

[111] As of counsel's latest visit in August 2006, harsh restrictions are in effect at the Guantanamo prison, arising from the U.S. military's response to three prisoner suicides in June 2006 prisoner. These changes in procedures have exacerbated the prisoners' plight, and their physical and mental condition continues to deteriorate. Mr. Boumediene has been confined to a cage of about 2.4 metres x 1.8 metres with half the width taken up by a steel bunk. The room is very cold because it is all steel. Lights – including a high-intensity fixture directly above his bed – remain on continuously 24 hours a day, seven days a week.

[112] In August 2006, Mr. Boumediene also described an ongoing, systematic effort by guards to deprive him and the other prisoners of sleep by constantly interrupting and disturbing them at night. He and the others imprisoned near him are never taken out for exercise during the day. Instead, they are awoken and taken out for "exercise" late at night -- sometimes after midnight. Guards intentionally make noise, including banging objects into the bars of cells and loudly cleaning cells late at night. Because of the heat, it is nearly impossible to make up lost sleep during the day. "Dinner" is sometimes served as late as 2:00 a.m. If prisoners roused from sleep are not quick enough to accept the meal, it is taken away.

III. STATEMENT OF VIOLATIONS OF THE CONVENTION AND THE PROTOCOLS

A. BOSNIA AND HERZEGOVINA VIOLATES ARTICLE 6(1) OF THE CONVENTION BY FAILING TO IMPLEMENT THE HUMAN RIGHTS CHAMBER DECISION

[113] Article 6(1) of the Convention guarantees the right to a fair trial. According to the Court's established case law⁷⁵, failure by competent authorities to take all necessary steps to execute a final and enforceable judgment undermines that right and thus constitutes a violation of Article 6(1). As this Court has held: "The administrative authorities form one element of a state subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees under Article 6 enjoyed by the litigant during the judicial phase of the proceedings are rendered devoid of purpose." *Hornsby v. Greece*.

[114] In the final and binding Decision of 11 October 2002, the Human Rights Chamber for Bosnia and Herzegovina ordered Bosnia and Herzegovina to use all diplomatic channels to protect the basic rights of the Applicant and to take all steps to prevent imposition of the death penalty on the Applicant.⁷⁶ The Human Rights Chamber further ordered Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina to retain authorized lawyers to protect the Applicant's right while in US custody and in case of possible military, criminal or other proceedings⁷⁷.

⁷⁵ E.g. *Hornsby v. Greece* (Application No. 18357/91), *Papamichalopoulos v. Greece* (Application No. 14556/89, judgment of 24 June 1993), *Dubenko v. Ukraine* (Application No. 74221/01), *Popov. v. Moldova* (Application No. 74153/01).

⁷⁶ Points 15 and 16 of the conclusions of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

⁷⁷ Points 17 of the conclusions of the Human Rights Chamber Decision of 11 October 2002, **Annex 3**.

[115] In continuing to fail to implement the terms of the Human Rights Chamber decision even today, nearly four years after that decision was issued, Bosnia and Herzegovina is violating Article 6(1) of the Convention. Bosnia's violation is particularly egregious because Mr. Boumediene remains subject to life-threatening conditions while imprisoned at Guantanamo Bay.

1. Failure to use all diplomatic channels to protect the basic rights of the Applicant

[116] First, Bosnia and Herzegovina has failed from the date of the Decision through today to use all diplomatic channels to protect the basic rights of the Applicant, as ordered by the Human Rights Chamber.

[117] The Human Rights Commission's 5 April 2006 decision of non-implementation expressly confirms the failure of Bosnia and Herzegovina to implement the Human Rights Chamber's order in this respect. As the Human Rights Commission so aptly put it, the Government of Bosnia and Herzegovina has taken a "particularly passive attitude" toward the entire matter, including failing even to make a written submission to its own national Human Rights Commission in response to the complaint of non-implementation.

[118] As recounted in **Part II.E** above, the Bosnian response has been one not of action but of delay and unfulfilled resolutions. It took over one and one-half years after the Human Rights Chamber decision (until 21 April 2004) before the Parliament even requested that the competent Bosnian authorities implement the Human Rights Chamber's decision. Even upon this request, however, Bosnian officials took no diplomatic action vis-à-vis the US Government.

[119] It took more than one year from the decision (until 18 November 2003) for the Government of Bosnia and Herzegovina even to determine that the Ministry of Justice should appoint, "as soon as possible," a person to visit the Bosnian citizens imprisoned at Guantanamo Bay. It took another 8 months (27 July 2004) before Mr. Pilav, the Ministry of Justice representative, actually visited Guantanamo Bay.

[120] Even then, as explained above, the visit did not serve to protect any of the Applicant's basic rights. Rather, it appears to have been designed in an effort to find pretexts for the Government of Bosnia and Herzegovina to abandon Mr. Boumediene altogether.

