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## THE IMPACT OF COVID-19 RESTRICTIONS ON HUMAN RIGHTS OF IRREGULAR MIGRANTS, REFUGEES AND ASYLUM SEEKERS IN BOSNIA AND HERZEGOVINA

**Jovana Tošić**

Pages: 67–85



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## THE IMPACT OF COVID-19 RESTRICTIONS ON HUMAN RIGHTS OF IRREGULAR MIGRANTS, REFUGEES AND ASYLUM SEEKERS IN BOSNIA AND HERZEGOVINA

*This paper aims to investigate possible human rights violations against irregular migrants, refugees and asylum seekers in Bosnia and Herzegovina as a result of national COVID-19 related measures introduced on the grounds of public health and safety. At the early onset of COVID-19 pandemic, Bosnia and Herzegovina disproportionately interfered with the enjoyment of human rights by imposing series of strict movement restrictions and prohibitions particularly affecting those already in situations of vulnerability. Consequently, people on the move were stranded in the country with limited reception capacities, thus facing severe health and safety risks associated with pandemic. The State's asylum system turned out to be largely ineffective due to persisting institutional gaps as well as reluctance in internal political discourse towards migration issues. Meanwhile, host communities had been turning to xenophobic narratives as a result of political instability and poor migration management during pandemic, which contributed to reinforcement of discriminatory practices.*

Keywords: *irregular migration, asylum seeker, refugees, COVID-19, Bosnia and Herzegovina.*

### 1. OVERVIEW OF MIGRANT SITUATION IN BOSNIA AND HERZEGOVINA

As a part of the so-called Balkan route, Bosnia and Herzegovina (hereinafter: BiH) has been faced with increased migrant arrivals since late 2017.<sup>1</sup> Located at a migration crossroad between Eastern and

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<sup>1</sup> BiH authorities detected more than 81.155 registered arrivals to the country between January 2018 and August 2021. Available at: <https://drc.ngo/our-work/where-we-work/europe/bosnia-and-herzegovina/>.

Western Europe, the country easily turned into a perfect hotspot for mixed migration including both people fleeing war and persecution in countries such as Syria and Afghanistan, but also so-called economic migrants or people in search for better living conditions. (Institution of the Human Rights' Ombudsman of Bosnia and Herzegovina 2018, 58). The Una-Sana Canton, located in north-west of BiH, was heavily hit by the increased influx of migrants due to its close proximity to the Croatian border. At the same time, implementation of violent pushback policies as well as stricter border controls by the Croatian authorities have made it more difficult to enter the territory of the European Union (hereinafter: the EU) which resulted in progressive growth of immigrant arrivals to the Canton of Una-Sana (Deidda 2020, 38).

The challenges posed by illegal migration in BiH are two-fold, thus having both external and internal dimensions. Firstly, the country has shown the overall inability to put in place legal and effective return policies due to absence of readmission agreements with countries of origin as well as adequate mechanism for determining one's identity (Mijović 2018, 544). Besides, border closures and COVID-19 contingency measures introduced by many European countries could be understood as an additional external factor affecting the course of BiH's irregular migratory movements. As for the internal perspective, asymmetric burden sharing and unharmonized migration policy, resulting from domestic political disagreements and divisive, nationalistic agendas put forward by incumbent leaders, led to further deterioration of migrant situation in the country. Thus far the EU has provided a significant financial support to BiH in improving their capacities to address the needs of irregular migrants, refugees and asylum seekers.<sup>2</sup> As correctly remarked by the State Watch (2021) and Mijović (2018, 542), the Union however seems to lack a profound political interest and solidarity in preventing humanitarian emergencies in neighboring countries, including BiH, despite bearing partial responsibility for the situation due to its strict external border controls.

For the time being, BiH is placed in the driving seat with neither multi-level and multi-sectoral approach in place, nor systemic cooperation and solidarity from the neighboring states, including the EU Member States. Consequently, human rights of people on the move

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<sup>2</sup> Since early 2018, the EU has provided EUR 89 million directly to Bosnia and Herzegovina and through implementing partners. Available at: [https://ec.europa.eu/echo/where/europe/bosnia-and-herzegovina\\_en](https://ec.europa.eu/echo/where/europe/bosnia-and-herzegovina_en).

are systematically endangered, thus leaving them in situations of permanent uncertainty where they depend solely on assistance of international organizations such as International Organization for Migration (IOM), the UN Refugee Agency (UNHCR), local Red Cross organizations and other relevant partners. With international border closures and halted migratory movements amidst the ongoing COVID-19 pandemic, health and wellbeing of migrants stranded in BiH are put at more risk than ever before.

