

Obligations of transit countries under refugee law: A Western Balkans case study

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Abstract

A significant increase in the number of arrivals of refugees and migrants in Europe along the Western Balkans route brought several Balkan countries into the spotlight of international refugee protection in 2015 and 2016. Out of hundreds of thousands of refugees and migrants recorded entering the former Yugoslav Republic of Macedonia and Serbia, only a handful remained to seek asylum from their authorities. Under the circumstances, the applicability of the 1951 Refugee Convention with respect to refugees refraining from seeking asylum was brought into question, as well as the extent of transit countries' legal obligations under refugee law. Based on the Western Balkans experience, the present article seeks to re-examine the relationship between the concept of asylum and the regime of the 1951 Refugee Convention, the Convention's scope of application in "transit countries", and minimal standards stemming from positive law regarding the treatment of refugees and migrants in a transit context.

Keywords: refugee law, transit countries, forced migration, asylum, Balkan route, Western Balkans.

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There is no work here, no work for refugees. The Serbian people are very good to us, they give us things, help us. But we cannot live here... Austria, Austria will give us papers, and give us work, and we'll live as free...

Anonymous migrant in Subotica, Serbia¹

Introduction

The massive movement towards Europe of forced migrants² fleeing escalating conflict in the Middle East, particularly Syria, in 2015 and 2016 has been described as the world's worst refugee crisis of our time.³ This forced migration wave has been provoked not merely by the continuing violations of international humanitarian law (IHL) and international human rights law (IHRL) within and beyond the region, but also by a deteriorating situation in neighbouring countries such as Turkey and Lebanon, where the majority of refugees continue to seek shelter.⁴ Therefore, an increasing number of persons have been moving to those European countries perceived as safe countries of asylum and as offering the chance to start a new life in peace and security, because of a lack of effective protection⁵ and durable solutions in the immediate region.⁶

Whereas the trend has been to see this flow of refugees primarily through the prism of receiving countries in Western and Central Europe,⁷ the principal source of the movement – the armed conflicts in Syria⁸ and Iraq⁹ – has primarily

1 Anonymous interview with a migrant, January 2017. Courtesy of the Belgrade Centre for Human Rights (BCHR).

2 The terminology employed in this article is further explained at the end of this section.

3 Office of the United Nations High Commissioner for Refugees (UNHCR), "UN Secretary General Says More Help Needed for Syrian Refugees", 30 March 2016, available at: www.unhcr.org/uk/news/latest/2016/3/56fb98dc3/un-secretary-general-says-help-needed-syrian-refugees.html (all internet references were accessed in August 2017).

4 See UNHCR, *Global Trends: Forced Displacement in 2015*, Geneva, 20 June 2016.

5 See Shaden Khallaf, "The Syrian Refugee Crisis in the Middle East", in Karim Makdisi and Vijay Prashad (eds), *The Land of Blue Helmets: The United Nations and the Arab World*, Oakland, CA, University of California Press, 2017.

6 UNHCR defines three types of durable solution as part of its core mandate: voluntary repatriation, local integration and resettlement. See UNHCR, *Framework for Durable Solutions for Refugees and Persons of Concern*, Geneva, May 2003.

7 Most European media outlets refer to the migration flow as the "European migrant crisis" or "European refugee crisis". See, for instance, "Migrant Crisis: Migration to Europe Explained in Seven Charts", *BBC News*, 4 March 2016, available at www.bbc.com/news/world-europe-34131911; "Crise migratoire en Europe: Des chiffres pour comprendre", *Le Parisien*, 16 June 2017, available at: www.leparisien.fr/flash-actualite-monde/crise-migratoire-en-europe-des-chiffres-pour-comprendre-16-06-2017-7057359.php.

8 See UNHCR, *International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic: Update IV*, Geneva, November 2015.

9 See UNHCR, *UNHCR Position on Returns to Iraq*, Geneva, November 2016.

caused a displacement crisis in the Middle East region itself. The largest number of displaced persons remain in their countries of origin,¹⁰ with neighbouring countries receiving the lion's share of refugees.¹¹ Nevertheless, as the focus of the present article is on transit countries, the migratory wave into Europe is of particular interest for two reasons: first, it concerns the applicability of international refugee law (IRL), which does not cover internally displaced persons (IDPs); and second, the majority of refugees located in the Middle East region are there to stay¹² – for them, countries such as Lebanon may be considered not as transit countries, but rather as countries of destination.

With respect to Middle Eastern refugees moving into Europe, official estimates indicate that a total of 850,230 persons of Syrian and Iraqi origin became first-time asylum applicants in various European Union (EU) member States in 2015 and 2016 alone. This represents a significant increase compared to the previous two-year period (2013/14), when that number was 189,070.¹³ A large number of these persons reached Central and Western Europe by taking the “Western Balkans route”,¹⁴ which meant travelling through countries which were not bound by EU asylum legislation,¹⁵ whose asylum systems were (and remain) of poor quality,¹⁶ and where they were not interested in seeking refuge.¹⁷ As these countries' principal source of obligations towards refugees remains the 1951

10 According to Khallaf, “[a] total of 16.4 million people have been displaced in the Syria and neighboring Iraq crises, including 6.6 million displaced within Syria and 4.8 million Syrian refugees abroad. In Iraq, 1.9 million were displaced in 2014 alone by internal fighting and the advance of militant extremists in both countries, adding to the 1 million previously displaced and the 220,000 who left the country to seek safety abroad. As of mid-2015 the total of internally displaced Iraqis had reached 3.9 million, with 377,747 persons having sought refuge abroad.” S. Khallaf, above note 5, p. 360.

11 According to the Syria Regional Refugee Response, over 5 million Syrian refugees had been registered in Egypt, Iraq, Jordan, Lebanon and Turkey at the time of writing of this article. See UNHCR, “Syria Regional Refugee Response: Regional Overview”, available at: data.unhcr.org/syrianrefugees/regional.php. See also Rawan Arar, Lisel Hintz and Kelsey P. Norman, “The Real Refugee Crisis Is in the Middle East, not Europe”, *Washington Post*, 14 May 2016, available at: www.washingtonpost.com/news/monkey-cage/wp/2016/05/14/the-real-refugee-crisis-is-in-the-middle-east-not-europe/?utm_term=.d5d626c94b55.

12 See UNHCR, *Global Trends: Forced Displacement in 2016*, Geneva, 21 June 2017, pp. 14–15, available at: www.refworld.org/docid/594aa38e0.html.

13 Statistical data comes from EUROSTAT.

14 The Western Balkans region is usually taken to include Albania, Bosnia and Herzegovina, Croatia, Kosovo (UNSC Res. 1244), the former Yugoslav Republic of Macedonia, Montenegro and Serbia. The “Western Balkans route” refers to the flow of refugees and migrants entering Europe through Greece and moving northward to perceived destination countries through the former Yugoslav Republic of Macedonia and Serbia. Until September 2015, the mixed-migration flow moved from Serbia, through Hungary and Austria, and principally towards Germany; in September 2015, the route diverted from Hungary to Croatia and Slovenia.

15 The Common European Asylum System (CEAS) refers to a number of EU directives and regulations that set out certain common standards for member States' national asylum systems. This includes asylum procedures, reception conditions and refugee status determination (RSD) proceedings. CEAS also establishes a joint fingerprint database (EURODAC) and sets out criteria for the determination of which member State is responsible for examining a particular asylum claim.

16 See UNHCR, *Serbia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia*, Geneva, August 2012; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum: Observations on the Situation of Asylum-Seekers and Refugees in the Former Yugoslav Republic of Macedonia*, Geneva, August 2015; Lena Petrović (ed.), *Right to Asylum in the Republic of Serbia 2016*, BCHR, Belgrade, 2017.

17 See L. Petrović, above note 16.

Geneva Convention relative to the Status of Refugees (1951 Refugee Convention),¹⁸ and taking into consideration the fact that the “refugee character” of the Western Balkans flow cannot easily be refuted,¹⁹ they provide an excellent model for a broader examination of the position of transit countries under IRL.

The question of what is the extent of State obligations towards transiting refugees is multifaceted, with potentially far-reaching implications in terms of both the law and political response. To that end, this article shall first examine the relationship between the concept of (political) asylum and the provisions of the 1951 Refugee Convention *stricto sensu*. An analysis of the scope of application of the Convention to “mixed-migration flows”²⁰ under circumstances where persons refrain from seeking asylum in the country in which they are present will follow, and finally, an overview of the minimum standards that even transit countries are obliged to meet as a matter of both IRL and IHRL will be provided.

The present article seeks to contribute to a better understanding of these issues by drawing upon the experience of Western Balkan countries in 2015 and 2016, principally the former Yugoslav Republic of Macedonia and Serbia. Although neighbouring countries such as Croatia and Bulgaria are no less “transitory” than the former, their status as EU Member States, bound by EU *acquis*²¹ and its intricate Dublin system,²² adds an additional legal layer that is not strictly relevant to an analysis of universal legislation. They are therefore not considered in the present piece.

With respect to terminology, the author of this article prefers to use the phrase “refugees and migrants”.²³ While different stakeholders use different terms

18 Convention relating to the Status of Refugees, 189 UNTS 150, 28 July 1951 (entered into force 22 April 1954).

19 According to UNHCR, the world’s top countries of origin of refugees remain Syria, Afghanistan and Somalia, all of whose nationals represent a majority of forced migrants registered in Serbia. See Lena Petrović (ed.), *Right to Asylum in the Republic of Serbia 2015*, BCHR, Belgrade, 2016, pp. 38–39.

20 “Contemporary irregular migration is mostly ‘mixed’, meaning that it consists of flows of people who are on the move for different reasons but who share the same routes, modes of travel and vessels. They cross land and sea borders without authorisation, frequently with the help of people smugglers. [The International Organization for Migration] and UNHCR point out that mixed flows can include refugees, asylum seekers and others with specific needs, such as trafficked persons, stateless persons and unaccompanied or separated children, as well as other irregular migrants. The groups are not mutually exclusive, however, as people often have more than one reason for leaving home.” Judith Kumin, “The Challenge of Mixed Migration by Sea”, *Forced Migration Review*, No. 45, February 2014, p. 49.

