Migration and European Security – with a Special Emphasis on Serbia as a Transit Country

JELENA CERANIC

Table of Contents

I. Introduction

The phenomenon of a massive movement towards Europe of migrants and refugees from the Middle East, particularly from Syria in 2015/16 has been described as the world's worst refugee crisis of our time. This forced

migration wave has been provoked not only by the continuing violations of international humanitarian law within and beyond the region, but also by the deteriorating situation in neighboring countries such as Turkey and Lebanon, where the majority of refugees continue to seek shelter.[1] Therefore, an increasing number of persons have been moving to those European countries perceived as safe countries of asylum.

As regards Middle Eastern refugees moving into Europe, a large number of these persons reached Central and Western Europe by taking the *Western Balkans route*. Travelling along this route meant travelling through certain countries which were not bound by EU asylum legislation – the Republic of North Macedonia and the Republic of Serbia. Their asylum systems were of poor quality. These countries' principal source of obligations towards refugees remains the Geneva Convention relative to the Status of Refugees from 1951 (Refugee Convention). Therefore these countries provide an excellent model for a broader examination of the position of transit countries under International Refugee Law.

Neighboring countries such as Croatia and Bulgaria are no less "transitory" than North Macedonia and Serbia. However, these two countries are EU Member States which implies that they are bound by EU *acquis* and its Dublin system.[2] Being an EU Member State opens up another legal aspect that is not strictly relevant to an analysis of universal legislation.

Policy towards refugees and migrants travelling along the Western Balkans route did evolve through several distinct stages, usually through joint undertakings by major EU receiving countries and the governments

---

[1] Kilibarda Pavle, Obligations of transit countries under refugee law: A Western Balkans case study, International Review of the Red Cross, 99/2017, pp. 211-238, p. 212.

[2] The Dublin system refers to a list of criteria established by the EU's Dublin Regulation in order to determine which country is responsible for addressing an individual's asylum claim. The specificity of this system is reflected in fact that the criteria are applied in a subsidiary manner. It means that the Member State in which an asylum-seeker is located may not necessarily be the responsible one for that case.

of the Western Balkan countries themselves. It was so until the Western Balkans route was completely closed in March 2016 after the EU-Turkish Agreement.

A comprehensive analysis of the relations between migrations and European security goes beyond the scope of this paper. Therefore, this article attempts to shed light only on some aspects of the migration crisis, i.e. to explain the position and obligations of transit countries. Accordingly, the presentation of this issue through the prism of Serbian experience could provide an excellent model for a broader examination of the position of transit countries under International Refugee Law. After short introductory notes (Part I.) and clarification of terminology (Part II.), the present paper analyses the so-called Western Balkans route (Part III.). Thereafter, the experience of Serbia as a transit country is examined (Part IV.). Special attention is devoted to the new Law on Asylum and Subsidiary Protection. Finally, in order to define the obligations of transit country under Refugee Convention, the article seeks to determine minimal standards of protection applicable to refugees in a transit context (Part V.).

II. Terminology

With respect to terminology, the phrase *refugees and migrants* is used in the present article. Different stakeholders use different terms to refer to the same phenomenon of forced migrations employing such terms as migrants, vulnerable migrants, forced migrants, asylum-seekers, persons in need of international protection, or even transit migrants. However, referring to refugees and migrants seems to be the most appropriate way of pointing out the legal relevance of status in a mixed-migration flow.

As regards *mixed-migration flow*, the fact is that contemporary irregular migration is mostly mixed. It means that it consists of flows of people who are on the move for different reasons but who share the same routes, modes of traveling and vessels. They cross land and sea borders without authorization, frequently with the help of people smugglers. Mixed flows can include refugees, asylum seekers and others with specific needs, as

well as other irregular migrants. It should be emphasized that groups are not mutually exclusive, as people often have more than one reason for leaving home.