[121] Bosnian officials have made no subsequent visits or attempts to communicate with Mr. Boumediene, let alone negotiate to improve his conditions of confinement or to have him released. It took almost 4 months after the visit (until 16 November 2004) for the Government of Bosnia and Herzegovina to adopt recommendations that the Minister of Justice had proposed on the basis of Mr. Pilav's report, including beginning diplomatic negotiations in the United States for the prisoners' repatriation. But, despite assurances by various officials, including Minister Kovač himself, no negotiations with the United States ensued.

[122] It took well over two years after the Human Rights Chamber decision (February 2005) for the Government of Bosnia and Herzegovina to send a formal letter to the U.S. Government requesting the return of the six Bosnian prisoners. Although the U.S. Secretary of State's response invited the Government of Bosnia and Herzegovina to submit further information bearing on Mr. Boumediene's possible release, the Bosnian government has failed to pursue this option. Indeed, on 15 June 2005, the U.S. State Department confirmed

that Bosnia and Herzegovina has not “indicated that it is prepared or willing to accept responsibility for [the six Bosnian prisoners] upon transfer.”

[123] The same result – inaction -- followed the Parliament’s 29 March 2005 Declaration and 16 September 2005 Resolution demanding the Bosnian government to take urgent measures to liberate the Bosnian prisoners, as well as Prime Minister Terzić’s 21 June 2005 remarks before the Parliamentary Assembly of the Council of Europe. In fact, that same day, Minister Kovač indicated to U.S. counsel that the matter was not within his Ministry’s competence.

[124] In sum, Bosnia and Herzegovina’s long history of empty resolutions followed by inaction – persisting to this day – fails to satisfy the unequivocal order of the Human Rights Chamber to take all diplomatic steps to secure Mr. Boumediene’s basic rights and thereby constitutes an ongoing violation of Article 6(1) of the Convention.

2. Failure to take all possible steps to prevent the death penalty from being pronounced

[125] Second, Bosnia and Herzegovina has failed from the date of the Human Rights Chamber’s decision and continues to fail to take any steps to prevent pronouncement or imposition of the death penalty on the Applicant.

[126] In the Decision of 5 April 2006, the Human Rights Commission expressly found that Bosnia and Herzegovina failed to comply with this obligation.

[127] In particular, the Bosnian government has failed to seek assurances from the United States via diplomatic contacts that the Applicant will not be subjected to the death penalty.

[128] The failure to seek these assurances from the US government not only violates Article 6(1) of the Convention given the Human Rights Chamber’s order, but also directly violates Article 1 of Protocol 6 and Protocol 13 (*see infra Part III.B.*).

3. Failure to retain authorized lawyers to protect the Applicant’s rights

[129] Third, Bosnia and Herzegovina has failed to retain lawyers on behalf of Mr. Boumediene.

[130] Such failure also constitutes an ongoing violation of the Human Rights Chamber’s order and thus an ongoing violation of Article 6(1) of the Convention.

B. BOSNIA’S FAILURE TO SEEK ASSURANCES AGAINST IMPOSITION OF THE DEATH PENALTY ALSO VIOLATES ARTICLE 2 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOLS 6 AND 13

[131] This Court has held that where an extradited person may face the death penalty in the requesting State, the requested State must seek sufficient assurances that that the person will not in fact be sentenced to death.⁷⁸ Similarly, in *Bander & Others v. Sweden*⁷⁹, the Court

⁷⁸ Einhorn v. France, Application No. 71555/01, 16 October 2001.

⁷⁹ Application No. 13284/04, judgment of 8 November 2005.

decided that a State may violate Article 2 of the Convention and Article 1 of Protocol 6 where it deports a person who risks the denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty. These principles apply all the more strongly when a state is ordered by its own court to seek assurances that the death penalty will not be imposed and fails to do so contrary to its own law.⁸⁰

[132] As the Human Rights Chamber correctly found, there is a clear and continuing risk that U.S. authorities might charge the Applicant of crimes for which the death penalty can be imposed.⁸¹ *See supra Part II.G.* (discussing availability under the President’s order of death penalty for convicted prisoners).

[133] Furthermore, as the Human Rights Chamber explained, because the U.S. military commissions (which, though struck down in *Hamdan*, are subject to reauthorization in the future) do not allow for sufficient independence from the executive branch or procedural protections for the prisoner – a finding confirmed by the UN Report and the U.S. Supreme Court – the risk of the death penalty being imposed is even greater. *See supra Part II.G.*

[134] Therefore, even aside from the Human Rights Chamber’s order requiring it to do so, Bosnia and Herzegovina’s continuing failure to seek assurances against imposition of the death penalty constitutes an independent and ongoing violation of Article 2 of the Convention, Article 1 of Protocol 6, and Article 1 of Protocol 13.

