



**THE INTERFACE  
BETWEEN  
MIGRATION AND ASYLUM  
IN  
BOSNIA AND HERZEGOVINA**

**Sarajevo, January 2001**



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Annex: Glossary of Acronyms



# THE INTERFACE BETWEEN MIGRATION AND ASYLUM IN BOSNIA AND HERZEGOVINA

## 1. INTRODUCTION

Five years after the signing of the General Framework Agreement for Peace (GFAP – commonly known as the Dayton Peace Agreement)<sup>1</sup>, the consequences of the severe armed conflict that took place in Bosnia and Herzegovina (BiH) are still very visible. The period since the signing of the GFAP has focused *inter alia* on enabling the return of Bosnian refugees from abroad and of displaced persons within BiH to their homes of origin as provided under the GFAP.<sup>2</sup> Minority returns<sup>3</sup> have been taken as an indicator of the success in the implementation of the GFAP, as has progress in implementation of property legislation designed to ensure that rightful pre-conflict owners/holders are able to return to their home. However, while minority returns have occurred in much higher numbers in 2000 than any other year since the end of the conflict<sup>4</sup>, and property restitution is progressing gradually<sup>5</sup>, implementation of the GFAP in general is still far from complete. UNHCR has repeatedly expressed serious concern at the gap in resources versus reconstruction needs.<sup>6</sup>

In addition, BiH continues to host a large number of refugees from the Federal Republic of Yugoslavia (FRY), many of whom arrived in 1998 and in 1999, with the advent of the NATO air strikes. While the large majority of more than 70,000 refugees returned immediately following the ending of the air strikes, an estimated

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<sup>1</sup> A glossary of all acronyms used in this report is included in Annex I.

<sup>2</sup> GFAP, Annex 7, Chapter One, Art I.1, see also *Constitution*, GFAP, Annex 4, Art II.5

<sup>3</sup> Minority returns are considered to be returns to areas where the individuals concerned currently constitute the minority regardless of pre-conflict demography.

<sup>4</sup> According to UNHCR statistics, since the beginning of the year, 59,049 minority returns had taken place through the end of November 2000, as compared to 32,002 during the same period in 1999. *UNHCR Statistics*, 1 January 2001.

<sup>5</sup> BiH consists of two Entities, the Federation of BiH and the Republika Srpska (RS), and the District of Brcko, which enjoys a special status. In the Federation, implementation has been higher with approximately 58% decisions issued and 27% repossessions of private and socially owned property out of a total of 120,719 claims as of 30 November 2000, whereas in the RS, 31% of the decisions have been issued and 12% of the repossessions have taken place out of a total of 119,432 claims. Within the Federation, there are differences between regions. The rates for private property is higher than for socially owned property in both Entities. In the District of Brcko, out of a total of 7,865 claims, 16% of the decisions have been issued and in 14% of the claims, repossession took place. Statistics are gathered collectively under the Property Law Implementation Plan (PLIP) by the Office of the High Representative, the Organization for Security and Cooperation in Europe (OSCE), and UNHCR.

<sup>6</sup> As of end August 2000, UNHCR estimated a gap of 18,254 housing units where returns had taken place or were in process, but where no repairs or reconstruction projects had been foreseen. *Gap Analysis*, 11 September 2000.





13,700 remain in BiH.<sup>7</sup> A smaller number of FRY refugees are accommodated in Refugee and Asylum Centres currently administered by the newly formed Ministry for Human Rights and Refugees (MHRR), funded by UNHCR, although most FRY refugees are hosted privately.<sup>8</sup>

Furthermore, an estimated 20,000 Croatian Serb refugees are believed to have found protection in the Republika Srpska (RS), although more accurate statistics should still become available from the re-registration exercise that took place in the autumn of 2000.<sup>9</sup> It should be noted that their status is somewhat more complex, as it was determined under RS legislation that is no longer in force, and the constitutionality of which could be challenged. However, a large number of Croatian Serbs granted refugee status on a *prima facie* basis are believed to have obtained RS citizenship in some form at the same time, although neither the basis for granting citizenship and therefore legality of the acquisition of the citizenship nor the effect on BiH citizenship is clarified.<sup>10</sup>

Additionally, a number of different factors have contributed more recently to making BiH an attractive transit country for traffickers, smugglers and irregular migrants in general. For one, memories of the conflict which kept away would-be migrants appear to have faded sufficiently to encourage transit travel on a larger scale. BiH's relatively liberal visa policy, which permits visa-free travel for countries such as Iran, Turkey and Tunisia has allowed many persons to enter BiH

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<sup>7</sup> The numbers are based on registrations undertaken by the then competent Ministry for Civil Affairs and Communications (MCAC) through the municipal bodies responsible for refugees and displaced persons and the relevant Entity authorities. The actual number of refugees is likely to be lower, as many who repatriated did not de-register.

<sup>8</sup> As of 31 December 2000, 1,941 refugees were accommodated in the Refugee and Asylum Centres in BiH.

<sup>9</sup> This re-registration exercise was undertaken by the Entity authorities with the support of UNHCR. It formally ended 25 October 2000, although final results and decisions have not yet been issued.

<sup>10</sup> The *Law on RS Citizenship* (RS *Official Gazette*, no. 19/1992, 16/1996, and 8/1997) stipulated that all citizens of the former Socialist Federal Republic of Yugoslavia (SFRY), who were born in the territory of the SFRY, and who until 30 June 1998 registered their permanent residence in the RS, were citizens of the RS. The recognition occurred *ex lege*, i.e. without any formal procedures. Citizenship certificates were granted, but UNHCR was informed by the RS authorities that no special records were kept of such attributions of citizenship. Nor was it specified to UNHCR during what time period these provisions were applied or how many persons benefited. While, normally proof needed to be shown that any previous permanent residence had been cancelled, it is not clear whether this was the case in the RS. Moreover, a great number of persons appear not to be registered in the book of citizens. Persons who were granted citizenship were at the same time recognized as refugees under RS legislation. The RS *Law on Citizenship* should have ceased to be applicable with the entry into force of the BiH *Law on Citizenship*, (first imposed by the High Representative on 16 December 1997 to enter into force on 1 January 1998, published in *Official Gazette* of BiH, no. 4/1997, 23 December 1997; it was later confirmed by BiH Parliament, *Official Gazette* of BiH, no. 13/1999, 26 August 1999). A new RS *Law on Citizenship* was adopted and entered into force on 14 December 1999 (RS *Official Gazette*, no. 24/1999, 6 December 1999, amendments, no. 17/2000, 27 June 2000); it is in line with the BiH *Law on Citizenship*. However, recognition of the RS citizenship attributed *ex lege* based on the previous law is problematic, as the RS did not have a legal status prior to the GFAP, and the law was not considered to be in line with the *Constitution* of BiH (GFAP, Annex 4, Annex II.2). However, this non-constitutionality was never confirmed formally.



legally and seek onward travel from BiH, although a visa requirement for citizens of Iran was introduced in December 2000.<sup>11</sup> A number of legal *lacunae* with respect to migration and asylum continue to stymie effective regulation of migration and asylum and prevent effective prosecution of smugglers. Added to this, borders in BiH are very porous in general, and have moreover been largely patrolled by regular Cantonal or Entity police (and others) who do not have any background or training in such tasks; the nascent State Border Service is represented at very few border crossings only. Migrants have therefore been able to enter BiH easily from FRY for onward migration to Croatia and beyond.<sup>12</sup>

In the period from 1 January to 31 December 2000, for 18 different nationalities monitored selectively, some 35,793 persons entered BiH via Sarajevo Airport, whereas only some 11,508 left through the Airport during the same period.<sup>13</sup> While the discrepancy is not necessarily conclusive, as persons would not necessarily have entered and departed BiH again during this period or through the same entry point and these statistics include persons working in BiH or travelling in the region in a regular fashion, the difference of 24,285 persons is nonetheless considerable. A large number are likely to have travelled onward to Croatia. Increasing numbers of irregular migrants are reported to have been intercepted throughout BiH on a daily basis. The United Nations Mission in BiH (UNMIBH) is pressuring the local authorities to investigate the traffickers and smugglers themselves.<sup>14</sup> The large majority of migrants are of Iranian nationality, followed by Turkish nationals. As they do not require visas to enter BiH, it is primarily when they seek entry or enter Croatia that they turn into illegal or undocumented

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<sup>11</sup> The BiH Council of Ministers on 7 December 2000 agreed to introduce a visa requirement for Iranian nationals; the *Decision on Changing the Visa Regime for Bearers of Ordinary Passports of Bosnia and Herzegovina and of the Islamic Republic of Iran* was published in the *Official Gazette of BiH*, no. 32/2000, 26 December 2000.

<sup>12</sup> FRY does not have visa requirements for nationals of Iraq and has a facilitated regime for nationals of the People's Republic of China.

<sup>13</sup> Summary of Arrival and Departure of Immigrants through Sarajevo Airport, provided by UNMIBH.