The *safe third country* concept operates on the basis that an applicant for international protection could have obtained it in another country and therefore the receiving State is entitled to reject responsibility for the protection claim. As is the case for the first country of asylum concept, which covers refugees who have already obtained and can again avail themselves of protection in a third country, the safe third country concept is in most cases applied as a ground for declaring an application inadmissible and barring applicants from a full examination of the merits of their claim.[3]

Finally, the concept of a *transit country* refers to a country that refugees and migrants pass through along the way to their preferred country of asylum. Hence, transit country may be located anywhere between the country of origin and the country of destination. But it is important to note that no transit country may be absolutely regarded as such. There will always be a certain number of persons interested in staying there and genuinely seeking some form of protection. So the designation is also subject to change as circumstances change.

Therefore, it seems to be the most suitable to define a transit country as a country in which, in a given moment, a large majority of refugees and migrants otherwise interested in seeking and receiving international protection refrain from doing so, or do so without genuinely intending to stay there; where they do not remain for a significant span of time; and which they eventually attempt to leave in an irregular manner. Western Balkan countries (Serbia and North Macedonia) meet this definition.[4]

---

[3] <https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf.>.

[4] KILIBARDA, Obligations of transit countries under refugee law: A Western Balkans case study, pp. 215-216.

III. The Western Balkan Routes

The Balkans has been an entry point for refugees and migrants into Central Europe for years. However, from April/May 2015, the number of new arrivals began to increase. In fact the old Mediterranean route was replaced by the Western Balkans route. Travelling from Turkey to Greece and then through the Balkan countries in order to reach Western and Central Europe gradually became a preferable alternative for the dangerous journey across the Mediterranean.

Nevertheless, Western Balkan countries such as Serbia and North Macedonia remained almost exclusively transit States. Actually, the vast majority of refugees and migrants simply passed through them without intending to request asylum from their authorities.

1. Unique way of operation

Although there were many different migrant routes active before 2015, the way the Western Balkans route operated between the summer of 2015 and the spring of 2016 was unique.

The Western Balkans route was special because from September 2015 to March 2016, it was the countries on this route which facilitated the transport of forced migrants towards the most desirable destinations rather than human smugglers. The States involved provided medical care and humanitarian assistance along the route as well as transportation and a number of provisional reception centers to accommodate the max influx of persons in transit.

In the late summer of 2015, Germany decided to accept a large number of Syrian refugees and the European Commission as well as a number of European countries welcomed that decision. Although there was no clear basis for it in EU law, the countries along the Western Balkans route, with the support of human rights activists and international organizations, decided to form a passage and helped refugees transit through their

territory. Most of the refugees did not fill in the asylum applications in these countries as there was a silent agreement they would be 'waved through' to Germany.[5]

This practice persisted for several months after Hungary had closed its borders, and basically involved an open-border policy with respect to refugees and migrants crossing into North Macedonia from Greece. However, restrictions on this manner of free movement were gradually imposed. Finally, after the EU–Turkey Agreement of March 2016,[6] the Western Balkans route was completely "shut down".

As a result of this, the majority of refugees and migrants are no longer able to use this route to travel to those European countries perceived as countries of asylum. However, persons who do reach Serbia may still submit an asylum application there.

When the Western Balkan route was shut down in March 2016, many questions about what would happen to the refugees taking this route remained unanswered. For example, around 7000 refugees remained stranded in Serbia. When the route closed, they did not seek asylum in Serbia, but rather remained there as irregular migrants in the hope that they would find their way to the EU. From their point of view, they were caught at an arbitrarily determined point, when the borders were open and when they closed down again.[7]

---

[5] The countries along the Western Balkan route at different points during the refugee crisis concluded that the Dublin III Regulation (which outlines which EU country is responsible for individual asylum claims) and other asylum and refugee-related EU Directives were not fully applicable during the 2015/16 refugee crisis. Some politicians, especially in Croatia, even said outright that they could not follow the EU legislation since it did not envision more than half a million of the refugees coming in such a short period and passing through the territories of these countries. At the peak of the refugee crisis in the autumn of 2015, Croatia did not consistently fingerprint refugees passing through its territory as it was envisioned in the EURODAC Regulation, but helped them get through Croatia towards Slovenia and Austria and then towards Germany.

[6] <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

[7] <https://www.greeneuropeanjournal.eu/the-western-balkan-route-a-new-form-of-forced-migration-governance-in-europe/>.

