Expert Opinion
Before the Constitutional Court
Of Bosnia and Herzegovina

IN THE CASE OF IMAD AL HUSIN

On the lawfulness of the administrative detention of foreign nationals under the international human rights law binding on Bosnia and Herzegovina

Appeal no. AP-2742/13

16 December 2014

1. Introduction

1. The Constitutional Court is considering the appeal of Imad Al Husin (appeal no. AP-2742/13). In this connection, the applicant has requested the International Commission of Jurists (ICJ) to provide to this Court its expert opinion on the international legal obligations and standards, as well as the attendant jurisprudence applicable to Bosnia and Herzegovina pertaining to the basis for the detention of foreign nationals for the purpose of impeding unlawful entry or performing a deportation. This expert opinion was produced *pro bono* in full independence.

2. The International Commission of Jurists (the ICJ), composed of 60 eminent judges and lawyers from all regions of the world, promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. It was set up in 1952; it has its headquarters in Geneva (Switzerland) and is active on the five continents; it has more than 60 national sections and affiliated organizations. The ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

3. The ICJ has submitted numerous independent third party interventions and expert opinions in international and national courts and quasi-judicial, including recently in the cases of *El-Masri v the Former Yugoslav Republic of Macedonia*, Application No. 39630/09, *Al-Nashiri v Poland*, Application No. 28761/11, *Al-Nashiri v Romania*, Application No. 33234/12, *Abu Zubaydah v Lithuania*, Application No. 46454/11, *Suso Musa v. Malta*, Application no. 42337/12, *F.G. v. Sweden,* Application No. 43611/11, *Lautsi v. Italy*, Application no. 30814/06, *Mamatkulov and Askarov v. Turkey*, Applications nos. 46827/99 and 46951/99, *Del Rio Prada v Spain,* Application No.42750/09, *Pavla Sabalic v. Croatia*, Application no. 50231/13, and *Husayn (Abu Zubaydah) v. Poland*, Application no. 7511/13, before the European Court of Human Rights; in *Grettel Artavia Murillo and Others v. Costa Rica* before the Inter-American Court of Human Rights; in *Abdul-Hakim Belhaj and Other v. Jack Straw and Others*, before the UK Court of Appeal; in *ACLU v CIA*, before the US Court of Appeals for the District of Columbia; and in Case no. 134/2009 before the Audiencia Nacional of Spain.

4. Bosnia and Herzegovina is party to the following international human rights treaties with relevance for the topic of this expert opinion: the International Covenant on Civil and Political Rights (ICCPR) (by succession on 1 September 1993), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (by accession on 13 December 1996), and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (ratified on 12 July 2002). Other treaties relevant to detention to which Bosnia and Herzegovina is a party are: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention for the Protection of all Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities.

5. The ICJ would call attention to the following provisions of the Constitution of Bosnia and Herzegovina:

- article II.1, providing "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms."

- article II.2, providing that "[t]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."

- article II.6 providing that "Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above."

- The Annex I to the Constitution reaffirms that the following human rights agreement are [applicable] in Bosnia and Herzegovina: "the 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto" (no. 7), the "1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (no. 8), the "1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" (no. 13)."

- Article VI.3. c, providing that the Constitutional Court has jurisdiction "over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision."[1]

2. Bosnia and Herzegovina international human rights treaty obligations

6. The international human rights treaties binding on Bosnia and Herzegovina include the following provisions specific to the lawfulness of detention of foreign nationals:

a. Article 5.1.f ECHR:

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

b. Article 9.1 ICCPR:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

[1] Article VI.3.c, Constitution.

c. Article 37, CRC:

"(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

d. Article 16.1, 16.4 ICRMW:

"Migrant workers and members of their families shall have the right to liberty and security of person. … Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived o their liberty except on such grounds and in accordance with such procedures as are established by law."

7. Finally, international human rights law also includes declaratory instruments that address the permissibility of deprivation of liberty of any person, including non-nationals: the UN Standard Minimum Rules on the Treatment of Prisoners; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the United Nations Rules for the Protection of Juveniles Deprived of their Liberty; the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders; the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention; Council of Europe Guidelines on human rights protection in the context of accelerated asylum proceedings, and the Twenty Guidelines on Forced Return of the Council of Europe.

