

**BH AND EUROPEAN UNION RESPONSIBILITY FOR VIOLATIONS OF FUNDAMENTAL RIGHTS OF ALIEN
DETAINEES AT THE LUKAVICA DETENTION CENTER**

CONTRIBUTORS:

MIGREUROP

JULIA SPIEGEL , JAY BUTLER AND SALLY PEI FROM THE Allard K. Lowenstein International Human Rights Clinic, Yale Law School.

I. REGARDING THE CASE OF HUNGER STRIKE LUKAVICA DETENTION CENTER IN JANUARY 2011

A family member of a detainee being held at the immigration detention center in Lukavica, Bosnia-Herzegovina (BH), alerted Migreurop that at that time, nine detained undocumented migrants¹ from Tunisia, Algeria and Palestine had been on a hunger strike for nearly twenty-three days to protest their indefinite detention without charge and the conditions of their detention. According to BH authorities, these nine individuals were arrested during an unauthorized crossing of the Montenegro-BH border.² They were then brought to the detention center in Lukavica, east of Sarajevo. Some of those on hunger strike have been held there for more than eight months, and they claim that they have not had access to a judge, lawyer, translator, or anyone who can provide legal advice.

The detainees on hunger strike informed Migreurop that they do not understand why they have been detained and do not know how long their detention will continue. The hunger strikers also said that detention center guards have subjected them to insults and violence.³ These concerns prompted them to go on a hunger strike starting in December 2010. The detainees ended their hunger strike after forty days, but they continue to denounce their detention and to demand their release. Several BH and international organizations have met with the detainees over the past six months to discuss their detention concerns. Unfortunately, these organizations are not in a position to provide direct legal or political redress for the detention issues.

Since learning of the hunger strike, Migreurop launched a campaign advocating for detainee rights;⁴ Migreurop has issued press releases and sent letters by fax to Lukavica detention center authorities about detainees' rights, while remaining in contact with the detainees. Migreurop has also alerted European authorities, including the Committee for the Prevention of Torture, the Council of Europe Commissioner for Human Rights Thomas Hammarberg, and members of the European Parliament, as well as BH authorities, about the situation of detainees in the center.

¹ These detainees included five Palestinians, two Algerians, and two Tunisians. *Bosnia: Hunger Striker's Letter: "This Centre Has Become the Shame of Europe,"* MIGREUROP (Feb. 11, 2011), <http://www.migreurop.org/article1806.html> [hereinafter Migreurop Letter from Hunger Strikers].

² Migreurop's interview from the 18th of January to the beginning of March 2011 and from the Bosnian Helsinki committee's interview after its visit in the detention centre on the 27th of January 2011.

³ *Bosnia- &-Herzegovina: Ill-treatments and Hunger Strike in Lukavica Foreigners' Camp,* Migreurop (Feb. 23, 2011), available at <http://www.migreurop.org/article1814.html>; Migreurop Letter from Hunger Strikers, *supra* note 1 ("When we ask about our lot, they beat us. Some of us have been theirs ribs broken, and have been forced to slash one's wrists in order to draw attention." (sic)).

⁴ Migreurop's Lukavica campaign materials are available at <http://www.migreurop.org/rubrique341.html?lang=en>.

BH detains immigrants at Lukavica under the Law on Movement and Stay of Aliens and Asylum. This law provides domestic legal grounds for BH authorities to indefinitely and arbitrarily detain migrants crossing or staying irregularly in BH as well as aliens whose citizenship has been revoked under the Law on Citizenship. Such detention and the laws authorizing it violate the detainees' fundamental rights under international and European Union standards.

There are two types of detainees in Lukavica:

- . Detainees (former mujahideen) who lost their Bosnian nationality regarding the BH Law on citizenship now considered subjected then to the Law on Movement and Stay of Aliens and Asylum (II. 1)
- . Foreigners who enter or stay irregularly on the BH territory, subjected to the Law on Movement and Stay of Aliens and Asylum (the case of the nine hunger strikers (II.2))

II. APPLICABLE PROVISIONS OF BH LAW

1. Nationality Stripping Under the BH Law on Citizenship

The Office of the High Representative in Bosnia and Herzegovina⁵ implemented a citizenship law in 1997⁶ that provided for review of naturalization decisions made during the war in BH.⁷ The original law authorized a state commission to revoke the citizenship of a naturalized citizen in any of three situations: (1) when citizenship had been acquired through fraudulent means; (2) when a citizen performed voluntary service in a foreign military force in spite of an injunction to the contrary; or (3) when citizenship had been acquired after the entry into force of the 1997 law but had not fulfilled the conditions for naturalization set out in Articles 9 and 10.⁸

⁵ The Office of the High Representative is an *ad hoc* international institution created under the Dayton Peace Agreement to oversee the implementation of that agreement.