While the European Commission welcomed such cooperation between EU States in September 2015, in the summer of 2017 the Court of Justice of the European Union (CJEU) effectively ruled that such cooperation was not in line with EU legislation. The two relevant cases are A.S. v. Slovenia[8] and Jafari.[9] The two CJEU judgments can be understood as an effort to strengthen the Common European Asylum System that has been shaken by the refugee crisis. They reinstate the legal boundaries that had become blurred due to massive non-compliance by Member States during the organized secondary movements through the Western Balkans corridor.[10]

2. EU-Turkish Agreement

On 18 March 2016, the European Commission and the Turkish government concluded an agreement with respect to the influx of migrants from Turkey to Greece. The goals of the agreement were to break the business model of the people smugglers and to offer migrants an alternative to putting their lives at risk. The agreement consists of nine Action Points.[11]

The first Action Point states that all new irregular migrants crossing from Turkey to the Greek islands will be returned to Turkey as of 20 March 2016. The transfer of asylum seekers to a third country like Turkey is only permissible if there is an individual determination of claim, legal representation, appeal and the prohibitions of collective expulsion and non-refoulement should be taken into account. The latter is the prohibition to return ("refouler") a refugee to the frontiers of territories where his life or freedom would be threatened. Last but not least, it is questionable whether Turkey can be considered a safe third country.

However, it is stated in the agreement itself that the return of migrants to Turkey will be in full accordance with European and international law. It

---

[8] CJEU, Decision of 26 July 2017 in the Case 490/16, A.S. v. Slovenia.

[9] CJEU, Decision of 26 July 2017 in the Case 646/16, Jafari.

[10] <https://eumigrationlawblog.eu/cjeu-rulings-on-the-western-balkan-route-exceptional-times-do-not-necessarily-call-for-exceptional-measures/>.

[11] <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.>.

is required that there will be no collective expulsions and that the prohibition of non-refoulement will be respected. According to the agreement, migrants arriving on the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive and in cooperation with UNHCR. Consequently, according to the text of the first Action Point, the application of the agreement will be in accordance with the Refugee Convention and European Asylum Law.[12]

The Agreement stipulates that for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to an EU Member State. This provision, however, has been a subject of intense debate. It could be said that it was at odds with the prohibition of non-discrimination based on country of origin laid down in article 3 of Geneva Convention. The 'one in-one out' resettlement approach is clearly a complicated and worrying suggestion and one that is incompatible with EU law.[13]

"The idea that one Syrian can be substituted for another is deeply inimical to established European traditions and norms in human rights, in which the individual circumstances of each person is the key factor. Moreover, a plan under which it is possible to penalise one Syrian for seeking to get to the EU and at the same time to privilege another who has not tried to do so is fundamentally incompatible with the human rights foundations of European integration."[14]

3. European solidarity on the test

This unforeseen mass influx situation put European solidarity to the test, both amongst receiving and transit countries, as well as towards refugees

---

[12] Rodrigues Peter, Migration and Security in times of the refugee crisis – Perspectives for Dublin and Schengen, in: Kellerhals/Baumgartner (eds.), New dynamics in the European integration process – Europe post Brexit, Zürich 2017, pp. 183-202, p. 188.

[13] <https://www.ceps.eu/ceps-publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges/>.

[14] Ibid.

themselves. Although the necessity of forming a common European response was recognized early on during the crises of 2015, a comprehensive common policy was not implemented.[15] The response to the crisis has been characterized by an imbalance between solidarity and security. When faced with an unprecedented influx of people in 2015-16, the pendulum swung sharply towards the latter, with the EU and its members concentrating predominantly on (mostly) *ad hoc* temporary solutions rather than systematic structural reforms.[16]

The lack of intra-EU solidarity has been a major source of tension between EU countries, not only casting doubts over the future of Schengen, but having a wider negative impact on cohesion within the Union. (…) "sharing the burden of refugee management is a litmus test for European solidarity." [17]

