



## International Covenant on Civil and Political Rights

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### Human Rights Committee

### Communication No. 1955/2010

#### Views adopted by the Committee at its 109th session (14 October – 1 November 2013)

<i>Submitted by:</i>	Zeyad Khalaf Hamadie Al-Gertani (represented by counsel, Nedzmija Kukricar)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Bosnia and Herzegovina
<i>Date of communication:</i>	4 June 2010 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 92 and 97 decision, transmitted to the State party on 14 June 2010 (not issued in document form)
<i>Date of adoption of Views:</i>	1 November 2013
<i>Subject matter:</i>	Deportation to Iraq
<i>Substantive issues:</i>	Risk of torture and other cruel, inhuman or degrading treatment or punishment upon return to country of origin; Prohibition of <i>refoulement</i> ; arbitrary and unlawful interference with privacy and family life; prohibition of discrimination
<i>Procedural issues:</i>	Exhaustion of Domestic Remedies; Insufficient substantiation
<i>Articles of the Covenant:</i>	6; 7; 9, paragraphs 1, 2, and 4; 13; 14; 17; 23; 24; and 26
<i>Articles of the Optional Protocol:</i>	2; 5, paragraph 2 b)

[Annex]

## Annex

### **Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (109th session)**

concerning

#### **Communication No. 1955/2010\***

*Submitted by:* Zeyad Khalaf Hamadie Al-Gertani (represented by counsel, Nedzmija Kukricar)

*Alleged victim:* The author

*State party:* Bosnia and Herzegovina

*Date of communication:* 4 June 2010 (initial submission)

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting on* 1 November 2013,

*Having concluded* its consideration of communication No. 1955/2010, submitted to the Human Rights Committee by Zeyad Khalaf Hamadie Al-Gertani under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts the following:*

#### **Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication is Mr Zeyad Khalaf Hamadie Al-Gertani, Iraqi national, born on 30 March 1970. He claims to be victim of a violation by the State party of his rights under articles 6; 7; 9, paragraphs 1, 2, and 4; 13; 14; 17; 23; 24; and 26, of the Covenant. At the time when he submitted the communication, he was detained at an Immigration Centre in Eastern Sarajevo, awaiting removal to Iraq. The author is represented by counsel. The Optional Protocol entered into force for the State party on 2 June 1995.

1.2 On 14 June 2010, the Special Rapporteur on New Communications and Interim Measures, acting on behalf of the Committee, requested the State party, pursuant to rule 92 of the Committee's rules of procedure, to refrain from deporting the author to Iraq while his case is under consideration of the Committee. On 15 December 2010, the State party

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

informed the Committee that the author's deportation was suspended in light of the Committee's request; and that, having been considered a threat to the State party's national security, the author would continue under measures of control (surveillance) in the Immigration Centre in Sarajevo, from where he was forbidden to leave.

### **Factual background**

2.1 The author is a Sunni Iraqi. He alleges that his mother's family was affiliated with Saddam Hussein's regime, and in particular, his brother was a member of the Republican Guard. He further argues that in 1989 he began his military service in the Iraqi army; that in February or March 1991, he deserted the army when Iraq occupied Kuwait; that following his desertion, he hid in the suburbs of Baghdad with some of his relatives. The author claims that he later learned through his relatives that he had been sentenced to death in absentia and that his brother was excluded from the army and condemned to a year in prison as a result of the author's desertion.

2.2 According to the author, he spent nine months hiding in Mosul and Arbil, Iraqi Kurdistan. He managed to obtain a forged passport issued by the "Iraqi Kurdistan's authorities" and feeling insecure he travelled to Iran, Pakistan and Sudan. Later, he went to Yemen where he resided for 11 months. He obtained a new forged Yemeni passport under the identity of Abdulla Seid Ali Ba-Awra, one of his friends' names, and travelled to Syria and Turkey. Subsequently, he moved to Croatia and arrived in Bosnia and Herzegovina (BiH) in September 1995.

2.3 In November 1995, he married a woman with BiH's nationality. They have three minor children. He settled in BiH and worked in the second-hand car business. On 4 January 1996, the Ministry of Internal Affairs granted him the BiH citizenship, under the name Abdulla Seid Ali Ba-Awra.

2.4 The author maintains that in 2003, he reported his true identity to the authorities of the Ministry of Internal Affairs of the Zenica-Doboj Canton and informed them that his full name was Zeyad Khalaf Hamadie Al-Gertani. However, they did not take it seriously as he did not provide any document to prove his real identity. In 2005 his brother managed to get him an ID card in Baghdad, which was subsequently submitted by the author to the State party's authorities. On 29 January 2007, his BiH citizenship was revoked by the State Commission for the Revision of Decisions on Naturalization of Foreign Citizens on the grounds that he had obtained it under a false identity.