⁶ The Parliamentary Assembly of Bosnia and Herzegovina adopted the law—called the Law on Movement and Stay of Aliens and Asylum—in April 2008.

⁷ *HR Decision on the Law on Citizenship of Bosnia and Herzegovina*, Office of the High Representative (Dec. 16, 1997), available at <http://www.google.com/url?sa=t&source=web&cd=1&ved=0CBgQFjAA&url=http%3A%2F%2Fwww.ohr.int%2Fohr-dept%2Flegal%2Foth-legist%2Fdoc%2FHR-DECISION-ON-LAW-ON-CITIZENSHIP.doc&rct=j&q=OHR%20bosnia%20and%20herzegovina%201997%20nationality%20law&ei=adChTcv2AcTm0gGG6Y2RBQ&usq=AFQjCNFM9ZogDI3bHWaXffEpGeTYMonTPg>.

⁸ Law on Citizenship of Bosnia and Herzegovina, art. 23. Article 9 defines the criteria for naturalization, which include age, a minimum residence of eight years prior to the application for citizenship, knowledge of one of the languages of BH's constituent peoples, no history of expulsion from BH for security reasons, no criminal record, and renunciation of former citizenship. Article 10 provides for the acquisition of BH citizenship through marriage.

In 2005, BH amended the Law on Citizenship to greatly expand the bases the state can invoke to revoke citizenship. Under Article 41, the Commission authorized to review the status of individuals naturalized between 1992 and 2006 may also revoke an individual's citizenship, in addition to the reasons specified in the 1997 law:

- (a) If the regulations in force in the territory of Bosnia and Herzegovina at the time of the naturalisation had not been applied; or
- ...
- (c) In the case of a lack of a genuine link between Bosnia and Herzegovina and a citizen habitually not residing in Bosnia and Herzegovina.

The 2005 amendments specify that, in making these determinations, the Commission "considers the information provided by the persons concerned as well as the information collected ex officio."⁹

The Commission has broad and exclusive authority in its decisions. The Commission may revoke an individual's citizenship based on a mere failure to respect any regulation in force at the time of naturalization; it need not show the individual's intent to violate the regulation. This constitutes a significant limitation on the requirements for nationality-stripping. In practice, BH authorities have often invoked Article 41 to revoke the citizenship of former mujahideen,¹⁰ now considered "undesirable," and then detain them under the detention provisions of the Law on Movement and Stay of Aliens and Asylum, discussed in the next section.¹¹ Neither the 1997 citizenship law nor the 2005 amendments contemplate an individual's right to appeal a determination by the Commission; the Commission's decisions simply enter into force upon notification of the individual concerned or upon publication.¹²

⁹ Law on Amendments to the Law on Citizenship of Bosnia and Herzegovina art. 8.

¹⁰ During the BH War, approximately 3,000 foreign Muslim or mujahideen combatants arrived in BH from North Africa and the Middle East to fight alongside local Muslims against Serbian forces. After the war, many mujahideen remained in BH despite the Dayton Peace Agreement's requirement that all forces not of local origin leave the country. A few hundred mujahideen stayed in BH; the BH government awarded many of them citizenship as a reward for their military services. See Stephanie Zosak, *Revoking Citizenship in the Name of Counterterrorism: The Citizenship Review Commission Violates Human Rights in Bosnia and Herzegovina*, 8 NW. J. INT'L HUM. RTS. 216, 218-19 (2010).