C. BOSNIA AND HERZEGOVINA’S FAILURE TO ACT VIOLATES OTHER HUMAN RIGHTS PROTECTED BY THE CONVENTION

[135] Bosnia and Herzegovina’s conduct (and lack thereof) in defiance of the Human Rights Chamber’s orders violates Article 1 of the Convention, which requires nations affirmatively to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention.” Among these rights are Mr. Boumediene’s right not to be subjected to torture or inhuman and degrading treatment (Article 3), right to liberty (Article 5), and right to practice religion (Article 9).

[136] According to settled case law, Article 1 of the Convention imposes positive obligations to take appropriate steps to ensure respect of the rights and freedoms within its jurisdiction.⁸² In particular, the Contracting Party’s positive obligations imply that “[t]he State in question must endeavor, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organizations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention.”⁸³

⁸⁰ **Annex 32** – Letter of Mladen Ivanić to Secretary General of Council of Europe, dated 4 April 2006, at p. 6.

⁸¹ Decision of the Human Rights Chamber of 11 October 2002, paragraphs 278-283, **Annex 3**.

⁸² See, e.g., *Z and Others v. the United Kingdom* [GC], Application no. 29392/95, paragraph 73, EC Human Rights 2001-V.

⁸³ *Ilascu and others v. Moldova and Russia*, judgment of 8 July 2004, application No. 48787/99, paragraph 333.

[137] The Court has recognized that the concept of “jurisdiction” within the meaning of Article 1 of the Convention is not restricted to the national territory of the High Contracting Parties.⁸⁴ The Court has accepted that in exceptional circumstances the acts of Contracting States performed outside their territory, or which produce effects there, may amount to exercise by them of their jurisdiction within the meaning of Article 1 of the Convention.⁸⁵ Such exceptional circumstances exist here.

[138] Bosnia and Herzegovina has been instrumental in Mr. Boumediene’s present imprisonment by U.S. forces at Guantanamo Bay. First, notwithstanding the decision of the Supreme Court of the Federation of Bosnia and Herzegovina of 17 January 2002 terminating the detention of Mr. Boumediene and the other five men, Bosnia and Herzegovina did not release them, but continued to detain them unlawfully. Subsequently and notwithstanding the Order of the Human Rights Chamber that Mr. Boumediene should not be removed from its territory, Bosnia and Herzegovina actively and deliberately handed Mr. Boumediene and the other five men over into illegal detention by U.S. forces in violation of Article 5, paragraph 1 of the Convention – as the Human Rights Chamber found⁸⁶. Bosnia and Herzegovina has therefore willfully removed Mr. Boumediene from its control and placed him in the hands of a foreign power that is not bound by the Convention without taking any steps to secure Mr. Boumediene’s rights. In the light of its close involvement in Mr. Boumediene’s transfer to U.S. forces and its subsequent inaction, Bosnia and Herzegovina is responsible for violations of Mr. Boumediene’s rights under the Convention because it failed to take all steps to secure those rights.

[139] It is also settled case law that the extradition or expulsion of a person by a Contracting State may give rise to an issue under Articles 2 and 3 (and, exceptionally, under Articles 5 and 8) and hence engage the responsibility of that State under the Convention.⁸⁷ In *Hilal v. UK*,⁸⁸ for example, the Court ruled that the expulsion of a person may give rise to violation of Article 3 of the Convention where there are substantial grounds for believing that this person, if expelled, would face a real risk of being subjected to torture or inhuman and degrading treatment in the receiving country.

[140] Bosnia and Herzegovina’s continuing failure to take affirmative steps to secure Mr. Boumediene’s basic rights following his abduction by Bosnia and Herzegovina authorities and rendition to the United States violates Article 1’s general affirmative mandate. The Human Rights Chamber’s decision ordering Bosnia and Herzegovina to take all necessary diplomatic action to secure Mr. Boumediene’s basic rights further strengthens Bosnia and

⁸⁴ See *Loizidou v. Turkey* (merits), judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2234-35, paragraph 52.

⁸⁵ *Ilascu and others v. Moldova and Russia*, judgment of 8 July 2004, application No. 48787/99, paragraph 314.

⁸⁶ Decision of the Human Rights Chamber of 11 October 2002, paragraphs 237, **Annex 3.**

⁸⁷ *Bankovice*, paragraph 68; *Soering*, at pages 35-36, paragraph 91; *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no 201, page 34, paragraph 103.

⁸⁸ Application No. 45276/99, judgment of 6 March 2001.

Herzegovina's affirmative obligations under Article 1 of the Convention – even if efforts must be made beyond its borders to protect his rights.

[141] In the absence of such positive obligations, Contracting States could in effect circumvent the Convention by handing persons over to foreign States that are not parties to the Convention, as Bosnia and Herzegovina has done with Mr. Boumediene. Those non-party States could in turn violate the human rights of those persons, as has happened and continues to happen here, while the Contracting State would escape liability under the Convention. Such situations must be avoided.