<sup>14</sup> For the purposes of this report, the definitions for traffickers and smugglers will be the same as defined under the Protocol to the Convention on Transnational Organized Crime, which was opened for signature in Palermo from 12-15 December 2000. "Trafficking in persons" is thus defined as "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation." (*Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, Art 3, Annex to the Report on *Crime Prevention and Criminal Justice*, UN General Assembly, Fifty-fifth session, A/55/383, 2 November 2000). It therefore refers primarily to persons where migration has involved an element of coercion and exploitation, and often involves female migrants who are forced into prostitution or into a form of slavery. The term "smuggling of migrants" refers to "procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident" (*Optional Protocol Against the Smuggling of Migrants by Land, Sea and Air*, Art 3). Smuggled persons therefore pay a certain sum for travel, but do so of their free will. The same Protocol provides that smuggled migrants are not liable to prosecution under the Protocol (Art 6). It is these definitions which have been used by the international community in BiH.



migrants. Migrant smuggling has not been without consequences. Since June 2000, between 25 and 30 deaths have been reported due to drowning in the Sava River bordering Croatia and BiH, including one of a ten-year old child.

The increased migration as well as trafficking and smuggling of migrants through BiH has gained the attention of the international community in BiH and European States. BiH is therefore under increasing pressure to find solutions for the irregular migration through BiH, although its capacity to do so is still non-existent. The impact of a Readmission Agreement signed with Croatia in July 2000 has also made more obvious to BiH authorities the number of irregular migrants who transit BiH. While the large majority of migrants are likely not to have been detected, the total of persons returned from Croatia pursuant to the Readmission Agreement at only one official border crossing point from 1 August to 28 December 2000 was 5,361.<sup>15</sup> Calls for the construction of detention centres for such irregular migrants have become louder on the part of both national and international actors in the course of the year.

The large majority of migrants in BiH are not likely to be of direct concern to UNHCR. However, as *bona fide* refugees have seen themselves forced to resort to irregular means of migration to flee persecution, any stream of such migrants is likely to include a proportion of asylum seekers and refugees. Moreover, while the large majority would appear to be “economic migrants”, it must be remembered that genuine refugees may flee for composite reasons that include persecution as well as economic grounds, which themselves are often the result of poor governance and economic marginalization. Although BiH generally is not a country of asylum of choice, it has experienced an increasing number of asylum seekers amongst irregular and legal migrants, and smuggled and trafficked persons transiting through BiH.

UNHCR is concerned that appropriate care is taken to ensure that *bona fide* asylum seekers and refugees, in line with the 1951 Convention on the Status of Refugees and its 1967 Protocol, are not *refouled* and that they are assured access to safety and protection. Any efforts to control migration must keep in mind international refugee law and human rights principles. To the extent that a national capacity to regulate migration and establish proper asylum procedures does not exist, there is a need for interim measures, which ensure that fundamental protection principles are met. To ensure that a competent national capacity is built over the longer term, additional assistance, capacity-building activities and training are required, although the development of an effective and well-functioning asylum system in BiH will take some time.

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<sup>15</sup> Summary of Readmission of Illegal Immigrants [sic], Izacic Border Crossing, provided by UNMIBH.

## 2. NATIONAL ACTORS

One challenge to the regulation of migration and asylum in BiH lies in the complexity of the political institutions in BiH itself. The *Constitution* of BiH, (which forms Annex 4 of the General Framework Agreement for Peace - GFAP), provides for a State consisting of two Entities, the RS and the Federation of Bosnia and Herzegovina (hereafter Federation), to whom competence in most areas is delegated. The Federation is further sub-divided into 10 Cantons, each of which is competent to regulate policy in all areas not specifically assigned to the Federation. Brcko District has a distinct status outside either Entity.<sup>16</sup>

The Constitutional Court of BiH has issued a partial decision with regard to the *Constitution* of the RS and the Federation respectively, noting that the constitutional principle of collective equality of the constituent peoples prohibits any special privilege for one or two of the constituent peoples only.<sup>17</sup> It is expected that this should have a considerable impact on institutions in both the RS and the Federation. *De facto*, however, the RS institutions refer to Serbs as the constituent people<sup>18</sup>, while the Federation *Constitution* refers to Bosniaks and Croats as the constituent peoples<sup>19</sup>. It consists of Cantons which are either majority Bosniak or Croat controlled. Because of these divisions, there is much political pressure to maintain control at as decentralized a level as possible, to ensure control by the respective constituent people.<sup>20</sup>

### 2.1 Actors at State Level

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<sup>16</sup> It was established by a Decision issued by the High Representative on 8 March 2000, *Official Gazette* of BiH, no. 9/2000, 6 April 2000.

<sup>17</sup> Decision of the Constitutional Court, Case No. 5/98, Third Partial Decision of 30 June and 1 July 2000, *Official Gazette* of BiH, no 23/2000, 14 September 2000. The Court decreed that provisions relating to the constituent people of both the RS and the Federation Constitutions respectively that were found to be unconstitutional ceased to be valid from the date of publication of the decision. It should be noted that the Constitutional Court includes international members, in addition to representatives of each constituent peoples (*Constitution of BiH*, GFAP, Annex 4, Art VI.1.). There were five dissenting opinions.

<sup>18</sup> *Constitution* of the Republika Srpska, *RS Official Gazette*, nos. 21/92 - consolidated text, 28/94, 8/96, 13/96, 16/96, 21/96, Art 1. See also footnote above.

<sup>19</sup> *Official Gazette* of the Federation, no. 1/1994, 13/1997; Art I.1

<sup>20</sup> The Office of the High Representative on 11 January 2001 issued a *Decision* providing for two Constitutional Commissions of the National Assembly of the Republika Srpska and the Parliamentary Assembly of the Federation of Bosnia and Herzegovina respectively to be established. The members and the Chairperson of the respective Commissions are to be appointed by the High Commissioner and will have the power to ensure that "vital interests of the constituent peoples along with Others are to be fully protected until the Decision of the Constitutional Court is fully implemented". They may decide by a majority of the delegates of each of the constituent peoples that specific legislation, regulations or governmental decision violate of any one of the constituent people in BiH are violated, or, if no agreement is reached, must forward the disputed legislation or decision to the High Representative for resolution. Moreover, the Commissions should prepare, until 15 March 2001, a plan to implement the *Constitutional Decision*. The *Decision* was published in the *Official Gazette* of BiH, no. 2/2001, 29 January 2001 with immediate entry into force.





At State level, each Minister is supported by two Deputies, each representing one of the constituent people.<sup>21</sup> For any decision by a Ministry, consensus must be reached by the Minister and both Deputies.<sup>22</sup> As decision-making often still occurs along nationalist lines, this composition may therefore act as an obstacle. To add to the complexity, BiH is in a process of transition with respect to migration and asylum, and not all competent bodies for specific areas relating to migration and asylum have been identified yet, particularly at Entity and Cantonal level. Bodies which had responsibilities under the previous legal regime, however, continue to exist.

The **Presidency** is composed of three members representing each constituent people. It is, *inter alia*, responsible for concluding and ratifying international agreements, including those relating to foreign nationals and refugees. Ratification must have the preliminary approval of the **Parliament**.<sup>23</sup>

The **Council of Ministers** is responsible for “carrying out the policies and decisions of Bosnia and Herzegovina” in all areas where the State is competent.<sup>24</sup> With respect to migration and asylum, the Council of Ministers is specifically responsible for issuing decisions on visa requirements for third country nationals. The Council may also decide on acceptable travel documents, regulate the duty to report the residence of foreigners, and can agree on exceptions to requirements for entry to BiH. The Council is also specifically tasked to establish an appeals panel for an eventual national asylum procedure.<sup>25</sup>

The **Ministry for Human Rights and Refugees (MHRR)** was established with the entry into force of the new *Law on the Council of Ministers* on 25 April 2000.<sup>26</sup> It is responsible to “undertake measures in exercise and protection of human rights and the rights of refugees, emigration, immigration and asylum in accordance with the *Constitution* of BiH, the GFAP, international conventions and laws and other acts issued by the responsible institutions of BiH and to coordinate the activities related to the rights of refugees and establish cooperation with the Entities” (Art. 39).

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<sup>21</sup> With the exception of the Presidency, which is regulated by Art V of the *Constitution* of BiH, GFAP, Annex 4, neither the *Constitution*, nor the *Law on the Council of Ministers* (*Official Gazette* of BiH, no. 11/2000, 17 April 2000) explicitly provides for such a practice, although Art V.4 (b) of the *Constitution* stipulates that the Minister and the Deputies may not be of the same constituent people. Art 16 and Art 47 of the *Law on the Council of Ministers* appear to imply that there should be (at least) two Deputy Ministers in each Ministry, although Art 6 simply provides that the Minister and Deputy Ministers shall be appointed from amongst the three constituent people.

<sup>22</sup> *Law on the Council of Ministers, supra*, Art 47.

<sup>23</sup> *Constitution* of BiH, GFAP, Annex 4, Art IV.4, Art V.1, V.2 and V.3; in this regard, a new *Law on Procedure for Concluding and Ratifying International Agreements*, was adopted regulating this issue, *Official Gazette* of BiH, no. 29/2000, 30 November 2000.