3. International law approaches to justification of immigration detention

8. The right to liberty and security of the person under international human rights law requires that deprivation of liberty, to be justified, must be in accordance with law, and must not be arbitrary.[2] Deprivation of liberty may be "arbitrary" either because it

[2] Adequate prescription by law and freedom from arbitrary deprivation of liberty are requirements of the right to security of the person as well as the right to liberty. See, *Zamir v. France,* ECommHR, Plenary, Application No.9174/80, Admissibility Decision, 13 July 1982, holding that "it is implicit in the said right [to security of the person] that an individual ought to be able to foresee with a reasonable degree of certainty the circumstances in which he is liable to be arrested and detained. It is further implicit in the right to security of person that there shall be adequate judicial control of arrest and detention."

is not based on a legitimate basis for detention or because it does not follow procedural requirements.

9. While the ICCPR, the ICRMW and the CRC do not make express provision for the circumstances in which deprivation of liberty is affirmatively permitted,[3] they do generally prohibit detention that is "arbitrary", and the notion of arbitrariness has been well developed in commentary and jurisprudence. The question of arbitrariness, specifically as it relates to immigration detention, has been discussed. The ECHR, by contrast, expressly provides that detention may be lawful on a series of specified grounds. In relation to immigration, it permits detention in two specific situations: to prevent unauthorized entry to the country, and pending deportation or extradition (article 5.1(f)). The scheme of article 5 ECHR differs from that of the ICCPR and the ICRMW in that detention that cannot be justified on one of the specified grounds will always be considered arbitrary.[4] Conversely, however, if detention can be shown to be necessary and proportionate for a listed purpose, such as prevention of unauthorized entry, it will generally not be considered to be arbitrary.

4. Detention must have a clear legal basis in national law and procedures

10. An essential safeguard against arbitrary detention is that at all times and in all circumstances, any deprivation of liberty must be adequately prescribed by law. This reflects the general human rights law principle of legal certainty, by which individuals should be able to foresee, to the greatest extent possible, the consequences which the law may have for them. The need for legal certainty is regarded as particularly vital in cases where individual liberty is at stake.[5] The principle of prescription by law has two essential aspects:

- that detention be in accordance with national law and procedures;
- that national law and procedures should be of sufficient quality to protect the individual from arbitrariness. [6]

11. For detention to have a sufficient basis under domestic law, the national law must clearly provide for deprivation of liberty. In *Abdolkhani and Karimnia v. Turkey*,[7] the European Court of Human Rights held that a law that required non-nationals without valid travel documents to reside at designated places did not provide sufficient legal basis for their detention pending deportation. Laws imposing deprivation of liberty must be accessible and precise.[8] Its consequences must be foreseeable to the individuals it affects. The law must provide for time limits that apply to detention, and for clear procedures for imposing, reviewing and extending

[3] See Human Rights Committee (CCPR), *General Comment no. 35*, UN Doc. no. CCPR/C/GC/35, 28 October 2014. para 14.
[4] The only exception to this rule has been recently established by the Grand Chamber of the European Court of Human Rights in the case of *Hassan v UK* CITE, for the custody of belligerent and civilians in in international armed conflict under the Geneva Conventions and their Additional Protocols (international humanitarian law). The remit of this decision is not applicable to the migration field and its rationale is based exclusively on the respect of other sources of international law. It should be noted that no other source of international law expressly provides for the detention of migrants for other grounds than those expressed by the ECHR.
[5] *Medvedyev v. France*, European Court of Human Rights (ECtHR), GC, Application no. 3394/03, Judgment of 29 March 2010, para. 80.
[6] *Čonka v. Belgium*, ECtHR, Application no. 51564/99, Judgment of 5 February 2002, para. 39; *Amuur v. France,* Case no. 17/1995/523/603, Judgment of 20 May 1996, para. 51. See also, UN Working Group on Arbitrary Detention (WGAD), *Annual Report 1998*, UN Doc. E/CN.4/1999/63, 18 December 1998, para. 69, Guarantee 2; WGAD, *Annual Report 1999*, UN Doc. E/CN.4/2000/4, 28 December 1999, Annex II, Deliberation No. 5 "Situations regarding immigrants and asylum-seekers", Principle 6; WGAD, *Annual Report 2008*, UN Doc. A/HRC/10/21, 16 February 2009, paras. 67 and 82.
[7] *Abdolkhani and Karimnia v. Turkey*, ECtHR, Application no. 30471/08, Judgment of 22 September 2009, para.133.
[8] *Amuur v. France*, ECtHR, *op. cit.*, para 51