EU governments have struggled to respond effectively to the crisis and still find it difficult to forge compromises because of deep differences of opinion between and within countries. It remains very difficult to reconcile the two basic camps: those who argue that Europeans have a moral, humanitarian and legal obligation to support those in need of help and refuge (so-called 'solidarity' camp) and those who argue that Europe must protect itself from the large numbers of people trying to reach the continent (so-called 'security' camp).[18]

Closing the Western Balkans route and the 2016 EU-Turkey deal have partially sealed Europe's borders. Further steps towards a 'fortress Europe' would seriously undermine basic human rights and the Union's international asylum obligations.[19]

---

[15] <https://blogs.icrc.org/law-and-policy/2016/06/23/european-migrant-crisis-avoiding-another-wave-refugees-living-limbo/>.

[16] <https://www.newpactforeurope.eu/documents/new_pact_for_europe_3rd_report.pdf?m=1512491941&>.

[17] Ibid.

[18] Ibid.

[19] Ibid.

IV. The Republic of Serbia as a Transit Country

The Republic of Serbia has come into the international spotlight during the refugee crisis. It has been praised by the international media and stakeholders as a model of good and tolerant policies towards refugees and migrants. The Serbian authorities and citizens, as well, met the wave of refugees and migrants from the Middle East and North Africa with tolerance and hospitality. More than one million migrants have been registered in the territory of Serbia since the onset of the crisis. The country provided the necessary medical care and accommodation for all migrants. Serbian approach has become even more visible and positive in comparison to the attitude adopted by some EU countries which openly expressed hostility towards the increasing number of migrants.

The Republic of Serbia is continuously working to improve and strengthen the system of migration management and the asylum system, both in a normative and operational sense. However, Serbia has still not been considered a safe third country.

1. Serbia's asylum system

While the treatment of refugees and migrants in transit by authorities in Serbia was absolutely positive, Serbia remained a "transit country". Serbia has never been perceived by refugees and migrants as a safe country of asylum. Serbia's asylum system has been described as poor and incapable of providing effective protection. In support of this claim is also a fact that only few refugees and migrants decided to apply for asylum in Serbia. The rest of them accepted a provisional shelter that the authorities provided before making their way towards those European countries that could provide them with a long-term protection.

The context in which Serbia's asylum system functions is influenced by its legal background as former federal units of the Socialist Federal Republic of Yugoslavia. The Socialist Federal Republic of Yugoslavia had been one of the original States party to the 1951 Refugee Convention and being non-

aligned, a major receiving country for refugees from the Eastern Bloc.[20] Post-World War II Yugoslavia guaranteed the right to asylum already in its 1946 Constitution.[21] (...) After breakup of the country, its federal units began to develop their own asylum system.

With respect to Serbia, in 2008 a general Law on Asylum entered into force.[22] During the migration crises, many weaknesses of this law appeared. Taking into consideration these deficiencies on one hand, and the EU integration process on the other hand, the Republic of Serbia adopted a new Law on Asylum and Temporary Protection in 2018.[23]

Unlike most European asylum legislation, Serbia's system envisions a procedural difference between "expressing the intention to seek asylum" or "seeking asylum" and formally "submitting an application for asylum". Speaking *de jure*, only persons who have done the latter are actually considered as having entered the asylum procedure.[24] And this may have practical consequences for the position of asylum seekers (see below, V.1.c.).

2. The new Law on Asylum and Temporary Protection

The Serbian new Law on Asylum and Temporary Protection was adopted on 22 March 2018. This act brings about wide-ranging modifications to the Serbian asylum system as part of EU accession negotiations commitments, mirroring the structure and procedures laid down in the EU asylum *acquis*.

---

[20] KILIBARDA, Obligations of transit countries under refugee law: A Western Balkans case study, pp. 215-216.

[21] Constitution of the Federal People's Republic of Yugoslavia, Official Gazette of the FPRY, 31 January 1946, Art. 31.

[22] Law on Asylum, Official Gazette of the Republic of Serbia, 109/2007,

[23] Law on Asylum and Permanent Protection. Official Gazette of the Republic of Serbia, 24/2018.

[24] KILIBARDA, Obligations of transit countries under refugee law: A Western Balkans case study, p. 217.

The Asylum Office is now required to decide on asylum applications within 3 months, as opposed to 2 months prior to the adoption of the Law on Asylum and Temporary Protection. The 3-month deadline may be extended by a further 3 months in complex cases or at times of a large number of applications, while the Office may postpone the examination of the application in case of an uncertain situation in the country of origin. In any event, the processing of asylum applications can never exceed 12 months, in contrast with 21 months under the recast Asylum Procedures Directive.[25] The new Law on Asylum and Temporary Protection further introduces a set of special procedures including the accelerated procedure, the border procedure, and formal inadmissibility grounds.[26]

In accordance with this Law, an asylum seeker may be subject to different restrictions on freedom of movement, or even detention, under the same set of grounds. The Law sets out "grounds for limiting movement" which correspond to the grounds for detention laid down in the recast Reception Conditions Directive:[27] (a) verification of identity or nationality; (b) determination of the main elements of the claim which cannot be done without such a restriction, in particular where there is a risk of absconding; (c) application made for the sole purpose to avoid deportation; (d) protection of national security or public order; and (e) decision, in a procedure, on the applicant's right to enter the territory.

According to the new legislation, the risk of absconding is assessed taking into account *inter alia* previous attempts of the applicant to irregularly leave Serbia, refusal to establish his or her identity and provision of false information on identity or nationality.

However, the list of measures to restrict freedom of movement raises concerns. The prohibition on leaving the Asylum Centre, regular reporting to the police, assigned residence in the Asylum Centre under strict

[25] Directive 2013/32/EU on common procedures for granting and withdrawing international protection, OJ L 180, 29. Jun 2013

[26] <https://www.ecre.org/serbia-new-act-on-asylum-and-temporary-protection-adopted/>.

[27] Directive 2013/33/EU laying down standards for the reception of applicants for international protection, OJ L 180, 29. Jun 2013.

police supervision, assigned residence in a social protection institution for children under strict control, temporary confiscation of travel documents and detention in the Shelter for Foreigners that may be ordered if the asylum seeker does not comply with a prohibition on leaving the Asylum Centre or regular reporting obligations. The prohibition on leaving the reception center amounts to deprivation of liberty regardless of its designation in the this Law, in line with European Court of Human Rights case law.[28]

Restrictions on freedom of movement cannot exceed 3 months, subject to the possibility of a prolongation for another 3 months in the case of restrictions related to the determination of main elements of the claim or the protection of national security or public order. The asylum seeker can appeal the order of restriction on freedom of movement within 8 days.[29]

Despite the fact that this new law has brought many improvements, practitioners working with refugees and asylum-seekers in Serbia during past years argue that the position of Serbia as a transit country for refugees and migrants cannot be expected to change overnight.

3. Serbia – "safe third country"?

As it was explained above, the notion of *safe third country* refers to a procedural limitation on examining an individual's asylum claim, introduced by certain countries, based on the fact that the individual entered the receiving country after having passed through one or more safe countries where they had the possibility of seeking and receiving effective international protection.

The United Nation High Committee for Refugees (UNHCR) has strongly advised against considering Serbia as safe third country and returning asylum- seekers there. Also, the European Court of Human Rights in its ruling against Hungary agreed with these considerations.

---

[28] <https://www.ecre.org/serbia-new-act-on-asylum-and-temporary-protection-adopted/>.

[29] Ibid.

In its decision *Ilias and Ahmed v. Hungary*[30] from March 2017, the European Court of Human Rights found that Hungary violated several provisions of the European Convention on Human Rights by returning two asylum seekers from Bangladesh (after carrying out the accelerated asylum procedure in Röszke detention unit) back to Serbia in 2015. The Court found that the asylum seekers were unlawfully deprived of their liberty and that the conditions in which they were staying in the detention unit were inhumane and degrading. Hungary therefore had violated the Articles 5 and 3 of the European Convention on Human Rights. In addition, since Hungary officially considers that Serbia is a safe third country, the refugees were returned to Serbia informally (without cooperation with Serbian police) following the asylum procedure.