21 See remarks on CEAS, above note 15.

22 The “Dublin system” or “Dublin regime” refers to a list of criteria established by the EU’s eponymous Dublin Regulation in order to determine which country is responsible for addressing an individual’s asylum claim. The criteria are applied in a subsidiary manner, and the member State in which an asylum-seeker is located may not necessarily be the one responsible for their case (for example, if they have a spouse or minor child who is already a beneficiary of international protection in another member State, that State should be the one examining their claim). See Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 (Recast).

23 This is also the preferred terminology of UNHCR, which stresses that the terms “refugee” and “migrant” cannot be used interchangeably. UNHCR, “‘Refugees’ and ‘Migrants’ – Frequently Asked Questions”, 16 March 2016, available at: www.unhcr.org/afr/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html.

to refer to the same phenomenon of forced migrations – employing such terms as “migrants”, “vulnerable migrants”,²⁴ “forced migrants”, “asylum-seekers”,²⁵ “persons in need of international protection”²⁶ or even “transit migrants”²⁷ – referring to “refugees and migrants” is the best way of highlighting the legal relevance of status in a mixed-migration flow.

Finally, the concept of a “transit country” is less easy to define than it may initially appear to be.²⁸ Very broadly, a transit country is a country that refugees and migrants pass through along the way to their preferred country of asylum – it may be located anywhere between the country of origin and the country of destination. While “institutionalized” transiting such as refugee resettlement schemes may also exist, this article refers only to irregular movement.²⁹ On the other hand, 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, and the designation is also subject to change as circumstances change.

The present author therefore proposes defining a transit country as a country in which, in a given moment, a large majority of refugees and migrants

- 24 The International Red Cross and Red Crescent Movement employs the terms “migrants” and “vulnerable migrants”, stressing the irrelevance of legal status with respect to the activities undertaken under its mandate. See International Federation of Red Cross and Red Crescent Societies (IFRC), *Policy on Migration*, Geneva, November 2009; Australian Red Cross, IFRC and International Committee of the Red Cross, *Implementation of Resolution 3 of the 31st International Conference, “Migration: Ensuring Access, Dignity, Respect for Diversity and Social Inclusion”*, Geneva, October 2015.
- 25 Stakeholders and NGOs providing legal assistance or analyzing asylum systems and proceedings will often use this term. See, e.g., European Council on Refugees and Exiles (ECRE), *Principles for Fair and Sustainable Refugee Protection in Europe: ECRE’s Vision of Europe’s Role in the Global Refugee Protection Regime*, Policy Paper No. 2, February 2017.
- 26 The term “international protection” is broader than the definition of refugee under the 1951 Refugee Convention and also covers persons who benefit from additional protection mechanisms under regional or human rights instruments. See UNHCR, *Persons in Need of International Protection*, Geneva, June 2017.
- 27 This is the term proposed by Missbach to refer to refugees and migrants in transit: “I prefer to use the generic term ‘transit migrant’ even though the term is controversial. Whereas categories of migration are generally labelled according to the circumstances of departure (voluntary or forced), the motivations for departure (economic or rescue), or the outcome of the migration process (resettled refugee, temporary migrant worker), transit migration does not denote a type of migration but rather certain phases in the whole migration process.” Antje Missbach, “Transiting Asylum Seekers in Indonesia: Between Human Rights Protection and Criminalization”, in Juliet Pietsch and Marshall Clark (eds), *Migration and Integration in Europe, Southeast Asia, and Australia: A Comparative Perspective*, Amsterdam University Press, Amsterdam, 2015, p. 118.
- 28 Discussing Hungary as a transit country, Irina Molodikova notes: “It is essential to ask if the term ‘transit migration’ has the same meaning now as in previous realities, or whether it is a new political construction. What are the most important factors that facilitate the transit of migrants through the country? For which groups of migrants does the country appear to be a country of transit? What is the difference between the groups of migrants who want to remain in Hungary and those who try to pass through Hungary into Western Europe? Does the recent readmission agreement create new realities for transit migration between the East and West?” Irina Molodikova, “Hungary and the System of European Transit Migration”, in Franck Düvell, Irina Molodikova and Michael Collier (eds), *Transit Migration in Europe*, Amsterdam University Press, Amsterdam, 2014, p. 154.
- 29 This also appears to be the approach of Géraldine Chatelard, writing for UNHCR in the context of Jordan. Although the notion of “transit countries” is never defined, it is clear that the author takes irregular migration as the key criterion in determining Jordan to be such a country. See Géraldine Chatelard, *Jordan as a Transit Country: Semi-protectionist Immigration Policies and Their Effects on Iraqi Forced Migrants*, Working Paper No. 61, UNHCR, Geneva, 2002, p. 6.

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 meet this definition.

The Western Balkans route: Serbia and the former Yugoslav Republic of Macedonia as transit countries

The Balkans had been an entry point for refugees and migrants into Central Europe for years, although it was only starting in spring 2015 that the number of arrivals began to rival those crossing the Mediterranean. As before, Western Balkan countries such as the former Yugoslav Republic of Macedonia and Serbia remained almost exclusively transit States: the vast majority of refugees and migrants simply passed through them without intending to request asylum from their authorities.³⁰

The prevailing context in which both countries' asylum systems function is remarkably similar. Both share a common legal background as former federal units of the Socialist Federal Republic of Yugoslavia (Yugoslavia), which 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.³¹ Post-World War II Yugoslavia guaranteed the right to asylum (*pravo utočišta*) already in its 1946 Constitution.³² In spite of that, the country had never developed a national refugee status determination (RSD) system; the Office of the United Nations High Commissioner for Refugees (UNHCR) itself used to conduct RSD under its mandate,³³ while the ultimate decision to grant asylum remained within the jurisdiction of the Federal Executive Council (i.e., the government).³⁴ It was not until after the breakup of the country that its federal units began to develop their own asylum systems: the Federal Republic of Yugoslavia (Serbia and Montenegro) adopted a Law on Refugees in 1992,³⁵ but this law (which remains in force) only pertains to the situation of Serbian and other refugees fleeing persecution in other former Yugoslav republics;

30 See, L. Petrović, above note 16, pp. 11–12; UNHCR, *Serbia as a Country of Asylum*, above note 16, para. 7; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, para. 36; Aleksandra Cvetanovska and Goce Kocevski (eds), *Annual Report on the Legal Protection of Human Rights in the Republic of Macedonia 2016*, Macedonian Young Lawyers Association (MYLA), Skopje, 2017, pp. 52–54; Pavle Kilibarda and Nikola Kovačević, *Asylum Information Database, Country Report: Serbia*, ECRE, March 2016, p. 18, available at: www.asylumineurope.org/sites/default/files/report-download/aida_sr.pdf.

31 For example, after the 1956 uprising in Hungary, almost 20,000 Hungarian refugees arrived in Yugoslavia. See UNHCR, *Report of the United Nations High Commissioner for Refugees*, UN Doc. A/3828/Rev.1, 1 January 1959.

32 Constitution of the Federal People's Republic of Yugoslavia, *Official Gazette of the FPRY*, 31 January 1946 (FPRY Constitution), Art. 31.

33 See the history page of the UNHCR Serbia website, available at: www.unhcr.rs/en/opste/o-nama/istorija-unhcra.html.

34 Vojin Dimitrijević, *Utočište na teritoriji strane države: Teritorijalni azil*, BCHR, Belgrade, 2015, pp. 84–85.

35 Law on Refugees, *Official Gazette of the Republic of Serbia*, Nos 18/92, 45/2002, and *Official Gazette of the Federal Republic of Yugoslavia*, No. 42/2002.

a general Law on Asylum did not enter into force until 2008.³⁶ The former Yugoslav Republic of Macedonia similarly adopted a Law on Asylum in 2003, which has since been amended several times.³⁷ Unlike most European asylum legislation, both of these countries' systems envision a procedural difference between "expressing the intention to seek asylum"³⁸ or "seeking asylum"³⁹ (sometimes imprecisely rendered in English as the asylum-seeker being "recorded" or "registered") and formally "submitting an application for asylum":⁴⁰ speaking *de jure*, only persons who have done the latter are actually considered as having entered the asylum procedure, which may have practical consequences for the position of asylum-seekers.⁴¹

The difference is telling. In Serbia, out of a total of 590,816 persons who "expressed the intention to seek asylum" in 2015 and 2016, a mere 1,157 (0.2%) submitted a formal application.⁴² Similarly, in the former Yugoslav Republic of Macedonia, where 525,059 asylum-seekers were recorded in the same time span, only 2,660 (0.51%) persons submitted an application.⁴³ These statistics obviously do not include persons whom the authorities either did not treat in line with asylum legislation or with whom they did not interact at all during their stay.

Both countries' asylum systems have been described as poor and incapable of providing effective protection.⁴⁴ The problems alleged to plague the systems include difficulties in accessing the territory and asylum procedure (including expulsion and push-backs);⁴⁵ failure or refusal to admit persons into the asylum

36 Law on Asylum, *Official Gazette of the Republic of Serbia*, No. 109/2007 (Serbian Law on Asylum).

37 Law on Asylum and Temporary Protection, *Official Gazette of the Republic of Macedonia*, Nos 49/03, 66/07, 142/08, 146/09, 166/12, 101/15 (Macedonian Law on Asylum).