[142] As explained below, Bosnia and Herzegovina's continued inaction violates Article 1 of the Convention, in combination with Articles 3, 5, and 9 of the Convention.

1. Right not to be subject to torture or to inhuman or degrading treatment (Article 3 of the Convention)

[143] Article 3 of the Convention states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The Applicant submits that Bosnia and Herzegovina's ongoing failure to use all diplomatic channels to protect him from such conduct violates Article 1 of the Convention, in combination with Article 3.

[144] Torture is defined by the case law as "*deliberate inhuman treatment causing very serious and cruel suffering.*"⁸⁹ The Court has explained that torture is pain and suffering inflicted for a purpose: obtaining information, inflicting punishment, or intimidating. Case law defines inhuman treatment or punishment as "intense physical and mental suffering."⁹⁰ Inhuman treatment includes treatment that is premeditated, applied for hours at a stretch, and caused either actual bodily injury or intense physical or mental suffering⁹¹. Degrading treatment or punishment includes treatment which arouses in the victim feelings of fear, anguish and humiliation. No intent to humiliate is required for an Article 3 violation; a victim need only be humiliated in his or her own eyes⁹².

[145] More specifically, with respect to conditions of detention and the use of interrogation techniques, the Court has ruled that:

- (i) complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason⁹³;
- (ii) absence of ventilation and extreme temperatures in prison amount to a violation of Article 3 of the Convention⁹⁴;

⁸⁹ Ireland v. UK, Application No. 5310/71, judgment of 18 January 1978.

⁹⁰ Ireland v. UK, Ibid.

⁹¹ Kudla v. Poland, Application No. 30210/96, judgment of 26 October 2000.

⁹² Tyrer v. UK, Application No. 5856/72, judgment of 25 April 1978.

⁹³ Messina v. Italy, No. 2 (Application No. 25498/94, judgment of 28 September 2000.

⁹⁴ Peers v. Greece, Application No. 28524/95, judgment of 19 April 2001.

- (iii) shaving of the prisoner's head may amount to degrading treatment in violation of Article 3 of the Convention depending on its aim, the context in which it is carried out, and the personal circumstances of the prisoner⁹⁵;
- (iv) strip searches and stripping naked in front of a group of prison guards amounts to degrading treatment⁹⁶;
- (v) failure to provide adequate medical treatment may amount to inhuman treatment⁹⁷;
- (vi) inadequate cell conditions such as overcrowding, lack of natural light, excessive temperatures, open toilets and lack of adequate hygienic and sanitary facilities may violate Article 3 of the Convention⁹⁸;
- (vii) rules granting discretionary power in relation to correspondence and prison visits, exercisable by prison wardens and other authorities, are arbitrary and incompatible with the requirement that prison systems maintain appropriate and effective safeguards against abuses.⁹⁹

[146] Applying these standards to the conditions of imprisonment and interrogation techniques generally used at Guantanamo Bay, as well as to the specific mistreatment of Mr. Boumediene, it is clear that Mr. Boumediene has suffered torture, inhuman, and degrading treatment under Article 3. *See supra Part II.H.* The isolation, denial of medical care, infliction of prolonged periods of cold temperatures, and lack of natural light – not to mention the excessive and severe physical abuse – are just a few of the abuses suffered by Mr. Boumediene that demonstrate violations of Article 3.

[147] The UN Report also unambiguously concludes that the abuses inflicted on the prisoners at Guantanamo Bay and Mr. Boumediene constitute “torture” or “inhuman or degrading treatment or punishment.”

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 authorized by the Department of Defense, 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

⁹⁵ Yankov. Bulgaria, Application No. 39084/97, judgment of 11 December 2003.

⁹⁶ Iwanczuk v. Poland, Application No. 25196/94, judgment of 15 November 2001.

⁹⁷ Kudla v Poland, Application No. 30210/96, judgment of 26 October 2000.

⁹⁸ Dougoz v. Greece (Application No. 40907/98, judgment of 6 March 2001), Peers v. Greece (Application No. 28524/95, judgment of 19 April 2001) and Kalashnikov v. Russia (Application No. 47095/99, judgment of 15 July 2002).

⁹⁹ Ilascu and others v. Moldova and Russia (Application No. 48787/99), judgment of 8 July 2004, para 439.

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 (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.

[148] There can be no doubt that Bosnia and Herzegovina has been aware of these abuses – through media outlets, through official reports, and through direct communication from Mr. Boumediene’s counsel. Yet it has failed to take any meaningful action to protect Mr. Boumediene from the torture and inhuman treatment to which he remains subject to this day.

[149] Under these circumstances, the conclusion can only be that Bosnia and Herzegovina’s failure (in violation of the Human Rights Chamber order) to take any action to protect Mr. Boumediene from being subjected to torture or to inhuman or degrading treatment violates Article 1 of the Convention, in combination with Article 3.