2.5 On 3 or 4 May 2009, by decision of the Service for Foreigners Affairs the author was apprehended and placed in an Immigration Centre in Eastern Sarajevo until 3 June 2009 on account of threat to the legal system, public order, peace and security of BiH, and of a reasonable doubt on his real identity pursuant to article 99 (2) (b) and (c) of Law on Stay and Movement of Aliens and Asylum (LSMAA). The author submitted an appeal against this measure to the Court of BiH. On 8 May 2009, the author's application was rejected. Subsequently, the detention order was extended periodically and the author has remained in detention since then.

2.6 On 13 May 2009, the author lodged a request for international protection to the Asylum Sector of the Ministry of Security in accordance with the LSMAA and claimed that he could not take his wife and children, BiH's nationals, to a country in war, as they would be exposed to human rights violations. On 18 and 20 May 2009, the author was interviewed by the authorities in presence of his legal counsel and a UNHCR representative. He claimed that he feared to be killed or tortured if returned to Iraq since he was sentenced to death, there was a civil war, and the country is governed by Shi'ites while he is a Sunni. He further claimed that at the time when he deserted, a person sentenced to death penalty by a military court was executed immediately. For this reason, he had to escape quickly and only

learnt about the sentence later, through his family. He pointed out that even without a verdict against him, he would be in danger due to his ethnic origin. He also mentioned that he belonged to a well known Sunni family, that several of his relatives were killed, and that his family fled to Syria or to the Iraqi border with this country. As to the use of a Yemeni passport under the name of Abdulla Seid Ali Ba-Awra, the author stated that he did not use his real identity in order to protect himself from reprisals from the former Iraqi regime.

2.7 On 28 May 2009, his asylum request was dismissed by the Asylum Sector of the Ministry of Security pursuant to articles 105, 106 (4) (a), 109 (6), 116 (1) (c), and 118 of the LMSAA as the State party's Intelligence and Security Agency had placed the author on the list of persons posing a threat to the State's security. Furthermore, his application did not disclose grounds for applying the principle of *non-refoulement* since the author's accounts lacked credibility and the reasons provided to ground his request for protection were not reasonable. He was given 15 days to leave the State party's territory. The decision pointed out that although there were concerns about the human rights situation in Iraq, international reports on the situation of human rights in Iraq indicated that members of the former regime, who supported it and were affiliated to the Ba'ath party were at risk, whereas Sunnis *per se* did not face such a danger. In this respect, the decision upheld that the author did not support the previous regime as documented by his desertion from the army; that his brother who worked in the Republican Guard was separated from his duties and sentenced by the previous regime; and that his allegation that his family was a well-known Sunni family was not documented. His alleged death sentence, if imposed, happened in the early-90s during a regime that was overthrown in 2003 when Shi'ites came to power; and there is no indication that the new regime would execute this sentence. Moreover, on 15 July 2007 one of his relatives obtained for him a citizenship certificate in Baghdad; on 11 May 2008, the author was also able to obtain a copy of his Iraqi passport issued by the Iraq's Embassy in Vienna and valid until 2016; and when the State party's authorities placed the author under measures of control (surveillance), his wife contacted the Iraqi Embassy in Belgrade and requested for assistance. Finally it was established that in spite of Iraq's violent situation, there was not a systematic persecution of Sunnites.

2.8 On 29 May 2009, the Asylum Division of the Ministry of Security extended the author's measures of restriction of movement and prohibition to leave the facilities of the Immigration Centre in Sarajevo for a period of 90 days as of 4 June 2009.

2.9 On 10 June 2009, the author filed an application against the denial of international protection before the Court of BiH and maintained that the decision was arbitrary. He claimed that there was an incorrect and incomplete understanding of the facts as to the risk he faced in Iraq; that the findings that he posed a threat to the public order or security were not justified or supported by any evidence; and that the authorities failed to take into consideration the human rights situation in Iraq, which resulted in an incorrect assessment of the factual situation and the risk that the author would face if deported. He further argued that the international reports, consulted by the authorities, revealed a climate of violence, including from sectarian and party-influenced militias, and human rights violations<sup>1</sup>. As to his family situation, he claimed that the authorities failed to consider whether his potential departure would significantly affect his family; that his family assimilation to the Iraqi society would not be possible given that they were BiH's nationals, did not speak Arabic, and did not have any tie with this country.

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<sup>1</sup> The author refers to the *UNHCR Guidelines of April 2009 in assessing the international protection needs of asylum-seekers from Iraq* which states that Iraqi asylum-seekers from five Central Governorates, among them Baghdad, should be considered in need of international protection. If they were found not eligible for refugee status, they should still be considered to be at risk of serious harm in the situation of armed conflict, which was ongoing in Iraq.

2.10 On 26 August 2009, the Ministry of Security extended the measures of restriction of movement against the author for 90 days, since the appeal filed by him was still pending.

2.11 On 18 November 2009, the Court of BiH rejected the author's application against the decision that revoked his BiH nationality. The author appealed this decision to the Constitutional Court. By the time the author submitted his communication to the Committee, his appeal was still pending.