¹¹ More than 300 decisions stripping individuals of their nationality were publicly pronounced, without reasons provided. Wanda Troszczyńska-van Genderen, *Bosnia: Citizenship and Detention*, HUMAN RIGHTS WATCH, published in Open Democracy (Dec. 1, 2010), available at <http://www.hrw.org/en/news/2010/01/12/bosnia-citizenship-and-detention>. These individuals were deported, fled BH for fear of reprisals in their countries of origin, or were detained in the Lukavica detention center. Some of these individuals have been detained in the center for nearly three years and do not know for how they will continue to be held, in part because their lawyers do not have access to the evidence used by the Minister of Security to revoke their citizenship.

¹² Law on Citizenship of Bosnia and Herzegovina art. 41(6).

International human rights organizations, such as Human Rights Watch and Amnesty International, have consistently denounced this situation.¹³ Cases are before the European Court of Human Rights (the European Court) seeking to end BH's use of the pretext of fighting terrorism to justify deporting individuals it now considers undesirable.

2. Detention of Aliens Under the Law on Movement and Stay of Aliens and Asylum

Article 99 of the Law on Movement and Stay of Aliens and Asylum authorizes BH authorities to place an alien under "supervision" prior to deportation after making a decision to expel the alien. It further provides that supervision *shall* be imposed against an alien when there is a suspicion that the alien might abscond, the alien poses a threat to public order, security or public health, or when the alien has either provided a false statement of his identity or his identity cannot be established within six hours of arrival at the official premises.¹⁴

Article 102 establishes that supervision will involve accommodating the alien in an immigration center.¹⁵ Supervision shall continue until the alien's forcible removal from the country, or as long as is necessary for execution of the purpose of the supervision, or until the reasons that constituted the grounds for supervision have significantly changed. In any case, the duration of supervision should not exceed the time period specified in the original decision to place the alien under supervision or to extend supervision.¹⁶

Article 101 governs the legal remedies available to an alien for a decision to detain her or him. Within 24 hours of the decision, the alien may appeal to the Ministry of Security.¹⁷ If the Ministry upholds the decision or fails to respond, the alien may,

¹³ See, e.g., *Bosnia and Herzegovina: Briefing to the UN Committee against Torture*, AMNESTY INTERNATIONAL (Oct. 18, 2010) (discussing prolonged detention in inadequate conditions at centers such as Lukavica), available at <http://www.amnesty.org/en/library/info/EUR63/005/2010/en>; *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' Against Torture*, AMNESTY INTERNATIONAL (Apr. 12, 2010) (discussing the case of Imad Al Husin and his detention at Lukavica), available at <http://www.amnesty.org/en/library/info/EUR01/012/2010/en>; Wanda Troszczynska-van Genderen, *Bosnia: Citizenship and Detention*, HUMAN RIGHTS WATCH, published in *Open Democracy* (Dec. 1, 2010), available at <http://www.hrw.org/en/news/2010/01/12/bosnia-citizenship-and-detention>.

¹⁴ Law on Movement and Stay of Aliens and Asylum adopted in April 2008 (Official Gazette 36/08, 6 May 2008), art. 99(2) (translation provided by the Office of the High Representative in Bosnia and Herzegovina), available at <http://www.legislationline.org/documents/id/16308>.

¹⁵ *Id.* art. 102(1).

¹⁶ *Id.* art. 102(2).

¹⁷ *Id.* art. 101(1).

within 24 hours, file an administrative appeal before the Court of Bosnia and Herzegovina,¹⁸ which must render a decision within three days.¹⁹

Article 102 limits initial detention to 30 days, but supervision may be extended, by decision of the Aliens Affairs Service, up to a total of 180 days.²⁰ However, in exceptional cases, the Law also allows the Aliens Affairs Service to make an extraordinary extension of supervision for a period longer than 180 days.²¹ Indeed, Article 12(3) of the By-law on Supervision and Removal of Aliens from Bosnia and Herzegovina, promulgated by the Ministry of Security at the proposal of the Aliens Affairs Service and in force since 2008, states that the Service may derogate from the 180-day limit “when the alien [prevents his/her removal or when the alien] cannot be removed for any other reason whatsoever.”²² Review of the Service’s decision to extend detention follows the same procedure as that of the original decision to detain, laid out in Article 101; i.e., the alien may appeal the decision within 24 hours to the Ministry of Security, and final review consists of an administrative appeal before the Court of Bosnia and Herzegovina.²³ Therefore, BH Law allows an indefinite length of detention for migrants.