2. Right to liberty (Article 5 of the Convention)

[150] The Applicant submits that Bosnia and Herzegovina’s ongoing failure to use all diplomatic channels to secure his release from unlawful detention violates Article 1 of the Convention, in combination with Article 5(1).

[151] Article 5, paragraph 1 of the Convention provides:

Everyone has the right to liberty and security of person. No one shall be deprived of 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 fulfillment 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 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 person of unsound mind,

alcoholics or drug addicts or vagrants;

f the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

[152] As shown herein, none of the exceptions justify Mr. Boumediene's ongoing illegal imprisonment.

[153] Article 5(1)(a) does not apply because Mr. Boumediene has not been convicted of any offence.¹⁰⁰

[154] Article 5(1)(b) does not apply because Mr. Boumediene has not been arrested and detained for non-compliance with a court order nor has he been detained to secure fulfillment of a legal obligation.

[155] Article 5(1)(c) does not apply because the Supreme Court of the Federation of Bosnia and Herzegovina ordered the release of Mr. Boumediene on 17 January 2002 on the ground that there was no further basis to detain him. All investigations in Bosnia and Herzegovina regarding Mr. Boumediene were terminated no later than June 2004. Accordingly, Mr. Boumediene is not being detained at Guantanamo Bay for the purpose of bringing him before a competent tribunal on reasonable suspicion of having committed an offence.

[156] Article 5(1)(d) does not apply, as Mr. Boumediene is not a minor. Nor is he a member of the categories enumerated in Article 5(1)(e).

[157] Article 5(1)(f) does not apply because Mr. Boumediene is not being detained to prevent his effecting an unauthorized entry into the country, and the goal of the detention is not deportation or extradition. Indeed, no charges are currently pending against Mr. Boumediene in Bosnia and Herzegovina (or any other country).

[158] Further, Article 5(2) requires that the person concerned be informed promptly of the reasons for his arrest and of any charge against him, and Article 5(3) requires that he shall be brought promptly brought before a judge and shall be entitled to trial within a reasonable time. Neither of these protections was afforded, as Mr. Boumediene has been held for nearly five years without being informed of any charges against him or being brought before an independent judge, much less been afforded a trial.

[159] Under these circumstances, the conclusion can only be that Bosnia and Herzegovina's failure (in violation of the Human Rights Chamber order) to take any action to secure Mr. Boumediene's release violates Article 1 of the Convention, in combination with Article 5(1).

¹⁰⁰ "Conviction" means the finding of guilt and the imposition of a penalty. De Wilde, Ooms and Versyp v. Belgium, judgment of 24 October 1979 (Series A, No. 12, 18.11.1970, (1979-1980) EHRR 373, Ilascu and others v. Moldova and Russia (Application No. 48787/99, judgment of 8 July 2004.

3. Right to practice religion (Article 9 of the Convention)

[160] The Applicant submits that Bosnia and Herzegovina's ongoing failure to use all diplomatic channels to protect his right to practice his religion violates Article 1 of the Convention, in combination with Article 9.

[161] Article 9 provides: "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."

[162] The restrictive conditions imposed at Guantanamo, as described **Part II.H** above, interfere with Mr. Boumediene's ability to practicing his Muslim faith. Among other things, the guards disrupt his prayer schedule and deprive him of the basic necessities required to practice his religion properly.

[163] Guards and interrogators have repeatedly defiled the Qur'an by touching it intentionally, dropping it, stepping on it, and throwing it on the ground.¹⁰¹ Guards have also thrown the Qur'an into buckets that function as toilets in the prisoners' cells.¹⁰²

[164] Guards have threatened to shave Mr. Boumediene's beard, even though his beard is part of his religious expression, and to apply lipstick to him.¹⁰³

[165] Under these circumstances, the conclusion can only be that Bosnia and Herzegovina's failure (in violation of the Human Rights Chamber order) to take any action to protect Mr. Boumediene's right to practice his religion violates Article 1 of the Convention, in combination with Article 9.

IV. STATEMENT RELATIVE TO ARTICLE 35 § 1

The conditions of Article 35(1) of the Convention are fulfilled in this case: (i) all domestic remedies have been exhausted, (ii) the application is submitted within 6 months of the final decision, and (iii) the Court has *rationae temporis* jurisdiction over the case.

A. ALL DOMESTIC REMEDIES HAVE BEEN EXHAUSTED

[166] Pursuant to Article 35 of the Convention, an application to the Court is admissible when all domestic remedies have been exhausted. The Court held that this rule should be applied with "*some degree of flexibility and without excessive formalism.*"¹⁰⁴ In particular, according to this Court's well-established case law, an Applicant is only required to pursue remedies that are available, effective and sufficient.

[167] The Applicant lodged an action on 14 January 2002 before the Human Rights Chamber, which delivered a decision on 11 October 2002 on both admissibility and the

¹⁰¹ CCR Report, page 25, Annex 36.

¹⁰² Composite Statement, page 27 (72), Annex 38.