2.12 On 23 November 2009, the Court of BiH rejected the author's application against the denial of protection. The Court stated that in rejecting the author's request for international protection pursuant to articles 105, 106(4), and 118 of the LSMAA, the Ministry of Security examined whether the author fulfilled the conditions for protection in accordance with the principle of *non-refoulement*. However, after a full and detailed examination of the information provided by the author, it concluded that his allegations of fear of being persecuted were not founded. The Court pointed out that the author left the State party's territory several times in 1995; that he and his family went to Dubai on vacations; and that he went to Hungary where he filed an asylum request that was later withdrawn. He did not prove before the Ministry of Security that a death sentence against him was actually passed, and during the interviews he kept avoiding to provide specific answers to the questions posed by the authorities. Given that the author was considered a threat to the public order and safety of the nation, the order to leave the State party's territory was legal and did not violate the author's right to family and private life since its exercise must be in line with the public interest and the State's national security. Since it was a final decision, on 30 November 2009, the Ministry of Security imposed on the author measure of control (surveillance), keeping him in the Immigration Centre in Sarajevo, without permission to leave it. This measure was continuously extended every 30 days.

2.13 On 15 December 2009, he lodged an application to the Constitutional Court against the Court of BiH's ruling and a request for interim measures in order to suspend his deportation. The author claimed that the Court of BiH's judgment was unlawful as it violated his fundamental rights: prohibition of torture, inhuman or degrading treatment or punishment, right to private and family life; right to an effective remedy; right to free enjoyment of his rights without discrimination, and right to contest the removal order and to a judicial review, enshrined in the Constitution and in the European Convention on Human Rights (ECHR). The author reiterated his claims and pointed out that the Ministry of Security did not explain why it considered that the name under "Abdulla Ba-Awra born on August 1974 in Kuwait", that appeared in the list of persons who were classified as threat to the national security, referred in fact to the author (Zeyad Khalaf Hamadie Al-Gertani, born on 30 March 1970 in Baghdad). Further, he argued that a person should not be returned to a place where he would be subjected to torture or other severe ill-treatment regardless of how unwelcome or dangerous he might be for the State which examined the request for international protection.

2.14 On 25 February 2010, the Constitutional Court rejected the author's request for measures to suspend his deportation as no decision had been made on his forced removal from the State party's territory if he failed to leave the territory voluntarily.

2.15 On 4 May 2010, the Service for Foreigners Affairs of the Ministry of Security issued an expulsion order against the author and prohibited him to enter and stay in BiH during a period of 5 years. He appealed the expulsion order on 12 May 2010. On 13 May 2010, he filed a second request for interim measures to the Constitutional Court on the grounds that an expulsion order had been issued against him. On 28 May 2010, the Ministry of Security rejected the appeal against the expulsion order.

### The complaint

3.1 The author claims that his deportation to Iraq by the State party would constitute a violation of articles 6; 7; 13; 14; 17; 23; 24; and 26, of the Covenant.

3.2 The author holds that the State party's authorities did not assess adequately the risk he would be subject to if returned to Iraq, notably that he would face a real risk of being detained immediately, tortured, and killed. Therefore, his return to Iraq by the State party would constitute a violation of articles 6 and 7 of the Covenant. The author contends that Sunni Arabs face a particular risk of being detained, tortured and executed for alleged involvement in or supporting Sunni armed groups; that the execution of death penalties in Iraq imposed against alleged insurgents has increased; and that Iraqi authorities will perceive him as being affiliated with the former regime and/or with these armed groups.<sup>2</sup> In light of the circumstances and his personal and family's background, he would catch the attention of the Iraqi authorities at the airport and be considered a potential threat, especially if he were to be returned from BiH by force. He faces a real risk of being executed for a crime compromising the internal security of Iraq on the mere ground that he is a Sunni Arab related to the former regime and because of his detention on security grounds in BiH. Furthermore, the death sentence imposed on him for deserting the Iraqi army would still apply even if it was decided under the former regime.

3.3 With regard to articles 13 and 14, read in conjunction with article 2, paragraph 3, the author contends that his request for international protection was denied on grounds of threat to the public order and national security, but he was not informed why he was considered a threat. He was not confronted with any facts, let alone evidence, relating to this threat and this issue was not even mentioned during the proceedings related to his request for international protection. The authorities merely referred to a list with names of persons who allegedly represented a security threat. The author submits that a security threat allegation has to be corroborated if it serves as a basis for an expulsion or prolonged detention. Therefore, the procedural safeguards set out in article 13 with regard to expulsions were violated, and he did not receive a fair and public hearing in accordance with article 14 of the Covenant.

