

EUROPEAN COURT OF HUMAN RIGHTS

Council of Europe
Strasbourg, France

APPLICATION

*under Article 34 of the European Convention on Human Rights
and Rules 45 and 47 of the Rules of Court*

Lakhdar Boumediene v. Bosnia and Herzegovina

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I. THE PARTIES

A. THE APPLICANT

<i>Surname and First Name:</i>	BOUMEDIENE Lakhdar
<i>Sex:</i>	Male
<i>Nationality:</i>	The Applicant has double nationality: Bosnia and Herzegovina and Algeria
<i>Profession:</i>	Charity worker
<i>Date and Place of Birth:</i>	27 April 1966, Ain Sultán, Algeria
<i>Last Permanent Address:</i>	Semira Fraste Street No. 16 Sarajevo Bosnia and Herzegovina
<i>Present Address:</i>	Imprisoned at United States Naval Base, Guantanamo Bay, Cuba
<i>Names of Representatives:¹</i>	Yves Van Gerven, Helena Doležalová and David Reingewirtz WilmerHale Bastion Tower Place Champ de Mars 5 BE 1050 Brussels, Belgium Tel.: +32 2 285 4900 Fax: +32 2 285 4949 E-mail: yves.vangerven@wilmerhale.com E-mail: helena.dolezalova@wilmerhale.com E-mail: david.reingewirtz@wilmerhale.com
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¹ Because Mr. Boumediene is imprisoned at Guantanamo Bay, a written copy of the Power of Attorney is not currently available. Counsels expect to be in a position to deliver a Power of Attorney to this Court following U.S. counsel's next visit to Guantanamo Bay, which is planned for December 2006.

B. THE HIGH CONTRACTING PARTY

[1] The respondent party under this application is **Bosnia and Herzegovina**, the High Contracting Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms and its respective Protocols (“the Convention”).

[2] Article I § 1 of the Constitution of Bosnia and Herzegovina provides that Bosnia and Herzegovina is a legal entity under international law. Pursuant to Article I § 3 of the Constitution, it is composed of two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. Article III § 2(b) of the Constitution provides that both Entities are obliged to provide the Government of Bosnia and Herzegovina all necessary assistance to enable the latter to honour the international obligations of Bosnia and Herzegovina.

[3] Article II § 2 of the Constitution provides that the rights and obligations set forth in the Convention shall apply directly in Bosnia and Herzegovina and that the Convention shall have priority over all other law.

[4] Bosnia and Herzegovina has made no reservations to the Convention or its obligations thereunder.

[5] We refer to the decision of the Court of 15 November 2005 in *Jeličić v. Bosnia and Herzegovina* (Application No. 41183/02) for further details regarding the functioning of the constitutional system of Bosnia and Herzegovina and the relationship with its two Entities.

II. STATEMENT OF THE FACTS

A. SUMMARY

[6] Through a remarkable series of events beginning in late 2001, the Applicant, Mr. Lakhdar Boumediene, was deprived of his freedom and life with his family as a citizen of Bosnia and Herzegovina and placed in indefinite and potentially life-long imprisonment without charge by the United States at the military base at Guantanamo Bay, Cuba, where he remains to this day. Acting in flagrant defiance of both domestic and international law – including court orders finding no basis for his detention and an order of the Human Rights Chamber for Bosnia and Herzegovina forbidding his removal from Bosnian soil – the Governments of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina abducted, transported, and rendered Mr. Boumediene to the United States military. Importantly, as confirmed earlier this year by the Human Rights Commission of Bosnia and Herzegovina, the Government of Bosnia and Herzegovina continues to defy an October 2002 order by the Human Rights Chamber to take diplomatic action to secure Mr. Boumediene’s basic rights and seek assurances against imposition of the death penalty.

[7] Various domestic and international bodies – including the Parliamentary Assembly of the Council of Europe – have called upon Bosnia and Herzegovina to secure Mr. Boumediene’s release. Despite these orders and entreaties, Bosnian authorities have yet to take meaningful steps toward Mr. Boumediene’s repatriation, leaving only a trail of belated and unfulfilled resolutions.

[8] Today, he lives in a cold cell of about 2.4 metres x 1.8 metres, with half the width being taken up by a steel bunk. His cell is flooded with harsh, bright light twenty-four hours a day, seven days a week; at night, he is subject to a systematic effort to prevent him from sleeping. He is rarely taken for exercise. As a direct result of Bosnia and Herzegovina's continuing failure to engage the United States, Mr. Boumediene remains – nearly five years after his initial extra-legal abduction – confined without charges at Guantanamo Bay, the victim of documented torture and brutal beatings, deprived of liberty, family, and religion with no semblance of due process.

B. THE APPLICANT'S LIFE IN BOSNIA AND HERZEGOVINA PRIOR TO OCTOBER 2001

[9] Mr. Boumediene was born on 27 April 1966 in Ain Soultan, Algeria. He is an Algerian national by birth and a citizen of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina by naturalization (Annex 1 – Nationality Certificate).

[10] Mr. Boumediene is married and has two children.

[11] Mr. Boumediene immigrated with his family to Bosnia and Herzegovina in 1997. He was employed there continuously by the Sarajevo office of the Red Crescent. On 20 December 1997, Mr. Boumediene was granted citizenship of Bosnia and Herzegovina and of the Federation of Bosnia and Herzegovina. At the same time, he retained his Algerian citizenship.

[12] Mr. Boumediene lived with his wife and children and worked in Bosnia and Herzegovina until his arrest in October 2001.

C. CRIMINAL AND ADMINISTRATIVE PROCEEDINGS AGAINST THE APPLICANT AND HIS ILLEGAL REMOVAL TO THE GUANTANAMO BAY DETENTION FACILITY

[13] In October 2001, the Supreme Court of the Federation of Bosnia and Herzegovina ordered that Mr. Boumediene be taken into custody on suspicion of attempt to commit the criminal act of international terrorism, punishable under Article 168 paragraph 1 of the Criminal Code of the Federation of Bosnia and Herzegovina. Mr. Boumediene was arrested on 20 October 2001. The Federation initiated criminal proceedings against Mr. Boumediene based only on U.S. allegations that he and some other men were planning to attack on the Embassies of the United States and the United Kingdom in Sarajevo.

[14] On 16 November 2001, the Supreme Court extended Mr. Boumediene's detention for two more months.

[15] On 20 November 2001, the Federal Ministry of Interior issued a decision purporting to revoke Mr. Boumediene's citizenship.

[16] The revocation decision speculated, based on the fact that criminal charges had been brought against Mr. Boumediene, that he had intended to violate the Laws of the Federation when he applied for citizenship, in violation of the Law on Citizenship of Federation of Bosnia and Herzegovina. The decision was delivered to Mr. Boumediene in prison on 4 December 2001 and approved by the Ministry of Civil Affairs and Communications on 28 December 2001.

[17] On 20 December 2001, Mr. Boumediene initiated a challenge before the Supreme Court to the decision revoking his citizenship.

[18] On 28 December 2001, the Federal Ministry of Interior submitted to the Ministry of Civil Affairs and Communications of Bosnia and Herzegovina an initiative for expulsion of Mr. Boumediene from the territory of Bosnia and Herzegovina. The Ministry of Civil Affairs took no action upon this initiative.

[19] On 10 January 2002, the Federal Ministry of Interior issued a decision refusing Mr. Boumediene entry into the territory of Bosnia and Herzegovina. Although this decision was a decision of refusal of entry and not a decision of expulsion, it ordered Mr. Boumediene to leave the territory of the Federation of Bosnia and Herzegovina immediately. Mr. Boumediene remained in the custody of the Federation at this time.

