to the United States in its efforts to fight terrorism, this must be on condition that all measures taken are fully respectful of human rights and the rule of law. Conformity with international human rights and humanitarian law is not a weakness in the fight against terrorism but a weapon, ensuring the widest international support for actions and avoiding situations which could provoke misplaced sympathy for terrorists or their causes.

3. The United States has long been a beacon of democracy and a champion of human rights throughout the world and its positive influence on European development in this respect since the Second World War is greatly appreciated. Nevertheless, the Assembly considers that the United States Government has betrayed its own highest principles in the zeal with which it has attempted to pursue the 'war on terror'. These errors have perhaps been most manifest in relation to Guantánamo Bay.

4. At no time have detentions at Guantánamo Bay been within a 'legal black hole'. International human rights law has at all times been fully applicable to all detainees. For those captured during the international armed conflict in Afghanistan, protection of certain rights may have been complemented by the provisions of international humanitarian law (IHL) for the duration of that conflict. Since that international armed conflict ceased, however, international human rights standards have applied in the normal fashion.

5. The Assembly applauds and supports the work of the International Committee of the Red Cross (ICRC) and the various United Nations human rights protection mechanisms, along with that of non-governmental organisations including Human Rights First, the Center for Constitutional Rights and Amnesty International, in striving to improve detention conditions at Guantánamo Bay and ensure that detainees' rights are respected. It also thanks the European Commission for Democracy through Law (Venice Commission) for its opinion on the possible need for further development of the Geneva Conventions, produced in response to a request from the Assembly's Committee on Legal Affairs and Human Rights.

6. The Assembly recalls the evidence provided by Mr Jamal Al Harith, former detainee, along with lawyers representing current and former detainees and other international experts, at the hearing held by its Committee on Legal Affairs and Human Rights in Paris on 17 December 2004.

7. On the basis of an extensive review of legal and factual material from these and other reliable sources, the Assembly concludes that the circumstances surrounding detentions by the United States at Guantánamo Bay show unlawfulness and inconsistency with the rule of law, on the following grounds:

i. many if not all detainees have been subjected to cruel, inhuman or degrading treatment occurring as a direct result of official policy, authorised at the very highest levels of government;

ii. many detainees have been subjected to ill-treatment amounting to torture which has occurred systematically and with the knowledge and complicity of the United States Government;

iii. the right of those detained in connection with the international armed conflict previously conducted by the United States in Afghanistan to be presumptively recognised as prisoners of war (POWs) and to have their status independently determined by a competent tribunal was not respected;

iv. there have been numerous violations of various aspects of all detainees' rights to liberty and security of the person, making their detention arbitrary;

v. there have been numerous violations of various aspects of all detainees' rights to fair trial, amounting to a flagrant denial of justice;

vi. the United States has engaged in the unlawful practice of secret detention;

vii. the United States has, by practising 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on *non-refoulement*;

viii. the United States' proposals to return or transfer detainees to other countries, even where reliant on 'diplomatic assurances' concerning the detainees' subsequent treatment, risk violating the prohibition on *non-refoulement*."

For the above reasons, the member States of the Council of Europe were called on:

"i. to enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantánamo Bay, whether legally obliged to do so or not;

ii. with respect to any of their citizens, nationals or former residents who have been returned or transferred from detention at Guantánamo Bay:

a. to treat such persons according to the usual provisions of criminal law, respecting the presumption in favour of immediate liberty on arrival;

b. to provide such persons with all necessary support and assistance, in particular legal aid to bring cases relating to detention at Guantánamo Bay;

c. to protect such persons from prejudice or discrimination and to ensure their mental and physical well-being during the process of reintegration;

d. to ensure that such persons do not suffer detriment to their rights or interests as a result of being held in unlawful detention at Guantánamo Bay, especially in relation to immigration status;

iii. not to permit their authorities to participate or assist in the interrogation of Guantánamo Bay detainees;

iv. to respect their obligations under international law to exclude any statement established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment from any proceedings, except against a person accused of such ill-treatment as evidence that the statement was made;

v. to refuse to comply with United States' requests for extradition of terrorist suspects liable to detention at Guantánamo Bay;

vi. to refuse to comply with United States' requests for mutual legal assistance in relation to Guantánamo Bay detainees, other than by providing exculpatory evidence, or unless in connection with legal proceedings before a regularly constituted court;

vii. to ensure that their territory and facilities are not used in connection with practices of secret detention or rendition in possible violation of international human rights law;

viii. to respect the *erga omnes* nature of human rights by taking all possible measures to persuade the United States authorities to respect fully the rights under international law of all Guantánamo Bay detainees."