<sup>24</sup> *Constitution* of BiH, GFAP, Annex 4, Art V.4 (a)

<sup>25</sup> *Law on Immigration and Asylum, Official Gazette* of BiH, no. 23/1999, 23 December 1999; see Art 7, 10, 26, and 53

<sup>26</sup> *Official Gazette* of BiH, no. 11/2000, 17 April 2000.



MHRR is therefore responsible for all issues relating to human rights, refugees and displaced persons, including refugees from BiH still abroad. With respect to persons from third countries, the Ministry, is competent to regulate the issuance of visas, travel documents, temporary and permanent residence permits; to review the issuance of residence permits and to decide on appeals for refusals to issue temporary residence permits. It is also responsible for appeals on refusals of entry, and to issue decisions on expulsions, and on revocations of visas and residence permits.<sup>27</sup> MHRR further is tasked with regulation of the national asylum procedure including the granting and cessation of asylum, the conducting of the procedure through a special asylum unit, and issuing specific instructions in cases of mass influx, in consultation with UNHCR, and to establish an asylum unit to undertake refugee status determination.<sup>28</sup>

At present, the Ministry is understaffed and underfunded. A Minister and two Deputy Ministers oversee six sections. The Section for Immigration and Asylum is headed by an Assistant Minister, who operates with minimal support staff. No qualified staff have been identified for the asylum unit which is to be established pursuant to existing legislation. The Section for Projects of Return, Repatriation and the Reception of Refugees also has some responsibilities with respect to refugees, although it mainly handles with issues concerning the return of BiH nationals.

The **Ministry for Civil Affairs and Communications (MCAC)** was responsible for immigration and asylum issues prior to the establishment of MHRR; the handover took place during the summer of 2000. MCAC continues to be responsible amongst others for citizenship, policy and regulation of issues of international and inter-Entity criminal law implementation, including relations with Interpol.<sup>29</sup>

The **State Border Service (SBS)** is a new body which UNMIBH has been developing as an integral part of its mandate to reform and restructure the law enforcement agencies of BiH. UNMIBH aims to establish a BiH state-level multi-ethnic law enforcement agency capable of controlling the 1,666 km which constitute BiH's borders with neighbouring countries. The *Law on the State Border Service* was imposed by the High Representative on 13 January 2000.<sup>30</sup> The SBS Directorate is answerable directly to the Presidency, although the Presidency may

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<sup>27</sup> *Law on Immigration and Asylum*, Official Gazette of BiH, no. 23/1999, 23 December 1999; see Art 12, 14, 21, 22, 23, 32, 36, 37, 38.

<sup>28</sup> *Ibid.*; see Art 48, 49, 51, 56, 59. See also *Instruction on the Temporary Admission to Bosnia and Herzegovina of Refugees from the Federal Republic of Yugoslavia (FRY)*, Official Gazette of BiH, no. 7/1999, 20 May 1999.

<sup>29</sup> *Law on Council of Ministers*, Official Gazette of BiH, no. 11/2000, 17 April 2000, Art 43.

<sup>30</sup> It was published in the *Official Gazette* of BiH, no. 2/2000, 26 January 2000, and entered into force on 3 February 2000.



delegate certain tasks to the Council of Ministers or the MCAC (Art 1). The SBS in exceptional cases may issue visas at the border, and may refuse entry to foreigners not meeting requirements as set out by law.<sup>31</sup> It must also ensure that any persons who seek protection from persecution or serious harm be referred to MHRR.<sup>32</sup> Beyond border protection and airport security, the *Law on the State Border Service* also provides for duties in case of civil states of emergency, as well as for investigative powers and the power to prosecute where suspicion exists that a crime or offence committed was aimed against the security of the border or the execution of border service duties; these powers also extend to any crimes or violation of a law that was committed in connection with the act of crossing the border or in a manner directly related to it.<sup>33</sup> The Office of the High Representative (OHR) has indicated that it interprets this power to mean that the SBS can conduct prosecutions beyond the border zone in consultations with the responsible authorities of the Entities and Cantons. While the SBS must notify the responsible authorities of its actions outside the border zone it is empowered to act there on its own authority, without seeking any consent or license from the relevant Entity or Cantonal authorities.

At present, the SBS is functional at four international border crossing points, all of which were opened in 2000: Sarajevo Airport (opened on 6 June), Metkovic-Doljani (since 31 July), Izacic (since 1 August), and Zvornik (since 3 August). Eight further SBS crossing points which are planned to be inaugurated in early 2001 include Neum, Trebinje, Hum, Srpski Brod, Orasje/Odzak, Brcko, Velika Kladusa and Kamensko, and UNMIBH has developed an operational plan for the full deployment of the SBS by the end of 2002, although this plan can only be implemented if UNMIBH receives the required financial support from the International Community.<sup>34</sup>

Moreover, in an illustration of the difficulties which the State of BiH faces in ascertaining its personality, the constitutionality of the SBS was challenged before the Constitutional Court of BiH by members of the House of Representatives of the Parliamentary Assembly on the grounds that it was not agreed to by the Entities and that it challenged an exclusive competence of the Entities for law enforcement in their respective jurisdictions. The Constitutional Court found, however, that no such agreement was required where such a body was “necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina”. The Court also found that while the Entities had competence to assume tasks of law enforcement in their

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<sup>31</sup> *Law on Immigration and Asylum*, Official Gazette of BiH, no. 23/1999, 23 December 19; see Art 12, 28, 35; *Law on the State Border Service*, Official Gazette of BiH, no. 2/2000, 26 January 2000: Art 2

<sup>32</sup> *Law on the State Border Service*, Official Gazette of BiH, no. 2/2000, 26 January 2000, Art 2

<sup>33</sup> *Ibid.*, Art 4 and 5 respectively. It should be noted that the scope of the articles, in particular the legal basis for action, still must be clarified.

<sup>34</sup> *Bosnia and Herzegovina State Border Service: Financial and Equipment Estimates 2001-2003*, UNMIBH, Sarajevo, January 2001.



respective jurisdictions, this did not constitute an exclusive competence, in particular with regard to a task which was in accordance with the competencies assigned to the State.<sup>35</sup>

A **State Court of BiH** should be established in 2001, which will, amongst others, act as the appeal instance for any expulsion orders issued by MHRR.<sup>36</sup> It is expected that it will also act as the competent court for any matters relating to migration, and it may act as the final appeal instance in the asylum procedure. The High Representative imposed the *Law on the Court of Bosnia and Herzegovina* on 12 November 2000<sup>37</sup>, and it entered into force on 8 December 2000. Judges are to be appointed within a six month period, lest they be imposed by the High Representative for a period of five years. The Court will include a criminal, an administrative and an appeals chamber, although there are still considerable *lacunae* as to the substantive law on which it could base its decisions.<sup>38</sup>

A number of human rights institutions could also play a role with respect to migration and asylum, in particular the **Human Rights Ombudsman** and the **Human Rights Chamber** established by the GFAP.<sup>39</sup> Both institutions are competent to consider any alleged or apparent violations of human rights provided for in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR), and alleged or apparent discrimination on any ground.<sup>40</sup> The **Constitutional Court**<sup>41</sup> also has appellate jurisdiction on any appeals over issues arising under the *Constitution* of BiH<sup>42</sup>, including the ECHR.<sup>43</sup> The *Constitution* also makes specific reference to the rights granted by a number of international instruments, which are listed in Annex I to the *Constitution*. They include the 1951 Convention on the Status of Refugees and its 1967 Protocol.

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<sup>35</sup> Decision of the Constitutional Court of BiH, 3 November 2000, *Official Gazette* of BiH, no. 1/2001, 19 January 2001.

<sup>36</sup> *Law on Immigration and Asylum*, *Official Gazette* of BiH, no. 23/1999, 23 December 19, Art 63.

<sup>37</sup> It was published in the *Official Gazette* of BiH, no. 29/2000, 30 November 2000.

<sup>38</sup> There is for example no State-level *Criminal Code*.

<sup>39</sup> Both institutions provide for international members. GFAP, Annex 6, Art IV.2 provides that the Human Rights Ombudsman be appointed by the Chairman-in-Office of the Organization for Security and Cooperation in Europe (OSCE) after consultation with the Parties. Art VII.2 provides that the international members of the Human Rights Chamber be appointed by the Committee of Ministers of the Council of Europe in consultation with the Parties; Art XIV provides that five years after the entry into force, responsibility for the human rights institutions shall pass over to the institutions of BiH unless otherwise agreed. Two Agreements were, however, signed between the Council of Ministers, and the Governments of the Federation and the RS respectively, on 10 November 2000 providing for the continuation of the bodies until end 2003.

<sup>40</sup> GFAP, Annex 6, Art II.2, Art V, Art VIII

<sup>41</sup> The Constitutional Court also includes international members, who are appointed by the President of the European Court for Human Rights after consultation with the Presidency; *Constitution* of BiH, GFAP, Annex 4, Art VI.1.