detention.[9] Furthermore, there must be a clear record regarding the arrest or bringing into custody of the individual.[10]

12. The Human Rights Committee has recently affirmed in its General Comment no. 35 on article 9 ICCPR that "[a]n arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality. … Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention."[11] The same principles have been affirmed by the UN Committee on Migrant Workers with regard to article 16 of the ICRMW.[12]

13. The requirement that the law governing detention must be accessible, precise and foreseeable has particular implications in the case of migrants, faced with an unfamiliar legal system, often in an unfamiliar language. The authorities are required to take steps to ensure that sufficient information is available to detained persons in a language they understand, regarding the nature of their detention, the reasons for it, the process for reviewing or challenging the decision to detain. The European Court of Human Rights has held that "the absence of elaborate reasoning for [a] deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention".[13] For the information to be accessible, it must also be presented in a form that takes account of the individual's level of education, and legal advice may be required for the individual to fully understand his or her circumstances.[14]

5. Detention must not be arbitrary, unnecessary or disproportionate

14. The European Court of Human Rights has held that, in order to avoid arbitrariness, detention must, in addition to complying with national law:

- be carried out in good faith and not involve deception on the part of the authorities;
- be closely connected to the purpose of preventing unauthorized entry of the person to the country or deportation;
- the place and conditions of detention must be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to people who have fled from their own country, often in fear of their lives;

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[9] *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*.
[10] *Tehrani and Others v. Turkey*, ECtHR, Applications Nos. 32940/08, 41626/08, 43616/08, Judgment of 13 April 2010.
[11] CCPR, *General Comment no. 35*, *op. cit.*, para 12.
[12] CMW, *General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, UN Doc. CMW/C/GC/2, 28 August 2013, paras. 23 and 25: "In order not to be arbitrary, arrest and detention of migrant workers and members of their families, including those in an irregular situation, must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances and proportionate to the legitimate aim pursued. … Although article 16, paragraph 4, does not define the permissible grounds for detention, it states that migrant workers and members of their families shall not be deprived of their liberty, except on such grounds and in accordance with such procedures as are established by law. Furthermore detention must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances, and proportionate to the legitimate aim pursued."
[13] *Lokpo and Toure v. Hungary*, ECtHR, Application No. 10816/10, Judgment of 20 September 2011, para. 24.
[14] *Nasrulloyev v. Russia*, ECtHR, Application No. 656/06, Judgment of 11 October 2007, para. 77; *Chahal v. United Kingdom*, ECtHR, Application no. 22414/93, Judgment of 15 November 1996, para. 118; *Saadi v. United Kingdom*, ECtHR, GC, Application no. 1329/03, Judgment of 29 January 2008, para. 74; *Abdolkhani and Karimnia v. Turkey,* ECtHR, *op. cit.*, paras.131-135; *Amuur v. France*, ECtHR, *op. cit.*; *Soldatenko v. Ukraine,* ECtHR, Application no. 2440/07, Judgment of 23 October 2008. See also, WGAD, *Annual Report 1998*, *op. cit.*, para. 69, Guarantees 1 and 5; WGAD, *Annual Report 1999*, *op. cit.*, Principles 1 and 8; WGAD, *Annual Report 2008*, *op. cit.*, paras. 67 and 82.