38 Serbian Law on Asylum, above note 36, Art. 22.

39 Macedonian Law on Asylum, above note 37, Art. 16.

40 Serbian Law on Asylum, above note 36, Art. 25.

41 In Serbia, the asylum procedure is considered an administrative procedure that only starts once an asylum application has been submitted; it is only as of this moment that the general two-month deadline for enacting an administrative decision foreseen by the Serbian General Administrative Procedure Act becomes relevant. However, as the Law on Asylum does not specify deadlines for "submitting" an application once a person has expressed the intention to seek asylum (practically speaking, this requires Asylum Office staff to schedule an interview with the asylum-seeker in the asylum centre, where they do not have a permanent presence), persons who have expressed the intention to seek asylum may have to spend an unforeseeable length of time waiting for their claim to be addressed. This problem is less pronounced in the former Yugoslav Republic of Macedonia than in Serbia, as Article 3 of the Macedonian Law on Asylum defines an asylum-seeker as "an alien who seeks protection from the Republic of Macedonia from the day he has approached the Ministry of Interior until the day of issuance of a final decision in the procedure for recognition of the right of asylum". For more information, see Serbian Law on Asylum, above note 36; Macedonian Law on Asylum, above note 37.

42 L. Petrović, above note 16, pp. 22, 38; L. Petrović, above note 19, pp. 38–39.

43 Statistics provided by MYLA.

44 UNHCR, *Serbia as a Country of Asylum*, above note 16, para. 10; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, para. 3.

45 Committee against Torture (CAT), *Concluding Observations on the Second Periodic Report of Serbia*, UN Doc. CAT/C/SRB/CO/2, May 2015, para. 15; UNHCR, *Serbia as a Country of Asylum*, above note 16, paras 12–14; L. Petrović, above note 16, pp. 19–36; CAT, *Concluding Observations on the Third Periodic Report of the Former Yugoslav Republic of Macedonia*, UN Doc. CAT/C/MKD/CO/3, June 2015, para. 19; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, paras 10–12.

procedure;⁴⁶ the practice of automatic application of the safe third country principle without entering the merits of a claim or examining whether applying that concept was appropriate;⁴⁷ expulsion and extradition of persons still undergoing asylum proceedings;⁴⁸ unlawful detention of refugees and migrants,⁴⁹ occasionally followed by credible allegations of ill-treatment of persons deprived of liberty;⁵⁰ and general issues related to ensuring respect for the rights of persons granted asylum⁵¹ and continuing lack of integration mechanisms.⁵² Based on these issues, UNHCR has strongly advised against considering either Serbia or the former Yugoslav Republic of Macedonia as safe third countries⁵³ and returning asylum-seekers there.⁵⁴ In a recent judgement against Hungary, the European Court of Human Rights (ECtHR) agreed with these considerations, finding that country to have violated the European Convention on Human Rights (ECHR)⁵⁵ by returning asylum-seekers to Serbia.⁵⁶ Along with economic reasons, these deficiencies should be seen as critical towards understanding why neither Serbia nor the former Yugoslav Republic of Macedonia have become destination countries for any significant number of refugees and migrants.

An additional specificity of the Western Balkans route was the State-sanctioned movement from the former Yugoslav Republic of Macedonia, through Serbia and onward to Croatia and Slovenia, thereby facilitating the

46 For example, in the first half of 2015, Serbian Border Police refused to admit 520 foreigners to Serbia, including eighteen Syrian and thirty Iraqi nationals. Vesna Petrović and Dušan Pokuševski (eds), *Human Rights in Serbia 2015*, BCHR, Belgrade, 2016, p. 264.

47 See Nikola Kovačević, *Asylum Information Database, Country Report: Serbia: 2016 Update*, ECRE, February 2017, pp. 28–30, available at: www.asylumineurope.org/sites/default/files/report-download/aida_sr_2016update.pdf.

48 *Ibid.*, p. 21.

49 *Ibid.*, p. 46; L. Petrović, above note 16, pp. 31–33; MYLA, *Immigration Detention in Macedonia 2016*, Skopje, 2016, available at: myla.org.mk/wp-content/uploads/2016/09/MYLA-Report-on-Immigration-Detention-in-Macedonia-FINAL.pdf.

50 See Human Rights Watch, “*As Though We Are Not Human Beings*”: *Police Brutality against Migrants and Asylum Seekers in Macedonia*, New York, September 2015, available at: www.hrw.org/report/2015/09/21/though-we-are-not-human-beings/police-brutality-against-migrants-and-asylum.

51 See L. Petrović, above note 16, pp. 99–112.

52 See chapters on Serbia and the former Yugoslav Republic of Macedonia in Sonja Tošković (ed.), *Serbia from Transit to Destination Country*, BCHR, Belgrade, 2016, pp. 15–30, 43–62.

53 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. For a discussion on this idea, see UNHCR, “Considerations on the ‘Safe Third Country’ Concept”, Geneva, July 1996; Violeta Moreno-Lax, “The Legality of the ‘Safe Third Country’ Notion Contested: Insights from the Law of Treaties”, Guy S. Goodwin-Gill and Philippe Weckel, *Migration and Refugee Protection in the 21st Century: International Legal Aspects*, Martinus Nijhoff, Leiden, 2015.

54 UNHCR, *Serbia as a Country of Asylum*, above note 16, para. 81; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, paras 46–47.

55 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950 (entered into force on 3 September 1953).

56 ECtHR, *Ilias and Ahmed v. Hungary*, App. No. 47287/15, 14 March 2017. See also Pavle Kilibarda, “The ECtHR’s *Ilias and Ahmed v. Hungary* and Why It Matters”, *EJIL: Talk!*, 20 March 2017, available at www.ejiltalk.org/the-ecthrs-ili-as-and-ahmed-v-hungary-and-why-it-matters/.

movement of refugees and migrants to Central Europe⁵⁷ – namely, this practice persisted for several months after Hungary had closed its borders,⁵⁸ and basically involved an open-border policy with respect to refugees and migrants crossing into the former Yugoslav Republic of Macedonia from Greece. The States involved provided medical care and humanitarian assistance along the route⁵⁹ as well as transportation and a number of provisional reception centres to accommodate the mass influx of persons in transit.⁶⁰ However, restrictions on this manner of free movement were gradually imposed, until finally, after the EU–Turkey deal of March 2016,⁶¹ the Western Balkans route was completely “shut down”.⁶² This did not entail full border closure, but the States no longer sanctioned movement along the route, which meant that the situation had essentially reverted to the previous state of affairs – refugees and migrants could either seek asylum in the country where they were present, or face treatment as irregular migrants.⁶³

For these reasons, it is submitted here that Serbia and the former Yugoslav Republic of Macedonia fully meet the above-proposed definition of a transit country for the purposes of IRL. As they are States party to the 1951 Refugee Convention, findings in relation to these two countries will also be relevant to other possible transit countries as well, and possibly to non-parties insofar as the relevant elements of IRL may be regarded as customary law.⁶⁴

Asylum and refugee protection: Complementary, but separate regimes?

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

57 See European Commission, *Report from the European Commission to the European Parliament and the Council on the Follow-Up to the Leaders’ Meeting on Refugee Flows along the Western Balkans Route*, Strasbourg, December 2015.

58 Kris Pollet and Minos Mouzourakis, *Crossing Boundaries: The New Asylum Procedure at the Border and Restrictions to Accessing Protection in Hungary*, ECRE, October 2015, pp. 33–34.

59 P. Kilibarda and N. Kovačević, above note 30, p. 25; State-sanctioned transportation in Serbia included taking refugees and migrants by bus from the Macedonia–Serbia border at Preševo to the Croatia–Serbia border at Šid on the Serbian side of the border, where they were placed under the jurisdiction of Croatian police officers. The Croatian police would conduct screening before allowing refugees and migrants to board a Croatian Railways train to the reception centre in Slavonki Brod. The author of this article observed the procedure himself as a member of a joint monitoring visit of the Ombudspersons of Croatia and Serbia to the centres in Šid and Slavonki Brod on 9 December 2015.

60 *Ibid.*, p. 28.

61 See European Commission, “EU–Turkey Statement: Questions and Answers”, 19 March 2016, available at: europa.eu/rapid/press-release_MEMO-16-963_en.htm.

62 See, e.g., Balkan Investigative Reporting Network, “Balkan States Close Borders in Domino Effect”, *BalkanInsight*, 9 March 2016, available at: www.balkaninsight.com/en/article/balkan-migrants-rute-is-no-more-slovenia-declares-03-09-2016-1.

63 “As of March 2016, following joint action by a number of countries along the Western Balkan route, 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 here.” P. Kilibarda and N. Kovačević, above note 30, p. 25.

64 For a discussion of customary IRL, see D. W. Greig, “The Protection of Refugees and Customary International Law”, *Australian Yearbook of International Law*, Vol. 8, 1983.

international law, and understanding the difference is crucial to establishing the obligations of transit countries.

As a matter of IRL *stricto sensu*, sixty-five years since its adoption, the 1951 Refugee Convention, as modified by its 1967 Protocol,⁶⁵ remains the single most important element of the international system of refugee protection.

While, before World War II, the League of Nations system had already known several arrangements for the protection of persons fleeing persecution (such as the 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees⁶⁶ and the 1936 Provisional Arrangement concerning the Status of Refugees Coming from Germany),⁶⁷ such arrangements remained of limited scope in terms of the rights they conferred and the nationalities they covered. Building upon a refugee definition largely adopted by the UNHCR Statute of 1950,⁶⁸ the 1951 Refugee Convention was the first universal treaty governing the situation of refugees in a general manner, especially following the adoption of the 1967 Protocol, which removed the limits on the Convention's application contained in Article 1(A)(2).⁶⁹

Although certain scholars have argued that the significance of the 1951 Refugee Convention has waned in light of developments in the field of IHRL,⁷⁰ it cannot be denied that at least some of its provisions reflect peculiarities of IRL and are not present in other branches of the law. For this reason, among others, the definition of a refugee⁷¹ under the 1951 Refugee Convention remains crucial for the enjoyment of a number of substantive rights that it grants its beneficiaries.

Most importantly, the Convention establishes an objective regime of refugee protection which is independent of the will of the receiving State Party –

65 Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967) (New York Protocol).

66 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, 89 LNTS 2004, 12 May 1926.

67 Provisional Arrangement concerning the Status of Refugees Coming from Germany, 171 LNTS 3952, 4 July 1936.

68 UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, UN Doc. A/RES/428(V), 14 December 1950 (UNHCR Statute), Art. 6(A)(ii).