¹⁰³ CCR Report, page 25, Annex 36.

¹⁰⁴ See e.g., *Guzzardi v Italy*, Series A, No. 39, 6.1.80, (1981) 3 EHRR, para.72.

merits (*see supra Part II.D*). The Human Rights Chamber was established under the Dayton Agreement, Article VIII.2.a of which provides: “*The Chamber shall decide which applications to accept [...]. In so doing, the Chamber shall take into account the following criteria: Whether effective remedies exist, and the Applicant has demonstrated that they have been exhausted [...]*” Article XI.3 sets forth that the decisions of the Human Rights Chamber “*shall be final and binding*”.

[168] By obtaining a final and binding judgment from the Human Rights Chamber on 11 October 2002, the Applicant has fulfilled the condition of exhaustion of available domestic remedies. To the Applicant’s knowledge, there is no other form of redress that would provide an adequate remedy and that should have been pursued.¹⁰⁵ Nor is the Applicant in a position to pursue effectively further domestic remedies given his highly restricted imprisonment.

[169] Moreover, according to the case law of the Court, if there are a number of possible domestic remedies, an applicant is not required to have exhausted them all if they would not achieve anything more¹⁰⁶ or would not have offered better chances of success¹⁰⁷. To the Applicant’s knowledge, there is no remedy that could achieve anything more or offer better chances of success.

[170] For the sake of clarity, as mentioned in **Part II.E** above, on 3 February 2006, Mrs. Dizdarević, the wife of Mr. Boumediene’s fellow Bosnian prisoner Hadž Boudella, submitted a memorandum to the Human Rights Commission (the successor of the Human Rights Chamber) in which she complained that the Decision of 11 October 2002 referred above has not been implemented and requested a Decision of non-implementation of the said Decision. On 5 April 2006 the Human Rights Commission delivered its decision of non-implementation.

[171] The Decision of non-implementation rendered by the Human Rights Commission is not an effective remedy nor a remedy enabling to achieve anything more or a better chance of success within the scope of the case law mentioned above. Indeed, the decision itself noted that the Government of Bosnia and Herzegovina had taken a “particularly passive” attitude toward the matter, having failed even to file a written submission with the Human Rights Commission. In the same vein, this Court confirmed that, in relation to the United Kingdom, a declaration of incompatibility under the *Human Rights Act 1988* does not provide an Applicant with an effective remedy.¹⁰⁸

[172] The Applicant considers that obtaining the judgment from the Human Rights Chamber on 11 October 2002 fulfills the condition of exhaustion of available domestic remedies.

¹⁰⁵ See e.g., *Hilton v UK*, No.5613/72, dec.5.3.76, (1976) 4 DR 177.

¹⁰⁶ See e.g., *Bosphorus Hava Yollari Turzim Ve Ticaret AS v Ireland*, No.45036/98, dec 13.9.01.

¹⁰⁷ See e.g., *A v France*, No. 14838/89, Series A, No.277-B, 23.11.93, (1994) 17 EHHR 462, Para.32.

¹⁰⁸ *Hobbs v UK*, No.63684/00, dec.18.6.02.

B. THE APPLICATION IS SUBMITTED WITHIN 6 MONTHS OF THE FINAL DECISION

[173] Pursuant to Article 35, paragraph 1 of the Convention, an application to the Court must be filed within six months of the final decision. However, according to the Court's established case law,¹⁰⁹ where the matter the Applicant complains about is continuing, the time limit will not start to run until the breach ceases to have a continuing effect. As the Court has ruled on numerous occasions, a failure to enforce a binding judgment as well as an illegal detention constitute continuing violations, which prevent the starting of the six-month deadline for submission of the application.¹¹⁰

[174] In the present case, the violations alleged by the Applicant constitute continuing violations of the Convention, which still have not ceased. The respondent State has not complied with the decision of the Human Rights Chamber and, furthermore, continues to fail to discharge its positive obligations to take appropriate steps to ensure respect of the Applicant's guaranteed rights under the Convention.

[175] The six-month period has therefore not started to run. This application accordingly complies with the time limit set forth in Article 35(1) of the Convention.

C. THE COURT HAS *RATIONAE TEMPORIS* JURISDICTION OVER THE APPLICATION

[176] The respondent State, Bosnia and Herzegovina, ratified the Convention and Protocol No. 6 on 12 July 2002 and Protocol No.13 on 23 June 2003 (Protocol No.13 entered into effect on 1 November 2003).

[177] The alleged violations fall within the scope of the *rationae temporis* jurisdiction of the Court as they relate to the non-implementation of the Decision of the Human Rights Chamber delivered on 11 October 2002, i.e. after the entry into force of the Convention vis-à-vis the respondent state, Bosnia and Herzegovina. The non-implementation of the Human Rights Chamber decision continues even today. The respondent's non-discharge of its positive obligations under the Convention likewise continues to this day.