- the length of the detention must not exceed that reasonably required for the purpose pursued.[15]

15. The European Court of Human Rights, applying article 5.1(f) ECHR, has found that, provided that these tests are met and that the detention can be shown to be for the purposes of preventing unauthorized entry or with a view to deportation, it is not necessary to show further that the detention of the individual is reasonable, necessary or proportionate, for example to prevent the person concerned from committing an offence or fleeing.[16] In *Saadi v. United Kingdom*, the Court therefore held that short-term detention, in appropriate conditions, for the purposes of efficient processing of cases under accelerated asylum procedures, was permissible in circumstances where the respondent State faced an escalating flow of asylum seekers.[17] The approach of the Court to article 5.1(f) is in contrast to justification of detention on certain other grounds under article 5.1(b), (d) and (e), under which there must be an assessment of the necessity and proportionality of the detention in the circumstances of the individual case, and detention must be used only as a last resort.[18]

16. However, the ECHR obligations must be read in conjunction with the obligations arising under other international treaties to which the State is party. Under article 9 of the ICCPR, as well as under international refugee law in regard to asylum seekers,[19] the State must show that the detention was reasonable, necessary and proportionate in the circumstances of the individual case, in order to establish that detention is not arbitrary.[20] To establish the necessity and proportionality of detention, it must be shown that other less intrusive measures have been considered and found to be insufficient. In *C v. Australia,*[21] the Human Rights Committee found a violation of article 9.1 on the basis that the State had not considered less intrusive means, such as "the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was … arbitrary and constituted a violation of Article 9.1".

17. In *F.K.A.G. v Australia*, the Human Rights Committee reaffirmed its general approach as to what constitutes arbitrariness in detention. It held that "detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of

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[15] *Saadi v. United Kingdom*, ECtHR, *op. cit.*, para.74.
[16] *Chahal v. United Kingdom*, ECtHR, *op. cit.*, para.112; *Saadi v. United Kingdom*, ECtHR, *op. cit.*, para. 72. This is in contrast to justification of detention under article 5.1(b), (d) and (e), under which there must be an assessment of the necessity and proportionality of the detention in the circumstances of the individual case, and detention must be used only as a last resort: *Saadi v. United Kingdom*, ECtHR, *op. cit.*, para. 70.
[17] *Saadi v. United Kingdom*, ECtHR, *op. cit.*, paras.75-80.
[18] *Ibid.*, para. 70.
[19] See, UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention.
[20] *A v. Australia,* CCPR, Communication No. 560/1993, Views of 30 April 1997, para. 9.3: "The State must provide more than general reasons to justify detention: in order to avoid arbitrariness, the State must advance reasons for detention particular to the individual case. It must also show that, in the light of the author's particular circumstances, there were no less invasive means of achieving the same ends." *Saed Shams and others v. Australia*, Communication No.1255/2004, 11 September 2007; *Samba Jalloh v. the Netherlands*, CCPR, Communication No. 794/1998, Views of 15 April 2002: arbitrariness" must be interpreted more broadly than "against the law" to include elements of unreasonableness; *F.K.A.G. v. Australia*, CCPR, Communication No. 2094/2011, Views of 26 July 2013, para 9.3. In that case was not unreasonable to detain considering the risk of escape, as had previously fled from open facility.
[21] *C. v. Australia*, CCPR, *op. cit.*. See also, *Al-Gertani v. Bosnia and Herzegovina*, CCPR, Communication No. 1955/2010, Views of 1 November 2013, paras. 10.4.

absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the … mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion".[22]

18. Recently, in its General Comment no. 35, the Human Rights Committee has stressed that "[d]etention in the course of proceedings for the control of immigration … must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time. … The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic reevaluation and judicial review. Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health. Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention."[23]

19. Both the ICCPR and the ECHR require that the length of detention must be as short as possible, and the more detention is prolonged, the more it is likely to become arbitrary.[24] Excessive length of detention, or uncertainty as to its duration, may also raise issues of cruel, inhuman or degrading treatment, and the Committee against Torture has repeatedly warned against the use of prolonged or indefinite detention in the immigration context.[25]

20. Where a national court orders the release of a detainee, delay in implementing the Court's order may lead to arbitrary detention. The European Court has held that although "some delay in implementing a decision to release a detainee is understandable and often inevitable in view of practical considerations relating to the running of the courts and the observance of particular formalities … the national authorities must attempt to keep it to a minimum … formalities connected with release cannot justify a delay of more than a few hours."[26] In *Eminbeyli v. Russia*,[27] three days to communicate a decision and to release the applicant was found to lead to a violation of Article 5.1(f).