69 The 1951 Refugee Convention permits States Parties to choose whether, with respect to their obligations, the words “events occurring before 1 January 1951” in Article 1(A) shall be understood to mean “events occurring in Europe before 1 January 1951” or “events occurring in Europe or elsewhere before 1 January 1951”. 1951 Refugee Convention, Art. 1(B)(1).

70 “A closer examination of [the norms of refugee and human rights law] clearly demonstrates that human rights law has become the primary source of refugee protection. The Geneva Convention has been accordingly relegated to a supporting role.” Vincent Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in Ruth Rubio-Marin (ed.), *Human Rights and Immigration*, Oxford University Press, Oxford, 2014, p. 22. For a more favourable approach to the Convention, see Jane McAdam, “The Enduring Relevance of the 1951 Refugee Convention”, *International Journal of Refugee Law*, Vol. 29, No. 1, 2017.

71 According to the Convention, a refugee is a person who “owing to 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”. 1951 Refugee Convention, Art. 1(A)(2).

once a person meets the requirements for refugee status, they are to benefit from its protection, regardless of whether they have been granted asylum by any country. Indeed, it has long been held that “a person becomes a refugee at the moment when he or she satisfies the definition, so that formal determination of status is declaratory, rather than constitutive”.⁷² In other words, the protection granted by the Convention is – for some of its provisions, at least – separate from the status of an asylum claim, unless of course it is determined, in fair proceedings, that the applicant in question is not a refugee in the first place.⁷³

In line with the understanding that the asylum procedure is merely declaratory,⁷⁴ many States Parties today afford a considerable part, if not the full spectrum, of refugee rights to asylum-seekers, who are therefore presumed refugees until proven otherwise. For example, Serbian and Macedonian law both grant a wide spectrum of rights to asylum-seekers, including the right to free accommodation,⁷⁵ health care⁷⁶ social security⁷⁷ and, under certain circumstances, access to the labour market.⁷⁸

On the other hand, 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 – the asylum-seeker – to demonstrate his or her eligibility for the rights proceeding from refugee status. This is an argument used at times by governments,⁷⁹ and it is not an unsound one at that.

72 Guy S. Goodwin-Gill, *The Refugee in International Law*, Clarendon Press, Oxford, 1989, p. 20.

73 Either by failing to meet the conditions for refugee status or being excluded from it under the exclusion clauses. 1951 Refugee Convention, Art. 1(D–F).

74 See UNHCR, *Note on Non-Refoulement (Submitted by the High Commissioner)*, UN Doc. EC/SCP/2, 23 August 1977, para. 17; UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, 2011 (RSD Handbook), para. 28; D. W. Greig, above note 64, pp. 133–134; Mariagiulia Giuffrè, “Access to Asylum at Sea? *Non-Refoulement* and a Comprehensive Approach to Extraterritorial Human Rights Obligations”, in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *“Boat Refugees” and Migrants at Sea: A Comprehensive Approach*, Brill Nijhoff, Leiden, 2016, p. 251.

75 Macedonian Law on Asylum, above note 37, Art. 48; Serbian Law on Asylum, above note 36, Art. 39.

76 Macedonian Law on Asylum, above note 37, Art. 48; Serbian Law on Asylum, above note 36, Art. 40.

77 Macedonian Law on Asylum, above note 37, Art. 48; Serbian Law on Asylum, above note 36, Art. 41.

78 Macedonian legislation only allows asylum-seekers to work within reception centres or other places of accommodation assigned by the Ministry of Labour and Social Policy; Macedonian Law on Asylum, above note 37, Art. 48. In Serbia, the Law on Asylum only allows persons recognized as refugees in the asylum procedure to become employed, though the 2014 Employment of Foreigners Act allows asylum-seekers to apply for a work permit and access the labour market if nine months have passed since they have submitted their asylum application and no final decision has been reached through no fault of their own. See Serbian Law on Asylum, above note 36, Art. 43; Employment of Foreigners Act, *Official Gazette of the Republic of Serbia*, No. 128/2014, Art. 13; Lena Petrović and Sonja Tošković, *Institucionalni mehanizmi za integraciju osoba kojima je odobren azil*, BCHR, Belgrade, 2016, pp. 23–25.

79 The argument can take different forms. For example, the government of Australia recently ordered that asylum-seekers would have to formally apply for asylum or face deportation after a certain deadline had expired. See, e.g., “Peter Dutton Gives Asylum Seekers in Australia Deadline to Apply for Refugee Status”, *The Guardian*, 21 May 2017, available at: www.theguardian.com/australia-news/2017/may/21/peter-dutton-gives-asylum-seekers-in-australia-deadline-to-apply-for-refugee-status. The author of the present article himself heard this argument raised by authorities in the Western Balkans during meetings related to the Western Balkans flow.

Neither the 1951 Refugee Convention nor its Protocol have anything to say on the matter of the RSD procedure as such. With respect to rights guaranteed by the Convention, there is no explicit discrimination within the treaty 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 provisions make reference to different types of refugee presence in States Parties' territory; this suggests that certain rights or obligations established by them only exist with respect to refugees whose stay has been formalized. For example, when Article 24 of the Convention discusses labour legislation and social security, it accords the same treatment to "refugees lawfully staying in their territory" as is accorded to that State's own nationals. This implies that refugees whose stay is not "lawful" continue to enjoy those Convention rights which are granted without the condition of lawful stay; however, it also implies that a State has the right to institute such procedures as are necessary for legalizing their stay on its territory before granting the full scope of Convention rights (as long as such procedures are not overly restrictive, which would go against the Convention's object and purpose).

Across Europe, as well as in most parts of the world, the national RSD procedure is referred to as the "asylum procedure". As stated above, 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 the protection itself, and just as a refugee may not be a beneficiary of asylum, so too may a person granted asylum not meet the criteria of the 1951 Refugee Convention for refugee status. As a result of developments in IHRL, many countries have instituted "subsidiary protection"⁸⁰ 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 preemptory norms of IHRL;⁸¹ likewise, a mandate refugee⁸² located in a State which has not ratified the Convention or maintains geographic or temporal limits on its application may only enjoy "temporary protection"⁸³ in that country, if they enjoy any manner of protection at all. With respect to the Western Balkan

80 See, e.g., European Council, Council Directive 2004/83/EC, 29 April 2004 (EC Qualification Directive), Arts 2(e), 15.

81 This primarily refers to the *jus cogens* prohibition against torture and other cruel, inhuman or degrading treatment or punishment, as well as the effectively absolute prohibition against arbitrary deprivation of life.

82 "A person who meets the criteria of the UNHCR Statute qualifies for the protection of the United Nations provided by the High Commissioner, regardless of whether or not he is in a country that is a party to the 1951 Convention or the 1967 Protocol or whether or not he has been recognized by his host country as a refugee under either of these instruments. Such refugees, being within the High Commissioner's mandate, are usually referred to as 'mandate refugees'." RSD Handbook, above note 74, para. 16.

83 Thus, Turkey provides "temporary protection" to Syrian refugees, with respect to whom it does not consider itself bound by the 1951 Refugee Convention, but nevertheless offers certain limited rights. See Oktay Durukan, Öykü Tümer and Veyzel Essiz, *Asylum Information Database, Country Report: Turkey*, December 2015, pp. 104–136, available at: www.asylumineurope.org/sites/default/files/report-download/aida_tr_update.i.pdf.

examples, both Serbia⁸⁴ and the former Yugoslav Republic of Macedonia⁸⁵ legally foresee 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.⁸⁶

Understood as long-term protection, asylum remains separate and different from the general obligations of States under such documents as the 1951 Refugee Convention. In fact, the Convention only mentions asylum in the Preamble, where it recognizes that “the grant of asylum may place unduly heavy burdens on certain countries” and that international cooperation on the issue is necessary.

The first mention of asylum in the United Nations (UN) system is made by the Universal Declaration of Human Rights (UDHR) itself.⁸⁷ However, the “right to asylum” under the UDHR was differentiated from the principle of *non-refoulement* under IRL because it did not oblige States to actually grant asylum to refugees (this stands in distinction to the obligation of *non-refoulement*, 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. When the UN General Assembly unanimously voted to adopt the Declaration on Territorial Asylum in 1967,⁸⁸ certain obligations, including those related to the principle of *non-refoulement* (such as the prohibition against rejections at the frontier, conspicuously absent from the text of the 1951 Refugee Convention), 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.⁸⁹ Coming back to the Yugoslav example, the right to asylum was guaranteed by all three of the country’s post-World War II constitutions.⁹⁰

84 Serbian Law on Asylum, above note 36, Art. 2.

85 In the former Yugoslav Republic of Macedonia, this type of protection is referred to as “humanitarian protection”. Macedonian Law on Asylum, above note 37, Art. 5.

86 This is particularly true of labour legislation. In the former Yugoslav Republic of Macedonia, recognized refugees have the right to work as foreigners with a permanent residence, which is not granted to beneficiaries of humanitarian protection (who may only work as foreigners with temporary residence). In Serbia, the Law on Asylum does not give the right to work to beneficiaries of subsidiary protection, but this right was granted by the 2014 Employment of Foreigners Act. The legislation of these countries does not provide for issuing travel documents to beneficiaries of subsidiary or humanitarian protection, respectively. See Macedonian Law on Asylum, above note 37, Arts 42, 56, 60; Serbian Law on Asylum, above note 36, Arts 43, 62; Serbian Employment of Foreigners Act, above note 78, Art. 13.

87 The UDHR foresees that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” UN General Assembly, Universal Declaration of Human Rights, UN Doc. 217 A (III), 10 December 1948, Art. 14. However, the adopted terminology was purposefully ambiguous, reflected in the use of the term “to enjoy” rather than “to be granted.” See G. S. Goodwin-Gill, above note 72, p. 104.

88 UN General Assembly, Declaration on Territorial Asylum, UN Doc. A/RES/2312(XXII), 14 December 1967.

89 Neither of the two 1966 Covenants contain provisions on the right to asylum *stricto sensu*, nor has a potential universal treaty that some had expected as follow-up to the 1967 Declaration ever been adopted.

90 FPRY Constitution, above note 32, Art. 31; Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of the SFRY*, Year XIX, No. 14, 10 April 1963, Art. 65; Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of the SFRY*, Year XXX, No. 9, 21 February 1974, Art. 202.

However, in spite of the fact that Yugoslavia had been engaged in the drafting of the 1951 Refugee Convention and became one of its original States Parties, the scope of this right remained much more narrow than the definition of a refugee under the Convention; in fact, the 1974 Constitution only granted the right to asylum to foreigners and stateless persons “who face persecution because of their advocacy of democratic opinions and movements, social and national liberation, the freedom and rights of the human person or the freedom of scientific or artistic creation”.⁹¹ 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 at odds with those very obligations. Generally speaking, providing asylum for refugees is extremely beneficial, and may even go beyond what is strictly required by the 1951 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 1951 Refugee Convention and various human rights instruments 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.

Application of the 1951 Refugee Convention in transit countries: Counter-arguments raised in practice

As previously mentioned, the 1951 Refugee Convention as modified by its 1967 Protocol becomes applicable once a person meets the criteria of Article 1(A)(2) and is not excluded from refugee status under one of the so-called exclusion clauses (Article 1(D–F)). Likewise, in spite of the fact that the Convention does not explicitly establish a State Party’s obligations vis-à-vis refugees as owed either to those on its territory or those under its jurisdiction, the latter, broader notion is generally taken to be relevant, which is particularly important for refugees intercepted at sea. Such people are certainly to be considered refugees from the moment they leave the territory of their country of origin,⁹² but until they come under the jurisdiction of a State Party, the extent of that country’s obligations

91 Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of the SFRY*, Year XXX, No. 9, 21 February 1974, Art. 202.

92 “The Refugee Convention is silent on the issue of its extraterritorial applicability, yet it is submitted that there are a number of more or less compelling reasons which would seem to indicate that Art. 33(1) of the Refugee Convention ought to apply outside the territory of the States Parties. By way of a preliminary remark it is worthy to note that Art. 1(3) of the 1967 Protocol to the Refugee Convention states that the Protocol ‘shall be applied by States Parties hereto without any geographical limitation.’” Killian S. O’Brien, “Refugees on the High Seas: International Refugee Law Solutions to a Law of the Sea Problem”, *Goettingen Journal of International Law*, Vol. 3, No. 2, 2011, p. 727.

towards them is questionable inasmuch as it is towards those on the territory of another State Party.

Bearing this in mind, it is reasonable to assume that, at least in terms of rights for the enjoyment of which the Convention establishes no further conditions, the obligations of a so-called transit country are no different from those of a destination country.

In the Western Balkans, however, several arguments, or groups of arguments, have been put forward asserting the contrary. They are both of a legal and factual nature and may conceivably be heard, *mutatis mutandis*, in the context of other transit countries as well. What will follow are the legal and factual merits of these arguments.

The most common argument that may be heard is that persons who do not seek asylum are not, in fact, entitled to the protection of IRL. When discussing the obligations of their respective countries, Western Balkan leaders often highlight that they only have legal obligations towards persons requesting asylum; statements to that effect were made in 2016 by the then labour minister of Serbia⁹³ as well as the prime minister.⁹⁴ 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".⁹⁵ This is the principal legal argument against the application of IRL in such situations.

In addition, it has been argued by Western Balkan leaders that certain national groups travelling along the route come from countries where there is no armed conflict and therefore cannot be refugees,⁹⁶ and that 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. While this

93 In early 2016, discussing refugees and migrants returned to Serbia from Croatia, the Serbian Minister of Labour stated that these persons could either request asylum in Serbia or face forced return to those countries from which they had first entered Serbia. See "Bit će onemogućeno novo vraćanje migranata iz Hrvatske", *NI*, 17 February 2016, available at: hr.n1info.com/a/104542/Svijet/Regija/Aleksandar-Vulin-Bit-ce-onemoguceno-novo-vracanje-migranata-iz-Hrvatske.html (in Croatian).

94 In 2016, the prime minister of Serbia stated at a press conference that "[o]ur prosecutors and courts will take all lawful measures to curb crime and show clearly to everyone that Serbia cannot be a parking lot for Afghans and Pakistanis whom no one in Europe wants to see, let alone receive", and that these persons could still request asylum "with minimal chances of getting it. And those who do not want to seek asylum will be removed from our territory according to the law." "Vučić: Zajednički timovi policije i Vojske Srbije na granicama", *Politika*, 16 July 2016, available at: www.politika.rs/sr/clanak/359265/Vucic-Zajednicki-timovi-policije-i-Vojske-Srbije-na-granicama (in Serbian, translated by the author).

95 Germann Molz and Gibson give an interesting perspective on what they term the "discourse of hospitality": "If the immigrant is imagined as 'the guest', the 'host nation' maintains its historical position of power and privilege in determining who is or is not welcome to enter the country, but also under what conditions of entry. ... The host nation, despite explicit evidence to the contrary, often imagines itself narcissistically as being hospitable." The "discourse of hospitality" is thus often based on notions of sovereignty and nationalism and paradoxically "reveal[s] the hostility present within such policies of managing diversity within the 'host nation'". Jennie Germann Molz and Sarah Gibson, "Introduction: Mobilizing and Mooring Hospitality", in Jennie Germann Molz and Sarah Gibson (eds), *Mobilizing Hospitality: The Ethics of Social Relations in a Mobile World*, Ashgate Publishing, Aldershot, 2007, pp. 8–9.

96 See, e.g., "Potvrđeno pisanje Blica: Srbija zatvorila granice za ekonomske izbeglice", *Blic*, 20 November 2017, available at: www.blic.rs/vesti/politika/potvrđeno-pisanje-blica-srbija-zatvorila-granice-za-ekonomske-izbeglice/17wfv4g (in Serbian).

argument may be attributed to a faulty understanding of the 1951 Refugee Convention – which concerns persons fleeing persecution, not armed conflict – it is very relevant from the perspective of the obligation to cooperate with UNHCR and to conduct gathering of country-of-origin information (COI).⁹⁷ Insofar as it is not a simple misreading of the law, this argument is factual, rather than legal.

(Non-)Applicability of the 1951 Refugee Convention: The legal argument

As has been discussed previously, the decision not to apply for asylum or any other form of protection that a country may offer should be seen as the key difference between countries of transit and destination. Such a decision, if it were to have any bearing on the legal relationship between a refugee and a State party to the 1951 Refugee Convention under whose jurisdiction the refugee finds themselves, has to be read with regard to its definition of a refugee.⁹⁸ Essentially, it must be examined whether a refugee has to take the initiative in order to receive international protection, or whether a country may be expected to take action regardless of the existence of any initiative on that person's part.

Bearing in mind that the 1951 Refugee Convention is silent on asylum and remains applicable to persons who objectively meet the criteria for refugee status, it is difficult to read the Convention as no longer being applicable to persons who do not seek asylum. In terms of Article 1(A)(2), the only element of the refugee definition that may feasibly be invoked as a basis for this argument is the “well-founded fear” requirement. This line of argument refers to situations where, for instance, persons decide not to apply for asylum in a certain country for reasons of what has been called “asylum shopping”,⁹⁹ thus not demonstrating well-founded fear of persecution on Convention grounds, as, were they genuinely in distress, they would accept the first shelter offered to them. This argument is of a legal nature, and although not convincing to the present author, it should nevertheless be examined. It creates a situation wherein it is no longer a question of whether a refugee who does not ask for asylum is entitled to enjoy rights under the 1951 Refugee Convention regardless – the person actually fails to meet the criteria of the Convention in the first place.

Certain situations – albeit marginal – can be conceived wherein a refusal to seek asylum would amount to a failure to meet the criteria of having a “well-founded fear”. The notion of such a fear is usually taken as consisting of two elements, one objective and the other subjective. The “objective” element lies in the requirement of

97 It should be mentioned here that UNHCR recently published its new international protection guidelines, reaffirming its decades-old position that persons fleeing an armed conflict will often have a “well-founded fear of persecution” for the purposes of IRL. See UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions*, UN Doc. HCR/GIP/16/12, 2 December 2016, para. 13.

98 See above note 71.

99 “Asylum shopping” refers to a perceived practice on the part of some refugees and migrants who do not seek asylum in the first country where they may (ostensibly) receive protection, but decide to seek it elsewhere, primarily motivated by economic considerations.

being well-founded – i.e., that persecution on Convention grounds is a reasonable possibility, although it is important to note that “the Convention neither requires that the putative refugee shall have fled by reason of fear of persecution, nor that persecution should have actually occurred”.¹⁰⁰ The “subjective” element, perhaps more difficult to define, naturally refers to an individual’s own feelings. Obviously, under normal circumstances, the asylum-seeker will have shown fear through the very act of making an informed decision to ask for asylum, yet the subjective element will often remain decisive throughout the asylum procedure:

At each stage, hard evidence is likely to be absent, so that finally the asylum-seeker’s own statements, their force, coherence, and credibility must be relied on, in the light of what is known generally, from a variety of sources, regarding conditions in the country of origin.¹⁰¹

The asylum systems of most countries – including Western Balkan countries – are founded on the paradigm of the asylum-seeker as an individual seeking to enforce his or her rights rather than providing *a priori* protection for larger groups (as is the case in situations of mass influx).¹⁰² Under the circumstances, a person facing forced return to any country where they may suffer treatment amounting to persecution in Convention terms but making the informed decision not to ask for asylum – thereby normally staying expulsion proceedings – could thereby be construed as not having demonstrated a well-founded fear, and therefore would not be a refugee in the first place. This situation is theoretically clear and practically plausible. However, the fact that it is plausible does not mean it happens in reality with any sort of regularity, and the transit context – being the principal situation where persons will generally refuse or avoid seeking asylum – is intrinsically different.