## 2. STATE'S RESPONSE TO MIGRATION CHALLENGES DURING THE PANDEMIC

The State's failures in establishing effective asylum system and providing support to the people on the move during the pandemic were reaffirmed by the Amnesty International Report on Bosnia and Herzegovina (2020). Accordingly, political inaction from the competent authorities, including BiH's Council of Ministers and Ministry of Security, has resulted in significant backlog of pending asylum cases and people awaiting registration in the country.

Nevertheless, some state-level awareness of the imminent threats presented by unprecedented influx of refugees and migrants to Europe did exist back in 2016 which resulted in adoption of the Strategy in the field of Asylum and Migration along with the Action Plan for the period 2016–2020 by the BiH Council of Ministers (2016). The said documents encompass some far-fetched details on how the progress of each strategic objective should be achieved in practice, including improvements in the field of border controls, irregular migrations, fight against human trafficking, strengthening of institutional and asylum capacities as well as establishing a permanent system of coordination in line with the EU standards and international refugee law.<sup>3</sup>

Having in mind the situation on the ground which was further complicated by the outbreak of COVID-19 pandemic, majority of the goals set out in the documents remain unaccomplished to date. As suggested by Mijović (2018, 546), one of the main reasons for such a

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<sup>3</sup> The EU standards refer to the number of legal acts adopted within the Common European Asylum System which establishes common procedures for international protection and a uniform status to those granted refugee status or subsidiary protection. For further reference *see* Krstić, Davinić 2013, 212; Islam, Bhuiyan 2013.

failure could be found in quite complex decentralization of the power structure between the state and entities (Republika Srpska and Federation of Bosnia and Herzegovina) as set out in the BiH Constitution<sup>4</sup> which can place disproportionate burden on local governments in the event of a stalemate at the state level as it was the case. Besides, the lack of cooperation among key ministries and bodies at various levels contributes to creating a “buffer zone” with blurred responsibilities and accountabilities for (in)action, which eventually result in violation of some crucial constitutional provisions.<sup>5</sup> Already hobbled by numerous divisions, the country was caught unprepared by the early outset of COVID-19 pandemic.

A series of countermeasures were adopted against the pandemic which directly targeted the rights of migrants, refugees and asylum seekers. The measures refer to restrictions and prohibitions of movement, public gatherings, use of public transport, as well as ban on allowing unofficial transportation and accommodation to migrants.<sup>6</sup> What is more, reception conditions further deteriorated during the pandemic with the opening of “Lipa” improvised migrant camp in Una-Sana Canton which was strongly condemned by the representatives of international community in BiH for strikingly poor reception conditions.<sup>7</sup> As reported by OSCE and Banja Luka Center for Human Rights (2020, 30) the improvised reception facility gradually turned into *de facto* detention center as migrants and refugees were forcibly kept in an overcrowded and unsanitary space in order to limit physical contact with the general public and curb the spread of the virus.

Additionally, the summer of 2020 saw new round of arbitrary prohibitions of migrants’ movement. The Government of Una-Sana Canton, overwhelmed by the migratory pressure and unequal burden sharing, imposed new rules allowing the local police to capture any migrants and refugees residing outside official reception centers and relocate them to the demarcation line between the two Bosnian entities, which some described as a legacy of the country’s 1990s war

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<sup>4</sup> Constitution of Bosnia and Herzegovina (as Amended in 2009), available at: <http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pf>.

<sup>5</sup> *Ibid.*, Article 2(8).

<sup>6</sup> Crisis Headquarters of the Ministry of Health, Labor and Social Policy of Una Sana Canton, Order No. 09–33–3099–2/20, 13.03.2020.

<sup>7</sup> More information available at: <https://www.infomigrants.net/en/post/29469/migrants-in-bosnia-eu-un-officials-condemn-situation-in-lipa-camp>.

(Kovačević 2020). Likewise, relevant authorities of the Serb-dominated entity of Republika Srpska remained persistent in refusing any migrant presence at its territory which rapidly increased the number of people stranded in Bosnia's internal "no man's land" amid rough living conditions and growing COVID-19 pandemic. The situation was worsened by forced closure of some reception centers and additional overcrowding of the ill-equipped "Lipa" camp. The peak of the crisis was reached when the latter was physically destroyed following the withdrawal of IOM and other aid organizations in protest to degrading reception conditions. Since rehousing solutions had been blocked by Bosnian politicians for weeks, hundreds of migrants were forced to reside outdoors in squalid living conditions awaiting humanitarian aid by relevant international partners.