The Court found that the Hungarian authorities did not implement the procedure for returns in accordance with the EU Return Directive[31] and that the refugees did not have any effective remedy at their disposal that could challenge the decision to return them to Serbia, which is a violation of Article 13 of the European Convention on Human Rights (ECHR). The Court pointed out that the return of refugees to Serbia, the country which the UNHCR declared unsafe in 2012, creates the risk of further return to Macedonia and Greece (chain *refoulement*) and exposure to treatment contrary to Article 3 of ECHR. According to Article 3 ECHR no one shall be subject to torture or to inhuman or degrading treatment or punishment. The Court noted that not only had the Hungarian authorities not considered whether there is an individual risk of inhuman and degrading treatment in the case of returning refugees to Serbia, but they even refused to take into account the reports submitted to them, basing the decision solely on the Regulation of the Government of Hungary from 2015, which declares Serbia a safe third country.[32]

---

[30] ECHR, Decision of 14 March 2017 in the Case 47287/15, Ilias and Ahmed/Hungary.

[31] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008.

[32] Kilibarda Pavel, Developments in International Judicial and Quasi-judicial practice relevant to the Serbian Asylum System: a Legal Review, Pravni zapisi, 2/2017, pp. 352-358, p. 355.

V. Application of Refugee Convention in Transit Countries

Since the Republic of Serbia is not an EU Member States yet, it's not bound by its asylum legislation. Therefore its principal source of obligations in this field remains The Geneva Convention. The present article seeks to determine the scope of obligations of Serbia regarding the treatment of refugees and migrants in transition context, and more broadly, the obligations of other countries in similar situations.

1. Regimes of refugee protection, asylum and subsidiary protection

Although the terms *refugee status* and *asylum* may commonly be heard in the same context, they are not identical. Each has its own meaning and history in international law. So, understanding the difference is crucial to establishing the obligations of transit countries. In this context, the notion of *subsidiary protection* is also important to be explained.

a. Refugee status

With respect to the international system of refugee protection, the main point of reference is the 1951 Refugee Convention. This Convention establishes an objective regime of refugee protection which is independent of the will of the receiving State Party – once persons meet the requirements for refugee status, they are to benefit from its protection, regardless of whether they have been granted asylum by any country.

In accordance with the Geneva Convention:

"For the purposes of the present Convention, the term "refugee" shall apply to any person who (...) as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or,

owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." [33]

The Convention entered into force on 22 April 1954, and it has been subject to only one amendment in the form of a 1967 Protocol which removed the geographic and temporal limits of the 1951 Convention. The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage. It has since been supplemented by refugee and subsidiary protection regimes in several regions, as well as via the progressive development of international human rights law.

As a rights-based instrument, the Convention is underwritten by three main fundamental principles: non-discrimination, non-penalization, and *non–refoulement* (non-expulsion).

The most important element is the principle of non-refoulement expressed in article 33 of the Geneva Convention. It provides that:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." [34]

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." [35]

---

[33] Art. 1, para 2 of the Geneva Convention.

[34] Art. 33, para 1 of the Geneva Convention.

[35] Art. 33, para 2 of the Geneva Convention.

It is often forgotten that the principle of non-refoulment is not unconditional. On the other hand its importance is crucial. It gives minimum protection to a refugee. What is more, this is the only provision that has a chance of being defended as a part of customary law. In the other words, it is binding for states independently of their being or not being parties to the Geneva Convention.[36]

The parties to it are under the entire set of obligations. They could be divided into two groups. One of them refers to the national principle. It means the obligation to grant a refugee the rights equal to the ones of a national (a citizen). The second group is connected with the most favorable treatment. In fact it is less favorable than the national one. It means a treatment equal to the treatment of foreigners being in the best position with the respect to given rights.[37]

However, in reality, a receiving country cannot usually be expected to discern of its own accord whether or not a foreigner entering or already present on its territory is, in fact, a refugee. Under regular circumstances (i.e. outside of the context of a mass influx situation), it must be up to the potential refugee to demonstrate his or her eligibility for the rights proceeding from refugee status. This is an argument used at times by governments (see below V.2.).