3. Organisation of American States

54. The Inter-American Commission on Human Rights is an autonomous organ of the Organisation of American States. On 20 August 2008 it issued urgent precautionary measures in favour of Mr Djamel Ameziane, an Algerian citizen held by the United States at the detention centre at Guantánamo Bay since 2002. Specifically, the Commission requested that the United States:

"1. Immediately take all measures necessary to ensure that Mr. Djamel Ameziane is not subjected to cruel, inhuman or degrading treatment or torture during the course of interrogations or at any other time, including but not limited to all corporal punishment and punishment that may be prejudicial to Mr. Ameziane's physical or mental health;

2. Immediately take all measures necessary to ensure that Mr. Djamel Ameziane receives prompt and effective medical attention for physical and psychological ailments and that such medical attention is not made contingent upon any condition;

3. Take all measures necessary to ensure that, prior to any potential transfer or release, Mr. Djamel Ameziane is provided an adequate, individualized examination of his circumstances through a fair and transparent process before a competent, independent and impartial decision maker; and

4. Take all measures necessary to ensure that Mr. Djamel Ameziane is not transferred or removed to a country where there are substantial grounds for believing that he would be in danger of being subjected to torture or other mistreatment, and that diplomatic assurances are not used to circumvent the United States' non-refoulement obligations."

4. Bosnia and Herzegovina

55. In accordance with Article 239 of the Criminal Code 2003 (*Krivični zakon Bosne i Hercegovine*; published in the Official Gazette of Bosnia and Herzegovina ("OG BH") nos. 3/03 of 10 February 2003 and 37/03 of 22 November 2003; amendments published in OG BH nos. 32/03 of 28 October 2003, 54/04 of 8 December 2004, 61/04 of 29 December 2004, 30/05 of 17 May 2005, 53/06 of 13 July 2006, 55/06 of 18 July 2006 and 32/07 of 30 April 2007), non-enforcement of a final and enforceable decision of the Human Rights Chamber amounts to a criminal offence:

> "An official of the institutions of Bosnia and Herzegovina, of the Entities or of the Brčko District of Bosnia and Herzegovina who refuses to enforce a final and enforceable decision of the Constitutional Court of Bosnia and Herzegovina, of the Court of Bosnia and Herzegovina or of the Human Rights Chamber of Bosnia and Herzegovina, or who prevents the enforcement of any such decision, or who frustrates the enforcement of the decision in some other way, shall be punished by imprisonment for a term between six months and five years."

5. United States

56. On 13 November 2001 the President of the United States issued a military order entitled "Detention, treatment, and trial of certain non-citizens in the war against terrorism" (66 FR 57833). The relevant part of the order reads as follows:

> "By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:
>
> **Section 1**
>
> (a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.
>
> (b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).
>
> (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.
>
> (d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens,

from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Section 2

(a) The term 'individual subject to this order' shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

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

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

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Section 3

Any individual subject to this order shall be

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

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

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

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

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

Section 4(a)

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

Section 7(b)

With respect to any individual subject to this order

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

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

THE LAW

57. The applicants complained under Articles 1, 2, 3, 5, 6 and 9 of the Convention and Article 1 of Protocols Nos. 6 and 13 to the Convention of the non-enforcement of domestic decisions of 11 October 2002 and 4 April 2003 in their favour.

Article 1 provides:

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

The relevant part of Article 2 reads:

"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."

Article 3 reads as follows:

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

Article 5 provides:

"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:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(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.

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

3. 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.

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.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Article 6, in so far as relevant, provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 9 reads as follows:

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

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

Article 1 of Protocols Nos. 6 and 13 provides:

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

58. The Government maintained that the Court lacked jurisdiction to examine the present case in view of the fact that the applicants had been transferred to the custody of the United States before the entry into force of the Convention in respect of Bosnia and Herzegovina.

Alternatively, they contended that the case was manifestly ill-founded. In the Government's view, the domestic authorities had taken all possible measures to persuade the US authorities to respect fully the basic rights of the applicants. The Government acknowledged some delays, but argued that most of them had been attributable to the US authorities. The Government further agreed that it could appear to the general public that they had neglected Mr Bensayah and Mr Lahmar to some extent, but they maintained that the difference in treatment was due to the strict rules in place at the detention centre at Guantánamo Bay, making access to non-citizens virtually impossible. Lastly, the Government declared that they had always been and still were willing to accept responsibility for all six applicants upon their return.

59. The applicants disagreed. They maintained that the BH authorities had disregarded their duty, arising out of domestic decisions, to take all possible steps to protect their basic rights. In particular, they stressed that the BH authorities had not visited the detention centre at Guantánamo Bay until more than one year and nine months after the first domestic decision concerning this matter. Moreover, only some of the applicants had been visited and the focus of the visit had been on the applicants' conduct prior to their removal from Bosnia and Herzegovina. The applicants criticised Bosnia and Herzegovina also for missing the opportunity to provide factual information to the competent Administrative Review Boards to support their release although it had been invited to do so by the US authorities (see paragraph 42 above). Lastly, the applicants pointed to a domestic decision which criticised the domestic authorities for taking a "particularly passive attitude" towards this matter (see paragraph 46 above).