<sup>42</sup> GFAP, Annex 4

<sup>43</sup> *Ibid.*, Art VI.3 and Art II



**Additional bodies** exist at the Entity and Cantonal level, which had played some responsibilities with regard foreigners and refugees under previous legislation. In many cases, they are continuing to carry out tasks assigned to them under the previous legal framework, although the specific bodies in the Entities and Cantons and the extent to which they will continue to perform specific tasks related to migration and asylum remains to be seen with the elaboration of the new legal framework. It should be noted that under previous legislation, decision-making power was largely delegated to the Entity and/or Cantonal level. The existing bodies are described briefly below. It should be noted that actors in the District of Brcko have not been defined.

## 2.2 Republika Srpska

The *Ministry for Refugees and Displaced Persons* has offices in each municipality. For persons granted temporary protection, it is these offices which are responsible for receiving applications for temporary protection, for registration and issuing of ID cards once approval is received from the MHRR.<sup>44</sup> Under the previous legal framework, this Ministry was also responsible for recognizing the status of refugees and of displaced persons and for ceasing such recognition.<sup>45</sup>

The *Ministry of Interior (known locally as MUP)*<sup>46</sup> – *Department for Foreigners* has regional and municipal offices, the so-called Public Security Stations (police stations), which were entrusted with functions relating to the stay and movement of foreigners.<sup>47</sup> Functions were limited to an operational and administrative nature.<sup>48</sup> They include registration, issuance of ID cards, and determination of temporary and permanent residence.<sup>49</sup> At present, the Public Security Stations continue to be responsible for the control of a great number of State border crossings.<sup>50</sup>

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<sup>44</sup> *Instruction on the Temporary Admission to Bosnia and Herzegovina of Refugees from the Federal Republic of Yugoslavia (FRY)*, *Official Gazette of BiH*, no. 7/1999, 20 May 1999.

<sup>45</sup> *Law on Refugees and Returnees in RS*, *RS Official Gazette*, no. 33/1999, 26 November 1999, Art 13 and 18.

<sup>46</sup> The *Law on Internal Affairs* of the RS (*RS Official Gazette*, 21/1998 and 18/1999) should be revised considerably as it was found not to be in line with the GFAP and the ECHR. UNMIBH and OHR are leading the revision.

<sup>47</sup> *Law on Changes and Amendments to the Law on Ministries*, *RS Official Gazette*, no. 3/1997, 10/1998 and 18/1999). Art 92 provides for the continuation of these functions until appropriate new regulations are issued pursuant to new legislation adopted to regulate the substantive issues.

<sup>48</sup> *Law on Changes and Amendments to the Law on Interior*, *RS Official Gazette*, no. 21/1998, 18/1999.

<sup>49</sup> See for example *Law on Refugees and Returnees in the RS*, *RS Official Gazette*, no. 33/1999, 26 November 1999, Art 14 and 15. However, this legislation should technically no longer be applied since the entry into force of the *Law on Immigration and Asylum*, *Official Gazette of BiH*, no. 23/1999, 23 December 1999.

<sup>50</sup> *Law on State Border Service*, *Official Gazette of BiH*, no. 2/2000, 26 January 2000, Art 8.

The *Commissariat for Refugees and Humanitarian Issues* was responsible for maintaining records of all refugees and returnees and related issues, which it continues to undertake.<sup>51</sup>

### 2.3 Federation of BiH

The *Federation Ministry for Social Affairs, Displaced Persons and Refugees (FMSA) - Office for Displaced Persons and Refugees* is the body through which applications for temporary admission are forwarded to the MHRR for processing and then returned for forwarding the decisions of MHRR to the municipalities, although it does not play a substantive role.<sup>52</sup>

The *Cantonal Ministries for Social Affairs, Displaced Persons and Refugees* have municipal offices, which have the same function as the municipal offices of the Ministry for Refugees and Displaced Persons in the RS.<sup>53</sup>

The *Federation Ministry of Interior (known locally as MUP)* presently has no specific competencies with regard to foreigners or refugees, although it has competence for inter-Cantonal and organized crime.<sup>54</sup>

*Cantonal Ministries of Interior (MoI, known locally as MUP) – Department for Foreigners.* In the Sarajevo Canton, for example, the MoI has certain responsibilities of an administrative and operational nature regarding the movement and stay of foreigners.<sup>55</sup> The Cantonal MoIs also have municipal offices – police stations – whose functions include tasks related to the stay and movement of foreigners.<sup>56</sup> At present, the Cantonal MoIs are also undertaking border control functions.<sup>57</sup>

## 3. INTERNATIONAL ACTORS

The international actors include, in addition to the United Nations High Commissioner for Refugees (UNHCR), the United Nations Mission in BiH

<sup>51</sup> *Law on Refugees and Returnees in RS, RS Official Gazette*, no. 33/1999, 26 November 1999, Art 24.

<sup>52</sup> *Instruction on the Temporary Admission to Bosnia and Herzegovina of Refugees from the Federal Republic of Yugoslavia (FRY), Official Gazette of BiH*, no. 7/1999, 20 May 1999.

<sup>53</sup> *Ibid.*

<sup>54</sup> The *Law on Internal Affairs, Official Gazette of the Federation*, 1/1996, 19/1998. It should be revised considerably as it was found by the Federation Constitutional Court not be in accordance with the *Federation Constitution*.

<sup>55</sup> *Law on Ministries of Sarajevo Canton, consolidated version, Official Gazette of the Sarajevo Canton*, no. 16/1999; *Law on Internal Affairs, consolidated version, Official Gazette of the Sarajevo Canton*, no. 22/2000, 24 October 2000.

<sup>56</sup> These tasks are defined under Cantonal legislation, e.g. *Law on Internal Affairs, Official Gazette of the Canton of Sarajevo*, no. 22/2000, 24 October 2000. Art 2 and Art 30.

<sup>57</sup> *Law on State Border Service, Official Gazette of BiH*, no. 2/2000, 26 January 2000, Art 8.



(UNMIBH) and the International Police Task Force (IPTF), the Office of the High Representative (OHR), the Organization for Security and Cooperation in Europe (OSCE), the UN Office of the High Commissioner for Human Rights (OHCHR), and the International Organization for Migration (IOM) amongst others.

**UNHCR** has a strong presence in BiH due *inter alia* to the special role assigned to the Office in Annex 7 of the GFAP in addition to its regular Mandate. UNHCR is the lead organization on asylum and asylum-related issues, and it coordinates with others agencies on migration issues in general. In early 2000, UNHCR also established a Working Group on Immigration and Asylum with the OHR, the MHRR (formerly MCAC), and the EU PHARE project. The Working Group currently has as its primary objective the elaboration of the legal framework and the establishment of procedures as provided for in current legislation. During the handover period from MCAC to MHRR, the Working Group was temporarily suspended. It was, however, revived and strengthened in the latter half of 2000, with the added presence of the UNMIBH-IPTF Human Rights Office, IOM, and the OHCHR. UNHCR at present is also undertaking refugee status determination on behalf of BiH, pending establishment of a national capacity and appropriate procedures.

**UNMIBH** represents the United Nations in BiH led by the Special Representative of the Secretary General. It is mandated by the GFAP and Security Council Resolution 1035 *inter alia* to reform and restructure the law enforcement agencies in BiH. UNMIBH's State Border Service (SBS) programme forms a key element in establishing a migratory control system in BiH.

UNMIBH has also established separately a "Joint Task Force on Illegal Immigration and Organized Crime" focusing on Entity Ministries of Interior. The Task Force is concerned with issues of cooperation and coordination of information related to a broader range of issues, including illegal immigration, terrorism, illegal trade, prostitution, trafficking in human beings, theft of vehicles, forgery, distribution of counterfeit bills of exchanges and other documents and trafficking of narcotics. The MHRR is to be invited on specific issues relating to migration.

UNMIBH further coordinates the work of IPTF officers in general, who are often the primary international contact for irregular migrants and asylum seekers, and is thus an important actor in monitoring migratory flows. The UNMIBH-IPTF Human Rights Office, in collaboration with UNHCR, has developed specific guidelines as to what should be done when asylum seekers or refugees are encountered within BiH or at the border. UNMIBH is also participating in the Working Group on Immigration and Asylum. As noted above, UNMIBH is also an important actor with respect to human trafficking in BiH together with OHCHR and IOM. The UNMIBH Human Rights Office has developed specific



guidelines on trafficked persons, to ensure that the rights of trafficked persons are observed *inter alia* in raids against brothels and other premises suspected of harbouring women forced into prostitution.<sup>58</sup>

**OHR** is responsible overall for coordinating the implementation of the GFAP under Annex 10. The High Representative is appointed by the UN Security Council. He has been accorded the power to issue binding decisions and instructions, and to impose legislation in BiH by the Peace Implementation Council Meeting in Bonn in 1997.<sup>59</sup> OHR has taken the lead with respect to immigration-related provisions in the legal framework; it has also taken the lead in coordinating the development of a high-tech system that will permit for machine-readable documents including passports, ID cards, and visas, amongst others.

**OHCHR** has taken the lead particularly with respect to trafficked persons in BiH primarily women forced into prostitution. Together with UNMIBH-IPTF and IOM, it has developed a framework for identifying victims of trafficking, providing for safe houses, and permitting for the return of victims in safety. Additionally, it has sought to foster the understanding of the trafficked person as a victim, encouraged the prosecution of traffickers instead. OHCHR is also participating in the Working Group on Immigration and Asylum and provides input from a human rights perspective.