### 3. HUMAN RIGHTS AND COVID-19: ANALYSIS OF THE ISSUES AT STAKE

Even though restrictions on human mobility were justified from the perspective of COVID-19 pandemic, the virus threats cannot be used as a pretext to strip migrants of their basic human rights. At the early onset of the pandemic, some human rights advocates warned about unintended consequences of COVID-19 containment policies on people seeking asylum or third country resettlement as refugees (Libal *et al.* 2021, 149). In Bosnia and Herzegovina, violation of migrants' human rights only spilled over from the usual situation with the outbreak of global health crisis. Legally speaking, reckless restrictions on fundamental rights and freedoms without ensuring humane treatment for the vulnerable population group can amount to serious breaches of the country's obligations towards international human rights law.

#### 3.1. Series of Movement Restrictions: Deprivation of Liberty or Limitation of Movement?

As illustrated previously, repressive anti-migration measures imposed by the State on the grounds of health protection against the pandemic largely revolved around arbitrary prohibitions and restrictions on migrants' mobility, including bans on movement outside official reception centers, public gatherings as well as use of public and private

transportation means. Prior to any legal assessment of the situation at hand, it is necessary to shed some light on concepts of “deprivation of liberty” and “limitation on freedom of movement” under the European human rights system in order to investigate which one of these categories can be attributed to aforementioned national provisions.

Hence, Article 5 of the European Convention on Human Rights (hereinafter: ECHR or the Convention) is conceptually silent on the notion of “deprivation of liberty” which creates blurred lines between the two legal terms and also complicates its relationship with the Article 2 of Protocol 4 guaranteeing freedom of movement. Nevertheless, in *Austin and Others v the United Kingdom* the European Court of Human Rights (hereinafter: ECtHR or the Court) emphasized that the difference between deprivation of liberty and restriction upon liberty of movement was one of degree or intensity, not of nature or substance.<sup>8</sup> Therefore, the point of departure has to depend upon a whole range of criteria such as type, duration, effects and manner of implementation of the measure in question. As for the Article 2 Protocol 4 of the Convention, restrictions on freedom of movement in certain areas are permitted if justified by the public interest in a democratic society.<sup>9</sup>

Considering the practical outcome of the BiH Council of Ministers’ decision on prohibition of migrants’ movement in the course of COVID-19 pandemic<sup>10</sup>, one might say that there was a disproportional interference with the rights under Article 5 rather than Article 2 Protocol 4 of the Convention, mainly due to existence of coercion and prolonged confinement measures seriously affecting migrants’ physical and psychological wellbeing. Particularly worrying is the fact that there no effective alternatives to immigration detention were identified, even in the case of unaccompanied minors. According to judgments in *Rahimi v Greece* and *H.A. and Others v Greece*<sup>11</sup> confinement of unaccompanied children can only serve as a measure of last resort imposed for the shortest period of time, provided that appropriate facilities are ensured. Otherwise, the State is in violation of Article 3 on prohibition of torture, inhuman or degrading treatment, Article 5 on right to

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<sup>8</sup> ECHR, application no. 9692/09, 40713/09 and 41008/09, *Austin and Others v the United Kingdom*, 2012, para. 57.

<sup>9</sup> Article 2(4) of Protocol 4 to the European Convention on Human Rights.

<sup>10</sup> BiH Council of Ministers, Decision 26/30 on restriction of movement and residence of foreigners in BiH, Official Journal of BiH 26/20, 16.04.2020.

<sup>11</sup> ECHR, application no. 8687/08, *Rahimi v Greece*, 2011; ECHR, application no. H.A. and Others v Greece, 16.



liberty and security, but also Article 13 of the Convention in case duration of protective custody measure is undefined. As reported by US Department of State (2020) and Human Rights Watch Report on BiH (2021), prohibitions and restrictions on movement impacted not only undocumented migrants, but also to some extent migrants with a valid proof of asylum intention and naturally wider legal rights with respect to intra-state movements.