[20] On 11 January 2002, the Ministry of Foreign Affairs of Bosnia and Herzegovina contacted the Democratic National Republic of Algeria about the possibility of deporting Mr. Boumediene to Algeria. On 12 January 2002, Algeria notified Bosnia and Herzegovina that it refused to accept Mr. Boumediene. On 14 January 2002, the Ministry of Foreign Affairs of Bosnia and Herzegovina again contacted Algeria with the same request and was again denied.²

[21] On 17 January 2002, in a diplomatic note, the Embassy of the United States in Sarajevo informed Bosnia and Herzegovina that it was willing to take custody of Mr. Boumediene and two other persons, whom the United States believed had been involved in international terrorism.³

[22] On 17 January 2002, the Supreme Court, based on the recommendation of the Prosecutor of the Federation of Bosnia and Herzegovina, issued a decision terminating Mr. Boumediene's detention on the ground that there was no justification for his continued imprisonment. The decision was brought to the prison of the Cantonal Court in Sarajevo, where Mr. Boumediene was being held, at approximately 5:00 p.m. on 17 January 2002. However, it does not appear that Mr. Boumediene received notice of the decision.⁴

[23] The Supreme Court issued similar decisions in the cases of Mustafa Ait Idir, Belkacem Bensayah, Hadž Boudella, Saber Lahmar and Mohamed Nechla, all of whom are of Algerian origin but are also citizens or lawful permanent residents of Bosnia and Herzegovina. These men and Mr. Boumediene were often referred to as the "Algerian six" or the "Algerian group," even though they are all citizens and/or residents of Bosnia and Herzegovina, and despite the fact that some of them had never met before their arrest.

[24] On 17 January 2002 at 11:45 p.m., Mr. Boumediene was released from detention but immediately taken into custody by the Federation Police under the authority of the Federal Ministry of Interior. In the middle of the night, the Federation Police shackled and hooded

² See the memorandum of the Council of Ministers of Bosnia and Herzegovina, mentioned at paragraph 50 of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

³ See paragraphs 52 of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

⁴ See paragraph 53 of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

Mr. Boumediene and the other five men and transported them to a military base within Bosnia and Herzegovina.

[25] The Federation Police handed over Mr. Boumediene and the five other men to United States military personnel at 6:00 a.m. on 18 January 2002. This illegal transfer took place within the territory of Bosnia and Herzegovina.

[26] Although the laws of Bosnia and Herzegovina require formal extradition proceedings before a person may be handed over to foreign authorities, extradition proceedings were never initiated here.⁵ In a formal submission to the Secretary General of the Council of Europe dated 4 April 2006, the Minister of Foreign Affairs of Bosnia and Herzegovina admitted that this action was a “hand-over” and not a lawful extradition. Mr. Boumediene had no notice of, nor any opportunity to contest, the transfer to U.S. authorities, and neither did he receive any explanation of charges for which he was supposedly being transferred or whether the death penalty would be sought.

[27] On 18 or 19 January 2002, Mr. Boumediene and the other men were forcibly taken on board a U.S. military aircraft. Although the six men were deliberately prevented from seeing the aircraft or their surroundings, official U.S. documents indicate that they boarded a C-130 aircraft at the Tuzla Air Base, Bosnia and Herzegovina.

[28] According to U.S. military records, the aircraft stopped at the Incirlik base in Turkey. The aircraft departed again at or about 12:00 GMT on 19 January 2002. The aircraft arrived at the U.S. Naval Base at Guantanamo Bay, Cuba at or around 19:30 GMT on 20 January 2002. Mr. Boumediene was continuously shackled and blindfolded during the journey, which lasted over thirty hours⁶. There were no restrooms, and he received no food during the transfer.

[29] Since 20 January 2002, Mr. Boumediene has been imprisoned at a military detention facility at the U.S. Naval Base at Guantanamo Bay, Cuba. He was first imprisoned at Camp X-Ray, where he was held in a steel cage located in the open air and full sun. He was subsequently held at Camp Delta, where he continues to be held at the time of filing of the present application.

[30] From January 2002 until mid-2004, Mr. Boumediene was permitted no visitors and no contact with the outside world. Since December 2004, U.S. counsel has been permitted – subject to numerous governmental restrictions – to visit Mr. Boumediene briefly on seven occasions.

D. LEGAL PROCEEDINGS BY THE APPLICANT BEFORE THE HUMAN RIGHTS CHAMBER FOR BOSNIA AND HERZEGOVINA

1. Human Rights Chamber Order of 17 January 2002 for Provisional Measures

[31] On 16 January 2002, two days before his handover by the Federation Police to the U.S. military forces, Mr. Boumediene lodged an application with the Human Rights Chamber

⁵ Paragraphs 275-277 of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

⁶ **Annex 4** – U.S. government documents concerning flight schedules, OLE 3517-3555.

for Bosnia and Herzegovina (“Human Rights Chamber”) against Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina. Mr. Mohamed Nechla and Mr. Saber Lahmar filed similar applications on the same day. Mr. Boudella filed a similar application on 14 January 2002.⁷

[32] Mr. Boumediene pled in this application violations of his rights under Article I of the Human Rights Agreement, which is set out in Annex 6 to the General Framework Agreement for the Peace in Bosnia and Herzegovina (“Dayton Agreement”) and which incorporates the Convention.⁸ Specifically, he argued that extradition to Algeria (his fear at the time) would subject him to torture and inhuman and degrading treatment in violation of Article 3 of the Convention; would deprive him of his right to a fair trial within a reasonable time with respect to his citizenship revocation appeal in violation of Article 6 of the Convention; and would deprive him of his right to respect for family life in violation of Article 8 of the Convention.

[33] Accordingly, Mr. Boumediene requested that the Human Rights Chamber issue an order for provisional measures to prevent his deportation or any other type of expulsion from Bosnia and Herzegovina.

[34] On 17 January 2002, the day *before* Mr. Boumediene was handed over to U.S. forces and forcibly removed from Bosnia and Herzegovina, the Human Rights Chamber issued an order on provisional measures, ordering the two respondent Governments to take all necessary steps to prevent the expulsion of Mr. Boumediene and the three other men from Bosnia and Herzegovina (**Annex 2**). The Governments of Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina materially assisted in Mr. Boumediene’s removal from the territory of Bosnia and Herzegovina notwithstanding, and in clear violation of, the Human Rights Chamber’s order on provisional measures.

2. Human Rights Chamber Decision of 11 October 2002

[35] On 6 March 2002, Mr. Boumediene (through a representative) added to his original application pleas of violations of other provisions of the Convention:

- violation of the right to liberty contained in Article 5 of the Convention (illegal detention after the release order of the Supreme Court of the Federation of Bosnia and Herzegovina until the handover to US military);
- violation of Article 6 the Convention (non-respect of presumption of innocence);
- violation of Article 1 of Protocol No. 7 of the Convention (non-respect of procedural safeguards in relation to expulsion of aliens);
- violation of Article 1 of Protocol No. 6 of the Convention (in light of the fact that the Applicant was expelled to a legal system where he risks the death penalty).

[36] On 11 October 2002, the Human Rights Chamber issued a final decision in the case of Mr. Boumediene and Messrs. Boudella, Lahmar and Nechla (**Annex 3**). The Chamber

⁷ In several Human Rights Chamber documents, the names of two of the six Bosnian prisoners are spelled “Nechle” and “Boudellaa.” Counsel understands the correct spelling to be “Nechla” and “Boudella” respectively.

⁸ Article I of the Human Rights Agreement provides that the Contracting Parties shall secure to everyone within their jurisdiction the rights provided in the Convention.

concluded, among other things, that both Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina violated:

- (i) the right of Mr. Boumediene not to be arbitrarily expelled, as guaranteed by Article 1 of Protocol 7 of the Convention;
- (ii) the right of Mr. Boumediene to liberty and security of person, as guaranteed by Article 5, paragraph 1 of of the Convention, with regard to the period of time between the Supreme Court's 17 January 2002 order to release Mr. Boumediene and the handover of Mr. Boumediene to US forces;
- (iii) the right of Mr. Boumediene to liberty and security of person, as guaranteed by Article 5 paragraph 1 of of the Convention, with regard to the period from the handover of Mr. Boumediene to the US forces and his removal by force from the territory of Bosnia and Herzegovina;
- (iv) the right of Mr. Boumediene to be presumed innocent until proven guilty according to the law, as guaranteed by Article 6 paragraph 2 of the Convention, with respect to his citizenship revocation;
- (v) the right of Mr. Boumediene not to be subjected to the death penalty, as guaranteed by Article 1 of Protocol 6 to the Convention, by failing to seek assurances from the United States that Mr. Boumediene would not be subjected to the death penalty.