21. The UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) has addressed the issue of legality, necessity and proportionality of the detention of undocumented migrant workers in its General Comment no. 2:[28]

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[22] *F.K.A.G. v. Australia*, CCPR, *op. cit.*, para 9.3.
[23] CCPR, *General Comment no. 35, op. cit.*, para 18
[24] See, WGAD, *Annual Report 1998*, *op. cit.*, para. 69, Guarantee 10; WGAD, *Annual Report 1999*, *op. cit.*, Principle 7; WGAD, *Annual Report 2008*, *op. cit.*, paras 67 and 82.
[25] *Concluding Observations on Sweden*, CAT, UN Doc. CAT/C/SWE/CO/2, 4 June 2008, para. 12: detention should be for the shortest possible time; *Concluding Observations on Costa Rica*, CAT, UN Doc. CAT/C/CRI/CO/2, 7 July 2008, para. 10 expressed concern at failure to limit the length of administrative detention of non-nationals. CAT recommended: "the State Party should set a maximum legal period for detention pending deportation, which should in no circumstances be indefinite."
[26] *Eminbeyli v. Russia*, ECtHR, Application No. 42443/02, Judgment of 26 February 2009, para. 49.
[27] *Ibid.*, para.49.
[28] CMW, *General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, UN Doc. CMW/C/GC/2, 28 August 2013.

> "In the Committee's view, any custodial or non-custodial measure restricting the right to liberty must be exceptional and always based on a detailed and individualized assessment. Such assessment should consider the necessity and appropriateness of any restriction of liberty, including whether it is proportional to the objective to be achieved. The principle of proportionality requires States parties to detain migrant workers only as a last resort, and to give preference to less coercive measures, especially non-custodial measures, whenever such measures suffice to achieve the objective pursued. In all such cases, the least intrusive and restrictive measure possible in each individual case should be applied.
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> … Administrative detention of migrants that is initially lawful and non-arbitrary may become arbitrary if it continues beyond the period for which a State party can provide proper justification. To prevent such a situation from occurring, a maximum period of administrative detention shall be established by law, upon expiry of which a detainee must be automatically released in the absence of such justification. Administrative detention must never be unlimited or of excessive length. The justification for keeping a migrant worker detained shall be reviewed periodically to prevent prolonged and unjustified detention, which would be considered arbitrary. Preventive detention of migrant workers often leads to prolonged detention based on vague criteria. Therefore, such detention should be imposed only following an individual assessment in each case and for the shortest time possible, in compliance with all procedural safeguards provided for in article 16 of the Convention. In cases where an expulsion order cannot be executed for reasons beyond the detained migrant worker's control, he or she shall be released in order to avoid potentially indefinite detention."[29]

6. Particular factors in detention pending removal

22. The European Court of Human Rights has consistently held that, under article 5.1(f) ECHR, a State must show that the detention measure has been decided with a view to deportation,[30] while the Human Rights Committee, in clarifying State obligations under the ICCPR, has stressed that, if the decision is not to be arbitrary, individual circumstances that justify detention must be established in each case.[31]

23. In order for detention to be justified, the State must establish that deportation is being pursued with due diligence.[32] Longer periods of detention may be justified by the complexity of a case or where the actions of the applicant have led to delays.[33]

24. However, where proceedings have been suspended for a significant period,[34] or where deportation is no longer being actively pursued or is excessively delayed, then