Finally, Article 98 requires that “[i]nstitutions [detention centers] specialized for the reception of aliens shall meet the requirements arising from the Constitution of Bosnia and international standards for treatment of the beneficiaries of specialized institutions.” The By-law on Standard Functions and Other Questions Relevant for the Work of the Immigration Centres establishes specific standards for the functioning of detention centers such as the one in Lukavica, including requirements for “safe and humane accommodation,” the right to legal assistance—to be provided by the Aliens Affairs Service if the detainee does not have the financial funds to engage his own attorney—and medical care.²⁴

¹⁸ *Id.* art. 101(3).

¹⁹ *Id.* art. 101(4).

²⁰ *Id.* art. 102(4).

²¹ *Id.* art. 102(5).

²² By-law on Supervision and Removal of Aliens from Bosnia and Herzegovina, art. 12(3) (unofficial translation provided by UNHCR), available at <http://www.unhcr.org/refworld/docid/4d36b5fd2.html>.

²³ *Id.* art. 12(5).

²⁴ In its written replies to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW/C/BIH/Q/1/Add.1, the BH Government provided a summary of the By-Law on Standard Functions and Other Questions Relevant for the Work of the Immigration Centres, The summary included the following paragraphs:

25. The Centre is a specialized institution of the Ministry of Security constituent with the Aliens Affairs Service, for acceptance and accommodation of aliens who are decided to be under supervision according to the Law on Movement and Stay of Aliens and Asylum. To the aliens the centre ensures safe and humane accommodation on the following categories: men, women, underage persons and families. The costs of acceptance and accommodation by beneficiaries of the Centre are being refunded according to the provisions of the Law. The Centre beneficiary has right to have legal assistance, as soon as possible, by engaging an attorney on his own cost and to have one free phone call to the Diplomatic Consular Representation of the Country or to the attorney or other

3. The Right to have access to free legal aid in detention in BH

While human rights organizations have been able to visit the center on occasion, detainees reportedly do not have free and regular legal counsel in the center.

Article 5(4) of the European Convention on Human Rights requires that the detainee be afforded a chance to challenge his or her detention before a court. In *Chahal v United Kingdom*, the European Court of Human Rights listed the fact that the detainee was not entitled to legal representation before the panel reviewing his detention as a factor in the European Court's decision that the domestic review panel was not a "court" within the definition of Art 5(4) and, thus, that the detainee had been deprived of his right to have the lawfulness of his detention reviewed.²⁵

Further, in *Čonka v Belgium*, the applicants, Slovakian asylum seekers, were detained in Belgium after the Belgian authorities denied their request for asylum and ordered their speedy deportation. The European Court noted that the applicants "had little prospect of being able to contact a lawyer from the police station with the help of the interpreter" and that, "although they could have contacted a lawyer by telephone from the closed transit centre [where they were detained], they would no longer have been able to call upon the interpreter's services."²⁶ The Court further observed that "despite those difficulties, the authorities did not offer any form of legal assistance at either the police station or the centre"²⁷ and that when the applicants did finally make contact with a lawyer, his appeal could have been heard only on the day after they were scheduled to have been deported.²⁸ The Court held that the deprivation of legal assistance under such circumstances constituted a violation of Art 5(4) of the Convention.²⁹

BH domestic law recognizes the right of detained aliens to legal counsel. The By-law on Standard Functions and Other Questions Relevant for the Work of the Immigration Centres grants detainees the right to prompt legal assistance through the

organization according to the Law, and to have one private phone call. If the Centre beneficiary does not have financial funds to engage the attorney, the Service will provide free legal assistance, as soon as possible. In the Centre can be accepted and accommodated only persons for whom the competent authority made decision on sending an alien under supervision that is on prolonging the supervision according to the Law.

26. If it is concluded that during acceptance a person is hurt or if he immediately needs medical help, before the acceptance in the Centre, he is insured by an adequate medical treatment in the medical care institution outside the Centre.

²⁵ *Chahal v United Kingdom* (Application no. 70/1995/576/662), European Court of Human Rights, 11 November, 1996, para 130.

²⁶ *Čonka v Belgium* (Application no. 51564/99), European Court of Human Rights, 5 February 2002, para 44.