**IOM** over the past years has focused primarily on refugees returning to BiH. It also operates a special project to permit the return of trafficked persons in cooperation with UNMIBH and OHCHR. IOM is also a member of the Working Group on Immigration and Asylum.

**OSCE's** mandate in BiH includes organizing and supervising elections, promoting democratic values, monitoring and furthering the development of human rights, as well as implementing arms control and security-building measures.

#### 4. THE INTERNATIONAL LEGAL FRAMEWORK

BiH is a State Party by succession to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol since 1 September 1993. BiH further acceded by succession to a range of human rights instruments including the International Covenant on Civil and Political Rights and Its Optional Protocol, the International Covenant on Economic Social and Cultural Rights, the Convention

<sup>58</sup> *Trafficking in Human Beings in Bosnia and Herzegovina: A Summary Report of the Joint Trafficking Project of the UN Mission in Bosnia and Herzegovina and the Office of the High Commissioner for Human Rights*, May 2000. See footnote 14 for a definition of smuggling and trafficking.

<sup>59</sup> Articles II.1.d and V of Annex 10 to the General Framework Agreement for Peace, as interpreted in paragraph XI.2 of the December 1997 Conclusions of the Bonn Peace Implementation Council.





against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Political Rights of Women, the Convention on the Rights of the Child, and the Convention on the Prevention and Punishment of the Crime of Genocide. Additionally, BiH also succeeded to the International Convention on the Elimination of All Forms of Racial Discrimination on 16 July 1993.<sup>60</sup>

Although BiH is not a State Party to the ECHR, the *Constitution* of BiH specifies the direct application of the ECHR in Bosnia and Herzegovina and gives it priority over all other law.<sup>61</sup> The ECHR applies to all persons in BiH. The *Constitution* further specifies that the rights in the 1951 Convention and its 1967 Protocol and a range of international and European human rights instruments “shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground...”<sup>62</sup>

The Council of Ministers of BiH signed an Agreement with the Government of the Republic of Croatia on Cooperation in Deportation and Admission of Persons Whose Stay is Illegal (hereafter Readmission Agreement) on 27 July 2000. The agreement applies generally to the return of nationals of one of the contracting States and of third country nationals who entered one of the contracting States illegally. The Readmission Agreement does not take into account the special situation of asylum seekers or refugees, and does not ensure their access to an asylum procedure. The agreement further provides that if refugees recognized in one of the contracting States are ‘returned’, then the other contracting State may apply officially for re-readmission of the refugee to the State that recognized the refugee. It therefore appears to permit for the return of asylum seekers or refugees. Although UNHCR submitted its reservations to the BiH Council of Ministers and secured support from the OHR to introduce some amendments referring to the 1951 Convention on the Status of Refugees, these amendments could not be incorporated in time.

BiH has further negotiated a Readmission Agreement with Slovenia, although it is not yet signed. UNHCR submitted comments on the draft agreement with Slovenia, which does not take into account the special situation of asylum seekers.<sup>63</sup> BiH also is the process of negotiating such an agreement with Turkey. Possible agreements with the Ukraine and Italy have also been mentioned, and an agreement with the Federal Republic of Yugoslavia (FRY) has been suggested. Bilateral agreements have also been concluded with Switzerland and Germany,

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<sup>60</sup> *REFWORLD Database*, UNHCR, July 1999 edition.

<sup>61</sup> *Constitution* of BiH, GFAP, Annex 4, Art II.2

<sup>62</sup> *Ibid.*, Annex I

<sup>63</sup> The Agreement should be adopted by the Council of Ministers and presented to the Presidency for signature. However, the Ministry has indicated its interest in re-negotiating parts of the Agreement.

although these latter agreements refer to readmission of citizens or persons who can be considered habitual settlers with a legal right of abode only and therefore do not affect asylum seekers or refugees.

## 5. THE NATIONAL LEGAL FRAMEWORK

As indicated already, the *Constitution* of BiH assigns only limited powers to the State of BiH. Any competencies not listed are the purview of the Entities, i.e. the Federation and the RS (Art III.3). Within the Federation, the competence to regulate certain issues is also limited by the *Constitution* of the Federation, which assigns any competence not assigned to the Federation to the Cantonal level.<sup>64</sup> The ten Cantons that make up the Federation each have their own Constitution and legislative framework, as does the District of Brcko. In practice, a particular legal issue may therefore be governed by 14 different Constitutions.

The *Constitution* of BiH explicitly assigns competence for Immigration, refugee and asylum policy and regulation to the State (Art III.1). However, partly due to the complexities of the legal system in BiH and a number of legal *lacunae* and conflicting legislation, much confusion continues to reign in this field. These gaps are coming painfully to the fore, as BiH is faced with an increasing number of irregular migrants, many of whom are channelled by traffickers and smugglers who rely on BiH as an “easy” route to Western Europe.

### 5.1 Immigration and Asylum

The primary legislation governing immigration and asylum in BiH is the *Law on Immigration on Asylum*, which was adopted by the Parliamentary Assembly on 4 December 1999, and entered into force on 31 December 1999.<sup>65</sup> It was drafted with the assistance of UNHCR, OHR and the Council of Europe. This *Law* replaces any other legislation relating to foreigners or refugees originating from outside BiH<sup>66</sup>, although the affected legislation is not specified. Laws which are superceded include, however, the former Republic of BiH (RBiH) *Law on Movement and Stay of Foreigners*<sup>67</sup> as well as the RBiH *Law on Displaced Persons and Refugees*.<sup>68</sup> They

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<sup>64</sup> As noted, the competencies of the Federation are limited by the *Constitution* of the Federation (*Official Gazette* of the Federation, no. 1/1994, amendments no. 13/1997), and powers not specifically granted to the Federation lie with the Cantons (Art III.4). According to the *Constitution* of the Federation, the enforcement of laws on the stay and movement of foreigners is a shared competence between the Federation and the Cantons (Art III.2). The Federation has, however, sole competence for inter-Cantonal crime and organized crime (Art III.1).

<sup>65</sup> *Official Gazette* of BiH, no. 23/1999, 23 December 1999.

<sup>66</sup> Art 62. The exception is the *Instruction on the Temporary Admission to Bosnia and Herzegovina of Refugees from the Federal Republic of Yugoslavia* (FRY), *Official Gazette* of BiH, no. 7/1999, 20 May 1999. It is described further below.

<sup>67</sup> *Official Gazette* of RBiH, no. 7/1994, 13/1994, 26/1996.

<sup>68</sup> *Official Gazette* of RBiH, no. 8/1994 and 13/1994

also include legislation enacted in the RS, which, in violation of the BiH *Constitution*, dealt with foreigners and refugees from third countries amongst others, including the Croatian Serb refugees<sup>69</sup>, and the RS *Law on the Movement and Stay of Foreigners*.<sup>70</sup>

While the *Law on Immigration and Asylum* is one of only a very limited number of laws adopted by Parliament in a regular manner, knowledge of the provisions of the *Law* throughout BiH is extremely limited. Because of this lack of familiarity, but also because due to *lacunae* inherent in the new legislation, the authorities at lower levels and the judiciary at times continue to rely on legislation which is technically no longer in force. Moreover, although the legislation has been in force since 31 December 1999, extensive by-laws are still needed.<sup>71</sup>

The new legislation entails a complete institutional and structural reform of the previous RBiH legislation. However, administrative procedures at the State level are not clearly defined, and the implementation of the *Law* will further require cooperation with Entity, Cantonal and Municipal authorities, entailing additional complexities. The drafting of the by-laws and establishing the procedures is likely to take some time.<sup>72</sup> Further, institutions as foreseen by the *Law* still need to be established, including a competent, fully equipped and trained asylum unit and

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<sup>69</sup> The *Constitution* of the RS provided that “Foreign citizens and Stateless persons may be granted asylum in Republika Srpska if prosecuted for the participation in movements for social and national emancipation, supporting democracy, human rights and fundamental freedoms or for the freedom of scientific and artistic creativity” (Art 44), although this provision ceased to be valid with the *Decision of the Constitutional Court*, Partial Decision, *Official Gazette* of BiH, no. 11/2000, 17 April 2000). The *Law on Displaced Persons, Refugees and Returnees* (RS *Official Gazette*, no. 33/1999, 26 November 1999) entered into force on 3 December 1999. It recognized refugees meeting the 1951 Convention definition, as well as refugees recognized under earlier legislation, although the *Law* explicitly provided that provisions relating to refugees shall apply only until the *Law on Immigration and Asylum* is enacted, which was soon thereafter. In practice, however, it was the 1995 *Law on Displaced Persons and Refugees* (RS *Official Messenger*, no. 26/1995) which regulated the status of the considerable Croatian Serb refugee population presently residing in the RS.

<sup>70</sup> RS *Official Gazette*, no. 22/1992.