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[29] CMW, *General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, UN Doc. CMW/C/GC/2, 28 August 2013, paras. 26-27.
[30] *Čonka v. Belgium*, ECtHR *op. cit.*, para. 38: "Article 5.1(f) does not require that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing …all that is required under sub-paragraph (f) is that "action is being taken with a view to deportation". *Soldatenko v. Ukraine,* ECtHR, *op. cit.*, para.109.
[31] *Samba Jalloh v. the Netherlands*, CCPR, *op. cit.*, para. 8; *Danyal Shafiq v. Australia,* CCPR, Communication No. 1324/2004, Views of 13 November 2006, paras. 7.2-7.3.
[32] *Chahal v. United Kingdom*, ECtHR, *op. cit.*, para.113: "any deprivation of liberty under Article 5.1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible." See, *Lokpo and Toure v. Hungary*, ECtHR, Application no. 10816/10, Judgment of 20 September 2011, para. 22, where a five month detention with a view to expulsion that never materialized contributed to the declaration of unlawfulness of the detention.
[33] *Kolompar v. Belgium*, ECtHR, Application No. 11613/85, Judgment of 24 September 1992, paras. 40-43.
[34] *Ryabikin v. Russia*, ECtHR, Application no. 8320/04, Judgment of 19 June 2008, para. 131, in the context of extradition proceedings, which were suspended for more than a year.

detention will no longer be justified.[35] Equally, if the authorities are unable to pursue a deportation because sending the person to the country of origin would be in breach of the principle of *non-refoulement*, detention pending deportation can no longer be justified.[36] The same applies when other legal or practical obstacles impede the deportation, such as the fact that the concerned person is stateless and there is no other State willing to admit him or her to its territory.[37]

25. As a consequence, where the Court has ordered interim measures to prevent a deportation pending full consideration of the case by the Court, and deportation proceedings are therefore suspended, detention may, in certain circumstances, no longer be justified.[38] The European Court has held that, as a general principle, "the fact that expulsion proceedings are provisionally suspended as a result of the application of an interim measure does not in itself render the detention of the person concerned unlawful, provided that the authorities still envisage expulsion at a later stage, so that 'action is being taken' although the proceedings are suspended, and on condition that that the detention must not be unreasonably prolonged."[39] However, this does not suspend consideration of the suitability of the detention measures in view of deportation. In the case of *Keshmiri v. Turkey (No. 2)*, the Court found the detention unreasonably prolonged and, therefore, in breach of article 5.1 ECHR, because it "continued for many months after the interim measure was applied and during that time no steps were taken to find alternative solutions",[40] including the possibility of sending the returnee to a different country than his country of origin, where the principle of *non-refoulement* did not allow for his transfer. However, the Court has also stressed that "an interim measure […] preventing a person's extradition or deportation does not require or form a basis for the person's detention pending a decision on his or her extradition or deportation."[41]

26. A further requirement is that detention must be genuinely undertaken for the purposes of expulsion. The European Court of Human Rights has held that where the real purpose of the detention is transfer for prosecution and trial in another State, then the detention will amount to a "disguised extradition" and will be arbitrary and contrary to article 5.1(f) as well as to the right to security of the person protected by Article 5.1.[42] The same reasoning applies when the detention is ordered solely for reasons of national security even when deportation is not possible.[43]

7. Detention of migrants for purposes other than immigration control

27. Under the ECHR, in addition to detention for the purposes of immigration control, permissible detention is limited to:

- detention following conviction by a criminal court;
- detention for failure to comply with an order of a court or to secure the fulfilment of an obligation prescribed by law;