²⁷ *Id.*

²⁸ *Id.*, at para 46

²⁹ *Id.*, at para 55.

services of an attorney. In the event that the detainee does not have adequate funds to engage his own attorney, the Aliens Affairs Service must provide free legal assistance as soon as possible.³⁰

III. DETAINING ALIENS AT LUKAVICA CENTER VIOLATES BH'S OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

1. BH's System of Detention is Contrary to the European Convention on Human Rights

Indefinite, arbitrary detention is contrary to the European Convention on Human Rights. Article 5 guarantees the right to liberty and security for everyone. Article 5(1)(f) allows "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."³¹ However, detention must be in accordance with law³² and detainees must be afforded adequate procedural safeguards to challenge their detention.³³

The European Court of Human Rights has ruled that, in order to comply with law as required by Article 5(1), detention must be pursuant to domestic law that itself limits the possibilities for arbitrariness. Thus, it is not enough that the detention is in accordance with domestic law; domestic law must also satisfy the Court's non-arbitrariness standard.³⁴ The Court has ruled that for detention not to be arbitrary, (1) it

³⁰ Written replies by the Government of Bosnia and Herzegovina to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW/C/BIH/Q/1/Add.1, para. 25.

³¹ European Convention on Human Rights, art. 5(1)(f).

³² *Id.*, art. 5(1); *Rusu v Austria* (34082/02), European Court of Human Rights, 2 October, 2008, paras. 54-58.

³³ *Id.*, art 5(4); *Al Nashif v Bulgaria* (50963/99), European Court of Human Rights, 20 June, 2002, para. 92 ("The Court reiterates that everyone who is deprived of his liberty is entitled to a review of the lawfulness of his detention by a court, regardless of the length of confinement. . . . The person concerned should have access to a court and the opportunity to be heard either in person or through some form of representation . . .").

³⁴ *Kaboulov v Ukraine* (41015/04), European Court of Human Rights, (2010) 50 E.H.R.R. 39, para. 130 ("The Court reiterates that the expressions 'lawful' and 'in accordance with a procedure prescribed by law' in art.5(1) essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. However, the 'lawfulness' of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of art.5(1) of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion."); *Amuur v France* (No. 19776/92), European Court of Human Rights, (1996) 22 E.H.R.R. 533, para 50 ("In laying down that any deprivation of liberty must be effected 'in accordance with a procedure prescribed by law,' Article 5(1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; like the expressions 'in accordance with the law' and 'prescribed by law' in the second paragraphs of Articles 8 to 11, they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls

must be “carried out in good faith” and “closely connected to the ground of detention relied on by the Government,” (2) “the place and conditions of detention should be appropriate,” and (3) “the length of detention should not exceed that reasonably required for the purpose pursued.”³⁵ Failure to meet these conditions is a violation of Article 5.

The European Court has also ruled that Article 5(4) of the Convention requires that a detainee have effective access to judicial redress. The Court recently ruled on this provision in the case of *A and others v United Kingdom*. In that case, the United Kingdom sought to deport foreign nationals whose presence there had been deemed a risk to national security. However, because these individuals came from states in which they would likely be tortured if returned, the United Kingdom could not, in line with its obligation of non-refoulement under ECHR Article 3, deport them. The Court held that the procedure to determine the lawfulness of detention “must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question.”³⁶ The Court further declared that the proceedings must be “adversarial” and “ensure equality of arms between the parties”³⁷ and that the detainee must be provided with sufficient information so as to “enable him to give effective instructions” to his advocate.³⁸

The BH system for adjudication and appeal of detention decisions violates Article 5 of the Convention. First, it does not provide safeguards against arbitrariness. Decisions to detain and to extend detention indefinitely are not subject to effective independent review. Although the law provides for appeals to the Ministry of Security and then to the BH courts, the requirement that detainees file these appeals within 24 hours renders these remedies virtually impossible to obtain, particularly when, as in Lukavica, detainees are not provided with access to counsel or even informed of their rights in a language they understand. Such practices, although in accordance with BH law, allow for the sort of arbitrary treatment that the European Court has declared violates Article 5.