The Refugee Convention does not say anything in terms of the Refugee Status Determination procedure as such. With respect to rights guaranteed by the Convention, there is no explicit discrimination between rights to be awarded after asylum has been granted and those stemming already *ipso facto* from meeting the criteria for refugee status. However, certain

---

[36] Przemyslaw Saganek, The refugee crisis – a few remarks from the perspective of a lawyer, in: Kellerhals/Baumgartner (eds.), Perspectives of Security in Europe – Current Challenges, EU Strategies, International Cooperation, Zürich 2015, pp. 176-211, p. 186.

[37] Ibid.

provisions make references to different types of refugee presences in State Parties' territories. This suggests that certain rights or obligations only exist with respect to refugees whose stay has been formalized.[38]

b. Concept of asylum

Understood as long-term protection, asylum remains separate and different from the general obligations of States under the Refugee Convention. In fact, the Convention only mentions asylum in the Preamble, where it recognizes that the "the grant of asylum may place unduly heavy burdens on certain countries". It is also foreseen that international cooperation on this issue is necessary.

Regarding the United Nations system, the asylum is mentioned in the Universal Declaration of Human Rights (UDHR). However, the "right to asylum" under UDHR was differentiated from the principle of non-refoulment under International Refugee Law because it did not oblige States to actually grant asylum to refugees (this stands in distinction to the obligation of non-refoulment, which is absolute). This implies that States had undertaken an undisputed obligation to refrain from the forced return of refugees, but did not have a corresponding obligation to provide durable solutions for their situation.[39]

The Declaration on Territorial Asylum was unanimously adopted by the UN General Assembly in 1967. However, certain obligations, including those related to the principle of non-refoulment, were fleshed out to a much greater extent, yet an obligation to grant asylum never materialized, and remained confined in broad terms to documents which were not *de jure* binding.

The difference between the regimes of asylum and the 1951 Refugee Convention is important for establishing how the manner in which a State may choose to implement its international obligations may, at times, be

[38] KILIBARDA, Obligations of transit countries under refugee law: A Western Balkans case study, p. 222.

[39] Ibid., p. 223.

at odds with those very obligations. In general, providing an asylum system for refugees is extremely beneficial, and may even go beyond what is strictly required by the Refugee Convention. However, conditioning the protection of the latter on requesting asylum can in practice undermine its implementation. Regardless of whether or not a State may grant permanent protection, individual rights as guaranteed by the Refugee Convention must be respected as soon as the conditions for their application have been met – irrespective of whether or not a formal procedure has actually been followed. This final point is crucial to understanding the position of transit countries, which are not really "countries of asylum" but remain bound by refugee law nonetheless.[40]

c. Subsidiary protection

Across Europe, the National Refugee Status Determination procedure is referred to as the "asylum procedure". While "asylum" is closely related to the notion of refugee status, the terms are not synonymous. Asylum may refer to the procedure of granting protection to a foreigner, as well as a protection itself. So, just as a refugee may not be a beneficiary of asylum, a person granted asylum may also not meet the criteria of the Refugee Convention for refugee status.

As a result of developments in International Refugee Law, many countries have instituted *subsidiary protection* as a type of protection status granted specifically to persons who do not meet the definition of a refugee, but whose return to their country of origin would nonetheless be in violation of peremptory norms of International Refugee Law. When it comes to the Republic of Serbia, this country legally foresees the possibility of granting subsidiary protection to persons who are not refugees but who may nevertheless be at risk of serious human rights violations. It should be noted that beneficiaries of subsidiary protection do not enjoy the full spectrum of refugee rights.[41]

---

[40] Ibid., p. 224.

[41] Ibid., pp. 222-223.

2. Obligations of transit countries under refugee law

It is reasonable to assume that, at least in terms of rights for which enjoyment the Convention establishes no further conditions, the obligations of a transit country are no different from those of a destination country.

In Serbia (as well as in other Western Balkan countries), however, several groups of arguments have been put forward asserting the contrary. They are of both a legal and a factual nature and may be heard, *mutatis mutandis*, in the context of other transit countries as well.