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[35] *Quinn v. France,* ECtHR, Application no. 18580/91, Judgment of 22 March 1995; *A. and Others v. United Kingdom*, ECtHR, GC, Application No. 3455/05, Judgment of 19 February 2009, para. 164. See also, WGAD, *Annual Report 2008*, *op. cit.*, paras 67 and 82.
[36] *Mikolenko v. Estonia*, ECtHR, Application no. 10664.05, Judgment of 8 October 2009, para. 65. See also, WGAD, *Annual Report 2008*, *op. cit.*, paras 67 and 82.
[37] *A. and others v. United Kingdom*, ECtHR, *op. cit.*, para.167.
[38] *Abdolkhani and Karimnia v. Turkey*, ECtHR, *op. cit.*, para.134.
[39] *Keshmiri v. Turkey (No. 2)*, ECtHR, Application No. 22426/10, Judgment of 17 January 2012, para. 34.
[40] *Ibid.*, para. 34.
[41] *Molotchko v. Ukraine*, ECtHR, Application No. 12275/10, Judgment of 26 April 2012, para. 174.
[42] *Bozano v. France*, ECtHR, Application No. 9990/82, Judgment of 18 December 1986, para. 60.
[43] *M.S. v. Belgium*, ECtHR, Application No. 50012/08, Judgment of 31 January 2012, paras.155-156.

- detention following arrest on suspicion of committing an offence or in order to prevent an offence being committed;
- detention of minors for educational purposes;
- detention where strictly necessary for the prevention of the spread of infectious diseases;
- detention of persons of unsound mind, alcoholics, drug addicts or vagrants, where necessary for their own protection or the protection of the public.

28. Detention on any of these grounds is subject to safeguards against arbitrariness similar to those that apply to immigration detention. It should also be noted that such powers of detention are also subject to the principle of non-discrimination, including on grounds of nationality, and must therefore not be exclusively or disproportionately imposed on non-nationals except where the difference in treatment can be objectively and reasonably justified in the circumstances.[44]

29. Administrative detention for reasons of national security, although distinct from detention for the purposes of immigration control, may nevertheless disproportionately affect non-nationals. Under the ICCPR, administrative detention without charge or trial is generally prohibited, save in exceedingly narrow and exceptional circumstances.[45] To the extent that it can be shown not to be arbitrary, and to be in accordance with principles of necessity, proportionality and non-discrimination and based on grounds and procedures established by law,[46] in practice such detention is unlikely to be permissible where there is not a derogation from Article 9 ICCPR in a declared state of emergency.[47]

30. The UN Working Group on Arbitrary Detention, as special procedure of the United Nations Human Rights Council established pursuant to resolution 1991/42 has held the practice of preventive detention to be generally incompatible with international human rights law. In 2009, the Working Group declared administrative detention to be inadmissible in relation to persons suspected of terrorism-related conduct.[48] Previously, in 1993, the Working Group examined the use of administrative detention and concluded that it is arbitrary on procedural grounds if fair trial standards are

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[44] *A. and Others v. United Kingdom*, ECtHR, *op. cit.*

[45] Human Rights Committee, *General Comment no. 35, op. cit.*, para 15: "[t]o the extent that States parties impose security detention (sometimes known as administrative detention or internment), not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and this burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited, and that they fully respect the guarantees provided for by Article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for these conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken."

[46] *Concluding Observations on Jordan*, CCPR, UN Doc. CCPR/C/79/Add.35, 10 August 1994, paras. 226-244; *Concluding Observations on Morocco*, CCPR, UN Doc. CCPR/C/79/Add.44, 23 November 1994, para. 21; and, *Concluding Observations on Zambia*, CCPR, UN Doc. CCPR/C/79/Add.62, 3 April 1996, para. 14. See, generally, International Commission of Jurists, *Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism,* March 2006.

[47] The Committee has also emphasized that the totality of ICCPR article 9 safeguards apply even when there is a "clear and serious threat to society which cannot be contained in any other manner" except through preventive detention. See, *Cámpora Schweizer v. Uruguay*, CCPR, Communication No. 66/1980, Views of 12 October 1982, para. 18.1.