3.4 With regard to the author's claims of violation of articles 17, 23 and article 24 of the Covenant, he submits that his detention and possible deportation constitute an arbitrary and unlawful interference with his privacy and family life. His wife and minor children are BiH's nationals, do not speak Arabic, and have no ties whatsoever with the Iraqi culture. They cannot follow him to a country facing a civil war with a deplorable security situation. Therefore, the execution of the expulsion order in practice would entail the split of his family for several years with a negative impact on the well-being of his children. In this regard, the authorities failed to assess properly the seriousness of the interference with the author's family life and the best interest of the children as defined in article 3 of the 1989 Convention on the Rights of the Child. Recalling the Committee's General Comment No 15<sup>3</sup>, the author claims that although the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party and that it is in principle a matter for the State to decide who it will admit to its territory, there are certain circumstances when an alien may enjoy the protection of the Covenant in relation to entry or reside in a country, in particular when there are considerations of respect of their family life.

3.5 As to his claim under article 26, the author submits that the determination of threat to the national security made by the authorities, which served as the main reason for

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<sup>2</sup> The author refers to the UNHCR Eligibility guidelines for assessing the international protection needs of Iraqi asylum-seekers and Amnesty International's Human Rights Briefing: Iraq of 1 March 2010.

<sup>3</sup> See Committee's General Comment No. 15, para. 5.

detaining him and expelling him from the country where he lived for almost 15 years, was based on prejudices against persons of Arabic origin who practice Islam.

#### **State party's observations on admissibility**

4.1 On 13 October 2010, the State party provided its observations on the admissibility of the communication.

4.2 The State party points out that the author entered in BiH illegally under someone else's name, as Abdulla Ba Awra Said Ali, national of Yemen and with a Yemeni passport. On the basis of documentation of the Embassy of Iraq and the Interpol as well as other evidence, the authorities found that his actual identity is Zeyad Khalaf Hamadie Al-Gertani. The revocation of his BiH's nationality and rejection of his request for international protection were motivated in part on grounds of threat to the public order, peace and national security as established by a document classified as "confidential" by the Intelligence and Security Agency. The author only applied for international protection two years after his BiH's citizenship was revoked, and when certain control measures were imposed against him. The State party maintains that the purpose of his request was to delay his deportation and represented an abuse of the right to request international protection.

4.3 The author filed an appeal before the Court of BiH against the Ministry of Security's decision of 28 May 2010 that confirmed the expulsion order against him. However, at the moment of presentation of the State party's observations this proceeding was still pending of court's decision.

4.4 On 28 July 2010, the Office for Foreigners Affairs extended the measure of control (surveillance) that placed the author in the Immigration Centre, until 5 September 2010, limiting his right to free and unrestricted movement. The author appealed this decision to the Ministry of Security. On 29 July 2010, his appeal was rejected. Subsequently, the author instituted a proceeding before the Court of BiH against this decision. At the moment of presentation of the State party's observations, no decision had been taken by the Court. The State party further notes that beginning of proceedings against the decision on deportation did not suspend its effects by itself and therefore did not delay the execution of the decision on deportation.

4.5 During the proceedings the Ministry of Security and the Court of BiH considered all the author's allegations. The authorities did not only limit themselves to conclude that he was a threat to the State's security, but also examined his request within the framework of article 91 of the LSMAA and assessed the alleged danger or risk the author would be exposed if deported to Iraq. The author's rights under articles 6, 13, 14, 17, 23, 24, and 26, of the Covenant were not violated while considering his request for international protection. In addition, the State party maintains that his right to liberty of movement could be subject to restriction under exceptional circumstance, for instance, to protect national security and public order. Further, the involvement of public authorities for the purpose of protection of the national interests is necessary in a democratic society. If a decision is taken in this regard, such decision prevails over the right to privacy and family life.

4.6 In light of the above, the State maintains that the author's communication is not sufficiently substantiated and that therefore shall declared inadmissible.

#### **State party's observations on the merits**

5.1 On 15 December 2010, the State party provided its observations on the merits of the communication.

5.2 The State party informed the Committee that after the Court of BiH confirmed the denial of the author's request for international protection, on 23 November 2009, he

continued under measures of control (surveillance) and that he could not leave the Immigration Centre in Sarajevo; that these measures had been extended monthly by the Service for Foreigners Affairs; and that they had been reviewed by the Ministry of Security and the Court of BiH, as appeal instance.

5.3 The State party notes that the decision for the author's removal to his country of origin was taken in accordance with articles 16, 88 (1), and 117 of the LSMAA, which provide that once an application for international protection is rejected by way of a final legally binding decision, the person shall be expelled from the country. As to the measure of control, article 99 of the LSMAA provides that an alien will be placed under surveillance to ensure that a decision on expulsion may be executed, and if there are reasonable grounds to believe that he could threaten the public order or security of the State party. According to article 102, such measure of control shall not last more than 180 days. In exceptional circumstances, if it is not possible to remove the alien within the 180 days period, the total duration of surveillance may be extended for a period longer than 180 days.

5.4 The State party reiterates that the Ministry of Security and the Court of BiH considered and assessed the author's allegations that his deportation to Iraq would put him at serious risk of treatment contrary to the Covenant.

5.5 As to the author's claim concerning his right to privacy and family life, the State party submits that it is not an absolute right and that may be restricted for reasons of public interest. In this regard, the established facts show that the author is a "social threat". Further, should the author's allegation be correct, it would confer a sort of permanent immunity to foreigners in similar situations and contrary to the protection of the right to private and family life.

5.6 The measures of control and surveillance against the author were adopted within the statutory procedure by the competent bodies. The length of these measures and their extension over 180 days is a consequence of the proceedings instituted by the author and the decision taken by the institutions that considered his applications, such as the Committee's request for interim measures. All these measures, as well as the decision on the author's request for international protection, were considered and reviewed in a fair and thorough manner by the administrative and judicial authorities.

5.7 As regards the author's claims of violation of articles 24 and 26 of the Covenant, the State party maintains they are not substantiated. The author had access to administrative and judicial proceedings in order to challenge all the decisions against him without discrimination as established by the LSMAA. The Service for Foreigners Affairs did not take any step about the author's expulsion until his request for international protection became final. On the other hand, the author's allegations do not show beyond a mere assertion how his children's rights were violated.

#### **Author's comments on the State party's observations**

6.1 On 31 December 2010 and 4 March 2011, the author provided his comments on the State party's observations on admissibility and merits.

6.2 The author informed the Committee that he appealed the Ministry of Security's decision of 28 May 2010 that confirmed the expulsion order before the Court of BiH and requested interim measures as the appeal application did not have automatic suspensive effects according to articles 4 (3) of the LSMAA and 18(1) of the Law on Administrative Disputes. Nonetheless, the Court of BiH refused to decide on the interim measures request and simply referred the matter to the Ministry of Security, which rejected this request on 11 June 2010. Therefore, the appeal to the Court of BiH did not turn out to be an effective remedy to challenge the deportation orders. Moreover, the forwarding of the consideration

of the request for interim measures to the entity that precisely is a party in the appeal proceeding compromised seriously the right to fair hearing.

6.3 As to his request for interim measures to the Constitutional Court, the author argues that due to the excessive length of time that the Constitutional Court takes to decide on this kind of request, in practice it cannot be considered an effective remedy to challenge a deportation that would constitute a violation of articles 6 and 7 of the Covenant. Notwithstanding, after the expulsion order was issued against him, he brought the matter to the Constitutional Court and requested interim measures. However, at the time of his submission to the Committee, on 31 December 2010, no decision had been issued by the Court. Finally, the author also holds that, as acknowledged by the State party's observations, the appeal proceeding against the decision on the enforcement of the expulsion does not stay the deportation order pursuant to articles 4(3), 89(5), and 93(2) and (3) of the LSMAA.

6.4 On 27 November 2010, the Constitutional Court delivered its judgment concerning the author's appeal against the Ministry of Security's decision of 28 May 2009 and the Court of BiH's judgment of 23 November 2009, which rejected the author's request for international protection. The Constitutional Court dismissed the author's application and stated that "*there could not be a connection between the administrative/judicial procedure, whereby the appellant's application for international protection was rejected, and the violation of the right not to be subjected to torture or inhuman and degrading treatment*"<sup>4</sup>. It also found that the expulsion order and denial of international protection did not constitute an arbitrary interference with the author's right to family life. In light of the above, the author claims that he exhausted all domestic remedies and that there is no effective domestic remedy left at his disposal to prevent his deportation to Iraq.

6.5 The author maintains that during the proceedings he was never confronted with any facts or evidence related to him as a threat to the national security or public order. Neither the Ministry of Security nor the Court of BiH provided the reasons why he was considered a threat to the State party's security and limited their assessments to make a mere reference to a list that allegedly included his name. Even if this would be the case, the State party could not disregard the fact that it was obliged not to return or remove a person to a place where he or she would be subjected to a treatment contrary to articles 6 and 7 of the Covenant. The author asserts that the State party does not provide any observation as to the alleged risk he would face if deported. Further, since the State party contacted the Iraqi authorities with a view to deport him, there is no doubt that these authorities are fully aware of the circumstances of his possible deportation, which increases the chances that he would be detained upon arrival in Iraq<sup>5</sup>.

6.6 The author points out that his initial communication did not raise any issue concerning the arbitrariness and the length of the measures of control imposed on him, in particular his continued detention, as these issues were still pending before the Constitutional Court and he considered this proceeding an effective remedy. However, given the reiterated State party's observations on these measures and the fact that his detention had lasted 22 months, the author argues that in practice the proceedings before the Constitutional Court turned out to be ineffective to protect a violation of article 9 of the Covenant.

6.7 The author claims that it is questionable that his initial detention served the purpose of securing his deportation and rather it was decided for preventive reasons based on

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<sup>4</sup> English translation of the Constitutional Court's judgment provided by the author, and transmitted to the State party.

<sup>5</sup> The author refers to the Committee against Torture's concluding observations: Bosnia and Herzegovina, CAT/C/BIH/CO/2-5 (45<sup>th</sup> Session, November 2010) para. 14.

uncorroborated security threat grounds. He points out that when he was placed in the Immigration Centre, the authorities had not even started proceedings to enforce the expulsion order.

