

*Sous la direction scientifique de  
Marion TISSIER-RAFFIN*

# LE DROIT D'ASILE

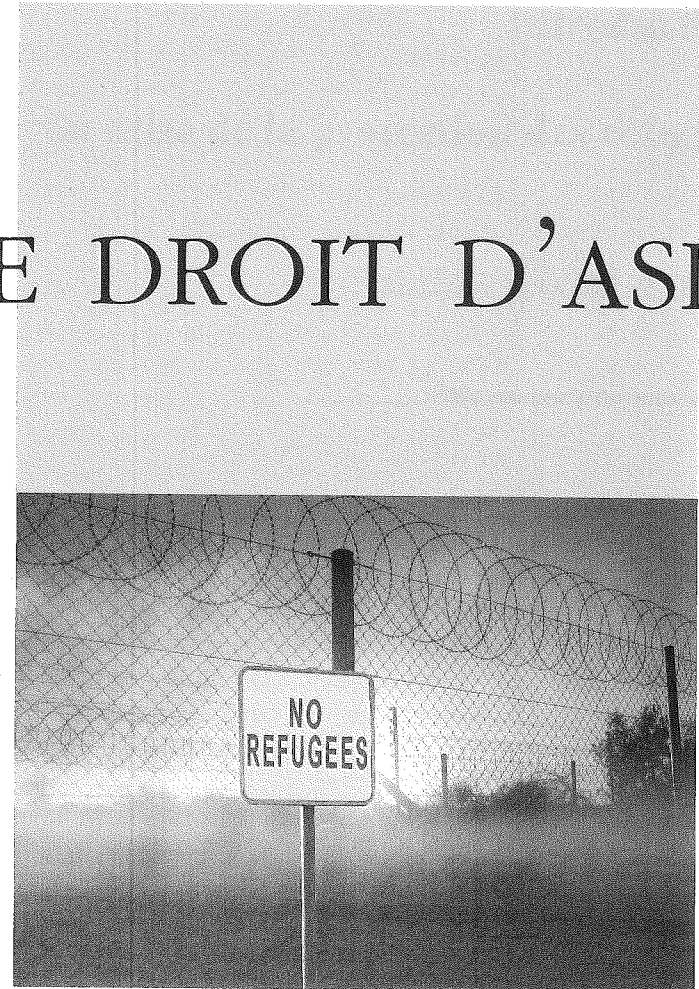


© Collection « Transition & Justice »  
éditée par l'Institut Universitaire Varenne  
Directeurs scientifiques : Jean-Pierre MASSIAS et Xavier PHILIPPE  
Diffusion : L.G.D.J. - lextenso éditions

Illustration (vignette) : Alexandre Varenne (1870-1947),  
homme politique et journaliste, fondateur du journal *La Montagne*

Illustration de couverture :  
*No refugees sign*, par theaphotography  
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ISSN 2269-7160  
ISBN 978-2-37032-170-1  
Dépôt légal : troisième trimestre 2018



2 0 1 8

*I n s t i t u t   U n i v e r s i t a i r e   V a r e n n e*

# **The refugee relocation system in EU and its implications to the countries on the Western Balkans route: the aftermath of the flawed reception conditions in the EU**

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**Abstract** – The summer of 2015 has been a period of time when the EU leaders were facing the worst contemporary refugee crisis that challenged the basic values of the European Union. The crisis is a common European challenge, which required a consistent approach, and called for collective and individual member state responsibilities to refugees. There has never been a time when the need for a common European response to refugee arrivals has been more urgent. That response is needed to meet the EU's collective obligations in international law, as reaffirmed in the EU legal order, in the EU Charter of Fundamental Rights, the EU Treaties and legislation. The paper analyses how the controversial new Decision establishing provisional measures for the relocation of 120,000 asylum-seekers from Italy and Greece to other EU Member States, which was adopted in September 2015 by the Extraordinary Justice and Home Affairs Council Meeting, affected the countries on the Western Balkans route. The paper will examine the scope and components of the newly adopted EU Temporary Relocation System. It will pay particular attention to the main issues and challenges that confront the effective operability of the EU relocation regime and all the ways it have affected the Western Balkan countries which are in a different stage in their European integration. It is argued that the EU provisional relocation system, and its potential future conversion into a permanent system, constitutes a timid step forward in addressing the central controversies of the current refugee debate in Europe, which revolve around the question whether all Member States are doing enough to receive and assist refugees arriving in the EU.

**Keywords** – European Union, Common european asylum system, Refugee crisis, Western Balkans, Republic of Macedonia.

**Résumé** – À l'été 2015, l'Union européenne a été confrontée à l'une des pires crises migratoires de son histoire, au point de faire vaciller les valeurs fondamentales qui la sous-tendent. Véritable défi commun posé à l'ensemble des États membres, cette crise aurait dû en appeler autant à l'engagement de leur responsabilité individuelle qu'à l'engagement de leur responsabilité collective pour que des solutions efficaces y soient apportées. Si jamais auparavant le besoin d'une réponse efficace, solidaire et urgente ne s'était fait autant sentir, celle-ci devait aussi être conforme au droit de l'UE, et notamment aux droits fondamentaux inscrits dans la Charte de l'UE.