[48] WGAD, *Annual Report 2008*, *op. cit.*, para.54. The Working Group states that: "(a) Terrorist activities carried out by individuals shall be considered as punishable criminal offences, which shall be sanctioned by applying current and relevant penal and criminal procedure laws according to the different legal systems; (b) resort to administrative detention against suspects of such criminal activities is inadmissible; (c) the detention of persons who are suspected of terrorist activities shall be accompanied by concrete charges [...]".

violated. The Working Group also found that administrative detention was "inherently arbitrary" where it was, *de jure* or *de facto*, of an indefinite nature.[49]

31. The European Convention system imposes strict limitations on the use of administrative detention. Under the ECHR, administrative detention without trial is not a specified ground for which detention is permitted under article 5 ECHR and therefore can only be legitimately imposed where the State derogates from its article 5 obligations in a time of public emergency threatening the life of the nation (under article 15 ECHR) and where the use of administrative detention can be shown to be "strictly required by the exigencies of the situation" and necessary, proportionate and non-discriminatory in the context of the particular emergency situation that prevails.[50] Measures which impose security-related administrative detention exclusively on those subject to immigration control, in circumstances where others may also pose similar security risks, have been found to discriminate unjustifiably between nationals and non-nationals and therefore to amount to disproportionate measures of derogation in violation of Article 5 ECHR.[51]

8. Conclusions

32. Bosnia and Herzegovina is party to the core international human rights treaties, including – and without reservations – the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the International Convention on the Rights of All Migrant Workers and the Members of Their Families. Bosnia and Herzegovina has therefore agreed and undertaken to abide by and be legally bound by all the obligations contained in these treaties.

33. The ICJ stresses that, according to the Vienna Conventions on the Law of Treaties, treaties must be interpreted in accordance with "any relevant rule of international law applicable." This established and customary rule of international law has been recognized by the European Court of Human Rights.[52] Article 81.1 of the ICRMW expressly states that "[n]othing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of …[t]he law or practice of a State Party; or … [a]ny bilateral or multilateral treaty in force for the State Party concerned."

34. The ICJ therefore submits that the obligations of Bosnia and Herzegovina under international human rights law must be interpreted in a holistic and comprehensive way that preserves the meaning of both article 5.1 ECHR, article 9.1 ICCPR and article 16.1 and 4 ICRMW. Detention of migrants would therefore be allowed only when

a. it is not arbitrary,

b. it is applied in order to impede unlawful entry or perform a deportation,

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[49] WGAD, *Annual Report 1992,* UN Doc. E/CN.4/1993/24, 12 January 1993, Deliberation No. 4, Conclusions at III.B. See also, WGAD, *Report on the visit to the People's Republic of China*, UN Doc. E/CN.4/1998/44/Add.2, 22 December 1997, paras. 80-99 and 109.

[50] *Lawless v. Ireland (No. 3),* ECtHR, Application No. 332/57, Judgment of 1 July 1961, paras. 13 and 14; *Ireland v. United Kingdom*, ECtHR, Plenary, Application No. 5310/71, 18 January 1978, paras. 194-196 and 212-213; *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, para. 172.

[51] *A. and Others v. United Kingdom,* ECtHR, *op. cit.*, para. 190. In light of this finding the Grand Chamber found it unnecessary to consider whether the measure also violated article 14 ECHR in conjunction with article 5.

[52] *Rantsev v Cyprus and Russia*, no. 25965/04, 7 January 2010, § 274, in turn referring to *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, 12 November 2008; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008; and Article 31 para. 3 (c) of the Vienna Convention of 23 May 1969 on the Law of Treaties.

c. it is foreseen in primary legislation,

d. it is necessary to this purpose and in a democratic society,

e. it is proportionate to this purpose,

f. there are no alternatives to detention available,

g. the procedure of entry or of deportation are performed with due diligence and are realistic. No detention of a migrant for purposes of migration control can be justified when the prospect of deportation is not realistic, including because it is not feasible to find countries to which to transfer the migrant.

35. Finally, no administrative detention without charge, undertaken solely on the basis of national security is permitted under the international human rights law obligations undertaken by Bosnia and Herzegovina. Such detention might in rare and narrow circumstances specified above not be discordant with article 9.1 ICCPR and article 16.4 ICRMW However it would necessarily constitute a violation of Bosnia and Herzegovina's obligations under article 5.1 ECHR, which does not allow for any kind of detention on the sole grounds of national security, public security or public order.

36. These conclusions on the need for a holistic interpretation of Bosnia and Herzegovina's obligations under international human rights law accord with article II.2 of its Constitution, according to which "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms."