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ANALISI & OPINIONI

*Managing Migration Flows at the Balkan Borders:
Which Challenges to the Rule of Law?*

Giorgia Lo Tauro

&

Giuliana Quattrocchi

University of Catania

Key Words

Balkan borders - Safe third country - Candidate country

Push back practices at the frontiers of the Western Balkans

In recent years Member States of the European Union have been implementing several measures aiming at externalizing to the maximum extent the management of the refugee crisis ([Liguori, 2019](#)). Legal avenues to access international protection in the European Union have been drastically reduced as the creation of a safe and reliable Common European asylum system is still lagging behind.

From a practical point of view, restrictions asylum seekers may encounter in some EU Member States range from not having their application registered or properly examined, being exposed to the risk of being returned without any assessment of their claim, or to prolonged periods of detention, thus impinging on their aspiration to ask for international protection ([Fullerton, 2018](#)).

The combination of coercive and restrictive measures, based on the closure of external frontiers and the misuse of the safe third country concept, make the right to seek asylum more difficult than ever and expose applicants to the risk of gross human rights violations ([Iván, 2017](#)).

This appears especially relevant today as regard migrants trying to reach Europe crossing the Balkan area, who are increasingly subjected to chain *refoulement* practices and illegally returned to countries where they could suffer persecution. What it is happening in the Western Balkans arguably mirrors the failure of EU externalization policies in the field of migration. While Member States of the EU show some convergence on a common policy as regards external borders, a coherent framework of migration management through burden sharing and solidarity mechanisms is still missing ([Caggiano, 2017](#)). Notably, this is due to the functioning of the Dublin Regulation, which puts great pressure on the Member States at the external frontiers of the EU, ultimately obliged to deal with the greatest number of asylum applications.

Background: the refugee crisis in the Western Balkans

Since 2013, as well known, the flows of arrivals in Europe progressively led to a collapse of the EU Asylum System. The EU was reached by a massive number of migrants through the so-called Western Balkan Route due to the Syrian War and the following humanitarian crisis in the Middle East region. The number of migrants reached more than 1 million both in 2015 and 2016, leading to the partial suspension of Schengen, triggering the reinstatement of border controls ([Weber, 2017](#)).

Even if the EU-Turkey agreement significantly obtained the result of curbing the number of refugees arriving in Europe, it has not succeeded in closing the Balkan Route, shifting migration waves to the borders of Western Balkans countries such as Bosnia and Serbia, leaving them alone to carry the burden of preventing illegal movements of people. Efforts to halt migrants on the move have ultimately failed in barring irregular entry into the EU territory, creating limbo zones in countries whose asylum systems are far from adequately developed ([den Heijer-Rijpma-Spijkerboer, 2016](#)).

In this respect, various human rights organizations have started to raise the attention on the increasing use by Member States of direct and indirect *refoulement* practices in the Balkan area. Such transfers have taken place on the assumption that those countries could be considered “safe” according to EU Asylum law in order to examine an international protection request by a foreigner.

The CJEU and the ECtHR have both dealt with the refugee crisis in the Balkans, emphasizing States’ obligations to assess to what extent countries ensure adequate access to asylum. For instance, following the migration waves that affected the area from 2015 onwards, the Court of Justice ruled for the restoration of the European legal order in the [AS](#) and [Jafari](#) cases when some Member States proposed to derogate from the criterion of the country of first entry for

the determination of those responsible for the examination of international protection requests in particular and exceptional circumstances.

Contrary to the [Opinion](#) of Advocate General Sharpston, the Court held that the functioning of the Dublin System must be safeguarded even to the detriment of humanitarian emergencies or in cases of massive influxes of people at the EU external borders, thus putting an unbearable pressure on some Member States, who remain responsible for examining the application for international protection of the vast majority of people irregularly crossing their borders ([Carlier–Leboeuf, 2018](#)). Such an approach inevitably implies the risk of burdening migration EU frontline States, often triggering *refoulement* practices to third countries.

The strategy based on the containment of migration flows at the EU external borders, particularly the Balkans, has also been based on the broad exploitation of the concept of a safe third country within the meaning of article 38 of the Procedures Directive. However, in a landmark judgment of 2017, *Ilias and Ahmed v. Hungary*, the ECtHR rebutted the presumption of the Western Balkans as safe countries as regards procedure asylum guarantees. The case concerned two Bangladeshi nationals who crossed Greece, Macedonia, and Serbia, before getting to the Hungarian border, and who spent more than three weeks in a transit zone prior to being pushed back to Serbia, considered to be a safe country following a government decree of 2015. The Court found that the applicants' expulsion to Serbia exposed them to a real risk of being returned to Greece *via* Serbia and to a treatment contrary to Article 3 of the EHCR following a potential *chain refoulement* in the destination country. The Court noted that Hungary did not evaluate such a risk, automatically referring to Serbia as included in the Government's list of safe third countries and disregarding states reports by international organizations and other evidence, thus ultimately imposing an unfair and excessive burden of proof on applicants.

The case prompts some more general considerations as regards the role of Western Balkans, and particularly potential candidate countries to the EU to deal with the management of the refugee crisis at the EU external borders.

On the link between 'safe country' and 'candidate country'

Ilias and Ahmed v. Hungary arguably highlights the link between the notions of 'safe country' and 'candidate country' (or potential ones), also calling into question the features of the EU enlargement process. The status of potential candidate countries in dealing with the management of the refugee crisis at the EU external borders indeed shows how migration issues are related to the rule of law as a core value of the EU.

The 'safe countries' concept fits uneasily with the nature of refugee protection, rather being the outcome of a political process ([Costello, 2016](#)) prompted by some European States. The same notion has been later introduced in EU law according to Procedures Directive and subsequently upheld by the European Commission when it has proposed the [EU safe country list](#), declaring that "candidates for EU membership are thus usually safe". From this

assumption, a sort of presumption of candidate countries' ability to deal with the managing of migration issues arises, but this should be verified in practice.

A glance at the 'new Balkan route' is useful to analyse whether this presumption could work, considering that the EU needs to face migration flows together with States which are trying to go further along the path towards membership. Indeed, scholars have noted that in these countries the migration and asylum development goals are mainly focused on meeting the EU accession requirements ([Porobic – D. Zuparic-Iljic, 2017](#)) and the way in which Western Balkans manage migration waves also means a great deal to the evaluation of their progress towards membership by the EU ([Mészáros, 2017](#)).

As well known, to join the EU a country must meet the 'Copenhagen criteria', among which the political one requires stability of the institutions, the rule of law, human rights and protection of minorities. The aims of EU conditionality are therefore to promote reforms in the Western Balkans, considering the difficulties in generating local consensus as well as the discrepancies between the priorities of the EU and the ones of locals ([Moise, 2015](#)). Anyway, conditionality and its implementation should be understood as an interactive process between the EU and applicant countries ([Dzihic–Wieser, 2011](#)).

From these assumptions, considering the emerging migration flows, one may wonder how the EU can expect the full compliance of the accession requirements by a potential candidate country while facing an unexpected migration wave.

Focusing on Bosnia and Herzegovina as a case-study

Bosnia and Herzegovina, among the other Western Balkans involved in the 'new Balkan route', inspires further questions ultimately related to the respect of the EU rule of law.

According to the [European Commission](#), more than 24.067 arrivals were registered in Bosnia in 2018 compared to only 755 in 2017, mostly in the cities located at the Croatian borders (namely Bihać and Velika Kladuša), as an effect of pushback practices at the EU borders.

In coping with this situation, the Bosnian asylum system seems inadequate. The Ministry of Security adopted some emergency measures just before the migration emergency (see the last [Strategy](#)), and therefore the institutions are unprepared. Moreover, Bosnia being a 'transit country' ([Kilibarda, 2017](#)), the priority should be to improve [reception conditions](#) (even though last January [UNHCR](#) noted an increase in the number of asylum requests). In 2018 Bosnian government tried to take [further measures](#), also requesting [assistance](#) from the EU. Nonetheless, these deficiencies have caused frustration among local people, as seen by public demonstrations held in Bihać [last October](#).

In coherence with its enlargement policies, EU intervened to help Bosnia in managing the migration emergency. As it is still a potential candidate country, Bosnia took some initial steps like the application for EU membership in 2016 and replied to the European Commission questionnaire both in February 2018 and in [March 2019](#). Beyond several

agreements (mainly the [Stabilisation and Association Agreement](#)), other measures have been adopted along the path to EU accession, addressing the development of asylum system, such as the [Instrument for Pre-accession Assistance for Bosnia 2014 – 2020](#) through both focused actions and technical assistance. Considering the need to strengthen the Bosnia's migration management capacities ([2018 Communication on EU Enlargement Policy](#)), EU is helping Bosnia mainly through funding practices: the European Commission delivered assistance amounting to more than [€7 million](#) from June to November 2018 and [€13 million](#) in April 2019. However, last February the European Parliament noticed the lack of coordination between different Bosnian government levels, noting that migration issues "[should not be politicised](#)".

From this brief analysis, it can be inferred that the previously mentioned presumption could not work in the peculiar case of Bosnia as a potential candidate country, a country that still does not meet the political criterion requested for joining the EU. This is demonstrated by the disfunctions of democratic institutions and the need for [public administration reforms](#), as well as by the weight of political elites ([Keil-Arkan, 2014](#)). Overall, its asylum system is still in progress and presents unsatisfactory reception conditions. For the above reasons, Bosnia cannot be considered *per se* to be a 'safe country' for migrants rejected at the EU borders, especially following the reasoning held by the ECtHR in the above-mentioned *Ilias* case. As said, in this case the Hungarian government claimed that Serbia, being a 'candidate country' should automatically be considered a 'safe third country'. Similar considerations have been raised about the EU-Turkey agreement ([Peers-Roman, 2016](#)). In *Ilias v. Hungary* the Court ruled out this automatism, instead requiring the need for a concrete assessment on the country's safety. This also holds true for Bosnia, *mutatis mutandis*, especially taking into account the latest initiatives about the [strengthening of the rule of law in the country](#), as core of the enlargement process.

Concluding remarks

Some considerations *vis-à-vis* the rule of law as a core value of the EU are useful. It has been argued that if the rule of law "has inspired the creation of the EU as a democratic system of governance, then it can be legitimately exported to third parties" ([Konstadinides, 2017](#)). With specific regard to the enlargement policies, especially as to the Western Balkans, "the EU is attempting not only to prepare these states for EU membership, but also to shape them through practices such as conditionality, incentives and direct intervention", thus being involved in a complex Member State building process ([Keil-Arkan, 2014](#)). This also holds true as regards this migration challenge. While sharing the assumption that the rule of law is an interactive process that depends overall on local circumstances ([Paasivirta, 2010](#)), nonetheless the current migration emergency in the UE – Balkan borders begs to question about the consistency of the EU action.

Namely, one may wonder to what extent the EU can expect respect and sharing of the rule of law values from candidate countries (or potential ones) if it is not completely able to guarantee the respect of these values among its member States (as pushback practises from many EU member States show, as well as more general policies on externalizing migration)

and to what extent EU attitude can be considered coherent with its own rule of law (both in the internal and external dimension).

The key point seems to be the link between what the EU is doing to help these States (particularly Bosnia) in managing migration flows and how this problem interacts with the path towards the EU membership. With this in mind, the EU needs the assistance of Western Balkans to manage these flows, but “it could not entice them with the possibility of an accelerated integration process, due to their obvious lack of preparedness” ([Mészáros, 2017](#)).

The common denominator of all these questions ultimately remains the assessment of the EU action towards respecting the rule of law and its fundamental values. In this respect, the migration crisis in Western Balkans represents the test to show whether and how the EU would be able to uphold itself as a credible participant in the global scenario.