6.8 The arbitrariness of his detention is also reflected in the fact that the Ministry of Security did not impose any kind of measure of control at the time when his BiH citizenship was revoked in 2007. Although there were no significantly altered circumstances, more than two years later, on 4 May 2009, he was considered a threat to the State party's Security and put in detention at an Immigration Centre. The review of this measure by the Court of BiH was also arbitrary. In its judgment of 30 April 2010, the Court of BiH granted the appeal against the decision of the Ministry of Security, dated 27 April 2010, that extended the author's detention since it raised concerns under article 5 of the ECHR. Later, on 4 May 2010, the same Ministry issued a new decision that prolonged his detention. Surprisingly, and even though the Ministry fully disregarded the Court's judgment of 30 April 2010, his appeal against this latter decision was rejected by the Court of BiH on 12 May 2010. This inconsistent approach of the Court of BiH corroborates that his detention amounts to an arbitrary deprivation of his liberty contrary to article 9, paragraphs 1, 2, and 4, of the Covenant.

#### **Additional observations of the State party**

7.1 On 21 June 2011, 10 January, 18 May, and 9 October 2012, the State party provided additional observations.

7.2 The State party maintains that the author's allegations concerning the measures of surveillance in the Immigration Centre in Sarajevo were imprecise. His continued detention is reasonable and justified for reasons of public interest and security. According to the reasons contained in the decisions which imposed and subsequently extended these measures, originally the surveillance was imposed with a view of establishing his identity and because he was considered a security threat to the State party. Later this measure was justified with a view to ensuring his deportation and because he was still considered a security threat. This measure was also extended in light of the Committee's request for interim measures, the authorities' conclusion that he is a threat to the State party's security, and the fact that he did not have a residence permit in BiH. The author had the opportunity to challenge these measures before the Ministry of Security and the Court of BiH. Against this background, the length of the measure of surveillance cannot be attributed to the State party. Moreover, despite the complexity of the case, the decisions concerning the measure of surveillance, the author's request for international protection, and the expulsion order, as well as the subsequent author's appeals, were taken by the authorities in a short time-frame.

7.3 The Service for Foreigners Affairs was not obliged to inform the author about the reasons why he was considered a threat to its security, since the legal grounds for imposing the measure of surveillance were clearly presented in the original decision of 4 May 2009. In this respect, the measure was not based on the fact that his BiH citizenship was under a revocation proceeding, but on relevant information and evidence that showed a reasonable suspicion about his identity. Therefore, the decision imposing the measure of surveillance and all its extensions were adopted in accordance with article 9 of the Covenant.

#### **Additional comments of the author**

8.1 On 15 November 2011, 27 March and 23 July 2012, the author provided further comments. He reiterates his previous allegations as to the risk he would face if deported to Iraq; the arbitrariness and length of the measure of surveillance imposed on him; and his right to family life.

8.2 The author argues that the length of the proceedings and of the measure of surveillance cannot be attributed to him. The proceedings he instituted were based on his right to access to legal remedies under article 2, paragraph 3 of the Covenant.

8.3 It is questionable that his detention continued to be lawful under article 9 of the Covenant after 14 June 2010, when the Committee adopted interim measures and requested the State party to refrain from deporting him while his communication was under its consideration. Moreover, his detention for the period when the authorities examined his request for international protection was not in compliance with the law and violated article 143 of the LMSAA which establishes that Chapter VI (on reception of aliens and supervision/detention) is not applicable to asylum seekers. While his request was under consideration, the authorities could only impose measures of restriction of movement, which do not include deprivation of liberty, for a period of 180 days. Therefore, his rights under article 9, paragraphs 1, 2, and 4 of the Covenant were violated.

### Issues and proceedings before the Committee

#### *Consideration of admissibility*

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee refers to its jurisprudence and recalls that the determination whether or not all remedies have been exhausted is made at the time a communication is being examined<sup>6</sup>. In the present case, the Committee observes that the author's request for international protection was rejected by the Court of BiH on 23 November 2009 and that the Constitutional Court found this decision lawful on 27 November 2010. The Committee takes note of the State party's acknowledgement that the appeal proceeding against the expulsion order issued by the Service of Foreigner Affairs on 4 May 2010 does not stay the deportation, and observes that the author's requests for interim measures, submitted within these proceedings, were dismissed. The Committee also notes that the measures of surveillance (detention orders) imposed on the author and their extensions were also challenged by the author before the administrative and judicial authorities without success. In the absence of any observations by the State party on this subject, the Committee finds that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

9.4 The Committee takes note of the author's allegations under articles 6, 7, 13 and 14 of the Covenant that the authorities failed to assess the risk to which he would be subject to if returned to Iraq and that they did not take into account his personal circumstances and the events he went through in Iraq prior to his departure. It also notes that his request for international protection was denied on grounds of threat to the public order and national security; however, he was not confronted with any facts or evidence relating to this threat and the authorities merely referred to a list with names of persons who allegedly

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<sup>6</sup> See communication No. 1876/2009, *Ranjit Singh v. France*, Views of 22 July 2011, para. 7.3; communication No. 1228/2003, *Lemercier et al. v. France*, decision on inadmissibility of 27 March 2006, para. 6.4; communication No. 1045/2002, *Baroy v. Philippines*, Views of 31 October 2003, para. 8.3; communication No. 1069/2002, *Bakhtiyari v. Australia*, Views of 29 October 2003, para. 8.2.

represented a security threat. Against this background, his right to access to an effective remedy in order to challenge the lawfulness of his deportation to Iraq was seriously undermined.