[37] The Human Rights Chamber held that in violating these provisions of the Convention the two respondent parties were in breach of Article I of the Human Rights Agreement.

[38] Accordingly, the Human Rights Chamber ordered the Federation of Bosnia and Herzegovina to take all necessary steps to annul the 10 January 2002 decision on refusal of entry. The Human Rights Chamber also required the Federation of Bosnia and Herzegovina to ensure that the administrative dispute before the Supreme Court of the Federation of Bosnia and Herzegovina concerning the decision revoking his citizenship took account of the Human Rights Chamber's decision⁹.

[39] The Human Rights Chamber further ordered:

- (i) "Bosnia and Herzegovina to use all diplomatic channels in order to protect the basic rights of the Applicants [including Mr. Boumediene], taking all possible steps to establish contact with the Applicants and to provide them with consular support;"¹⁰
- (ii) "Bosnia and Herzegovina to take all possible steps to prevent the death penalty from being pronounced against and executed on the Applicants [including Mr. Boumediene], including seeking assurances from the United States via diplomatic contacts that the Applicants will not be subjected to the death penalty;"¹¹
- (iii) "both respondent parties, Bosnia and Herzegovina and the Federation of Bosnia and

⁹ Points 12 and 14 of the conclusions of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

¹⁰ Point 15 of the conclusions of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

¹¹ Point 16 of the conclusions of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

Herzegovina, to retain lawyers authorized and admitted to practice in the relevant jurisdictions and before the relevant courts, tribunals and other authoritative bodies in order to take all necessary action to protect the Applicants' [including Mr. Boumediene] rights while in US custody and in case of possible military, criminal or other proceedings involving the Applicants, each of the respondent parties should bear half the cost of attorney fees and expenses",¹²

[40] Finally, the Human Rights Chamber ordered both respondent parties, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina, to pay each Applicant 10,000 Convertible Marks by way of compensation for non-pecuniary damages, no later than 11 November 2002, each of the respondent parties bearing half of the cost of the compensation.¹³ Both respondent parties were also to report to the Human Rights Chamber no later than 11 November 2002 and thereafter periodically every two months until the full implementation of the Decision was achieved, on all steps taken by them to implement the decision.¹⁴

E. EVENTS SUBSEQUENT TO THE HUMAN RIGHTS CHAMBER DECISION OF 11 OCTOBER 2002

[41] For over a year after the Human Rights Chamber's unequivocal mandate, the Government of Bosnia and Herzegovina failed to take any action to protect Mr. Boumediene's rights or to seek his return from Guantanamo Bay.

[42] On 18 November 2003, the Council of Ministers of Bosnia and Herzegovina - the executive body with primary responsibility for carrying out policies and decisions in the fields of defense, intelligence and foreign policy - determined that the Ministry of Justice should assign, as soon as possible, a person who would visit Bosnian citizens imprisoned at Guantanamo Bay¹⁵. Despite the urgency of the Council's decision, no visit occurred until July 2004, eight months later.

[43] On 21 April 2004, the Commission for Human Rights, Immigration, Refugees and Asylum of the Parliament of Bosnia and Herzegovina formally accepted the conclusions and measures ordered by the Human Rights Chamber. The Commission requested all relevant institutions of Bosnia and Herzegovina urgently to implement the Chamber's decision and to initiate a procedure with the United States authorities for the return of Guantanamo prisoners,

¹² Point 17 of the conclusions of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

¹³ Point 18 of the conclusions of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

¹⁴ Point 18 of the conclusions of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

¹⁵ See Report on the visit by the representative of Bosnia and Herzegovina, 10 August 2004, **Annex 7**.

including Mr. Boumediene, to their homes in Bosnia and Herzegovina. The Commission's report was adopted by the full House of Representatives of the Parliament on 11 May 2004¹⁶.

[44] On 24 June 2004, the Federation prosecution authorities formally terminated investigations regarding Mr. Boumediene and the other Bosnian prisoners with regard to any suspicion of terrorism. Mr. Zdravko Knežević, Chief Prosecutor of the Federation of Bosnia and Herzegovina, confirmed in a letter dated 8 November 2004 to the head of the United Nations Office of the High Commissioner for Human Rights that all terrorism-related investigations of Mr. Boumediene have been terminated.¹⁷ The Chief Prosecutor later made the same statement in a meeting with Mr. Boumediene's counsel on 18 January 2005.

[45] Between 27 and 29 July 2004, Mr. Amir Pilav of the Bosnian Ministry of Justice visited Guantanamo Bay and met with Mr. Boumediene and three of the five other Bosnian prisoners. Mr. Pilav failed to respond to requests by Mr. Boumediene's U.S. counsel to speak or meet in advance of his visit.

[46] Based on questions approved by the Government of Bosnia and Herzegovina, Mr. Pilav interviewed the prisoners regarding their activities in Bosnia and Herzegovina before the handover to U.S. authorities. He inquired about their activities in Algeria and any connections they might have with international terrorism. As can be inferred from his questions, the actual purpose of Mr. Pilav's visit was not to establish contact with the prisoners or give them consular support, but rather to collect possible incriminating information in any further proceedings that the Bosnian authorities might want to pursue against them, such as a renewed revocation of citizenship. Mr. Pilav only incidentally inquired about the prisoners' conditions of confinement.¹⁸

[47] Mr. Pilav wrote a report to the Ministry of Justice dated 10 August 2004 and, at the request of the Council of Ministers, an annex that contained recommendations for actions to be taken with regard to the prisoners. Recommendation 9 stated that it was necessary to start negotiations with the United States Government for the repatriation of the Bosnian prisoners. The annex was forwarded to the Council of Ministers on 21 October 2004. The cover letter to the annex, signed by the Minister of Justice of Bosnia and Herzegovina, Slobodan Kovac, recommended that the Ministry of Justice be tasked with implementing the proposed recommendations and appointing an official, called the "Secretary with Special Assignment,"

¹⁶ Report of the Commission on Human Rights, Immigration and Refugees and Asylum of the Parliament of Bosnia and Herzegovina, Representatives House, No. 01/5-059-1030/04, 21 April 2004, Annex 5.

¹⁷ Letter from Zdravko Knežević to Madeleine Rees of 8 November 2004, Annex 6.

¹⁸ The Report on Mr. Pilav's visit (Annex 7) suggests that the Council of Ministers of Bosnia and Herzegovina authorized him only to ask the questions attached to the report. These questions included mostly inquiries about Mr. Boumediene's motives for coming to Bosnia and Herzegovina, his place of residence in Bosnia and Herzegovina, the persons with whom he was acquainted during his stay in Bosnia and Herzegovina, whether he was connected with or had any contacts with terrorists or terrorist organizations, the whereabouts of his family, etc.

to lead the implementation of the Human Rights Chamber Decision. The Secretary would report to the Council of Ministers¹⁹.

[48] On 16 November 2004, the Council of Ministers of Bosnia and Herzegovina adopted the recommendations of the Ministry of Justice as the official policy of the Government of Bosnia and Herzegovina, including the recommendation that negotiations be commenced with the United States Government for repatriation of the Bosnian prisoners.²⁰

[49] On 31 January 2005, the Bosnian Minister of Justice, Mr. Kovac, issued a statement declaring that he would exercise his full authority to help implement the recommendations.

[50] On 1 February 2005, the Council of Ministers unanimously approved an initiative of Prime Minister Adnan Terzić to send a formal letter to the United States Government requesting the return of the Bosnian prisoners.

[51] On 2 February 2005, Mr. Terzić sent a letter to U.S. Secretary of State Condoleezza Rice requesting the return of Mr. Boumediene, Mr. Boudella, Mr. Nechla and Mr. Ait Idir. The letter does not mention the two other Bosnian prisoners, Mr. Bensayah and Mr. Lahmar.