60. Interights and the International Commission of Jurists, in their third-party submissions of 9 November 2007, argued that the BH authorities had a duty to intervene *vis-à-vis* the US authorities on behalf of the applicants because of the applicants' unlawful transfer and the peremptory (*jus cogens*) nature of the prohibition of arbitrary detention. They referred, in particular, to paragraph 11 of the Human Rights Committee's General Comment no. 29 (see UN Doc. CCPR/C/21/Rev.1/Add.11 (2001)).

61. The Center for Constitutional Rights, in their third-party submissions of 14 November 2007, analysed successful diplomatic efforts for release and repatriation of Guantánamo Bay detainees and suggested that the

combination of early intervention, sustained pressure, unequivocal public statements and intervention at different levels of government had been crucial. They further submitted that diplomatic efforts had led to the release of nearly all citizens of the member States of the Council of Europe by August 2006.

62. In view of its conclusion below, the Court considers that it can leave open the question, raised by the Government, as to whether the Court has jurisdiction to deal with the present case notwithstanding the fact that the applicants were transferred to the custody of the United States before the entry into force of the Convention in respect of Bosnia and Herzegovina (see, as regards continuing obligations in respect of alleged violations based on facts pre-dating ratification and which continued within the jurisdiction of a respondent State after ratification, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 401-403, ECHR 2004-VII). Furthermore, the Court does not consider it necessary to examine whether the BH authorities would have had an obligation under the Convention to intervene *vis-à-vis* the United States authorities on behalf of the applicants even in the absence of domestic decisions ordering so, as suggested by Interights and the International Commission of Jurists (see, by analogy, *Bertrand Russell Peace Foundation v. the United Kingdom*, no. 7597/76, Commission decision of 2 May 1978, and *Dobberstein v. Germany*, no. 25045/94, Commission decision of 12 April 1996, according to which the Convention does not contain a right which requires a Contracting Party to espouse an applicant's complaints under international law or otherwise intervene *vis-à-vis* the authorities of another State on his or her behalf; see, by contrast, *Ilaşcu and Others*, cited above, §§ 310-352, where the applicants were found to be within the jurisdiction of Moldova with the result that positive obligations devolved on Moldova with respect to the plight of the applicants).

63. As to the Government's alternative argument, the Court notes that the BH authorities made repeated interventions *vis-à-vis* the US authorities (see, in particular, paragraphs 26, 42, 49 and 50 above), the first of which was made only one week after the first decision of the Human Rights Chamber concerning this matter. They thereby clearly demonstrated their unequivocal commitment to repatriating the applicants, a point that was endorsed by the applicants' representative (see paragraph 45 above).

64. Moreover, the BH authorities sent an official to visit the applicants at the detention centre at Guantánamo Bay (see paragraph 45 above). As to the claim that the visit was belated, it is noted that the authorities had to wait until 20 May 2003 to receive preliminary instructions concerning access to Guantánamo Bay detainees and another six months (from 26 December 2003 to 15 July 2004) before they obtained an official invitation from the US authorities. Therefore, the responsibility for any delays cannot be attributed to Bosnia and Herzegovina. Neither can Bosnia

and Herzegovina be held responsible for not having access to Mr Bensayah and Mr Lahmar or for not being able to focus more on the applicants' situation at the detention centre, as opposed to the applicants' conduct prior to their transfer (see paragraphs 30 and 39 above concerning the conditions governing access to the applicants).

65. The BH authorities also removed all internal obstacles to the applicants' returning to Bosnia and Herzegovina on 7 November 2002 and 18 April 2003 (see paragraphs 27 and 29 above).

66. The applicants specifically criticised the failure of Bosnia and Herzegovina to submit to the Administrative Review Boards any information in support of their release. Given that there is no indication that Bosnia and Herzegovina has in its possession any exculpatory evidence, the Court finds this criticism groundless.

67. Lastly, the Court is aware of the finding of the domestic Human Rights Commission in this matter (see paragraph 46 above). However, taking into consideration subsequent developments and, in particular, the assurances obtained by the BH authorities that the applicants would not be subjected to the death penalty, torture, violence or other forms of inhuman or degrading treatment or punishment (see paragraphs 49 and 50 above), the Court concludes that Bosnia and Herzegovina can be considered to be taking all possible steps to the present date to protect the basic rights of the applicants, as required by the domestic decisions in issue.

68. Accordingly, the applications are manifestly ill-founded. They must therefore be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Lawrence Early
Registrar

Nicolas Bratza
President