Indeed, in *Soldatenko v Ukraine*, the European Court concluded that, for a remedy to satisfy the requirements of Convention Article 5(4), “[t]he accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.”³⁹ The BH authorities have created a system that makes it nearly impossible for alien detainees to

to the Court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty—especially in respect of a foreign asylum seeker—it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.”)

³⁵ *A and others v United Kingdom* (3455/05), European Court of Human Rights, 19 Feb. 2009, para. 164.

³⁶ *Id.*, para. 203.

³⁷ *Id.*, para. 204.

³⁸ *Id.*, para. 220.

³⁹ *Soldatenko v Ukraine* (2440/07), European Court of Human Rights, 23 Oct. 2008, para. 125.

seek appropriate legal redress, as required by Article 5. In addition, even in cases where detainees exercise their appeal rights in compliance with the statutory deadlines, the Court of Bosnia and Herzegovina has employed, on numerous occasions, an erroneous legal analysis when reviewing detention decisions, examining detentions solely for procedural compliance with BH law without reference to the European Convention standards with which domestic law must comply.⁴⁰ The appeals process is thus an ineffective remedy for alien detainees, in both procedural and substantive terms.

Alien detainees do not have access to effective legal assistance, and the extraordinarily short period for appeal deprives them of any viable avenue through which to seek redress from arbitrary determinations. The system thus falls well below European standards...

IV. THE EUROPEAN UNION HAS A RESPONSIBILITY IN THE PROTECTION OF ALIEN DETAINEES IN BH

This responsibility has a political ground.

1 – The political responsibility

The EU has a political responsibility in the protection of foreign detainees in BH and especially in Lukavica detention center for several reasons:

First, BH asylum and immigration policy is of interest for the EU when it serves its externalization policy;

Second, the EU has imposed and funded the Lukavica detention center;

Third, this was a determining element of the pre-accession process;

And the UE expressly demanded that the European standards apply to the detention center.

As BH is not yet a member of the EU, EU standards are not legally binding on its jurisdictions. The pressure put by the EU on the BH authorities to implement its requirement implies that it assumes the consequences of its policy: the EU is politically responsible for ensuring BH to implement EU standards at Lukavica detention center.

- The EU political involvement in BH asylum and immigration policy : externalization of migration controls

⁴⁰ See, e.g., *Imad al-Husin*, AP-3307/08 (CCBH, 28 March 2009); *Aissa Benkhira*, AP-1499/09 (CCBH, 24 June 2009); *Ammar al-Hanchi*, AP-1804/09 (CCBH, 16 July 2009). In its analysis, the Court presumed that unlawful *presence* was equivalent to “unauthorised entry” for the purposes of Convention Article 5(1)(f) and did not examine the detainees’ ambiguous immigration status.

The European response to the influx of migrants and the relaxing of border controls among member states has been to limit migration into the EU. Strengthening control of the borders of the EU as a whole has thus emerged as the core goal of European migration policy.

The EU has pursued this goal through a strategy of externalization of migration control.

One first element of the EU's externalizing approach has been to use the leverage that the accession process offers by placing specific conditions on applicants for EU membership, particularly in central and Eastern Europe. Candidate states must work to "improve border management" and implement specific measures such as setting up detention centers.⁴¹ Issues related to migration control tend to dominate EU demands upon candidate states as conditions for EU membership and are priorities for EU funding to central and eastern European countries that are preparing for accession.⁴²

The second element consists of returning illegal migrants to third countries. Readmission Agreements between the EU and a number of states or territories are designed to facilitate the expulsion of third-country nationals to their countries of origin or to countries through which irregular immigrants had passed as they entered the EU. Twelve Readmission Agreements are currently in force,⁴³ including with BH.⁴⁴ The Agreement with BH, effective since January 2008, is typical of these agreements. It requires BH to readmit both its own nationals who no longer fulfill the conditions of entry to, presence in, or residence in another Member State,⁴⁵ and third-country nationals who "illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of Bosnia and Herzegovina."⁴⁶ Individual EU member states also maintain bilateral agreements with third countries that establish arrangements for readmitting migrants to those countries; Italy's relationship with Libya is one such example.⁴⁷ The readmission of migrant is facilitated by the presence of detention center where expelled foreigners can be placed during the period they are waiting for a new expulsion to their country of origin.