[52] On 1 March 2005, Mr. Stephen Oleskey, a U.S. lawyer representing Mr. Boumediene,²¹ wrote Mr. Terzić and urged the Bosnian government to take immediate action to secure the rights of Mr. Boumediene and the other Bosnian prisoners. In particular, Mr. Oleskey requested that the Bosnian government initiate negotiations with the United States to ensure the prisoners' safe and prompt return to Bosnia and Herzegovina. The letter reminded Mr. Terzić of the prisoners' unlawful handover to U.S. forces and their suffering and mistreatment at Guantanamo Bay, of which Mr. Oleskey had learned during meetings with Mr. Boumediene and the other Bosnian prisoners at Guantanamo. Mr. Oleskey's letter emphasized that circumstances were ripe for negotiations with the United States.²²

[53] Mr. Oleskey sent similar letters to Mr. Kovač, Minister of Justice²³; Mr. Bariša Čolak, Minister of Security²⁴; Mr. Mladen Ivanić, Minister of Foreign Affairs²⁵; Mr. Tihomir

¹⁹ **Annex 7** – Report on the visit by the representative of Bosnia and Herzegovina, 10 August 2004.

²⁰ **Annex 8** – Notification of Council of Ministers to Ministry of Justice (22 November 2004).

²¹ The undersigned law firm, Wilmer Cutler Pickering Hale and Dorr LLP (“WilmerHale”), of which Mr. Oleskey is a Senior Partner, took on Mr. Boumediene's case. As Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina did not comply with the order of the Human Rights Chamber to retain lawyers to take all necessary action to protect Mr. Boumediene's rights (point 17 of the conclusions of the Decision of the Human Rights Chamber of 11 October 2002), WilmerHale currently represents Mr. Boumediene and the other five Bosnian prisoners vis-à-vis the courts, government, and military authorities of the United States on a *pro bono* (i.e. volunteer and unpaid) basis.

²² **Annex 9** – Mr. Oleskey's letter to Mr. Terzić, dated 1 March 2005.

²³ **Annex 10** - Mr. Oleskey's letter to Mr. Kovač, dated 1 March 2005.

²⁴ **Annex 11** - Mr. Oleskey's letter to Mr. Čolak, dated 1 March 2005.

Gligorić, Parliament of Bosnia and Herzegovina²⁶; Mr. Šefik Džaferović, Chairman of the Representative House of the Parliament, Parliament of Bosnia and Herzegovina²⁷; Mr. Elmir Jahić, President of the Commission for Human Rights, Parliament of Bosnia and Herzegovina²⁸; Mr. Sulejman Tihić, member of the Presidency of Bosnia and Herzegovina²⁹; Mr. Orhan Pašalić, legal counsel to the Prime Minister³⁰; Mr. Zdravko Knežević, Chief Prosecutor of the Federation of Bosnia and Herzegovina³¹; and Mr. Miriofil Ljubić³², Mr. Safet Pašić³³ and Mr. Vitomir Popović, Ombudsmen of Bosnia and Herzegovina.³⁴

[54] On or about 22 March 2005, U.S. Secretary of State Condoleezza Rice responded to Prime Minister Terzić's letter. Secretary Rice thanked the Prime Minister for his letter and advised him that the United States was continuing to evaluate the possibility of transferring prisoners to their home countries and that its goal was to reduce the number of persons in U.S. custody consistent with the security and intelligence interests of the United States. Secretary Rice's letter advised that each prisoner, including Mr. Boumediene, was the subject of an annual review, during which the U.S. Government evaluated whether the prisoner would pose a threat to the United States if released and during which the prisoner was allowed to present evidence supporting release. Secretary Rice's letter welcomed any information that the Government of Bosnia and Herzegovina could supply in this regard.

[55] The Government of Bosnia and Herzegovina has never provided, to Applicant's knowledge, any information to the United States supporting Mr. Boumediene's release, notwithstanding the U.S. Secretary of State's express invitation that it do so.

[56] On 29 March 2005, the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina adopted a Declaration demanding that the Council of Ministers of Bosnia and Herzegovina take urgent measures to liberate the Bosnian prisoners, including Mr. Boumediene, from the military prison at Guantanamo Bay. On 30 March 2005, the

²⁵ **Annex 12** - Mr. Oleskey's letter to Mr. Ivanić, dated 1 March 2005.

²⁶ **Annex 13** - Mr. Oleskey's letter to Mr. Gligorić, dated 1 March 2005

²⁷ **Annex 14** - Mr. Oleskey's letter to Mr. Džaferović, dated 1 March 2005.

²⁸ **Annex 15** - Mr. Oleskey's letter to Mr. Jahić, dated 1 March 2005.

²⁹ **Annex 16** - Mr. Oleskey's letter to Mr. Tihić, dated 1 March 2005.

³⁰ **Annex 17** - Mr. Oleskey's letter to Mr. Pašalić, dated 1 March 2005.

³¹ **Annex 18** - Mr. Oleskey's letter to Mr. Knežević, dated 1 March 2005.

³² **Annex 19** - Mr. Oleskey's letter to Mr. Ljubić, dated 1 March 2005.

³³ **Annex 20** - Mr. Oleskey's letter to Mr. Pašić, dated 1 March 2005.

³⁴ **Annex 21** - Mr. Oleskey's letter to Mr. Popović, dated 1 March 2005.

Chairman of the House of Representatives of the Parliament sent the Council of Ministers of Bosnia and Herzegovina a letter in which he reported the adoption of the Declaration.³⁵

[57] On 26 April 2005, the Parliamentary Assembly of the Council of Europe adopted Resolution 1433 (2005), which called on all member states of the Council of Europe, including Bosnia and Herzegovina, 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 imprisoned at Guantanamo, whether legally obliged to do so or not."³⁶

[58] On 29 April 2005, Mr. Oleskey sent another letter to Prime Minister Terzić, explaining the dire conditions of the Bosnian prisoners at Guantanamo Bay and citing reported cases of torture and religious persecution. This letter described in detail the torture of Mr. Mustafa Ait Idir, one of the Bosnian citizens imprisoned at Guantanamo, by the U.S. military. Mr. Oleskey requested that the Bosnian government take immediate action to secure the rights of the six Bosnian prisoners, including Mr. Boumediene. The letter also urged the Prime Minister to act on the U.S. Secretary of State's invitation to provide information to the United States supporting Mr. Boumediene's release, including most importantly "*information demonstrating the willingness of the BiH [Bosnia and Herzegovina] Government to accept return of the six detainees under conditions mutually agreeable to the two governments.*"³⁷ Similar letters have been sent to most of the addressees of the letter of 1 March 2005³⁸.

[59] On 15 June 2005, the Committee of Ministers of the Council of Europe noted the Parliamentary Assembly's Resolution 1433 and expressed its "full support" of all bilateral negotiations with the United States aimed at securing the prompt release of Guantanamo prisoners³⁹.

[60] On the same day, 15 June 2005, the U.S. State Department stated, in response to a formal enquiry from a United States Senator, that the Government of Bosnia and Herzegovina "has not indicated that it is prepared or willing to accept responsibility for [the six prisoners] upon transfer."⁴⁰

[61] On 21 June 2005, Prime Minister Terzić appeared before the Parliamentary Assembly of the Council of Europe. During that session, Mr. Kevin McNamara, a British Member of

³⁵ **Annex 22** – Letter of the Chairman of the House of Representatives of the Federation of Bosnia and Herzegovina to the Council of Ministers of Bosnia and Herzegovina, dated 30 March 2005.

³⁶ **Annex 23** – Resolution No. 1433 of the Parliamentary Assembly of Council of Europe.

³⁷ **Annex 24** – Mr. Oleskey's letter to Mr. Terzić, dated 29 April 2005.

³⁸ Copies of these letters can be provided upon request.

³⁹ **Annex 25** – Reply by Committee of Ministers of Council of Europe, adopted on 15 June 2005 (CM/AS(2005)Rec1699 final, published on 17 June 2005).

⁴⁰ **Annex 26** – Letter of Matthew A. Reynolds, Acting Assistant Secretary of State for Legislative Affairs, to Senator James Jeffords, dated 15 June 2005.

the Parliamentary Assembly, observed that six Bosnian citizens and former residents remained prisoners at Guantanamo and asked what efforts Bosnia was taking to secure their return. In response, Prime Minister Terzić acknowledged the importance of the issue and its relevance as an indicator of the progress of democracy in Bosnia and Herzegovina, and stated his willingness to determine the best course to secure the eventual release of the six prisoners from Guantanamo, in accordance with the Parliamentary Assembly's resolution⁴¹. To the Applicant's knowledge, Mr. Terzić has not taken any action regarding the matter despite this commitment.