V. STATEMENT OF THE OBJECT OF THE APPLICATION

[178] The Applicant requests the Court to:

- o Hold that the application is admissible;
- o Hold that Bosnia and Herzegovina has violated and continues to violate Article 6(1) of the Convention through its failure to implement the Decision of 11 October 2002 of the Human Rights Chamber for Bosnia and Herzegovina;
- o Hold that Bosnia and Herzegovina has violated and continues to violate Article 2 of the Convention, Article 1 of Protocol No 6, and Article 1 of Protocol 13 through its ongoing failure - in disregard of the Decision of 11 October 2002 of the Human Rights Chamber for Bosnia and Herzegovina and its other affirmative

¹⁰⁹ See e.g., *Jecius v Lithuania*, No.34578/97, 31.7.00, para.44.

¹¹⁰ E.g. *Hornsby v. Greece* (Application No. 107/1995/613/701), *Papamichalopoulos v. Greece* (24 June 1993, A.260 B), *Dubenko v. Ukraine* (Application No. 74221/01), *Popov v. Moldova* (Application No. 74153/01).

obligations - to seek assurances from the United States via diplomatic contacts that the Applicant will not be subjected to the death penalty;

- o Hold that Bosnia and Herzegovina has violated and continues to violate Article 1 of the Convention, in combination with Article 3, through its ongoing failure - in disregard of the Decision of 11 October 2002 of the Human Rights Chamber for Bosnia and Herzegovina and its other affirmative obligations - to use all diplomatic channels to protect Mr. Boumediene's right not to be subjected to torture or inhuman and degrading treatment;
- o Hold that Bosnia and Herzegovina has violated and continues to violate Article 1 of the Convention, in combination with Article 5, through its ongoing failure - in disregard of the Decision of 11 October 2002 of the Human Rights Chamber for Bosnia and Herzegovina and its other affirmative obligations - to use all diplomatic channels to protect Mr. Boumediene's right not to be illegally imprisoned and to retain lawyers to secure his release from Guantanamo Bay;
- o Hold that Bosnia and Herzegovina has violated and continues to violate Article 1 of the Convention, in combination with Article 9, through its ongoing failure - in disregard of the Decision of 11 October 2002 of the Human Rights Chamber for Bosnia and Herzegovina and its other affirmative obligations - to use all diplomatic channels to protect Mr. Boumediene's right to practice his religion;
- o Hold that Bosnia and Herzegovina is to pay to Mr. Boumediene, within 3 months of the date on which the judgment becomes final according to Article 44(2) of the Convention, the following amounts to be converted into the currency of Bosnia and Herzegovina, plus any tax that may be chargeable:
 - (a) *Pecuniary damages* that result *inter alia* from loss of earnings (past and future), loss of means of earning a living, loss of pension scheme or social security scheme, medical and other expenses, in an amount to be determined;
 - (b) *Non-pecuniary damages* that result *inter alia* from pain and suffering, anguish and distress, trauma, uncertainty and anxiety, frustration, feelings of isolation and helplessness, loss of opportunity, loss of reputation, in an amount to be determined; and
 - (c) *Costs and Expenses* in an amount to be determined.
- o Hold that Bosnia and Herzegovina is to take all necessary measures with all legal and diplomatic means available to it, including the initiation of negotiations with the U.S. government, to obtain Mr. Boumediene's release from Guantanamo Bay and his repatriation to Bosnia and Herzegovina;¹¹¹
- o Hold that, until Mr. Boumediene is released, Bosnia and Herzegovina is to take all necessary measures with all legal and diplomatic means available to it to put an

¹¹¹ Compare for the Court's power to order measures with *Ilascu and others v. Moldova and Russia*, judgment of 8 July 2004, Application no. 4878/99.

end to the torture and inhuman and degrading treatment of the Applicant at Guantanamo Bay;

- o Hold that, until Mr. Boumediene is released, Bosnia and Herzegovina is to take all necessary measures with all legal and diplomatic means available to it to secure the right of the Applicant to practice his religion;
- o Hold that, until Mr. Boumediene is released, Bosnia and Herzegovina is to seek assurances from the U.S. government that the Applicant will not be subject to the death penalty.

VI. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

[179] The matter has not been subject to another procedure of international settlement or investigation. As the Court determined in *Jeličić v. Bosnia and Herzegovina*,¹¹² the Human Rights Chamber for Bosnia and Herzegovina is not an “international body” within the meaning of Article 35(2) of the Convention.

VII. LIST OF DOCUMENTS

[180] Annex 1 – Nationality Certificate of the Applicant.

[181] Annex 2 – Human Rights Chamber Order of 17 January 2002.

[182] Annex 3 – Human Rights Chamber Decision of 11 October 2002.

[183] Annex 4 – US government documents concerning flight schedules, OLE 3517-3555.

[184] Annex 5 – 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.

[185] Annex 6 - Letter from Mr. Zdravko Knežević to Madeleine Rees of 8 November 2004.