⁴¹ See Heather Grabbe, *The Sharp Edges of Europe: Extending Schengen Eastwards*, 76 INT'L AFF. 519, 524-26 (2000).

⁴² *Id.* at 526.

⁴³ Readmission Agreements are in force between the EU and the following territories: Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, the former Yugoslav Republic of Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, and Pakistan. Negotiations with additional territories, including Morocco, Turkey, and Cape Verde, are currently ongoing. *Comm. Staff Working Doc. Accompanying the Comm. from the Comm'n to the Eur. Parliament and the Council: EU Readmission Agreements: Brief Overview of State of Play (February 2011)*, COM (2011) 76 final (Feb. 23, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:0209:FIN:EN:PDF>.

⁴⁴ Agreement Between the European Community and Bosnia and Herzegovina on the Readmission of Persons Residing Without Authorisation, Sept. 18, 2007, 2007 O.J. (L 334) 66.

⁴⁵ *Id.* art. 2 § 1.

⁴⁶ *Id.* art. 3 § 1(b).

⁴⁷ STEMMING THE FLOW, *supra* note 57, at 106.

The EU's relationship with BH is a clear example of this strategy. Its location at the eastern margins of the EU near the coast of the Adriatic Sea makes it a key transit country for migration into western Europe, and the EU has accordingly placed much emphasis on improving migration controls as BH prepares for accession. Article 80 of the SAA mandates cooperation between the EU and BH on migration issues,⁴⁸ and the EU contributed considerable funds to the construction of the Lukavica detention center. The EU's involvement in BH migration controls has been significant and systematic and, overall, representative of its broader policies and objectives.

- The European Union provided extensive funding and operational support for the establishment of the Lukavica center.

Through a financial assistance program for the Western Balkans' EU pre-accession process, the EU allocated 1.2 million Euros for the Lukavica detention center for the "construction, supervision, [and] supply of furniture, equipment and vehicles for transportation of the migrants to the countries of origin."⁴⁹ The detention center, in operation since late 2008, was officially inaugurated with great pomp on November 23, 2009, in the presence of BH authorities and representatives of the EU.

The building of Lukavica was one of the conditions set by the EU for BH to fulfill its EU accession, as a part of its EU pre-accession program⁵⁰ requirements. On June 16, 2008, BH formally began its accession to the European Union by signing the Stabilisation and Association Agreement (SAA) with the EU.⁵¹ The SAA requires commitments from BH for improvements in democratization, human rights, reconstruction, development, cooperation, and regional security. Article 80 of the SAA mandates cooperation between the EU and BH on visa, migration, border management, and asylum issues.⁵² Although the agreement has yet to enter into force, the specified cooperation has already begun, as evidenced by the construction and operation of the Lukavica

⁴⁸ Stabilisation and Association Agreement, *supra* note 46.

⁴⁹ This financial assistance program is called the Community Assistance for Reconstruction, Development, and Stabilisation program, or CARDS. 2009 Annual Report on PHARE, Turkey Pre-Accession Instruments, CARDS and the Transition Facility, European Commission, Doc. COM(2010) 793 final, Dec. 20, 2010, at 2. A Works Procurement Notice for the Lukavica construction project also demonstrates the extent to which a delegation of the European Union Commission to Bosnia and Herzegovina exercised control over the design and execution of the project, as the contracting authority. Works Procurement Notice, Construction of a Reception Facility For Irregular Migrants in Bosnia and Herzegovina, Lukavica, Sarajevo, Bosnia and Herzegovina, Tender No. EC/BiH/07/036 (2007).

⁵⁰ Signed at a summit in Sarajevo in 1999, the stability pact for southeast Europe places a large emphasis on border controls. The Balkan countries, including BH, and the EU then initiated the long process of accession to the EU. Stability Pact for South Eastern Europe, Regional Cooperation Council, <http://www.stabilitypact.org/> (last visited Apr. 10, 2011).

⁵¹ *EU Signs Stabilisation and Association Agreement with Bosnia and Herzegovina*, Slovenian Presidency of the EU, Press Release, June 16, 2008,

http://www.eu2008.si/en/News_and_Documents/Press_Releases/June/0616GAERC_BIH.html.