[62] That same day, Mr. Oleskey met with Mr. Kovač, Minister of Justice. Mr. Kovač indicated that initiating negotiations for the release of the Bosnian prisoners was not within the competence of his Ministry. Mr. Kovač indicated that he therefore would not appoint a negotiator for talks with the United States, notwithstanding the Bosnian Council of Ministers' mandate of 16 November 2004 that he do so. In a letter of 12 July 2005, Mr. Oleskey reported to Prime Minister Terzić the results of that meeting. Mr. Oleskey requested that the Council of Ministers immediately resolve the matter⁴².

[63] On 19 August 2005, Mr. Oleskey, sent a letter to Mr. Sulejman Tihić, member of the Presidency of Bosnia and Herzegovina, requesting that the Bosnian government start negotiations with the U.S. for the repatriation of Mr. Boumediene immediately.⁴³

[64] In a letter of the same date to Prime Minister Terzić, Mr. Oleskey urged the Bosnian government immediately to begin negotiations with the United States for the release of the six Bosnian prisoners. He indicated that other countries were also negotiating with the United States to achieve release of their nationals. Mr. Oleskey explained that the U.S. government might seek to negotiate with the Algerian authorities the return of the prisoners to Algeria, where they could face substantial, life-threatening jeopardy. Finally, Mr. Oleskey identified the U.S. diplomatic contacts with whom negotiations could be initiated and proposed the manner in which the negotiations could be conducted⁴⁴.

[65] On 16 September 2005, the Parliament of Bosnia and Herzegovina adopted a resolution obligating the Bosnian Council of Ministers to enter into contact with the U.S. Government and resolve the issue of the six Bosnian citizens and former residents at Guantanamo as soon as possible⁴⁵.

⁴¹ See **Annex 27** – Report of 2005 Ordinary Session (Third Part) of Parliamentary Assembly of Council of Europe, 21 June 2005, available at <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/Records/2005-3/E/0506211000E.htm#6t>.

⁴² **Annex 28** – Mr. Oleskey's Letter to Mr. Terzić, dated 12 July 2005.

⁴³ **Annex 29** – Mr. Oleskey to Mr. Tihić, 19 August 2005.

⁴⁴ **Annex 30** – Mr. Oleskey's letter to Mr. Terzić, dated 19 August 2005.

[1] ⁴⁵ **Annex 31** – Statement of the Representative to Parliament of Bosnia and Herzegovina, Mr. Malden Potočnik, 9 December 2005 referring to the Resolution of Parliament of Bosnia and Herzegovina, 16 September 2005.

[66] On 4 April 2006, the Minister of Foreign Affairs of Bosnia and Herzegovina, Mr. Mladen Ivanić, candidly admitted in a letter to the Secretary-General of the Council of Europe that, in the case of Mr. Boumediene and the five other Bosnian prisoners, “a formal and legal procedure for extradition was not carried out, instead this was labeled as a ‘hand over.’”⁴⁶

[67] Despite repeated promises and commitments to do so, Bosnia and Herzegovina has not taken any effective diplomatic action vis-à-vis the U.S. government to obtain the release of Mr. Boumediene and the other five prisoners since Prime Minister Terzić’s initial letter of 2 February 2005.

[68] Furthermore, in spite of the Human Rights Chamber’s clear findings of violations of domestic and international law, neither Bosnia and Herzegovina nor the Federation of Bosnia and Herzegovina has investigated, let alone punished, the perpetrators (i.e. responsible Bosnian officials) of these violations.

F. THE HUMAN RIGHTS COMMISSION’S DECISION ON NON-IMPLEMENTATION OF THE DECISION OF THE HUMAN RIGHTS CHAMBER

[69] The Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina is the legal successor of the Human Rights Chamber for Bosnia and Herzegovina, which ceased to exist on 31 December 2003. Article XIV of Annex 6 to the Dayton Agreement provides that the Human Rights Commission is competent to hear cases that were pending before the Human Rights Chamber before 31 December 2003⁴⁷.

[70] In accordance with the Rules and Procedures of the Human Rights Chamber and the Rules and Procedures of the Human Rights Commission, decisions by the Chamber and the Commission are final and binding. All institutions of Bosnia and Herzegovina are obliged to implement the orders of the Chamber and the Commission to the extent they come within their responsibilities. When a Chamber or Commission order has not been implemented in a timely manner, the Commission may issue a decision establishing non-implementation. Non-implementation constitutes a criminal act pursuant to Article 239 of the Criminal Code of Bosnia and Herzegovina. Non-implementation decisions are delivered to the responsible official for prosecution.⁴⁸

[71] On 3 February 2006, Mrs. Nada Dizdarević, the wife of Mr. Hadž Boudella (one of the Bosnian prisoners), submitted a memorandum to the Human Rights Commission, in which she complained that the Human Rights Chamber’s Decision of 11 October 2002 had not been implemented with respect to Mr. Boudella as well as to Mr. Boumediene and Mr. Nechla.⁴⁹ In particular, Mrs. Dizdarević submitted that the Bosnian government had failed (1)

⁴⁶ **Annex 32** – Letter of Mladen Ivanić to Secretary General of Council of Europe, dated 4 April 2006, at p. 6.

⁴⁷ Point 5 of Article XIV of Annex 6 to the Dayton Agreement.

⁴⁸ See point 15 of the Decision of the Human Rights Commission - **Annex 33**.

⁴⁹ The Human Rights Commission adjudicated the application only with respect to Mr. Boudella because Ms. Dizdarević had not provided authorizations to represent the other men. The reasoning and findings underlying the decision apply equally to Mr. Boumediene.

to use all diplomatic channels in order to protect the basic rights of the men (conclusion 15 of the original decision); (2) to take all possible steps to prevent the death penalty from being imposed on the men, including seeking the necessary assurances from the United States (conclusion 16); and (3) to retain lawyers authorized and admitted to practice in the relevant jurisdictions and before the relevant courts, tribunals and other authoritative bodies in order to take all necessary action to protect the men's rights while in US custody (conclusion 17). Consequently, she requested a declaration of non-implementation.

[72] On 5 April 2006, the Human Rights Commission issued its non-implementation decision (**Annex 33**). The Human Rights Commission concluded:

the respondent party, Bosnia and Herzegovina, in relation to Applicant Hadž Boudellaa has not fulfilled its obligations from conclusions number 15 and 16 of the final and binding Decision on admissibility and merits, by the Chamber in cases no. *CH/02/8679, CH/02/8689, CH/02/8690 and CH/02/8691, Hadž Boudellaa, Boumediene Lakhdar, Mohamed Nechle and Saber Lahmar versus Bosnia and Herzegovina and Federation of Bosnia and Herzegovina*, from 3 September 2002.

[73] The Human Rights Commission reasoned that the 21 April 2004 report of the Commission for Human Rights, Immigration, Refugees and Asylum of the Parliament of Bosnia and Herzegovina and the letter dated 30 March 2005 of the Chairman of the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina were insufficient because they only demanded certain activities from certain institutions. They did not represent acts of implementation of the Decision of the Human Rights Chamber.

[74] The Human Rights Commission did not reach the issue of retaining counsel because it concluded that no military, criminal, or other proceedings had been launched against the applicant to date.

[75] The Human Rights Commission criticized the Government of Bosnia and Herzegovina for taking a "particularly passive attitude toward this issue," noting that it had failed even to make a written submission to the Human Rights Commission defending its failure to implement the Human Rights Chamber's earlier decision.

[76] In accordance with Rule 62 of the Commission, the Human Rights Commission delivered its decision to the respondent party and responsible prosecutor for further proceedings. No further proceedings, however, have been instituted.