First of all, as has been attested with regard to the movement of refugees towards Central and Western Europe in 2015 and 2016, the Western Balkan “transit” countries are generally not perceived as being capable of providing adequate protection to refugees or enabling them to live their lives in relative safety and dignity.¹⁰³ Economic reasons may well have some bearing upon a decision to by-pass these countries’ asylum systems, but this does not necessarily amount to “asylum shopping”: countries with a poor economy and/or high corruption are usually also incapable of providing a safe protection environment to any significant number of people, and furthermore, refugees themselves often have very little or no knowledge at all of the asylum procedure and what it entails. Under such circumstances, omission or even explicit refusal to apply for asylum should not be understood as implying lack of a well-founded fear of

100 G. S. Goodwin-Gill, above note 72, p. 25.

101 *Ibid.*

102 See Macedonian Law on Asylum, above note 37, Arts 62–66; Serbian Law on Asylum, above note 36, Arts 36–38.

103 L. Petrović, above note 16, pp. 11–12; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16, paras 8, 40–44.

persecution, especially in situations wherein refugees are not faced with a choice to ask for asylum or undergo forced return. In the latter situation, authorities should take particular care not to immediately assume that the person in question is seeking to abuse the asylum procedure in order to delay deportation, and should carefully assess the position of the potential refugee.

The mere fact that a particular country is party to the 1951 Refugee Convention and/or its Protocol and has a legal framework in place for their implementation does not *ipso facto* mean that it actually provides a safe protection environment. An analogy with practice regarding the application of the safe third country context may be made in order to examine key stakeholders' attitude as to what constitutes a safe country of asylum (in fact, transit countries themselves are often considered safe third countries by their neighbours).¹⁰⁴ Thus, for example, EU member States have refrained from executing Dublin returns¹⁰⁵ after the ECtHR had found such returns to be in violation of the ECHR,¹⁰⁶ and UNHCR itself has published reports describing the protection environment in certain countries and has even recommended that other States Parties not consider them safe third countries.¹⁰⁷ The implication is that failure to seek asylum in a country which does not adequately provide for refugee rights ought not to have any significant bearing upon that refugee's status as a matter of international law.

Refusal on the part of a potential refugee to seek asylum may cause significant issues of a different nature, particularly as a matter of national law. For example, national legislation may absolutely precondition the grant of asylum by requiring the individual to actually request such protection, thereby rendering *proprio motu* action by the State impossible even if that person's status as a refugee is not in doubt. However, national legislation may at the same time prohibit in absolute terms (in line with the principle of *non-refoulement* as present in human rights law) the return of any foreigner to a country where he or she may be at risk of torture or other ill-treatment. Such norms exist across Europe and are present in EU directives,¹⁰⁸ and even persons actually requesting asylum may be excluded from either recognition of refugee status or being granted subsidiary protection.¹⁰⁹ This may lead to a case wherein a person may neither receive asylum nor be removed from that particular country, and may

104 Thus, Hungary considers Serbia a safe third country, and Serbia, in turn, considers the former Yugoslav Republic of Macedonia as such.

105 See above note 22.

106 In the well-known case of *M. S. S. v. Belgium and Greece*, an asylum-seeker was returned from Belgium to Greece under the Dublin Regulation in spite of the fact that he was at real risk of ill-treatment upon return. The ECtHR rejected the notion that the Dublin Regulation could take precedence over the norms of human rights law and found a violation of the European Convention in this regard. See ECtHR, *M. S. S. v. Belgium and Greece*, App. No. 30696/09, 21 January 2011.

107 See UNHCR, *Serbia as a Country of Asylum*, above note 16; UNHCR, *The Former Yugoslav Republic of Macedonia as a Country of Asylum*, above note 16.

108 EC Qualification Directive, above note 80, Art. 21.

109 *Ibid.*, Art. 17.

even face deprivation of liberty for unforeseeable lengths of time (as well as losing other rights resulting from refugee status).

With respect to protection and status, it is important to note that the content of protection granted to refugees under IRL goes far beyond simple *non-refoulement*.¹¹⁰ When a person is excluded from refugee status, she or he is *ipso facto* excluded not only from the prohibition of *refoulement* under IRL, but also from such rights as refugees are entitled to under the 1951 Refugee Convention. Because of the gap that arguably exists between the principle of *non-refoulement* under IRL (which is limited) and the same principle under IHRL (which is absolute and non-derogable), it is entirely conceivable that a person excluded from refugee status for having committed a serious non-political crime¹¹¹ may nevertheless not be forcibly returned as a result of human rights legislation. However, because IHRL is not status-based, such persons would effectively remain without any form of status under international law. In fact, many countries – including both Serbia¹¹² and the former Yugoslav Republic of Macedonia¹¹³ – could subject them to deprivation of liberty as “irregular migrants” for the duration of their stay in the country’s territory. As this detention could last as long as there is a risk of ill-treatment in case of return, and if the legislation of the country *in casu* does not foresee an alternative way of resolving the individual’s situation, such deprivation of liberty, even if it were lawful in the beginning, could soon become arbitrary and unlawful under IHRL.¹¹⁴ Therefore, while a strict reading of the law could lead to a situation wherein a forced migrant could remain in legal limbo, it is submitted that allowing such situations to go without being resolved properly could very easily produce a situation which is in contradiction to international law.

(Non-)Applicability of the 1951 Refugee Convention: The factual aspects

A separate but similarly common issue concerns the obligation to gather COI and how this relates to the question of applying the 1951 Refugee Convention. Is a receiving country subject to higher standards in this respect when faced with an influx of persons who are known to be very likely to meet the Convention’s criteria for refugee status?

110 For this reason, UNHCR sees international protection as ensuring that “all women, men, girls, and boys of concern to UNHCR have equal access to and enjoyment of their rights in accordance with international law. The ultimate goal ... is to help them rebuild their lives within a reasonable amount of time.” UNHCR, *UNHCR and International Protection: A Protection Induction Programme*, Geneva, 2006, p. 12.

111 This is foreseen by the exclusion clauses of the 1951 Convention: see 1951 Refugee Convention, above note 18, Art. 1(F).

112 Law on Foreigners, *Official Gazette of the Republic of Serbia*, No. 97/2008, Arts 45, 49–50.

113 Law on Foreigners, *Official Gazette of the Republic of Macedonia*, No. 35, 23 March 2006, Arts 107–110.

114 In its General Comment No. 35, the Human Rights Committee recalls that, in the context of immigration control, “detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time”, and that “the inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention”. Human Rights Council, General Comment No. 35, “Article 9 (Liberty and Security of Person)”, UN Doc. CCPR/C/GC/35, 16 December 2014, para. 18.

When faced with a mass influx situation, States have been known for decades to make a *prima facie* determination of the “refugee character” of a particular flow.¹¹⁵ Such a determination is usually made when, due to the scale of the situation, protection considerations outweigh the need to make an individual assessment, and thus a group determination is made. This was arguably the case when, in September 2015, the government of Serbia enacted a “Decision on Issuing a Certificate of Having Entered the Territory of Serbia for Migrants Coming from Countries Where Their Lives are in Danger”,¹¹⁶ which circumvented the necessity of applying for asylum in Serbia in order to facilitate movement along the Western Balkans route. These certificates were initially provided to all persons transiting through Serbia at key checkpoints and were later issued exclusively to nationals of Afghanistan, Iraq and Syria.¹¹⁷

A number of States party to the 1951 Refugee Convention also provide for some form of temporary protection that may be enacted particularly in times of mass influx.¹¹⁸ Otherwise, the determination may not always be made officially, especially if the State’s national legislation does not provide for it; under such circumstances, the relevant authorities may opt to simply apply appropriate norms of refugee law in spite of the provisions of domestic law and national asylum bodies may informally choose to prioritize the claims of persons hailing from certain countries of origin.¹¹⁹ Such responses are intrinsically connected to the practical necessity of gathering COI in order to ensure the implementation of the Convention in practice.

There are at least two grounds from which the existence of relevant legal standards may be inferred, and both may be gleaned from the Convention itself. The first is implicit yet self-evident, as it lies in the very nature of the Convention’s provisions; for example, the whole of Articles 1 and 33 cannot be implemented without the State Party conducting at least some COI-gathering on its own. Yet such an obligation is very broad and is certainly one of result rather than means (i.e., what is necessary for it to be met is for a person objectively meeting the Convention definition of a refugee to enjoy such rights as are granted to them by it).

An additional, more precise obligation may be inferred from the relationship between States Parties and UNHCR. Article 35(1) of the Convention states the following:

115 “*Prima facie* refugee determination is made on the basis of the objective circumstances leading to the mass displacement and the obvious refugee character of the individuals concerned.” Jean-François Durioux and Jane McAdam, “*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies”, *International Journal of Refugee Law*, Vol. 16, No. 1, 2004, p. 11.

116 Decision on Issuing a Certificate of Having Entered the Territory of Serbia for Migrants Coming from Countries Where Their Lives are in Danger, *Official Gazette of the Republic of Serbia*, No. 81/2015.

117 P. Kilibarda and N. Kovačević, above note 30, p. 25.

118 Macedonian Law on Asylum, above note 37, Arts 62–66; Serbian Law on Asylum, above note 36, Arts 36–38.

119 Prior to legislative amendments in 2016, this was the case in Germany, where the Federal Office for Migration and Refugees used to prioritize certain caseloads through different administrative measures, but without actual basis in law, and mainly with respect to claims that appeared manifestly unfounded. See Michael Kalkmann, *Asylum Information Database: National Country Report: Germany*, ECRE, May 2013, p. 31.

The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.¹²⁰

An almost identical obligation exists under Article 2(1) of the 1967 Protocol.¹²¹ Taken at face value, these provisions are very broad, but also seemingly very “soft” in terms of what they require of States Parties. The nature of cooperation required of States Parties under the 1951 Refugee Convention is fleshed out in Article 35(2), which makes reference to the special role played by UNHCR in monitoring the implementation of the Convention. An obligation to cooperate with UNHCR had also already been recognized by the UN General Assembly in Resolution 428(V) of 14 December 1950, adopting the UNHCR Statute as an annex; the nature of cooperation with UNHCR is more precisely defined there, although again not in exhaustive terms.¹²²

In line with its mandate, UNHCR’s Executive Committee has already defined its role in the determination of refugee status, which includes making recommendations of minimal procedural requirements in the RSD procedure,¹²³ and many countries accommodate for UNHCR’s opinion to be taken into account during such proceedings, even if not considering themselves bound by it.