Even though imminent threats to public health can justify implementation of certain restrictive policies in accordance with Article 15 of the Convention providing for lawful derogations in time of emergency<sup>12</sup>, it is important to consider the availability of less-stringent measures prior to undertaking any discriminatory action of this kind (Parliamentary Assembly Recommendation 1900 of Council of Europe, 2010).<sup>13</sup> When it comes to migration management amidst the global health crisis, less-restrictive approach would entail special care for groups at risk such as unaccompanied minors, but also milder restrictions on migrants' movement as well as adaptation of housing facilities in line with migrants' humanitarian needs and other State's obligations under the international law.<sup>14</sup>

Not only did the State fail to adopt more adequate movement policies, but it also failed to restore the state of normalcy by reviewing disputed restrictions on a periodic basis as to ensure that they last only as long as necessary within the meaning of Article 5 and Article 15 of the Convention, as well as Article 4 of the International Covenant on Civil and Political Rights (hereinafter: ICCPR). Therefore, it is clear that disputed movement restrictions were merely based on discriminatory grounds, rather than legitimate aim, since no such measures had been imposed on the rest of the population in BiH during the pandemic.

Other movement restrictions turned out to be either unfeasible or arbitrary in real-life, thus violating the State's responsibility to protect vulnerable categories from ill-treatment. More specifically, the

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<sup>12</sup> Article 15(1) sets out three conditions for a valid derogation: i) it must be in time of war or other public emergency threatening the life of the nation, ii) the measures taken in response to that war or public emergency must not go beyond the extent strictly required by the exigencies of the situation, and iii) the measures must not be inconsistent with the State's other obligations under international law.

<sup>13</sup> ECHR, application no. 34082/02, *Rusu v Austria*, 2008; ECHR application no. 56529/00, *Enhorn v Sweden*, 2005, para. 4.

<sup>14</sup> For instance, *see* Article 4 of the ICCPR on states of emergency.

ban on gatherings in public places had no practical effect as a result of overcrowding in reception centers and lack of alternative accommodation capacities which forced many migrants to reside and gather outdoors regardless of the prohibitions in place. Before impulsively restricting their rights to freedom of movement and assembly, the State should have provided suitable housing solutions to unaccommodated migrants in accordance with their needs and exigency of the situation.

Furthermore, the ban on transporting migrants, refugees and asylum seekers only served as a motivation for self-organized vigilante groups whose actions were aimed at preventing additional migrant arrivals via buses and other transportation means which only increased the number of people stuck in the “no-man’s land”. As reported by some non-governmental organizations, significant concerns were raised due to non-exclusion of families with children from the scope of these activities in spite of their vulnerable status (Amnesty International, 2020). The fact that Bosnian authorities have failed to prevent vigilante actions and meet specific needs of endangered migrant groups such as unaccompanied children and women makes the country directly responsible for non-compliance with the principle of best interest of the child within the meaning of Article 8 of the ECHR<sup>15</sup>, but also state’s positive obligation under Article 3 of the ECHR as well as Articles 7, 17 and 24 of the ICCPR.<sup>16</sup> As noted by some authors, vulnerability as such should serve as a limiting factor when introducing restrictive measures on the ground of public health, which requires rather higher standards of protection during the pandemic, especially considering the specificity of the situation of those in need of international protection (Čučković 2021, 17).

### 3.2. Lengthy Procedures, Poor Reception Conditions and Associated Health Risks

In the course of recent events, many have expressed their concern over the lengthy administrative procedures as well as growing number of migrants living rough in public places or overcrowded of-

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<sup>15</sup> Even though the principle of best interest of the child is not explicitly stated in the European Convention on Human Rights, it has been well-recognized in the case law of the European Court of Human Rights. *See* ECHR, application no. 31679/96, *IgnaccoloZenide v Romania*, 2000.

<sup>16</sup> Also see ECHR, application no. 15297/09, *Kanagaratnam and others v Belgium*, 2011.

ficial reception centers in BiH. As for prolonged procedures, the latest judgment of the ECtHR in the case of *Muqishta v. Bosnia and Herzegovina*<sup>17</sup> is worth recalling. In particular, the Court identified a violation of the right to fair trial embedded in Article 6(1) of the Convention due to failure of BiH's authorities to meet the "reasonable time" requirement within the meaning of the aforementioned article and relevant case law. Although there are neither resolved nor pending cases of this kind before the ECtHR with a reference to the latest migration crisis in BiH, such scenario is also easily imaginable when it comes to asylum procedures, which have been criticized for being lengthy and inaccessible. According to the UNHCR's official report from 2018, out of 70 percent of people who expressed their intention to seek asylum in BiH, only 30 percent submitted formal applications, which perfectly reflects the poor migration management and limited access to asylum procedure in the country. (UNHCR, 2018). Besides, these procedures are particularly inconvenient and almost out of reach for those not accommodated at one of the official reception centers.