G. LEGAL REGIME IMPOSED ON PRISONERS AT THE GUANTANAMO BAY DETENTION FACILITY

[77] The United States takes the position that the President of the United States may unilaterally designate individuals such as Mr. Boumediene as "enemy combatants" – as the President has done for all prisoners at Guantanamo Bay – without any independent judicial review of the factual basis underlying that determination. Further, the United States takes the position that the Guantanamo prisoners have no right to seek legal redress in a U.S. court. The U.S. Supreme Court, however, has rejected those propositions. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

[78] Over two years after Mr. Boumediene was first imprisoned at Guantanamo Bay, and in response to the Supreme Court's decision in *Hamdi*, the United States established "Combatant Status Review Tribunals" ("CSRT"). These are administrative proceedings presided over by military officers and were purportedly instituted to determine whether a prisoner had properly been designated an "enemy combatant." The review tribunals do not permit prisoners to be represented by counsel, restrict prisoners' right to be present at hearings, and base their decisions on classified evidence to which the prisoners have no access. The CSRTs are permitted to rely on evidence obtained by the use of torture.

[79] The United Nations Special Rapporteurs' Report of 15 February 2006, entitled *Situation of Detainees at Guantanamo Bay* ("UN Report", **Annex 34**), concluded that the CSRTs failed to comply with the International Covenant on Civil and Political Rights ("ICCPR") because they lack the independence essential to judicial proceedings and lack fundamental procedural protections.

[80] In the case of Mr. Boumediene, a CSRT stated in 2004 that he was supposedly an "enemy combatant" and therefore subject to further indefinite imprisonment.

[81] In 2004, a U.S. federal judge ruled that Guantanamo prisoners are protected by the Fifth Amendment to the U.S. Constitution, and that the CSRTs violate that Amendment's due process protection. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-478 (D.D.C. 2005), **Annex 35**. The decision is pending appeal in the United States Court of Appeals for the District of Columbia Circuit.

[82] The federal judge in that case quoted at length from the CSRT hearing of one of the six Bosnian prisoners, Mr. Mustafa Ait Idir, finding that it was indicative of the unfairness of the procedures applied to Guantanamo prisoners. *Id.* at 469. The discussion arose because the military officers, who compose the CSRT, were considering allegations based on classified evidence, which the prisoner was not allowed to examine. The Recorder of the CSRT had asserted that "[w]hile living in Bosnia, the Detainee [Mr. Ait Idir] associated with a known Al Qaida operative." In response, the following exchange occurred:

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of Al Qaida?

Detainee: No, no.

Tribunal President: I'm sorry, what was your response?

Detainee: No.

Tribunal President: No?

Detainee: No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was

on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.

Tribunal President: We are asking you the questions and we need you to respond to what is on the unclassified summary.

[83] The federal judge's opinion then quoted a further conversation between Mr. Ait Idir and the CSRT President, which occurred after the Recorder read an allegation that Mr. Ait Idir was arrested because of his alleged involvement in a plan to attack the U.S. Embassy in Sarajevo:

Detainee: ... The only thing I can tell you is I did not plan or even think of [attacking the Embassy]. Did you find any explosives with me? Any weapons? Did you find me in front of the embassy? Did you find me in contact with the Americans? Did I threaten anyone? I am prepared now to tell you, if you have anything or any evidence, even if it is just very little, that proves I went to the embassy and looked like that [Detainee made a gesture with his head and neck as if he were looking into a building or a window] at the embassy, then I am ready to be punished. I can just tell you that I did not plan anything. Point by point, when we get to the point that I am associated with Al Qaida, but we already did that one.

Recorder: It was [the] statement that preceded the first point.

Detainee: If it is the same point, but I do not want to repeat myself. These accusations, my answer to all of them is I did not do these things. But I do not have anything to prove this. The only thing is the citizenship. I can tell you where I was and I had the papers to prove so. But to tell me I planned to bomb, I can only tell you that I did not plan.

Tribunal President: Mustafa, does that conclude your statement?

Detainee: That is it, but I was hoping you had evidence that you can give me. If I was in your place--and I apologize in advance for these words--but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.

[Everyone in the Tribunal room laughs.]

Tribunal President: We had to laugh, but it is okay.

Detainee: Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

[84] After this extensive quotation from the CSRT proceedings of Mr. Ait Idir, the federal judge commented as follows: "The laughter reflected in the transcript is understandable, and this exchange might have been truly humorous had the consequences of the detainee's 'enemy combatant' status not been so terribly serious and had the detainee's criticism of the process not been so piercingly accurate."

[85] In a second case brought by the six Bosnian prisoners, however, a different federal judge ruled that Mr. Boumediene's imprisonment did not violate the United States Constitution or laws. *Boumediene v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). Mr. Boumediene and the other Bosnian prisoners have appealed that decision.

[86] Beginning in 2005, the U.S. Department of Defense also instituted Administrative Review Board ("ARB") proceedings annually, in which panels of three military officers purportedly review whether prisoners designated by CSRTs as "enemy combatants" no longer present a threat to the United States or its allies and may be released or transferred to third countries. The ARB is subject to the same serious deficiencies as the CSRT, including forbidding representation by counsel and permitting consideration of classified evidence not shown to the prisoner and to which the prisoner has no opportunity to respond. In Mr. Boumediene's case, the ARB has not recommended that he be transferred or released.

[87] The United States has also taken the position that it could try prisoners in military commissions for unspecified terrorism-related crimes and impose the death penalty upon conviction. *See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833, 57834 (Nov. 13, 2001) ("November 13 Military Order"). These commissions, however, lacked even the protections of a military court-martial proceeding, let alone civilian court. The commission decisionmakers all were required to be military officers. The rules provided that the accused and his civilian counsel could be excluded from, and precluded from ever learning, what evidence (which could be any evidence – including hearsay evidence or evidence obtained by torture) was presented during any part of the proceeding that the presiding officer decides to "close" for "national security interests." Review of the commission decision was limited to military officers, the Secretary of Defense, and the President; decisions were afforded no independent judicial review. *See U.S. Dept of Defense Military Commission Order No. 1* (Mar. 21, 2002; amended Aug. 31, 2005).

[88] The UN Report found that the military commissions could not be reconciled with the right to be tried by a competent and independent tribunal and the right to a fair trial. The U.S. Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), struck down those commissions as unauthorized by Congress and as violating the Uniform Code of Military Justice and the Geneva Conventions.

[89] The President of the United States is currently seeking Congressional authorization for similar commissions. Although the procedural nuances of future military commissions are unclear at this time, the death penalty will remain the ultimate punishment, as dictated by the military order and the law of war. *See* November 13 Military Order, 66 Fed. Reg. At 57833 (stating law of war shall apply); *id.* at 57834 (stating penalties under applicable law include death); U.S. Dept of Defense, Field-Manual 27-10 ("The punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense. The death penalty may be imposed for grave breaches of the law.").

[90] The U.S. Supreme Court's decision in *Hamdan* also rejected the United States' position that Guantanamo prisoners were not protected by Common Article 3 of the Geneva Conventions, which affords basic protections to prisoners captured during armed conflict. However, it is unclear what, if any, changes in treatment of the Guantanamo prisoners will

follow. Publicly authorized interrogation techniques still include isolation, exposure to extreme temperatures, and deprivation of light and auditory stimuli.⁵⁰

H. TORTURE AND INHUMANE TREATMENT OF THE APPLICANT AT GUANTANAMO BAY

[91] Mr. Boumediene has been subject to torture and inhumane treatment throughout his imprisonment at Guantanamo Bay. The abuse of Guantanamo prisoners is well documented in U.S. Government documents, reports of independent third parties and international bodies, and interviews with lawyers and former prisoners. All of these sources confirm the extreme psychological and physical abuse suffered by the Guantanamo prisoners.

1. Conditions of imprisonment, interrogation techniques, and abuse of prisoners

[92] Mr. Boumediene has been held at two facilities since his arrival at Guantanamo Bay: first Camp X-Ray and subsequently Camp Delta.

[93] In July 2006, the Center for Constitutional Rights released the *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners At Guantanamo Bay, Cuba* (“CCR Report”, Annex 36). The report is drawn directly from unclassified counsel notes made during interviews with Guantanamo prisoners, generally corroborated by official U.S. accounts. The Report describes the two camps as follows:

The chillingly-named **Camp X-Ray** exemplified a prison where every aspect of a prisoners’ life was under close observation. A temporary camp set up until more permanent facilities could be erected, Camp X-Ray housed prisoners, from January – April 2002, in cages (wire mesh units, with wood/metal covers and concrete floors). Without privacy, these units exposed prisoners to the elements and to the scorpions, spiders, and banana rats that populate the island.

More permanent facilities for prisoners were soon built, and, in April 2002, prisoners moved into the first buildings at Camp Delta. Camp Delta is referred to informally as “the Wire,” owing to the lengths of chain link fence and concertina that surround it. At the camp’s main gate stands a 4 x 8 foot sign, displaying the words: “Honor Bound to Defend Freedom.”

The actual physical layout of **Camp Delta** is not easy to ascertain because access is tightly controlled by the military and its public affairs staff. What seems clear is that Camp Delta includes five different facilities, numbering One through Five, with the numbers based on the order in which the camps were built. Together, Camps One to Five have a capacity of over 1000.⁵¹

[94] A first-hand account from former prisoners describes the restrictions at Camp X-Ray as follows: “[W]e were not allowed any exercise at all; this meant that all day every day we were stuck in a cage of 2 meters by 2 meters. We were allowed out for 2 minutes a week to have a shower and then returned to the cage. ... During the day we were forced to sit in the cell (we couldn’t lie down) in total silence. We couldn’t lean on the wire fence or stand up

⁵⁰ See United Nations, Commission on Human Rights, 15 February 2006, Future E/CN.4/2006/120 (“UN Report”), para. 50, Annex 34.

⁵¹ CCR Report, page 14 (footnotes omitted), Annex 36.

and walk around the cage. ... we were only allowed about one minute in which to eat our food. The cells were often under direct sunlight for hours on end.”⁵²

[95] The UN report is based on the replies of the U.S. government to a questionnaire, interviews conducted with former Guantanamo prisoners, information received from prisoners’ lawyers, including Mr. Boumediene’s counsel, declassified official U.S. documents, and media reports.⁵³ It gives the following account of the conditions of confinement of the prisoners at Guantanamo Bay – rising to the level of inhumane treatment under the ICCPR if not outright torture –:

Whereas it is conceivable that in the beginning the conditions of detention put in place were determined for reasons of order and security, they then seem to have been used to “counter resistance” and to cause stress. Moreover, they were closely linked with investigation techniques. There is plentiful evidence indicating that policies aimed at forcing detainees to cooperate such as withholding of clothes or of hygienic products, permanent light in the cells, no talking, cultural and religious harassment, sensory deprivation, intimidation, and the deliberate uncertainty generated by the indeterminate nature of confinement and the denial of access to independent tribunals, were used and led to serious mental health problems. Moreover, prolonged detention in Maximum Security Units clearly had the effect of putting pressure on detainees. Reports indicate that although 30 days of isolation was the maximum period permissible, detainees were put back in isolation after very short breaks, so that they were in quasi-isolation for up to 18 months. According to the jurisprudence of the Human Rights Committee, prolonged solitary confinement and similar measures aimed at causing stress violate the right of inherent dignity of the human person, and might also amount to inhuman treatment in violation of article 7 ICCPR.⁵⁴

[96] The UN report also describes the use of excessive, severe, and unprovoked violence against prisoners:

There are recurrent reports of three contexts in which excessive force was routinely used: during transportation, with regard to operations by the “Initial Reaction Forces” (IRF), and by force feeding during hunger strikes. The last is briefly dealt with in section V on the right to health. According to reports by the defence counsels, some of the methods used to force-feed definitely amounted to torture. In the absence of any possibility of assessing these allegations in situ by means of private interviews with detainees subjected to forced feeding, as well as with doctors, nurses and prison guards, the allegations, which are well substantiated, must be held to be accurate. Treatment during transport and IRF operations is documented by photo and video material. These pictures indicate that during transport and IRF operations, detainees shackled, chained, hooded, forced to wear earphones and goggles. They also show beating, kicking, punching, but also stripping and force shaving by IRF where detainees resisted, which have been corroborated by testimonies of former detainees. The Special Rapporteur considers that such treatment amounts to torture, as it inflicts severe pain or suffering on the victims for the purpose of intimidation and/or punishment.⁵⁵

⁵² Composite Statement, see *infra*, at 25, Annex 38.

⁵³ UN Report, Annex 34.

⁵⁴ UN Report, para. 53; pages 25-26 (footnotes omitted), Annex 34.

⁵⁵ UN Report, para. 54; page 26 (footnotes omitted), Annex 34.

[97] Sources from the U.S. Federal Bureau of Investigation (“FBI”) corroborate such treatment. One U.S. court quoted an individual affiliated with the FBI who had seen prisoners left chained in the fetal position for 18 to 24 hours or more without a chair, food or water, and who had urinated or defecated on themselves. On another occasion, the FBI source stated, a prisoner was kept barefoot in an air-conditioned room that was so cold that the prisoner was shaking. The source also saw a prisoner kept in a room at well over 100 degrees Fahrenheit (over 37 degrees Celsius); the prisoner was nearly unconscious and had pulled out his own hair throughout the night. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474 (D.D.C. 2005). An FBI agent observed a female interrogator sexually caress a prisoner and grab his genitalia. FBI agents also reported various interrogations at Guantanamo where prisoners were gagged with duct tape covering most of their heads, intimidated by dogs, and isolated for over three months in cells constantly flooded with light.⁵⁶

[98] The CCR report describes in great detail the different types of harsh and degrading treatment imposed on prisoner at Guantanamo Bay – in the course of interrogation as well as day-to-day life. The Applicant invites the Court to review this report in its entirety. A few excerpts follow:

B. Types of Torture and Abuse: Prisoners in Guantanamo have reported being exposed to extraordinary psychological and physical abuse. In addition to abusive interrogation practices, prisoners report harsh disciplinary measures. These reports have been corroborated by military and news accounts. The United States has systematically applied the following techniques to prisoners, in connection with interrogation and disciplinary measures, and in the context of conditions of arbitrary confinement and detention.⁵⁷ (...)

1. Psychological Abuse: Psychological abuse includes solitary confinement, light and sound manipulation, exposure to the elements and to temperature extremes (arguably also physical abuse), sleep deprivation, and threats of transfer for torture in another country. (...) There are a variety of accounts – not only from the prisoners themselves, but also from government documents disclosed through FOIA and statements by former government personnel – indicating that psychological abuse at Guantanamo is unremitting and has resulted in extraordinary damage to prisoners’ mental health. (...)⁵⁸

2. Physical Abuse: Numerous reports of extreme physical abuse have emerged from Guantanamo. Physical abuse is often meted out systematically by the specially trained “Immediate Reaction Force” (IRF); at other times, soldiers have beaten prisoners for no apparent reason or in connection with an alleged violation of a camp disciplinary rule. Some prisoners have sustained permanent physical injury as a result.⁵⁹

Physical Beatings. Beatings are the most frequently reported form of mistreatment, with many prisoners providing details of such physical mistreatment. Military reports admit that many prisoners have been thrown or dropped on the ground or thrown against walls. Several prisoners report that assailants jumped on their backs or shoved their heads into hard surfaces

⁵⁶ Letter from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, FBI to Major General Donald J. Ryder (July 14, 2004), Annex 37.

⁵⁷ CCR Report, page 15 (footnotes omitted), Annex 36.

⁵⁸ CCR Report, page 16 (footnotes omitted), Annex 36.

⁵⁹ CCR Report, page 20 (footnotes omitted), Annex 36.

while they were incapacitated and lying on the ground. Many other prisoners describe frequent and vicious beatings. (...) ⁶⁰

Short-Shackling and Stress Positions. Short-shackling – a very painful technique in which a prisoner’s arms and legs are shackled together and to the ground, forcing him into a stooped position, often for many hours at a time – was routinely employed at Guantanamo until April 2003, but sporadic reports of its use persist. ⁶¹ (...)