Bearing in mind the general rule that treaties are to be interpreted with regard to their object and purpose,¹²⁴ Article 35 of the 1951 Refugee Convention can only be properly understood by reference to its Preamble, wherein the high contracting parties note UNHCR’s role in “supervising international conventions providing for the protection of refugees” and recognize “that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner”.¹²⁵ Because the problem of forced migrations cannot and should not be considered any single country’s burden, the role of UNHCR in coordinating efforts remains crucial. In an international system where the grant of asylum remains particularized, a central coordinating body to ensure a certain level of uniform practice must exist.

UNHCR continues to act in line with such a role, *inter alia* by means of various position papers, such as the ones on the international legal status of persons fleeing Syria,¹²⁶ Iraq¹²⁷ or Libya.¹²⁸ In researching and publishing

120 1951 Refugee Convention, Art. 35.

121 New York Protocol, above note 65.

122 UNHCR Statute, above note 68, Art. 2.

123 G. S. Goodwin-Gill, above note 72, p. 204.

124 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 22 May 1969 (entered into force 27 January 1980), Art. 31(1).

125 1951 Refugee Convention, Preamble.

126 UNHCR, above note 8.

127 UNHCR, above note 9.

128 UNHCR, *UNHCR Position on Returns to Libya: Update I*, Geneva, October 2015.

such documents, UNHCR provides support to national COI-gathering mechanisms, which may often be lacking or overburdened; beyond that, however, UNHCR offers its own opinion on the protection needs of certain categories, recommending that States take their asylum claims into particular consideration. Such positions are not legally binding, yet clearly no State party to the 1951 Refugee Convention can simply take them for granted – and this constitutes a clear legal obligation for all receiving countries, both in terms of the Convention and UNHCR’s Statute.

The above argument can easily and credibly be made vis-à-vis objections that the legal status of a particular group cannot be presumed in advance and that persons who have not even filed a request for asylum cannot avail themselves of the protection of international refugee law. It should also be pointed out that while the risk of human rights violations amounting to persecution exists even in countries with a relatively solid human rights record (there is not a single country in the world whose citizens’ asylum claims may be simply brushed aside as unfounded without ever even giving them the chance to explain them),¹²⁹ clearly proving the existence of circumstances amounting to persecution becomes more difficult in practice for individuals coming from such countries. When the phenomenon of seeking refuge is primarily individual, the merits of a case will have to be examined in a way that is more scrupulous than would be required in a situation of massive forced displacement. For good or ill, the “lonely” asylum-seeker may need to be more assertive with regard to their claim (always bearing in mind that the asylum procedure cannot have the same standard of proof as a criminal trial) than one arriving along a well-known refugee flow. This remains the crucial difference between a mass influx situation extensively covered by UNHCR and other bodies on the one hand, and “everyday” situations on the other.

How does this affect the position of a transit country? First of all, if the act of seeking asylum is disregarded as grounds for not benefiting from Convention rights, authorities facing mass influx situations cannot assert that the status of all or most arrivals is somehow “unclear”, provided that UNHCR and, indeed, other organizations have communicated their views on the issue. Even if the situation is described as a “mixed-migration flow”, wherein persons entitled to refugee status in line with the Convention may be travelling together with “economic migrants”, such circumstances absolutely require that – at least in the interest of safeguarding the Convention rights of those entitled to them – everyone taking the route be given the benefit of the doubt before proper RSD proceedings may take place.

129 “In so far as application of the [safe country of origin] concept would a priori preclude a whole group of asylum-seekers from refugee status, in UNHCR’s view this would be inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees.” UNHCR, “Background Note on the Safe Country Concept and Refugee Status”, July 1991, para. 5.

Minimal standards of protection applicable to refugees in transit

Bearing in mind that the 1951 Refugee Convention continues to be applicable to refugees “transiting” through a particular country, the question of what rights¹³⁰ guaranteed by this treaty such persons may benefit from remains. Different provisions of the Convention provide different “criteria of entitlement” – while some rights are undeniably granted only to refugees staying “lawfully” in the receiving country, this issue is less clear when it comes to others. According to Goodwin-Gill, “there is little consistency in the language of the Convention ... but three general categories may be distinguished: simple presence, lawful presence, and lawful residence”.¹³¹ The previously discussed distinction between the Convention regime and the concept of asylum therefore becomes significant in this respect, with refugees “lawfully residing” in a country arguably being those actually granted asylum there.

With respect to rights granted to refugees “simply present” in the territory of the State Party, however, there is no doubt that such rights are likewise owed to refugees merely transiting there. These rights include at least those guaranteed by Articles 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 importantly, 33 (*non-refoulement*).¹³² However, even this core of Convention rights may be read as having a broader scope than being simply applicable to refugees in transit: crucially, 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 becomes applicable.

Take Article 31 as an example of such a right.¹³³ Generally speaking, 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

130 It should be highlighted that traditional international law regards the right to (seek) asylum exclusively as an obligation that exists among States; the individual is therefore a beneficiary, but not the bearer, of this right. V. Dimitrijević, above note 34, at p. 110. Nevertheless, for the purposes of the present discussion, it is submitted that it is both useful and consistent to talk of refugee “rights” as practically emanating from corresponding State obligations, without prejudice to more abstract considerations of the nature of such rights.

131 G. S. Goodwin-Gill, above note 72, p. 160.

132 “Contrairement aux articles 32 ou 28 de la Convention, dont l’application est conditionnée respectivement par les expressions ‘se trouvant régulièrement’ et ‘résidant régulièrement’, l’article 33 n’exige aucune condition tenant à la légalité de la présence du bénéficiaire sur le territoire des Etats parties à la Convention.” Vincent Chetail, “Le principe de non-refoulement et le statut de réfugié en droit international”, in *La convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: Bilan et perspectives*, Institut pour les Droits de l’Homme, UNHCR and Bruylant, Brussels, 2001, p. 12.

133 It may be debated on a theoretical level whether the 1951 Refugee Convention grants rights to refugees, or rather bestows obligations upon States Parties. This is not an easy question to answer, and it is not necessary to delve into it here. However, the author of the present article subscribes to the belief that the Convention is best read as bestowing both negative and positive rights upon refugees themselves.

actually opts to drop one or more of them¹³⁴ – the crux of the matter is that it is generally not upon the authorities to determine the existence of such circumstances at their own initiative. In order for this article to come into play, some jurisdictions require that the refugee actually requests asylum, although it is debatable to what extent this is in line with the article’s wording. At any rate, in a situation of mass influx, the phrase “show good cause” should be interpreted as broadly as possible, and there is very little doubt that refugees travelling along the State-sanctioned Western Balkans route in late 2015 and early 2016 should be considered as enjoying its benefits.¹³⁵ In practice, this means that these countries should refrain from penalizing for illegal entry persons coming from refugee-producing countries regardless of whether or not they seek asylum.

The most appropriate way of defining the scope of rights to which refugees in transit are entitled as a matter of refugee law is to draw a line between “positive” and “negative” ones – i.e., those obliging a State Party to act in a certain way, and those requiring it to refrain from doing something. Although such language is absent from the Convention, a plain reading of different provisions allows insight as to which group a particular right may best be placed in. Thus, whereas being granted an identity paper in line with Article 27 is best understood as a positive right, the prohibition against *refoulement* is not, and there the initiative to ensure that it is not violated in an individual case rests principally with the contracting State. Apart from Article 33, such rights are likewise bestowed by Articles 3 and 16(1).

It is extremely important to note that these rights are similarly guaranteed by human rights instruments,¹³⁶ although their specific application to the situation of refugees may often only be gleaned from case law. While some treaties make specific provision for a general prohibition against discrimination,¹³⁷ this is not the case with the ECHR, which bans discrimination only with respect to the enjoyment of other Convention rights. In this respect, Article 3 of the 1951 Refugee Convention remains of exceptional relevance.

However, arguably the most important right of refugees in a transit context is the prohibition against *refoulement*; here, the practice of human rights bodies is

134 Thus, for example, the requirement of “coming directly” from the country of origin is abandoned under Serbian legislation. See Serbian Law on Asylum, above note 36, Art. 8.

135 During early discussions on Article 31, a number of countries were of the opinion that this provision should, depending on the circumstances of the case, also remain valid with respect to refugees who, having found refuge in one State Party, later decided to move to another one. In this respect, they shared the opinion of the High Commissioner for Refugees that “necessary transit” should be allowed for refugees arriving in an “ungenerous country”. There is little reason why this approach should not be applicable to Western Balkan transit countries. See Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection*, UNHCR, Geneva, October 2001, paras 17–25.

136 See, e.g. International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976) (ICCPR), Arts 2, 7, 14, 18; ECHR, Arts 3, 6, 9, 14; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987), Art. 3.

137 ICCPR, Art. 26.

crucial to understanding what rights all refugees – and, indeed, other groups of migrants – are entitled to.

Unlike the prohibition contained in Article 33 of the 1951 Refugee Convention, which allows for exceptions with regard to refugees who are dangerous to the security of the receiving country or its community after having been convicted of a particularly serious crime, the equivalent prohibition in human rights law is universal and absolute.¹³⁸ Not even persons who pose a serious risk to national security may be expelled to a country where they would face a real risk of ill-treatment. Naturally, the extent to which the principle of *non-refoulement* as espoused in refugee law correlates with the same principle in human rights law is debatable, bearing in mind that the latter primarily concerns the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. However, it cannot be contested that there is considerable overlap in practice, and that persons fleeing persecution on Convention grounds will usually likewise benefit from the protection of human rights law in this respect. Bearing in mind that the 1951 Refugee Convention sets out no relevant procedural safeguards, the standards of human rights law must be applied to the situation of refugees.