Speaking of the reception conditions and associated health risks of migrants and refugees, the available data leaves no room for optimistic predictions. According to Special Representative of the Secretary General on Migration and Refugees to BiH, some 4,000 – 5,300 migrants, out of 9,000 – 10,000 were present in the country and estimated to be living rough, including women and children (2021). Health risks stemming from COVID-19 pandemic were aggravated by reduction of official accommodation capacities after the closure of "Bira" and "Lipa" reception centers, which contributed to additional overcrowding in remaining reception centers even amid harsh weather conditions. From legal point of view, migrants' confinement in reception centers is allowed provided that minimum procedural safeguards are met such as protection from arbitrariness, discrimination and ill-treatment in order to ensure full protection of non-derogable rights at all times.<sup>18</sup>

More precisely, Article 5(1) of the Convention states that migrants may be deprived of liberty only in accordance with a procedure prescribed by law while detention measure can be justified on

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<sup>17</sup> ECHR, application no. 27994/19, *Muqishta v. Bosnia and Herzegovina*, 2021.

<sup>18</sup> See Article 5(1) of the European Convention on Human Rights, Article 26 of the 1951 Refugee Convention and Article 9 of the ICCPR.

two grounds: to prevent unauthorized entries or for the purpose of expulsion. In *Saadi v Italy*, the Court enlisted several prerequisites for lawful migrants' detention.<sup>19</sup> Thus, in order to avoid arbitrariness and violation of the Convention, the Court stated that this type of detention needs to be driven by the principle of good faith as well as legitimate aim, while the place and duration of detention measure must be appropriate and reasonable. On the other hand, definition of reception conditions is unfortunately contained in very few international human rights instruments. Neither the ECHR nor 1951 Refugee Convention set out exact material standards for migrants' reception, but some of the existing provisions do cover certain rights and freedoms attributable to the subject in question.<sup>20</sup> However, the Article 25 of Universal Declaration of Human Rights seems to be more specific in the light of migrants' right to "an adequate standard of living which guarantees their subsistence and protects their physical and mental health", as well as the EU's Reception Conditions Directive<sup>21</sup> which lays down standards for reception of applicants seeking international protection in terms of accommodation, healthcare, employment as well as special care for vulnerable migrant groups such as women and children. The impressive body of the ECtHR case law, notably in the field of reception conditions of refugees and asylum seekers, significantly helped with clarification of the relevant legal questions and ambiguities.

In light of the Article 3 of the Convention and principle of *non-refoulement*<sup>22</sup> thereof, systemic flaws in the asylum system and reception conditions of a state can result in inhuman or degrading treatment. In the infamous case of *M.S.S. v Belgium and Greece* the Court considered that "the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it constituted degrading treatment contrary to Article 3 of the Convention" while the applicant's distress was

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<sup>19</sup> ECHR, application no. 37201/06, *Saadi v Italy*, 2008.

<sup>20</sup> See Articles 21 and of the 1951 Refugee Convention. Also see Articles 2, 3, 5 and 14 of the European Convention on Human Rights.

<sup>21</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96 of 29/06/2013.

<sup>22</sup> Non-refoulement prohibits states from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations. See General Principles of the UN Convention against Torture, Inhuman or Degrading Treatment or Punishment, C/50/R.2.

“accentuated by the vulnerability inherent in his situation as an asylum seeker”.<sup>23</sup> In other words, the Court underlined that inappropriate detention conditions can amount to violation of the Article 3 ECHR. Needless to say, not every ill-treatment can fall under the scope of this article which means that a minimum level of severity must exist.<sup>24</sup>

While any torture accusations against BiH under Article 3 of the Convention would seem rather weak and unfounded, there is a solid ground for claiming inhuman and degrading treatment which involves a lesser degree of suffering inflicted (Moya and Millios 2021, 49). Taking into consideration largely inadequate living conditions of migrants and lack of necessities such as food, shelter, water, electricity, which can cause intense physical or mental suffering, it seems that there is enough evidence to put into question the country’s international obligations under Article 3 ECHR with respect to inhuman treatment of migrants and refugees. (European Commission: Bosnia and Herzegovina Factsheet, 2021). As stated in *Ireland v. the United Kingdom*, mental suffering is equally important element in terms of violation of Article 3 ECHR.<sup>25</sup> Even in the absence of actual physical or psychological harm, degrading treatment can be claimed as long as it debases or humiliates the individual, which was specifically emphasized in the case of *Idalov v. Russia*.<sup>26</sup>