The Immediate Reaction Force (IRF). Some of the most severe physical abuse reported at Guantanamo is attributed to the IRF. Comparable to a riot squad, the IRF functions as a disciplinary force within the camps. (...) Because of the acronym IRF, “being IRF’d” is Guantanamo-speak for being beaten by a group of military guards. ⁶² (...)

3. Medical Abuse Doctors’ Involvement in Interrogations. Doctors and psychologists have reportedly been actively involved in abuse and interrogation at Guantanamo. ⁶³ (...)

Withholding Medical Care or Conducting Unnecessary Medical Procedures. The military has been accused of withholding needed medical care that has resulted in permanent injuries and disabilities, in addition to furthering prisoners’ pain or suffering. In other cases, prisoners have described doctors performing unnecessary procedures. Even minor conditions, if neglected, can develop into permanent or life-endangering illnesses, yet the United States, at times, has refused to provide necessary treatment. ⁶⁴ (...)

BSCT Teams. In addition to participation in medical abuse and neglect, psychiatrists and psychologists also assisted in designing the extreme interrogation techniques discussed above, as part of the Behavioral Science Consultation Team (BSCT, pronounced “Biscuit”). ⁶⁵ (...)

Dr. Robert Jay Lifton, an authority on the participation of doctors in torture, says of the role Guantanamo and Abu Ghraib doctors have played: “The doctors thus brought a medical component to . . . an ‘atrocious-producing situation’ – one so structured, psychologically and militarily, that ordinary people can readily engage in atrocities. . . . [In such situations, t]he participation of doctors can confer an aura of legitimacy and can even create an illusion of therapy and healing.” ⁶⁶

4. Sexual Provocation, Rape, and Harassment (...) The use of sexual degradation and humiliation techniques was developed at Guantanamo and then exported to Iraq. ⁶⁷ (...)

5. Religious and Cultural Abuse. Guantanamo techniques include conduct intended to “soften up” prisoners by abusing items or disrupting rituals known to have particular importance for

⁶⁰ CCR Report, page 20 footnotes omitted), Annex 36.

⁶¹ CCR Report, page 21 (footnotes omitted), Annex 36.

⁶² CCR Report, page 21 (footnotes omitted), Annex 36.

⁶³ CCR Report, page 22, (footnotes omitted), Annex 36.

⁶⁴ CCR Report, page 23, (footnotes omitted), Annex 36.

⁶⁵ CCR Report, page 23, (footnotes omitted), Annex 36.

⁶⁶ CCR Report, page 24, (footnotes omitted), Annex 36.

⁶⁷ CCR Report, page 24, (footnotes omitted), Annex 36.

Muslims. Desecration of the Qur'an. The statements of prisoners to their attorneys indicate that desecration of the Qur'an is widespread.⁶⁸ (...)

Religious Humiliation and Interference with Religious Practices. Prisoners report additional abusive practices targeted specifically to humiliate them as Muslims or to interfere with their ability to practice Islam.⁶⁹ (...)

Cultural Abuses. Cultural insult also is a feature of prisoner life at Guantanamo. Mr. Al Qosi saw prisoners being wrapped in Israeli flags during interrogations.⁷⁰

[99] A statement of three former Guantanamo prisoners from Britain (**Annex 38**) draws on their own experience and provides an intimate, representative description of the conditions endured by prisoners at Guantanamo Bay.⁷¹ The constant psychological and physical abuse suffered by the prisoners left them, in their own words, "terrified that we might be killed at any minute. The guards would say to us 'we could kill you at any time'. They would say 'the world doesn't know you're here, nobody knows you're here, all they know is that you're missing and we could kill you and no one would know.'"⁷² The 115-page statement provides a detailed, first-hand account confirming the type of conduct described through independent sources. We invite the Court to review that statement, as attached, in its entirety.

2. Specific details on treatment of the Applicant

[100] Mr. Boumediene himself has suffered and continues to suffer significant torture and inhumane treatment – including but not limited to the general conditions described above – at the hands of U.S. personnel at Guantanamo Bay. Mr. Boumediene has communicated some of that abuse, as described herein, to his counsel, who have documented those communications. Because of the limited contact that the U.S. Government allows between Mr. Boumediene and his counsel, the following description does not convey the full extent of abuse that Mr. Boumediene has suffered or will suffer during his imprisonment.⁷³

[101] The abuse started upon his handover to U.S. forces in January 2002. During transport to Guantanamo, Mr. Boumediene's handcuffs were so tight that for a month or two after he arrived he could not feel his hands or arms. He has two scars on his wrists from the handcuffs. He developed a severe infection in his arm at the beginning of his imprisonment at Guantanamo. His arm was swollen, red and numb. A nurse indicated that the infection was caused by the handcuffs.

⁶⁸ CCR Report, page 25, (footnotes omitted), **Annex 36**.

⁶⁹ CCR Report, page 26, (footnotes omitted), **Annex 36**.

⁷⁰ CCR Report, page 28 (footnotes omitted), **Annex 36**.

⁷¹ **Annex 38** – Composite Statement: Detention in Afghanistan and Guantanamo Bay, Shafiq Rasul, Asif Iqbal and Rihuel Ahmed ("Composite Statement").

⁷² Composite Statement, page 46, **Annex 38**.

⁷³ In addition to counsel's notes, most of these details are recounted in the CCR Report, pages 14-24, **Annex 36**.

[102] Mr. Boumediene was deprived of sleep for 13 days consecutively during an intense interrogation period in early 2002. He was shackled to the floor during this period.

[103] On several occasions during that 13-day period in early 2002, upon his return to his cell following interrogation, guards grabbed Mr. Boumediene under his armpits, lifted him up, and threw him to his cage floor repeatedly while his wrists were shackled to his waist and his feet were shackled to an anchor in the floor of his cage. During one of those beatings, a soldier pushed Mr. Boumediene to the ground, put his knee behind Mr. Boumediene's knee, and ground Mr. Boumediene's knee into the floor. He has a scar caused by that beating.

[104] During one interrogation, Mr. Boumediene was choked by a Jordanian interrogator who then threatened to send him to Jordan where they could "make [him] talk."

[105] For an extended period during his imprisonment, whenever Mr. Boumediene made a request -- for example, for medication -- he was told to ask his interrogator. Interrogators controlled his access to medical treatment, and access to that treatment was granted or denied based on the interrogator's assessment of his level of cooperation.

[106] Medical records that Mr. Boumediene's counsel obtained through a lawsuit under the U.S. Freedom of Information Act confirm that medical personnel were sometimes present during Mr. Boumediene's interrogations and authorized interrogations to proceed. In February 2003, for example, Mr. Boumediene complained of stomach pain while being interrogated. Medical personnel entered the interrogation room, examined Mr. Boumediene, and "cleared" him for "interrogation and all other detainee things."⁷⁴

[107] While Mr. Boumediene was on a hunger strike during his 13-day ordeal, a nurse ordered Mr. Boumediene to accept food intravenously. The nurse threatened that if he did not eat, she would have a soldier administer the intravenous tube (IV). She carried through with this threat: a soldier with apparently little experience attempted to administer the IV. The soldier could not find a vein, causing pain and bleeding. Thereafter the nurse administered the IV and threatened him that if Mr. Boumediene did not eat, she would administer the IV through his nasal passage.

[108] Mr. Boumediene was threatened with rape during an interrogation. Interrogators told him they would send him to a U.S. prison where he would be raped. Interrogators also threatened to shave his beard and put lipstick on him.

[109] On one occasion, Mr. Boumediene fell and broke his left ankle while being moved from his cell because of the chains around his feet. The guards saw him fall and simply laughed. Mr. Boumediene received no medical attention for two months. He was then told he would receive physical therapy but never did.

[110] Throughout his nearly five years in imprisonment at Guantanamo, Mr. Boumediene has spent a total of at least one year in solitary confinement. During those periods, Mr. Boumediene was placed in a cold, small, narrow room that was continuously illuminated with artificial, high-intensity light. Mr. Boumediene has experienced continuous isolation for at least one month during which he was deprived of all sunlight.

⁷⁴ Chronological Medical Record for Lakhdar Boumediene (Feb. 20, 2003), [Annex 39](#).