<sup>71</sup> Two by-laws were adopted to the *Law on Immigration and Asylum*, the Book of Rules on the Layout and Content of Application Forms for the Issuance of Visas to Foreigners and the Format of Visas for Foreigners and the Format of Visa Sticker Forms for Foreigners; and the Book of Rules on the Layout of Travel Documents (*Putni List*) for Foreigners and on the Application Form for the Issuance of *Putni List* to Foreigners, *Official Gazette* of BiH, no. 12/2000, 9 May 2000. These by-laws were adopted due to urgent requirements, but will be repealed, as new provisions in the by-laws will be considered in the comprehensive by-laws being elaborated at present.

<sup>72</sup> The status of the former SFRY *Law on Administrative Procedures* is not clear, as it was not confirmed, although the *Constitution* of BiH, in its transitional provision, stipulates that all existing legislation will remain in force unless found not to be in accordance with the *Constitution*. Annex II, Art II.2. This law was taken over by the RBiH, *Official Gazette* of RBiH, no. 2/1992, and 13/1994 (confirming the Decree of 1992). It was also confirmed by the *Constitution* of the RS. The general administration of the State also still needs to be clarified. The *Law on the Council of Ministers* (*Official Gazette* of BiH, no. 11/2000, 17 April 2000) does not provide for situations, where one Ministry may need to regulate an issue to be implemented by another Ministry. The situation where the MHRR may prescribe the work of the SBS, which is directly answerable to the Presidency, is also not regulated.

appeals panel. As noted above, the competent Ministry is, however, seriously underfunded at present and does not have the necessary capacity.<sup>73</sup>

By and large the sections pertaining to asylum are in conformity with international and European standards. Asylum is granted to persons who meet the definition outlined in the 1951 Convention on the Status of Refugees. Asylum is also granted to persons whose lives or freedom would be in danger, if returned to the country of origin, or who would risk torture or inhumane or other degrading treatment, although all categories are subject to the exclusion clauses which follow those of the 1951 Convention. The legislation therefore provides for asylum on humanitarian grounds and ensures refugee status to those persons who cannot be deported pursuant to Article 3 of the ECHR, to the extent that such persons are not excludable.<sup>74</sup> The status of persons who cannot be deported but who are excluded from asylum is not clarified.

However, Article 34 of the *Law* contains an absolute prohibition of *refoulement*, both direct and indirect, and makes it clear that the principle applies regardless of whether asylum has been granted or not. In addition to the text of Article 33 (1) of the 1951 Convention, the *Law* also prohibits *refoulement* where the person may be in danger of being subjected to torture or other inhumane, or degrading treatment or punishment.

Recognized refugees are granted permanent residence in BiH. Further, they have the right to work, and access to education, medical care and social welfare on an equal basis with citizens of BiH (Art 54). Asylum seekers are also ensured adequate reception standards pending a final determination of their application (Art 50). The *Law* further stipulates that asylum seekers shall not be punished for illegal crossing of the state border or illegal presence, if they came directly from a territory where their life or freedom was threatened (Art 49). As noted already, Article 2 of the *Law on the State Border Service* provides that the Border Service must refer any alien raising claiming asylum, as defined in the *Law on Immigration and Asylum*, to the MHRP without delay, although no procedure has yet been defined for ensuring such a linkage.

As is evident from the title, the legislation deals with both immigration and with asylum. However, while the *Law* provides for refusal of entry and expulsion, it does not include provisions on illegal entry or exit, or provide for sanctions for violations of the legislation. While there are some indications that the State authorities may provide for administrative sanctions, i.e. fines, through the by-laws

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<sup>73</sup> It should be noted that while this competence is recognized generally, no legislation has been adopted to date regulating the transfer with respect to specific legislation where the formerly competent Ministry is explicitly mentioned, including the *Law on Immigration and Asylum*.

<sup>74</sup> *Law on Immigration and Asylum*, *Official Gazette* of BiH, no. 23/1999, 23 December 1999, Art 46 and 47.

accompanying it, the *Law* itself would require either amendments or a new State-level criminal code to cover crimes relating to immigration.<sup>75</sup> The lack of punitive provisions in the legislation is held by many to be a serious gap in the legislation, and is causing confusion as to who has competence to regulate illegal entry. OHR has, however, indicated that it views the regulation of illegal entry and exit to BiH to be a State competence, derived from its competence to regulate immigration, asylum and refugee policy generally.

The visa regime is to be determined by the Council of Ministers. As indicated above, the present liberal visa regime of BiH is likely to be one factor encouraging large numbers of migrants transiting through BiH. While the previous visa regime should have been superseded along with the RBiH *Law on Movement and Stay of Foreigners*, in practice the same list continues to be applied.<sup>76</sup> The list included Turkey and Iran in the visa-free entry list, although as of 26 December 2000, Iranian nationals require visas for entry to BiH.<sup>77</sup>

## 5.2 Temporary Protection

The *Instruction on the Temporary Admission to Bosnia and Herzegovina of Refugees from the Federal Republic of Yugoslavia (FRY)*<sup>78</sup> provides for temporary admission to all persons from FRY seeking protection in BiH on a *prima facie* group basis. It refers to basic rights and guarantees included in the 1951 Convention and the 1967 Protocol. Persons from FRY who do not have another citizenship enjoy safe admission to BiH without discrimination, protection from *refoulement*, temporary right of residence, recognition as a person before the law, and adequate reception conditions and treatment. Persons who enjoyed refugee status in FRY, but can no longer benefit from protection there may also enjoy protection in BiH. This *Instruction* was adopted by the BiH Government in close consultation with UNHCR in June 1999 in response to the influx of refugees from FRY created by the Kosovo crisis in 1999. It is an amended version of the *Instruction on the Temporary Admission of Federal Republic of Yugoslavia Refugees from the Territories of Kosovo and Metohija*<sup>79</sup> adopted in October 1998 following negotiations between UNHCR and the then competent MCAC in response to the initial influx from Kosovo.

While the *Instruction* has more or less ensured admission to safety, as well as temporary protection and basic assistance for FRY refugees in the Federation, its

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<sup>75</sup> The State Court, which is to be established within the first six months of 2001, would presumably be competent to decide on any such cases, although it is likely to take some time until it is fully functional.

<sup>76</sup> Turkish, Iranian and Tunisian nationals amongst others therefore did not require visas.

<sup>77</sup> *Decision on Changing the Visa Regime for Bearers of Ordinary Passports of Bosnia and Herzegovina and of the Islamic Republic of Iran* was published in the *Official Gazette* of BiH, no. 32/2000, 26 December 2000.

<sup>78</sup> *Official Gazette* of BiH, no. 7/1999, 20 May 1999, entered into force on 21 May 1999.

<sup>79</sup> *Official Gazette* of BiH, no. 19/98, 11 October 1998.

implementation has been problematic in the RS. Moreover, UNHCR is aware of at least one case of *refoulement*, where a FRY refugee was handed over to FRY police pursuant to an arrest warrant without further formalities in June 2000. Nonetheless, the *Instruction* remains in force for the time being.

### 5.3 Other Legislation Pertaining to Migration or Asylum

While the *Law on Immigration and Asylum* should have superceded any other legislation relating to foreigners or asylum seekers, courts at times rely on legislation which is technically no longer in force, partly due to lack of awareness of the new legislation, partly due to legal gaps with respect to punitive provisions relating, e.g. to illegal entry, smuggling or trafficking, but also a desire to maintain competence for such crimes at Entity level. Thus, detention of irregular migrants, including asylum seekers, have been reported based on either the RBiH *Law on Movement and Stay of Foreigners*, which was adopted by the Republic of Bosnia and Herzegovina in 1994, or, in the RS, the identical RS *Law on Movement and Stay of Foreigners* of 1992.<sup>80</sup> The *Law* provides for pecuniary penalties or imprisonment and expulsion for illegal entry or stay of foreigners (Art 65 and 66).

Cantonal courts for minor offences have at times relied on Cantonal laws on minor offences to expel foreigners. In Sarajevo Canton, for example, according to the Cantonal *Law on Minor Offences*, the expulsion from the territory of the Canton may be ordered of any alien who has been convicted of a minor offence, such as for example, violation of “public order”.<sup>81</sup> It is left to the judge’s discretion as to when such expulsion is ordered. However, expulsion can take place to another Canton only. While different legislation exists in each Canton, similar provisions have been incorporated in their respective laws.<sup>82</sup>

Despite the disputed constitutionality of such provisions, crimes related to illegal entry have also been included in the amended RS *Criminal Code*, which came into force on 1 October 2000.<sup>83</sup> It provides for fines or imprisonment for illegal entry either without the requisite permits, or by use of arms or force. It also includes provisions targeting smugglers (Art 380).

While the Federation *Criminal Code*<sup>84</sup> does not include a similar provision, the Federal prosecutor has issued an *Obligatory Instruction*<sup>85</sup> that refers to the

<sup>80</sup> *Official Gazette* of BiH, no. 7/1994. The RS had adopted the same law in 1992; *RS Official Gazette*, no. 20/92. Reliance on this law can be seen at least partially as a rejection of state competence in this regard.

<sup>81</sup> “Public order” in local language generally is understood as a minor offence, whereby it consists of a disturbance of the peace. The legislation was published in *Official Gazette* of the Canton of Sarajevo, 3/1997, 28 February 1997. Art 41 and Art 45 pertain to sanctions for violations by foreigners generally.