From the perspective of Article 5, taken in conjunction with Article 3 of the Convention, detention measure imposed upon migrants is legitimate and proportionate as long as suitable living conditions are ensured with due diligence.<sup>27</sup> Additionally, the Court has found on numerous occasions that poor detention conditions, including overcrowded facilities with lack or absence of adequate sanitation as well as medical care, can amount to degrading treatment.<sup>28</sup> Having said that,

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<sup>23</sup> ECHR, application no. 30696/09, *M.S.S. v Belgium and Greece*, 2011, para. 233. Also see ECHR, application no. 19400/11, *R.R. and Others v Hungary*, 2013; ECHR, application no. 29217/12, *Tarakhel v Switzerland*, 2014; ECHR, application no. 28820/13, *N.H. and Others v France*, 2020.

<sup>24</sup> ECHR, application no. 5310/71, *Ireland v. the United Kingdom*, 1978, para. 162.

<sup>25</sup> *Ibid.*, para. 176.

<sup>26</sup> ECHR, application no. 5826/03, *Idalov v. Russia*, 2012, para. 41.

<sup>27</sup> ECHR, application no. 13229/03, *Saadi v the United Kingdom*, 2008.; ECHR, application no. 42337/12, *Suso Musa v Malta*, 2013.

<sup>28</sup> ECHR, application no. 1443705, *Modarca v. Moldova*, 2007; ECHR, application no. 9852/03 and 13413/04, *Hummatov v. Azerbaijan*, 2017.

temporary tent settlements such as “Lipa” camp, without sufficient physical space, access to heating, running water, sanitation or sewage, cannot be regarded as dignified and suitable solution for accommodation of migrants, refugees and asylum seekers, especially considering pandemic health concerns. Thus, overcrowding in densely populated reception facilities with no or limited possibility to practice widely prescribed social distancing and other relevant means of protection makes a perfect breeding ground for the virus transmission and associated health risks which could also possibly impact the right to life under Article 2 of the Convention.

The fact that respective State authorities were indifferent towards migrants, refugees, and asylum seekers, including highly vulnerable migrant sub-category comprised of women and children, makes the country internationally responsible for violation of both substantive and procedural duties under the international human rights law.<sup>29</sup> As the situation in reception camps across BiH deteriorates and turns into humanitarian crisis, a handful of alerts has been issued against a possible risk of smuggling and trafficking among migrants who are financially capable to facilitate their onward journey in search for better reception conditions and access to healthcare (Bird 2020, 19). Having in mind that the rise in COVID-19 infections is likely to increase health needs of both migrants and BiH nationals, there is a firm ground to believe that migrants will not be placed in the country’s framework of priorities when responding to the crisis and deciding upon reallocation of available resources.

### 3.3. Pandemic of Exclusion: Revival of Anti-Immigration Narratives

As some findings suggest, the pandemic fanned the flames of already high-rates of stigma and xenophobia towards people on the move (UNHCR 2021, 1) and BiH was no exception to this trend. Politically and economically fragile post-war countries such as BiH can

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<sup>29</sup> General Comment No. 17 (2013) on the right of the child to rest, leisure, play recreational activities, cultural life and the arts, available at: <https://www.refworld.org/docid/51ef9bcc4.html>. Also see General Recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, available at: <https://www.refworld.org/docid/4d467ea72.html>.

serve as a conducive ground for proliferation of extremist behaviors and narratives which many have warned about, including IOM (2021). The COVID-19 related discrimination issues in the country should be tackled from two different angles, namely horizontal (tensions between migrants and host communities) and vertical (tensions between migrants and the host state).

Despite its different manifestations, the problem of growing anti-migrant sentiment seems to be rooted in the State's failure to effectively control spread of the virus, manage migratory movements and halt episodes of discontent and violence suffered by both local communities and migrants in the course of pandemic. Increasingly restrictive COVID-19 related policies, that criminalized not only migrants but all forms of solidarity with them, can be perceived as one of the main causes of these multifaceted tensions (Čebren et. al. 2020, 412). In spite of its compliance with internationally prescribed standards, the national Law on Prohibition of Discrimination<sup>30</sup> remains largely ineffective as a result of, *inter alia*, political obstructionism within the country as well as continuous reductions in budget of BiH Ombudsman Institution which consequently disrupts its powers and operating practices in the field of human rights protection and promotion (Council of Europe, 2021).

Speaking of discrimination from the perspective of international human rights law, all individuals must be guaranteed equal treatment and protection regardless of, *inter alia*, their race, ethnicity, or immigration/citizenship status in any given country.<sup>31</sup> Additionally, states are obliged to combat and condemn all forms of hatred, xenophobia and discrimination and promote positive narratives which reflect the reality of migrants' real-life experiences. Considering COVID-19 circumstances, the principle of non-discrimination also requires a proactive approach that would benefit the community as a whole and reduce the risk of virus transmission by providing vital life-saving services

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<sup>30</sup> The BiH Law on Prohibition of Discrimination, BiH Official Gazette 59/09; The BiH Law on Amendments to the Law on Prohibition of Discrimination, BiH Official Gazette 66/16.

<sup>31</sup> Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR); Article 2(2) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR); Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Articles 1(3) and 55 of the Universal Declaration of Human Rights (UDHR); Article 3 of the Convention Relating to the Status of Refugees (Refugee Convention).

irrespective of one's affiliation to a particular group. As correctly remarked in International Journal of Refugee Law (2020), COVID-19 pandemic knows no boundaries and respects no borders – it affects everyone irrespective of their nationality, age, gender, race or any other status. However, some might be more exposed and vulnerable to virus infection, such as migrants, refugees and asylum seekers residing in highly occupied facilities with limited or no access to life necessities.

In order to compensate for these differences and comply with the principle of non-discrimination, the State's COVID-19 containment and mitigation measures should be applied to everyone, but not equally, meaning that protection of vulnerable groups would urge additional attention in line with other non-derogable human rights such as right to life, protection from torture, slavery as well as the principle of *nullum poena sine lege*.<sup>32</sup> Taking into account inaccessible national programs for socio-economic recovery from COVID-19, unaddressed health needs of migrants, but also other restrictions on citizens' movement during pandemic which did not entail complete movement bans<sup>33</sup>, it is obvious that State's approach to the pandemic constituted multiple discrimination based on immigration status, national/ethnic origin and gender. If discrimination is perceived as an unequal treatment of equals (direct discrimination) and/or equal treatment of unequals (indirect discrimination) (Krstić 2018, 16), one might conclude that Bosnian migration policy can be viewed through the lens of the former definition as it disparately impacts rights of persons seeking international protection.

Although the rest of BiH population was also affected by arbitrary movement restrictions that were later declared unconstitutional, disproportional and discriminatory by the BiH Constitutional Court<sup>34</sup>, it is important to highlight discrepancy between the measures im-

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<sup>32</sup> No punishment without law.

<sup>33</sup> Conclusion on the mandatory implementation of measures in response to the occurrence of diseases caused by COVID-19 in Republika Srpska, No. 01–3/20; Conclusion on restriction and prohibition of movement on the territory of Republika Srpska, No. 16–3/20, Conclusion on restriction and prohibition of movement of persons on the territory of Republika Srpska, No. 26–2/20; Order prohibiting the movement of persons under 18 and older than 65 in the territory of the Federation of Bosnia and Herzegovina, No. 12–40–6–148–34/20; Order on introduction of ban on movement of citizens on the territory of the Federation of Bosnia and Herzegovina, No. 12–40–6–148–32/20. Also see Constitutional Court of BiH, AP-3683/20 40, E.Š. and Others, 22.12.2020.

<sup>34</sup> Constitutional Court of BiH, AP-3683/20 40, E.Š. and Others, 22.12.2020.



posed on the general public and on persons in need of international protection. While the contested age-specific restriction of movement imposed upon entire BiH population might have caused some feelings of distress, migrants had been exposed to greater risks in terms of their physical and mental health as a consequence of absolute movement bans and unreasonably long confinement in overcrowded reception centers across the country. By comparing two different population groups, it is clear that disputed anti-COVID-19 measures were rather rooted in discriminatory preconceptions and attitudes towards people on the move, contrary to the values enshrined in Article 14 of the Convention but also Article 12 of the ICCPR, since no such measures have been inflicted upon host communities at the same point in time.

Therefore, the country has overstepped its discretionary powers when it comes to the proportionality requirement as well as permissible discriminatory treatment of aliens during pandemic times. Not only did the State fail to suppress anti-immigration narratives through different educational or media tools in accordance with its positive obligation, but it also breached its negative duty to abstain from human rights violations. Thus, discriminatory health and mobility measures only stirred up already existing tensions in the country and contributed to perpetuation of social stigma against irregular migrants, refugees and asylum seekers.

#### 4. FUTURE PROSPECTS

Due to persistent institutional gaps and political disagreements at all levels, the country seems to be paralyzed amid numerous exigencies necessitating an effective and prompt response. Inadequate border protection and unequal distribution of the burden among state-level and local authorities pose a serious threat not only to persons seeking international protection but also host communities themselves. In order to prevent humanitarian crisis from unfolding, BiH urgently needs transparent and well-managed migration policy followed by fair distribution of available resources, but also articulated diplomatic action from external partners, including the EU, regional countries as well as migrants' countries of origin. The best-case scenario would also entail an effective management of migrant reception system in line with prescribed international standards as

well as adherence to inclusive and non-discriminatory health practices during the COVID-19 pandemic.

Even though it is important to welcome the latest legislative efforts made with respect to alignment of BiH Bylaw on Asylum with *acquis communautaire*, it is difficult to expect efficient practical implementation of the proposed amendments, bearing in mind persisting anti-immigrant trends. Also, the draft amendments to the Bylaw on Asylum should have been discussed with a wider political audience in BiH (rather than fewer), in line with the 'all-hands-on-deck' approach. The well-functioning asylum system requires a great deal of political support as well as practical functioning of institutions at all levels which is not the case at the moment. The substance of the proposed amendments could have been improved as well because the current ones do not seem suitable for the situations of increased migrant arrivals. Such scenario will most probably be inevitable in the coming months considering mass displacement caused by the ongoing Russia-Ukraine conflict. In order to effectively respond to existing and forthcoming challenges, BiH needs to facilitate internal political dialogue as well as government capacities. As stated by the UNHCR, the asylum procedures should be more efficient and conducted in a timely manner as to allow simultaneous submissions of asylum requests which is necessary in cases of increased migrant flows. Also, a special working group should be established to address the current backlog of pending asylum cases, while the particular attention needs to be drawn to safeguarding procedural guarantees for vulnerable sub-category of migrant groups such as women and children (UNHCR, 2021).

When it comes to irregular migrants and refugees, BiH is in urgent need of more adequate reception conditions from the perspective of both spatial and material requirements. The existing reception centers must be better equipped as required by the exigencies of the COVID-19 situation. Also, expansion of reception capacities should be taken into consideration in order to brace for inevitable migrant arrivals in the future. The country should also work on curbing xenophobic migrant narratives in media and promote fact-based public discourse in order to change the overall perception on migration. Finally, the country needs to ensure effective coordination of border management at all levels, but also to provide for more transparent and proportionate allocation of international humanitarian aid. The practical realization of the latter has been particularly problematic due

to multiple hurdles posed by decentralized power structure. In order to depart from corrupt practices, the country needs to reconsider its methods of aid distribution as to ensure that it is received only by the local governments in need.

## 5. CONCLUSION

For the aforementioned reasons, it can be concluded that BiH's COVID-19 emergency measures were inadequately implemented without due respect for standards and procedures set out in relevant international human rights instruments. As a result of reckless restrictions and prohibitions imposed in the fight against the ongoing pandemic, rights of persons in need of international protection were heavily affected, including those of both peremptory and discretionary nature.

More specifically, series of movement bans have disproportionately interfered with individual liberty rights under Article 5 of the ECHR, while poor reception conditions and migrants' treatment thereof can amount to inhumane and degrading treatment pursuant to Article 3 of the Convention. Despite the fact that BiH has not been subject to formal accusations within the meaning of the latter article, or at least not yet, it is hard to divert attention from such legal reasoning considering a great deal of the relevant ECtHR case law.

Besides, highly vulnerable migrant groups such as children and women were not taken into consideration, especially in decisions regarding mobility restrictions and family unity. Finally, persons seeking international protection were deprived of their equality rights and freedoms set forth in Article 14 of the Convention as a result of discriminatory treatment between the two comparing groups (migrant communities on one hand and other population groups on the other hand) based on nationality/ethnicity and gender. Therefore, what may have seemed as a justified derogation in time of global health crisis resulted in serious human rights violations and breaches of State's obligations under international law.

As some have correctly explained, portraying migrants as a national security challenge rather than humanitarian concern is related to a broader politicization of immigration issues in BiH (Hodžić 2020, 94). In the absence of adequate long-term solutions, internal coordination and much needed international pressure that goes beyond emer-

gency funding, BiH is likely to turn into a place of recurring humanitarian catastrophe.

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