The most common argument is that persons who do not seek asylum are not, in fact, entitled to the protection of the International Refugee Law. When discussing the obligations of their respective countries, Western Balkan leaders often highlight that they only have legal obligations towards persons requesting asylum. These statements further suggest that any assistance provided to refugees and migrants who do not request asylum remains a question of policy, rather than law, and represents a measure of countries' "hospitality".[42]

Furthermore, Serbian leaders often argued that certain national groups travelling along the route come from countries where there is no armed conflict. Therefore, they cannot be refugees. The persons travelling along the route have already passed countries where they could have applied for asylum and are therefore not entitled to protection in other countries.

Bearing in mind that the Refugee Convention continues to be applicable to refugees transiting through a particular country, the question remains: What rights are guaranteed by this treaty that such persons may benefit from? In the other words, what is the scope of minimal standards of protection applicable to refugees in transit?

Even a brief look at the Convention is enough to realize that different provisions of the Convention provide different "criteria of entitlement".

---

[42] Ibid, p. 225, FN 95.

Although the Convention's consistency is questionable, three general categories may be distinguished: simple presence, lawful presence and lawful residence.

With respect to rights granted to refugees simply present in the territory of the State party, there is no doubt that such rights are likewise owed to refugees merely transiting there. These rights include at least those guaranteed by Article 3 (non-discrimination), 4 (religion), 16(1) (access to courts), 20 (rationing), 27 (identity papers), 31 (exemption from penalization for unlawful entry or stay) and most important 33 (non-refoulment).

However, even this core of the Convention rights may be read as having a broader scope than simply being applicable to refugees in transit. For some of them it is obvious that some sort of initiative must be shown on the part of the refugee before the relevant provision can become applicable. Article 31 presents an example of such a right. Generally, it requires that in order to be exempt from punishment for unlawful entry or stay, refugees "coming directly" from their country of origin must "present themselves without delay to the authorities and show good cause for their illegal entry or presence". As the provision sets a number of conditions to be fulfilled in order for the refugee to enjoy this right – although some domestic legislation actually opts to drop one or more of them – the crux of the matter is that it is generally not upon the authorities to determine the existence of such circumstances on their own initiative.[43]

Hence, in a situation of mass migrations, States through which these people transit have the legal obligation to refrain from any manner of forced return. This holds true even of those persons who refuse to submit an asylum application on their territory, without undertaking a fair and effective determination of whether the return must lead to a violation of the individual's rights. No discrimination is allowed with regard to a refugee. Transit countries also must provide basic shelter and supplies to all vulnerable migrants, regardless of their status.

---

[43] Ibid, 234.

VI. Concluding Remarks

Concluding remarks can be summarized on three levels: EU level, transit countries' level and Serbia's level.

With respect to the European Union itself, to respond to future needs, EU countries should agree on a comprehensive and balanced human mobility strategy based on a holistic concept of migration management that combines security and solidarity elements. In other words, Member States need to enhance the notion of a 'protective Europe' while avoiding the pitfalls of a 'fortress Europe'.[44]

As regards the position of transit countries, at present, positive international law may place only very limited obligations on transit countries. In times of mass influx, International Refugee Law remains applicable to refugees in transit countries and regardless of whether they have actually requested protection in the receiving State. However, the scope of rights provided may remain limited to the prohibition of refoulement, non-discrimination, non-penalization and humanitarian assistance.

Finally, when it comes to Serbia, a proper response to the refugee and migrant movement needs to be organized on two parallel tracks. First, urgent short-term measures have to be taken to ensure that legal protection, as well as humanitarian assistance, is provided to refugees and migrants. One can say that Serbia is quite successful in accomplishing this task. And second, in order for transit countries to actually become destination countries, long-term asylum sector reform with a focus on the integration of beneficiaries of international protection is required. In Serbia, such reform is scheduled to take place as a part of EU accession. However, it is very important to highlight that establishing strong protection mechanisms at the national level presents a value as such, and should be the country's goal, independently of the European integration process.

---

[44] <https://www.newpactforeurope.eu/documents/new_pact_for_europe_3rd_report.pdf?m=1512491941&>.