9.5 The Committee observes that during the consideration of the author's request for international protection, he was interviewed twice on 18 and 20 May 2009 by the authorities, in presence of his legal counsel and a UNHCR representative; during the proceedings the author did not provide any documentation in support of his allegations regarding the risk to which he would be subjected to if returned to Iraq, in particular with reference to his death sentence. The Committee also observes that, through his relatives, the author was able to obtain identity documents from the Iraqi authorities in Baghdad and to submit them within the proceedings regarding the revocation of his BiH citizenship. After he was placed in detention, his wife contacted the Iraqi Embassy in Belgrade for assistance. The Committee also observes that the author's request for international protection was considered by the Ministry of Security and later reviewed by the Court of BiH and the Constitutional Court. In rejecting this request the Ministry of Security and the Courts did not limit their assessments to their expressed concerns regarding the State's party security, but considered also the author's claims about the possible risk that he would face if deported to Iraq, arriving to the conclusion that he was not in need of international protection. In the circumstances, the Committee considers that the author's claims under articles 6, 7, 13 and 14 have not been sufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

9.6 The Committee also takes note of the author's allegation under article 26, that the determination of threat to the national security made by the authorities against him, was based on prejudices against persons of Arabic origin who practice Islam. The Committee considers that this claim has been insufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

9.7 The Committee takes note of the author's allegations under article 9 paragraphs 1, 2 and 4 of the Covenant, that on 4 May 2009, he was placed under measure of control (surveillance) in an Immigration Centre in Sarajevo as he was considered a threat to the State party's national security; that he has been in detention since then; and that although he appealed this measure and its extensions before the Ministry of Security and Courts, in practice he was unable to challenge the grounds on which it was based, since the State party failed to provide him with the reasons or evidence that led them to conclude that he represents a threat to the national security. The Committee considers that, for the purpose of admissibility, the author has provided sufficient details and substantiation concerning his allegations under article 9, paragraphs 1, 2 and 4 of the Covenant and declares them admissible.

9.8 Regarding the author's claims under articles 17, 23, and 24, the Committee considers that, for the purpose of admissibility, the author has provided sufficient details and substantiation and declares them admissible.

#### *Consideration of the merits*

10.1 The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

10.2 As regards the author's claim that his detention was arbitrary under article 9, paragraphs 1, 2 and 4, the Committee notes that the author was placed under measures of surveillance (detention) in an Immigration Centre in Sarajevo, from where he was not allowed to leave. According to the State party, this measure was originally imposed with a view to establishing his identity and because he was considered a threat to the State party's

security. Later this measure was justified with a view to ensuring his deportation and because he was still considered a threat. Finally, it was also extended in light of the Committee's request for interim measures; the authorities' conclusion that he is a threat to the State party's security; and the fact that he did not have a residence permit in BiH. In the State party's view, the continued detention of the author is reasonable and clearly justified for reasons of public interest, and the length of the measure cannot be attributed to the State party.

10.3 The Committee recalls that the notion of "arbitrariness" employed in article 9, paragraph 1 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.<sup>7</sup> Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention 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 take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding. Furthermore, it must be subject to periodic re-evaluation, and to judicial review in accordance with article 9, paragraph 4.<sup>8</sup> The Committee also recalls that article 9, paragraph 2 requires that anyone who is arrested be informed, at the time of arrest, of the reasons for the arrest, and that this requirement is not limited to arrest in connection with criminal charges<sup>9</sup>.

10.4 The Committee observes that the author remains in custody since 2009. On 4 May 2009 the Intelligence and Security Agency informed the Service for Foreigners Affairs that the author was considered a threat to the public order, peace and security of the State party. On the same day, the Service for Foreigners Affairs arrested the author and placed him in the Immigration Centre in Sarajevo until 3 June 2009 on account of threat to the legal system, public order, peace and security of BiH, and of a reasonable doubt on his real identity pursuant to article 99 (2) (b) and (c) of LSMAA. On 8 May 2009, the Court of BiH rejected the author's appeal against this measure. Subsequently, this measure and its prolongations have been also appealed by the author. However, the author was never provided with the reasons or evidence that led the authorities to the conclusion that he is a threat to its national security or any specific explanation of why he could not receive any information on this subject. From the materials provided by the parties, the Committee concludes that the Courts that reviewed the measures of his detention neither considered the adequacy of this assessment nor explained why they themselves could not be informed of the grounds on which such assessment was based. Accordingly, the Committee considers while the initial arrest and detention may have been justified on the basis of information available to the State party, the latter has failed to justify the necessity of continued and prolonged detention since 2009 and to demonstrate that other, less intrusive, measures could not have achieved the same end. Accordingly, the Committee considers that the author's detention violated his rights under article 9, paragraph 1 of the Covenant.