⁵² Stabilisation and Association Agreement, Eur. Communities-Bosn. & Herz., June 16, 2008.

detention center.⁵³ The EU has exercised substantial control of the development of this detention facility and, therefore, must also take responsibility for procedures there that violate EU standards.

In addition, Article 115 of the SAA creates a Stabilisation and Association Council, whose role is to “regularly review, as a rule on an annual basis, the implementation of this Agreement and the adoption and implementation by Bosnia and Herzegovina of legal, administrative, institutional and economic reforms.”⁵⁴ The Stabilisation and Association Council is comprised of the members of the Council of the European Union, members of the European Commission, and members of the Council of Ministers of Bosnia and Herzegovina.⁵⁵ The SAA clearly envisages EU oversight and supervision of reforms that BH undertakes in preparation for accession. Insofar as cooperation has already begun, as evidenced by the construction and operation of the Lukavica detention center, the Stabilisation and Association Council has a duty to ensure that EU-BH cooperation remains faithful to the SAA, including the declaration that “respect for democratic rights and human rights” and “respect for principles of international law” “form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.”⁵⁶

- The EU demanded that the EU standards apply to the detention center of Lukavica

In an EU Commission report, the EU proudly cites the Lukavica facility as one of its “success stories.”⁵⁷ The European Commission has also made clear that EU detention standards must be applied to the Lukavica detention center, explicitly stating that the facility is “for lawful detention of irregular third country nationals in conformity with international and EU standards and best practices.”⁵⁸

2 – The Applicable standards

EU standards applicable to the detention of Foreign detainees:

- ◆ The European Charter of Fundamental Rights

⁵³ The SAA will enter into force once its ratification process has been completed. *Bosnia and Herzegovina - Relations with the EU*, EUROPEAN COMMISSION: ENLARGEMENT, http://ec.europa.eu/enlargement/potential-candidate-countries/bosnia_and_herzegovina/eu_bosnia_and_herzegovina_relations_en.htm (last visited Apr. 10, 2011). BH, whose citizens have recently been exempted from needing visas to enter the EU, is a partner in controlling the Union’s external borders and thereby serves the EU’s interests.

⁵⁴ Stabilisation and Association Agreement, *supra* note 46, art. 115.

⁵⁵ *Id.* art. 116.

⁵⁶ *Id.* art. 2.

⁵⁷ 2009 Annual Report, *supra* note 42, at 18.

⁵⁸ *Id.*

Article 4 on inhumane and degrading treatment is applicable, as well as article 18 on the right of asylum and article 19, the protection against mass expulsion.

◆ The Return Directive

Adopted by the European Parliament on June 16, 2008, the return directive establishes common standards and procedures in Member States for returning illegally staying third-country nationals.⁵⁹

Among those, Article 15 provides “...Each Member State shall set a limited period of detention”.

Article 16 provides, “Third-country nationals in detention shall be allowed—on request—to establish in due time contact with legal representatives, family members and competent consular authorities.”⁶⁰ Article 16 states that member states should provide detainees with full information on their right under national law to contact such individuals.⁶¹

Article 17 of the Directive states, “Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law.”⁶²

Those two articles seem to have been constantly violated by the authorities managing the Lukavica detention center. The EU does therefore fail its commitment of respect of both international Human rights law and European law.

VI. CONCLUSION

Protecting the security of Europe and its individual states is one of the main goal of the European Union. It cannot discard its international and European human rights obligations. When outsourcing its migration flow policies and procedures, the European Union has a responsibility to ensure that its projects outside the EU respect fundamental rights. Migreurop recalls its opposition to the administrative detention of migrants and to the criminalization of immigration which both lead to the violation of fundamental rights⁶³. The above case of hunger strikers of Lukavica’s detention center shows that BH detention system violates the European human rights principle.

⁵⁹ This EU Directive is known as the “Return Directive.” *Detention in Europe: Detention in the Context of Forcible Return of Irregular Migrants*, Jesuit Refugee Service Europe, last updated on Nov. 26, 2010, http://detention-in-europe.org/index.php?option=com_content&view=article&id=103&Itemid=132.

⁶⁰ *Id.* art. 16.

⁶¹ *Id.*

⁶² *Id.* art. 17.

⁶³ <http://www.migreurop.org/article1719.html>