L'angle proposé dans cet article pour analyser la crise européenne est spécifique puisqu'il entend évaluer les conséquences de la décision controversée de relocaliser 120 000 personnes depuis l'Italie et la Grèce, adoptée en septembre 2015 par le Conseil JAI, dans les États situés sur la route des Balkans. Seront ainsi d'abord étudiés l'étendue et les éléments composant ce Plan de relocalisation. Puis, une attention toute particulière sera portée aux difficultés de la mise en place effective et opérationnelle de ce plan et à ses conséquences sur les États des Balkans qui, d'un point de vue politique et légal, n'en sont pas tous au même stade dans leur procédure d'adhésion à l'UE. L'idée défendue est que le Plan de relocalisation, même pérennisé, n'est en réalité qu'un pas très timide pour trouver une solution durable et collective car il met en lumière, sans y remédier durablement, les insuffisances des États pour accueillir solidairement les réfugiés.

**Mots-clés** – Union européenne, Régime d'asile européen commun, Crise des réfugiés, États des Balkans, République de Macédoine.

## INTRODUCTION: PREVIEW OF THE COMMON EUROPEAN ASYLUM SYSTEM

The uncontrolled and large number of migrants and asylum seekers arriving in Europe during the 2015 has put a strain not only on many Member States' asylum systems, but also on the Common European Asylum System as a whole. The Common European Asylum System consists of a legal framework covering all aspects of the asylum process and a support agency – the European Asylum Support Office (EASO). EASO supports the implementation of the legal framework and facilitate practical cooperation between Member States. The refugee crisis has exposed the weaknesses in the way the system was designed and implemented. Moreover, this crisis has exposed the weaknesses of the "Dublin" arrangements in particular.

According to the Dublin Regulation, which establishes the criteria and mechanisms for determining which Member State is responsible for examining an application for international protection, those who seek, or have been granted protection do not have the right to choose in which Member State they want to settle. If the Member State in which the asylum

seekers apply is not the one responsible for dealing with the application, they should be transferred to the responsible Member State.<sup>1</sup>

The main shortcomings of the Dublin system were highlighted, since this system was not designed to ensure a sustainable sharing of responsibility for asylum applicants across the EU. The main criterion for allocating responsibility for asylum claims is irregular entry through one Member State's territory. This criterion relied on the assumption that the allocation of responsibility in the field of asylum and the respect by Member States of their obligations in terms of protection of the external border will be linked. However, the ability to effectively control irregular inflows at the external border is to some extent dependent on cooperation with third countries.<sup>2</sup> In the case of 2015 crisis, those were mainly the Western Balkan countries. Additionally, in situations of mass influx along specific migratory routes, the current system places responsibility, for the vast majority of asylum seekers on a limited number of individual Member States. This situation creates major pressure on the capacities of any Member State that is affected. Furthermore, it gives an explanation to the increasing disregard of EU rules in the past years. According to the EU Commission Communication, the migrants also often refuse to make asylum applications or comply with identification obligations in the Member State of first arrival, and then move on to the Member State where they wish to settle and apply for asylum there. These secondary movements have resulted in many asylum applications being made in Member States which are not those of the first point of entry, a situation which has in turn led several Member States to reintroduce internal border controls to manage the influx.<sup>3</sup> The greatest issue with these secondary movements was the fact it was difficult to obtain and agree on evidence proving one Member State is responsible for examining the asylum application, which lead to an increase in the number of rejections of requests to accept the transfer of applicants.

The secondary movements were also encouraged by another characteristic of the Common European Asylum System – the differing treatment of asylum seekers, including in terms of the length of asylum procedures or reception conditions across Member States. Those divergences are arising in part from

<sup>1</sup> Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

<sup>2</sup> According to the Communication from the Commission to the European Parliament and the Council towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, Brussels, COM (2016) 197 final, 6.4.2016.

<sup>3</sup> *Ibid.*

the discretionary provisions contained in the Asylum Procedures Directive<sup>4</sup> and Reception Conditions Directive.<sup>5</sup> Moreover, while the Qualification Directive<sup>6</sup> sets out the standards for the recognition and protection to be offered at EU level, in practice recognition rates vary between Member States. As a response to those weaknesses which were detected by the EU institutions, the Commission proposed the two temporary crisis relocation schemes which were agreed in September 2015. The schemes were supposed to provide for the transfer of responsibility for certain asylum claimants from Italy and Greece to other Member States. However, these schemes had huge impact on non-Member States as well, especially to the countries in the Western Balkan route. This situation calls for a better reforms in the EU, which means addressing the inherent weaknesses in longer term. Even the agreement with Turkey<sup>7</sup> does not give the Union a permanent solution to the crisis. Legal and safe pathways to Europe need to be provided in line with the existing legal instruments and a strengthened Common European Asylum System. Moreover, the EU needs to address the root causes of migration. It is imperative that these measures are implemented fully and swiftly to cope with immediate challenges.