<sup>82</sup> In one case, on 12 November, four Iranian nationals were expelled from Posavina Canton for a period of two years. UNMIBH reports.

<sup>83</sup> *RS Official Gazette*, no. 20/2000, 31 July 2000.

<sup>84</sup> *Official Gazette* of the Federation, no. 43/1998, 2/1999, 15/1999, 29/2000.



provisions on illegal entry of the previous SFRY *Criminal Code* which was confirmed by RBiH.<sup>86</sup> The Instruction relies on Art 395 of the currently applicable Federation *Criminal Code*, which provides that it repeals any provisions contained in the former legislation regulating the same issues. As illegal entry is not regulated in the new law, Cantonal and Municipal prosecutors are to rely on the SFRY provisions.<sup>87</sup> The provision in the SFRY legislation appears to provide for sanctions in case of organized illegal entry only, and does not touch on individuals entering illegally.<sup>88</sup>

The Federation *Criminal Code* further provides for the crime of forging documents, which includes the creation or use of false documents, which has at times been used to detain irregular migrants including asylum seekers<sup>89</sup>. The RS *Criminal Code* also includes provisions on creation or use of or intent to use fraudulent documents.<sup>90</sup> Furthermore, the *Criminal Codes* in both the RS and the Federation furthermore provide for expulsion of foreigners having committed a crime; the Federation permits expulsion for a period of one to ten years<sup>91</sup>, whereas in the RS a person may be banned permanently.<sup>92</sup>

OHR has disputed the competence of Entities to regulate issues related to illegal entry. Moreover, as noted already, the majority of third country nationals enter BiH legally, and it is only when reaching Croatia that they turn into illegal or undocumented migrants, or if undocumented, upon being returned to BiH.

As long as regulations regarding the implementation of the *Law on Immigration and Asylum* have not been adopted, however, the High Representative's Decision

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<sup>85</sup> Issued 31 May 2000, pursuant to the *Law on Changes and Amendments to the Law on Federation Prosecutors*, *Official Gazette* of the Federation, no. 2/1995, 9/1996, 6/1997, 33/1999.

<sup>86</sup> *Official Gazette* of RBiH, no. 2/1992

<sup>87</sup> While this approach appears questionable, this interpretation was confirmed in a letter from the Federation Minister of Justice to the Municipal Public Prosecutor's Office II in Sarajevo on 10 December 1998. The Supreme Court of the Federation, in a verdict issued 1 June 2000 (no. Kvl.z.17/2000), also confirmed the applicability of the SFRY provision on illegal entry in a case overturning a decision of the Cantonal Court in Zenica.

<sup>88</sup> SFRY *Criminal Code*, adopted by the RBiH, *Official Gazette* of RBiH, no. 2/1992, Art 249. It refers to a "person who without a prescribed permit crosses or tries to cross the RBiH border in an organized group, armed or by using force" as well as "a person who deals with unauthorized taking across other persons over the border of RBiH or who in order to achieve material benefit enable other persons to cross the border without authorization". It therefore appears to exclude persons who are travelling individually and are not armed or using force.

<sup>89</sup> *Official Gazette* of the Federation, no. 43/1998, 2/1999, 15/1999, 29/2000, Art 351 and 352

<sup>90</sup> RS *Official Gazette*, no. 20/2000, 31 July 2000: Art 364 RS Criminal Code Art 364

<sup>91</sup> *Official Gazette* of the Federation, no. 43/1998, 2/1999, 15/1999, 29/2000, Art 351 and 352: Art 69 provides that "(2) In deciding whether to pronounce the measure defined in paragraph 1 of this Article, the court shall take into account motives from which the person has committed the criminal offense, the mode of its commission, and other circumstances that may indicate that further staying of the foreign citizen in the Federation would be undesirable"

<sup>92</sup> RS *Official Gazette*, no. 20/2000, 31 July 2000: Art 65 follows the corresponding provision in the Federation *Criminal Code* except that expulsion may also be permanent.



of 29 October 1999 remains in force. It effectively prohibits any deportation or refusals of entry without prior consultation with IPTF.<sup>93</sup>

## 6. INTERIM MEASURES

A framework to safeguard the rights of victims of trafficking, primarily women forced into prostitution, has been established by UNMIBH/ OHCHCR together with IOM, amongst others, to ensure identification of trafficked victims and recognition of their human rights. A project has also been developed for the voluntary return to their countries of origin. This framework does not, however, cover smuggled persons.<sup>94</sup>

With respect to asylum seekers and refugees, given the current non-implementation of the *Law on Immigration and Asylum*, UNHCR has established interim measures to ensure their protection. UNHCR has also initiated a pilot project in north-western BiH to try to survey irregular migrants returned from Croatia, in order to gain a better understanding of the motives of the individuals for leaving their countries of origin.

### 6.1 Access to the Asylum Procedure

The *lacunae* in and the non-implementation of the existing legal framework ensure that asylum seekers and refugees are unlikely to be referred to UNHCR by the local authorities.

With respect to refusals of entry and deportations from Croatia to BiH pursuant to the Readmission Agreement, the largest number of irregular migrants are handed over at the Izacic border crossing, where the SBS is established. While the Agreement provides for some proof that should be shown that persons concerned transited through BiH, it is rare that readmission is refused. However, refusals of entry and deportations to BiH also occur at other border crossing points maintained by the local police. Given the large number of persons transiting to Croatia, over so-called “green borders”, where there is no official border crossing, the local police is further seeking to intercept foreigners prior to their crossing into Croatia.

Generally they are held for a short period only for identity checks and then released. In some cases, detentions for short periods have been ordered by courts based on legislation which is technically no longer in force. Increasingly, however, the view that traffickers and smugglers should be the prime target is becoming

<sup>93</sup> *Official Gazette* of BiH, no. 19/1999, 6 November 1999; *RS Official Gazette*, no. 31/1999, 12 November 1999; *Official Gazette* of the Federation, no. 46/1999, 20 November 1999.

<sup>94</sup> See footnote 14 for the differentiation between traffickers and smugglers.





prevalent, and irregular migrants are questioned by the local police or the Cantonal Departments for Foreigners in order to identify the smugglers or traffickers themselves. The migrants are often released, and at times bussed to Sarajevo, in accordance with the wishes of many of the irregular migrants returned from Croatia. It is believed that in Sarajevo, the migrants again contact the smugglers to attempt another entry to Croatia.<sup>95</sup>

The local police - and the IPTF - are thus the most likely point of contact with asylum seekers and refugees. Moreover, given the OHR Decision preventing refusals of entry and deportation without consultation with IPTF, cooperation with UNMIBH and IPTF is particularly important to prevent *refoulement* and to ensure access to the asylum procedure for *bona fide* asylum seekers. UNHCR therefore conducts regular briefing sessions with IPTF officers, and the UNMIBH-IPTF Human Rights Office, together with UNHCR, has developed specific guidance for IPTF officers with regard to asylum seekers, according to which IPTF must refer any asylum seekers to UNHCR.<sup>96</sup> These include persons who explicitly request asylum but also persons who express fear of being returned to their countries of origin.

However, IPTF officers are subject to frequent rotation, and new arrivals in BiH are confronted with a wide range of complex issues which relate to the implementation of the GFAP. Their familiarity with and understanding of the importance of the non-*refoulement* principle and access to the asylum procedure is therefore not guaranteed in practice.

Sarajevo Airport is the primary entry point to BiH, with flights from Turkey arriving daily. Charter flights from Iran and Romania<sup>97</sup> have also landed on a regular basis at the Airport. More recently, the low frequency of flights, the lack of accommodation facilities and funds to ensure basic needs has led the SBS to seek immediate refusal of entry which would permit departure from BiH on the same flight. Such a short time period is likely to reduce effectively any possibility to seek asylum. UNHCR has sought to ensure respect for fundamental refugee law principles and is working closely with UNMIBH on this issue.

Overall, however, given the general lack of understanding and familiarity with refugee law principles and the gaps in the national legislative framework and capacity, there is at present no guarantee that all asylum seekers are identified and referred to UNHCR.

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<sup>95</sup> This information is based on UNMIBH-IPTF reports, UNHCR field reports, and news reports.

<sup>96</sup> *Procedures for Dealing with Foreign Citizens Seeking Asylum*, UNMIBH Human Rights Office, Revised Guidance No. 2, 28 July 2000.

<sup>97</sup> Romania does not have a visa requirement for Turkish nationals.



## **6.2 Reception of Asylum Seekers vs. Irregular Migrants**

Asylum seekers are currently in large part accommodated in the existing Refugee and Asylum Centres, established for FRY refugees, that have been adapted to take in persons from outside the region. Four such Centres exist in BiH that are administered by MHRR and funded by UNHCR. While during some time, one of the Centres located closer to the Izacic border crossing was used for readmitted irregular migrants from Croatia in general, MHRR informed all camp managers that the Centres are intended for refugees and asylum seekers only. On 16 October, MHRR also issued an instruction that the Ministry's approval must be sought before third country nationals can be permitted to enter the Centre.