The ECtHR has, on a number of occasions, found violations of the ECHR with respect to the forced return of refugees and asylum-seekers in line with Article 3 of the ECHR.¹³⁹ More importantly, it has found violations of Article 13 (the right to an effective remedy) in conjunction with Article 3 even where the latter, as such, had not been or would not be violated – this being because the State Party had not set in place adequate procedural safeguards to determine if persons facing forced return would be at real risk of treatment contrary to Article 3 upon return.¹⁴⁰ Most recently, the ECtHR found Hungary to have violated both Article 3 and Article 13 in conjunction with Article 3 when it returned asylum-seekers to Serbia.¹⁴¹ Similarly, the UN Committee against Torture has, in its 2015 Concluding Observations on Serbia, found wrongful practice with regard to national authorities who failed to do so.¹⁴² In spite of the fact that States may implement their obligations in the way they deem most fitting, the resulting protection must fall in line with international standards.

138 See Human Rights Council, CCPR General Comment No. 20, “Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), 10 March 1992; CAT, General Comment No. 2, “Implementation of Article 2 by States Parties”, UN Doc. CAT/C/GC/2, 24 January 2008; ECtHR, *Ireland v. The United Kingdom*, App. No. 5310/71, 19 January 1978, para. 163.

139 See ECtHR, *M. S. S.*, above note 106; ECtHR, *Mohammed v. Austria*, App. No. 2283/12, 6 June 2013; ECtHR, *Sharifi and Others v. Italy and Greece*, App. No. 16643/09, 21 October 2014; ECtHR, *Tarakhel v. Switzerland*, App. No. 29217/12, 4 November 2014.

140 ECtHR, *Mohammed*, above note 139, paras 64–111.

141 ECtHR, *Ilias and Ahmed*, above note 56.

142 It is important to note that the CAT has already taken the stance that the conduct and procedures employed by Serbian border police officials at Belgrade airport do not conform to procedural standards required under the 1984 Convention. See CAT, *Concluding Observations on the Second Periodic Report of Serbia*, above note 45, para. 15.

Finally, human rights standards – which are applicable to all refugees and migrants, including those transiting – should be seen as crucial with regard to the provision of humanitarian assistance to all vulnerable migrants. While the global debate on humanitarian assistance has primarily concerned itself with populations in armed conflict situations (bearing in mind that IHL remains the body of law most explicitly regulating such matters), beyond rationing, equivalent norms do not exist as a matter of refugee law *stricto sensu* (i.e., as referring to populations of war-afflicted areas once they have actually left their country). However, human rights standards may well be said to fill in the gap – the provision of humanitarian assistance is intrinsically linked to the right to life, according to which:

[The] duty to take positive action implies that States have a duty to ensure that the population affected by a crisis is adequately supplied with goods and services essential to its survival and, if they are unable to do so or their own efforts fail, to allow third parties to provide the required relief supplies.¹⁴³

In fact, the draft General Comment No. 36 to Article 6 of the International Covenant on Civil and Political Rights makes specific reference to asylum-seekers and refugees, noting that “the duty to protect the right to life requires States parties to take exceptional measures of protection towards vulnerable persons”.¹⁴⁴ The provision of humanitarian assistance to all vulnerable migrants, regardless of their status under international law, cannot therefore be regarded as purely a matter of policy considerations for any country (transit ones included), but rather a legal obligation that needs to be adequately implemented in practice.

These considerations likewise bring us back to the closely related question of *prima facie* refugee status determination. It would be very difficult to interpret treaty law as obliging States to undertake such a determination. Where *prima facie* refugee status determination would entail higher standards than the ones discussed above – for example, by excluding the necessity of undergoing the asylum procedure altogether, wherefore the refugee’s stay may also be deemed “lawful” in the sense of certain Convention provisions – such a policy should be encouraged, yet it can hardly be advocated as being required by international law. On the other hand, some form of *prima facie* recognition is absolutely necessary in mass influx situations if failure to react swiftly would deprive refugees of a minimum of core rights to which they remain entitled under all circumstances.

To summarize, when faced with a situation of mass influx of persons coming from countries long since described as “refugee-producing” by key stakeholders (most notably UNHCR), States through which these people

143 Ruth Abril Stoffels, “Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps”, *International Review of the Red Cross*, Vol. 86, No. 855, 2004, p. 517.

144 Human Rights Council, Draft General Comment No. 36, “Article 6: Right to Life”, UN Doc. CCPR/C/GC/R.36, 1 April 2015, para. 26.

“transit” have the legal obligation, at the very least and regardless of the manner in which these matters are implemented in national legislation, to refrain from any manner of forced return, including push-backs, of even those persons who refuse to submit an asylum application on their territory, without undertaking a fair and effective determination of whether the return might lead to a violation of the individual’s rights; no discrimination whatsoever is allowed with regard to refugees, and this includes decisions that certain national groups do not *a priori* qualify for refugee status and may therefore even face rejection at the border; and these countries must provide basic shelter and supplies – or otherwise allow others to do so in their stead – to all vulnerable migrants, regardless of their status. On a related note, allowing certain groups into reception centres while barring others solely on the grounds of their nationality is not in line with the norms of international refugee and human rights legislation.

Conclusion: Less is not more

It is difficult to limit any discussion of “transit countries” without taking into consideration such provisions as may have far greater scope than this relatively limited context. However, this is not a negative occurrence: the term “transit”, so often used by the media and State authorities themselves, has no legal relevance under international law, and is to a certain extent a misnomer – some refugees choose to stay and apply for asylum in these countries as well; furthermore, it serves to reassert the continued relevance of the 1951 Refugee Convention even under such unclear circumstances, bearing in mind that its application is by no means limited to “destination” countries.

A proper response to refugee and migrant movement in the Western Balkans needs to be organized in a two-fold manner. 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. Legislative mechanisms for providing such a response in mass influx situations already exist at the national level (including “temporary protection”).¹⁴⁵ Bearing in mind what is known about the demographics of the Western Balkans mixed-migration flow,¹⁴⁶ such measures could be complemented by efficient and fair screening procedures in order not only to identify upon arrival extremely vulnerable individuals (victims of sexual and gender-based violence, torture and other cruel, inhuman or degrading treatment or punishment, persons with disabilities, unaccompanied minors, victims of human trafficking, etc.), but also to facilitate the provision of

145 Macedonian Law on Asylum, above note 37, Arts 62–66; Serbian Law on Asylum, above note 36, Arts 36–38.

146 According to the EU’s border agency Frontex, nationals of Syria, Afghanistan and Iraq continue to top the chart of irregular arrivals into the EU from the Western Balkans. See Frontex, *Western Balkans Annual Risk Analysis 2017*, Warsaw, 2017, p. 38, available at: frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2017.pdf.

international protection to persons coming from well-known refugee-producing countries (in a way which is not discriminatory towards refugees of other nationalities, which would be in violation of the 1951 Refugee Convention).¹⁴⁷ Strong cooperation and information-sharing between all of the countries along the route, as have already been suggested in practice,¹⁴⁸ coupled with an effective resettlement programme, would go a long way towards truly curbing irregular movement, eliminating human smuggling and trafficking, “taming” the migratory flow and enabling access to durable solutions in the near future. On the other hand, 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.¹⁴⁹ Within the Western Balkans, such reform is scheduled to take place as part of EU accession;¹⁵⁰ however, it is very important to highlight the independent value of establishing strong protection mechanisms at the national level, as obligations under IRL exist independently of European integration.

At present, positive international law may place only very limited obligations on transit countries. In times of mass influx, IRL remains applicable to refugees in transit countries and regardless of whether they have actually requested protection in the receiving State, although the scope of rights provided – even when complemented by human rights law – may remain limited to the prohibition of *refoulement*, non-discrimination, non-penalization and humanitarian assistance. It must, however, be made clear that a change in individual or group circumstances may change the legal situation as well; for example, a refugee transiting through a country may change their mind or become stranded and choose to undergo the asylum procedure in that country, if possible.

Finally, although the above discussion has principally focused on Serbia and the former Yugoslav Republic of Macedonia, these countries remain representative more broadly of transit countries that are also States party to the 1951 Refugee Convention. The same minimal level of standards will be required of each of these countries under IRL, unless these norms are complemented by more generous legislation at the regional or national level. That being said, ensuring respect for minimal standards is by no means an ideal response to any refugee “crisis”; it should be seen as inherent in the nature of humanitarian

¹⁴⁷ 1951 Refugee Convention, Art. 3.

¹⁴⁸ A system of “burden-sharing” was suggested at a late 2015 EU–Western Balkans summit that produced a seventeen-point plan of action for regulating the Western Balkans flow. The plan foresaw stronger cooperation between States along the route and increasing reception capacity in transit countries. However, most of these points were generally rendered moot by the EU–Turkey deal of March 2016. See European Commission, “Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point Plan of Action”, Brussels, 25 October 2015, available at: europa.eu/rapid/press-release_IP-15-5904_en.htm.

¹⁴⁹ See S. Tošković (ed.), above note 52.

¹⁵⁰ European Commission, *Commission Staff Working Document: The Former Yugoslav Republic of Macedonia 2016 Report*, SWD (2016) 362, 9 November 2016, pp. 65–66; European Commission, *Commission Staff Working Document: Serbia 2016 Report*, SWD (2016) 361, 9 November 2016, pp. 67–68.

action to advocate the greatest extent of protection and welfare available to one's beneficiaries. Other venues for achieving this purpose, including ethics-based arguments,¹⁵¹ should not be disregarded. Being forced to invoke legal provisions in order to ensure a minimum of respect for human dignity should always be seen as an exceptional, even aberrant, situation.

151 Thus, William O'Neill highlights the limits of pure law-based advocacy and suggests arguments based in philosophy and religion for a more "humanistic" approach to refugee rights advocacy. See William O'Neill, "What We Owe to Refugees and IDPs: An Inquiry into the Rights of the Forcibly Displaced", in David Hollenbach (ed.), *Refugee Rights: Ethics, Advocacy and Africa*, Georgetown University Press, Washington, DC, 2008.