10.5 With regard to the author's claims under article 9, paragraph 2, the Committee considers that one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded; and that the reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint.<sup>10</sup> In the

<sup>7</sup> See communications Nos. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005 para. 5.1; 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8.

<sup>8</sup> See communications Nos. 2094/2011, *F.K.A.G. et al. v. Australia*, Views adopted on 26 July 2013, para. 5.8, 2136/2012, *M.M.M. et al. v. Australia*, Views adopted on 25 July 2013, para. 10.3.

<sup>9</sup> *Ibid.*, paras. 9.5 and 10.2, respectively.

<sup>10</sup> See communication No. 2094/2011, *F.K.A.G. et al. v. Australia*, Views adopted on 26 July 2013 para. 9.5, and *M.M.M. et al. v. Australia*, Views adopted on 25 July 2013, para. 10.3.

circumstances, the Committee is of the view that the lack of information provided to the author by the administrative authorities when he was placed in the Immigration Centre in Sarajevo and to the Courts on the reasons why he was considered a threat to the security, in practice undermined his right to seek release before a court. Accordingly, the Committee concludes that by not providing information to the author on the reasons for his arrest, the State party violated his right under article 9, paragraph 2 of the Covenant.

10.6 The Committee considers article 9, paragraph 4 of the Covenant requires that courts reviewing the lawfulness of detention must take into account all relevant factors necessary to assess the lawfulness of detention. The Committee concludes on the basis of the material in front of it that the courts had no access to the information leading the Intelligence and Security Agency to the conclusion that the author was considered a threat to the public order, peace and security of the State party and did not question the reasons why they themselves could not be informed of the grounds on which such assessment was based<sup>11</sup>. The Committee concludes that the review of the lawfulness of the detention by the courts of the State party was not commensurate with the standards of review required by article 9, paragraph 4 and thus violated this provision of the Covenant.

10.7 The Committee takes note of the author's claims under articles 17, 23 and 24 of the Covenant, that his detention and possible deportation constitute an arbitrary and unlawful interference with his privacy and family life since it would entail the split of his family with a negative impact on the well-being of his children. His wife and minor children are BiH's nationals, do not speak Arabic, and have no ties whatsoever with the Iraqi culture. Furthermore, they cannot follow him to a country facing a civil war with a deplorable security situation. The Committee also takes note of the State party's argument that the right to privacy and family life are not absolute rights and that they may be restricted for reasons of public interest.

10.8 The Committee recalls its jurisprudence according to which the separation of a person from his family by means of his expulsion constitutes an interference with the family life protected by article 17, paragraph 1 of the Covenant.<sup>12</sup> In cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life amounts to arbitrary interference or can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.<sup>13</sup>

10.9 In the present case, the Committee observes that the removal of the author would impose a considerable hardship on his family. If the author's wife and minor children were to decide to immigrate to Iraq in order to avoid a separation of the family, they would have to live in a country whose culture and language are unfamiliar. The Committee also observes that when deciding the removal of the author, the Court of BiH and the Constitutional Court limited themselves to referring to the fact that the author was considered a threat to the national security without properly assessing this reason for removal. Further, these Courts failed to give the author an adequate opportunity to address the alleged security threat in a manner that would enable him to contribute to an appropriate assessment of the effects of his removal on his family situation. In the absence of clear explanation from the State party as to why the author constitutes a threat to the security of

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<sup>11</sup> See communication No. 1051/2004, *Ahani v. Canada*, Views adopted on 29 March 2004, paras. 10.2-10.3.

<sup>12</sup> See communication No. 558/1993, *Canepa v. Canada*, decision adopted on 20 June 1997, para. 11.4.

<sup>13</sup> See communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.8..

the country or why this information cannot be transmitted, the Committee is of the view that the State party has failed to show that the interference with his family life is justified by serious and objective reasons. Accordingly, the Committee considers that under the circumstances the author's deportation would constitute a violation of articles 17 and 23 of the Covenant.

10.10 Having concluded to violation of the above provisions, the Committee decides not to separately examine the author's claims under article 24 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view the State party violated the author's rights under articles 9, paragraphs 1, 2 and 4; and that the author's removal to his country of origin would constitute a violation of articles 17; and 23, of the Covenant.

12. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. It should either release the author on appropriate conditions or provide him with an adequate opportunity to challenge all grounds on which his detention is based. It should also undertake full reconsideration of the reasons for and the effects of removing the author to Iraq on his family life, prior to any attempt to return the author to his country of origin. The State party is also under the obligation to take steps to prevent similar violations in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views and to have them translated in the official language of the State party and widely distributed.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]