[186] Annex 7 – Report on the visit by the representative of Bosnia and Herzegovina, 10 August 2004.

[187] Annex 8 – Notification of Council of Ministers to Ministry of Justice (22 November 2004).

[188] Annex 9 – Mr. Oleskey’s letter to Mr. Terzić, dated 1 March 2005.

[189] Annex 10 – Mr. Oleskey’s letter to Mr. Kovač, dated 1 March 2005.

[190] Annex 11 - Mr. Oleskey’s letter to Mr. Čolak, dated 1 March 2005.

[191] Annex 12 - Mr. Oleskey’s letter to Mr. Ivanić, dated 1 March 2005.

[192] Annex 13 - Mr. Oleskey’s letter to Mr. Gligorić, dated 1 March 2005.

¹¹² Application No. 41183/02, Decision as to admissibility of 15 November 2005.

- [193] **Annex 14** - Mr. Oleskey's letter to Mr. Džaferović, dated 1 March 2005.
- [194] **Annex 15** - Mr. Oleskey's letter to Mr. Jahić, dated 1 March 2005.
- [195] **Annex 16** - Mr. Oleskey's letter to Mr. Tihić, dated 1 March 2005.
- [196] **Annex 17** - Mr. Oleskey's letter to Mr. Pašalić, dated 1 March 2005.
- [197] **Annex 18** - Mr. Oleskey's letter to Mr. Knežević, dated 1 March 2005.
- [198] **Annex 19** - Mr. Oleskey's letter to Mr. Ljubić, dated 1 March 2005.
- [199] **Annex 20** - Mr. Oleskey's letter to Mr. Pašić, dated 1 March 2005.
- [200] **Annex 21** - Mr. Oleskey's letter to Mr. Popović, dated 1 March 2005.
- [201] **Annex 22** – Letter of Chairman of the House of Representatives of Bosnia and Herzegovina to the Council of Ministers of Bosnia and Herzegovina (dated 30 March 2005).
- [202] **Annex 23** – Resolution No. 1433 of 2005 of the Parliamentary Assembly of Council of Europe.
- [203] **Annex 24** – Mr. Oleskey's letter to Mr. Terzić, dated 29 April 2005.
- [204] **Annex 25** – Reply by Committee of Ministers of the Council of Europe, adopted on 15 June 2005 (CM/AS(2005)Rec1699 final, published on 17 June 2005).
- [205] **Annex 26** – Letter of Matthew A. Reynolds, Acting Assistant Secretary of State for Legislative Affairs, to Senator James Jeffords, dated 15 June 2005.
- [206] **Annex 27** – Report of 2005 Extraordinary Session (Third Part) of Parliamentary Assembly of Council of Europe, 21 June 2005.
- [207] **Annex 28** – Mr. Oleskey's Letter to Mr. Terzić, dated 12 July 2005.
- [208] **Annex 29** – Letter from S. Oleskey to S. Tihić, 19 August 2005.
- [209] **Annex 30** – Mr. Oleskey's letter to Mr. Terzić, dated 19 August 2005.
- [210] **Annex 31** – Statement of the Representative to Parliament of Bosnia and Herzegovina, Mr. Malden Potočnik, 9 December 2005.
- [211] **Annex 32** – Letter of Mr. Mladen Ivanić to Secretary General of Council of Europe, dated 4 April 2006.
- [212] **Annex 33** – Human Rights Commission for Bosnia and Herzegovina Decision of 5 April 2006.
- [213] **Annex 34** - U.N. Special Rapporteurs' Report *Situation of Detainees at Guantanamo Bay*, 15 February 2006.
- [214] **Annex 35** – *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443.

[215] Annex 36 – CCR Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba, July 2006.

[216] Annex 37 – Letter from T.J. Harrington to Major General D. J. Ryder (14 July 2004).

[217] Annex 38 - Composite Statement: Detention in Afghanistan and Guantanamo Bay, Shafiq Rasul, Asif Iqbal and Ruhel Ahmed.

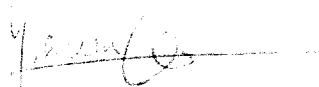
[218] Annex 39 – Chronological Medical Record for Lakhdar Boumediene.

VIII. DECLARATION AND SIGNATURE

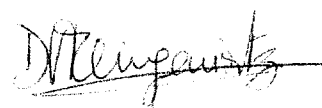
I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

Place: Brussels, Belgium.

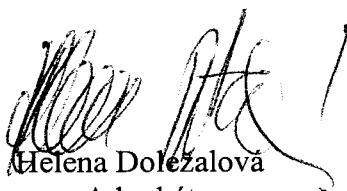
Date: 26 September 2006.



Yves van Gerven
Avocat
Applicant's representative



David Reingewirtz
Avocat
Applicant's representative



Heřena Doležalová
Advokát
Applicant's representative