The lack of facilities for the large number of irregular migrants who are intercepted or who are deported from Croatia pursuant to the Readmission Agreement with Croatia has been raised repeatedly by both UNMIBH and national authorities. This has led to considerable confusion, where little distinction is made between asylum seekers and economic migrants, and plans to build detention facilities for irregular migrants in general are currently pursued by MHRR.

## **6.3 The Asylum Procedure**

UNHCR is currently undertaking refugee status determination on behalf of BiH under its mandate. Asylum seekers at present do not have access to independent counsel, due to lack of independent agents who could assist and/or provide counsel to asylum seekers or refugees. UNHCR is planning to introduce such a possibility, possibly through its own extensive Legal Aid and Information (LAIC) network. At present, however, LAIC lawyers have focused primarily on displaced persons and returnees, and are not familiar with refugee law. It should be noted that the largest number of persons who initially seek protection do not stay, but rather leave the Centres very shortly after their arrival. It is believed that most seek onward travel to Western Europe rather than initiating the procedure in BiH.

## **6.4 Durable Solutions**

Recognized refugees have been submitted for resettlement consideration in third countries, although this is by no means guaranteed. UNHCR is also seeking to identify durable solutions for the remaining FRY refugees in BiH under the temporary protection regime, many of whom have been displaced since 1998. These may be a composite of voluntary repatriation, local integration, particularly for those hosted privately, and third country resettlement. The situation of Croatian Serb refugees in the RS still requires attention, although voluntary repatriation or local integration are the two most likely solutions.



## 7. CAPACITY-BUILDING ACTIVITIES

BiH will require extensive technical expertise, financial resources and capacity-building efforts to begin developing a coherent and effective migration regulation and asylum capacity.

UNHCR has signed Agreements for technical and financial assistance with the MHRR. Under the Agreements, UNHCR provides funding for facilities and logistical arrangements required for refugees and asylum seekers in BiH. UNHCR also provides additional resources to strengthen the capacity of the Ministry itself. Additionally, UNHCR provides technical expertise, in part through the Working Group on Immigration and Asylum, but also outside of this forum on individual cases and in respect of the development of a national asylum capacity.

In 2001, UNHCR plans to conduct a series of round tables and seminars to familiarize local authorities and human rights institutions at all levels with international refugee law principles. Although the judiciary below the State level will likely not be involved in asylum decisions, as the Entity *Criminal Codes* permit for expulsion of aliens for serious crimes, it will be important to include them in training.

An additional area of concern has been the negative images of foreigners which have found expression in the local media. UNHCR will therefore seek to inform journalists as well on the subject matter. In particular, UNHCR also plans to establish regular contact and bring together the various national actors who would be involved in establishing a national asylum capacity to discuss issues from the various perspectives.

As the by-laws to the *Law on Immigration and Asylum* are elaborated and adopted, additional efforts to ensure greater familiarity throughout BiH with the *Law* have been discussed with MHRR. Such familiarization is particularly important given the structural and administrative changes which the new legislation entails.

In this respect, one challenge has been that the actual actors have not yet been identified or agreed. As noted, even within the Ministry, the respective persons who will be involved with immigration and asylum issues in the long term have not yet been identified. Assistant Ministers are political appointments, and therefore subject to change pending each election. OHR has, however, indicated that it disputes the political appointments of Assistant Ministers in general, and feels that these functions should be part of the regular civil service, whereby persons would be selected based on open competition, but would then remain regardless of changes in the political constellation.<sup>98</sup>

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<sup>98</sup> According to OHR, the draft *Law on the Civil Service* provides for the Assistant Minister and expert posts to be staffed by members of the regular Civil Service.



More extensive seminars are planned, if possible in cooperation with MHRR, for the SBS and for local police undertaking border control functions, who will be the bodies competent to decide on refusals of entry. Given the definition of a refugee under BiH law, which incorporates “ECHR refugees”, i.e. persons who would fear torture or inhumane or degrading treatment or punishment, UNHCR has sought possible collaboration also with the Council of Europe and OHCHR.

Cooperation with the latter is useful also in view of the fact that human rights provisions that apply generally to irregular migrants also apply to asylum seekers and refugees. Provisions relating to detention and the principle of privacy and family unity are an example. Additional rights that are of particular relevance for migrants and asylum seekers include the right to recognition as a person before the law, the right to an effective remedy, and the right to a fair trial. Such inter-agency collaboration should also be very helpful in ensuring that the rights of asylum seekers and refugees are recognized and taken into consideration when developing the general policy on migration and migration control, and would encourage a comprehensive approach. Cooperation with human rights institutions in BiH in general will be pursued for the same reasons.

Collaboration with European States should prove particularly helpful in developing a migration and asylum system that is respectful of international refugee and human rights principles, while at the same time permitting for orderly migration. In this regard, the list of conditions which BiH must fulfil prior to membership in the Council of Europe is significant, as it includes specifically the adoption and implementation of the *Law on Immigration and Asylum*.<sup>99</sup>

## 8. CONCLUSION

There are many challenges to the development of a comprehensive migration (control) scheme and the establishment of an effective national asylum capacity in BiH. Asylum and migration in many ways present a new and additional challenge for this country. The phenomenon of transit migration in the post-conflict period is a new one, which has arisen only in 2000.

The number of actors, both international and national, who may be involved in asylum and migration issues in BiH is very considerable, due partly to the particular situation of BiH, as well as its complex political structure. As the country is in the process of transition as regards the legal and structural framework

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<sup>99</sup> The requirements were identified by the Council of Europe in May 1999. Monthly progress reports are issued by the Inter-Agency Human Rights Coordinating Centre based on information drawn from the various international actors present in BiH.



for migration and asylum, many of the specific national actors and their functions have not yet been identified or confirmed.

Moreover, there are a number of *lacunae* in the legislative framework which need to be addressed. As identified above, they are as follows:

- A new law or amendments to the present legislation on asylum and migration is required to complete the transfer of competencies from the MCAC to the MHRH;
- The status of a BiH *Administrative Procedural Law* needs to be verified and the RBiH *Law* either confirmed or amended;
- There is a need for regulation of how one Ministry may regulate the operations of another Ministry or other State bodies that may be answerable *inter alia* to the Council of Ministers and the Presidency, such as the SBS;
- The competent bodies as provided for in the *Law on Immigration and Asylum* at Entity and Cantonal level must be identified and a solution found for the District of Brcko;
- The extent of competence of different bodies responsible for implementation of the *Law on Immigration and Asylum* must be determined;
- The specific procedures and principles need to be elaborated;
- Once finalized, the by-laws to the *Law on Immigration and Asylum* need to be adopted;
- The required institutional capacity for implementation of the *Law* needs to be established at State, Entity and Cantonal level to ensure not only an effective asylum procedure with the possibility for appeal, but also coverage of the full range of needs from reception facilities at the airport, transportation, accommodation, interpreters, social support including medical and psycho-social care, and legal support;
- The *Laws on Internal Affairs* regulating the establishment of the bodies at Entity and Cantonal as well as Municipal level may require amendment to reflect new functions and tasks;
- Clarifications are required on the capacity of the still-to-be-established *State Court of BiH* to issue decisions relating to migration and asylum. The possibility of bringing cases before the *Constitutional Court* and the BiH *Human Rights Ombudsman* and *Human Rights Chamber* could also be explored;



- Confirmation is needed as to who should regulate crimes and offences related to illegal entry, smuggling and trafficking; depending on such clarification, either amendments to the *Law on Immigration and Asylum*, and/or drafting and adoption of a State Criminal Code, and/or amendments to the Entity Criminal Codes and to the Cantonal Laws on Minor Offences are needed.

Any system that is ultimately adopted to regulate migration should take a holistic approach that recognizes and takes into account international refugee law and human rights principles. The complex and multi-layered political structures and the political processes which to a large degree are still being determined by political considerations on the part of the three constituent peoples of BiH, must also be kept in mind. Above all, the extensive resource needs and the many challenges which arose in the aftermath of a protracted armed conflict, and which relate to the confirmation of its own personality with respect to the Entities and Cantons, the return of displaced persons and BiH refugees, post-conflict reconstruction, and the recovery of the economy, must be recognized.

UNHCR Bosnia and Herzegovina  
Sarajevo, January 2001

## ANNEX: GLOSSARY OF ACRONYMS

BiH	Bosnia and Herzegovina
ECHR	1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and Its Protocols
EU	European Union
FMSA	Federation Ministry for Social Affairs, Displaced Persons and Refugees
FRY	Federal Republic of Yugoslavia
GFAP	General Framework Agreement for Peace – also known as the Dayton Peace Agreement
IOM	International Organization for Migration
IPTF	International Police Task Force
MCAC	Ministry for Civil Affairs and Communications
MHRR	Ministry for Human Rights and Refugees
MoI	Ministry of Interior (at Entity and Cantonal level)
MUP	Local acronym for Ministry of Interior
OHR	Office of the High Representative
OHCHR	United Nations Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Cooperation in Europe – Mission to BiH
RBiH	Republic of Bosnia and Herzegovina (predecessor to BiH)
RS	Republika Srpska
SFRY	Socialist Federal Republic of Yugoslavia





**SBS**            **State Border Service**

**UNMIBH**    **United Nations Mission in Bosnia and Herzegovina for  
peacekeeping**