## 2015 REFUGEE CRISIS: WHAT HAS BEEN DONE?

On 22<sup>nd</sup> of September, an Extraordinary Justice and Home Affairs Council Meeting adopted a controversial new Decision establishing provisional measures for the relocation of 120,000 asylum seekers from Italy and Greece to other EU Member States.<sup>8</sup> The Council Decision

- <sup>4</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, which was replaced in July 2015 by the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
- <sup>5</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, which was replaced in July 2015 by the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.
- <sup>6</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.
- <sup>7</sup> On 18 March 2016, following on from the EU-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March 2016 EU-Turkey statement, the European Union and Turkey decided to end the irregular migration from Turkey to the EU and replace it instead with legal channels of resettlement of refugees to the European Union.
- <sup>8</sup> Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Council of the EU, 12098/15, 22 September 2015.

introduces a temporary relocation system in the EU which consists of the transfer of applicants for international protection from two EU Member States – Greece and Italy to the territory of other Member States. The Decision constitutes a provisional emergency led scheme envisaged to run for a two years. It is legally founded on Article 78.3 TFEU which provides that in an event that one or more Member States are being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries it aims at supporting them in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in those Member States.

This was done after President Juncker gave his speech before the European Parliament on 9<sup>th</sup> September 2015.<sup>9</sup> The adoption of the Decision was welcomed by the Commission and on 23<sup>rd</sup> of September the Commission adopted a Communication on Managing the Refugee crisis.<sup>10</sup> The Communication laid down the priority actions for the months to come. Establishing the EU provisional relocation system and its potential future conversion into a permanent system, constitutes a timid step forward in addressing the central controversies of the current refugee debate in Europe, which revolve around the question whether all Member States are doing enough to receive and assist refugees arriving in the EU.<sup>11</sup>

Under the EU relocation scheme, the Member States authorities should take into account the potential of the applicants to fit into daily life of the relocation state – to consider their language skills and family, cultural or social ties when taking the decision. However, as Carrera and Guild argue, the key weakness of this model is the fact it is still anchored in the much criticized Dublin system, meaning that it does address the symptoms, but not the actual causes behind the crisis – an unfair system of attribution of state responsibility for determining asylum applications, which results in human rights and protection failures and gives very little consideration to the preferences of the asylum seekers when assessing their family, private and economic link with a certain state.<sup>12</sup>

<sup>9</sup> See European Commission, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM (2015) 451 final, 9.9.2015 ([http://europa.eu/rapid/press-release\\_IP-15-5596\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5596_en.htm)).

<sup>10</sup> Commission Communication, "Managing the refugee crisis: Immediate operational, budgetary and legal measures under the European Agenda on Migration", COM (2015) 490 final, 23.9.2015.

<sup>11</sup> Sergio CARRERA and Elspeth GUILD, *Can the new refugee relocation system work: Perils in the Dublin logic and flawed reception conditions in the EU*, (2015) CEPS Policy Brief, No. 334.

<sup>12</sup> *Ibid.*

## THE WESTERN BALKAN ROUTE

Largely owing to its strategic geopolitical location, the Western Balkans has become an important Hotspot on one of the main migration routes to the EU. An increasing number of refugees and migrants from outside the region,<sup>13</sup> were arriving from Turkey and from Greece and were transiting the region using the Western Balkan route. The route became a popular passageway into the EU in 2012 when Schengen visa restrictions were relaxed for five Balkan countries – Albania, Bosnia and Herzegovina, Montenegro, Serbia and Republic of Macedonia.

The record number of migrants arriving in Greece had a direct knock-on effect on the Western Balkan route. This was mainly due to the fact that the people who entered the EU in Greece tried to make their way via the Republic of Macedonia, Serbia into Hungary and Croatia and then towards western Europe. During all of 2015, the region recorded 764 000 detections of illegal border crossings by migrants, a 16-fold rise from 2014.<sup>14</sup> The top-ranking nationality was Syrian, followed by Iraqis and Afghans.

Many of the refugees that are using this route lodge asylum claims in one or more of the Western Balkans countries. However, they often depart before having their asylum claims processed and their protection needs determined. Moreover, large number of the movements of migrants and refugees within the region takes place either via secret entry on border crossing points or via illegal border crossing. These irregular movements and associated transnational crime, such as trafficking in persons and human smuggling, raise a number of shared concerns for all states along the migration route. They constitute security threats, negatively affect the access to protection for those in need of it and render persons on the move vulnerable to safety risks and severe human rights violations. Trafficking in persons constitutes a particular challenge for the Western Balkan countries which have been to varying extent countries of origin, transit and destination, mostly for the purposes of sexual exploitation and forced labour. It appears that trafficking takes place internally, within the region and across the borders, in particular towards Greece, Italy, Spain and Western Europe.<sup>15</sup>

After intensifying border controls at one crossing point – such as between Libya and Italy, or through building a fence along the Hungarian-Serbian border, a geographical reorientation of crossing points was done. This put an additional pressure to the Western Balkan countries, which are not part of the European Common Asylum Policy and cannot use the EU mechanisms,

<sup>13</sup> Mainly from Afghanistan, Pakistan, Palestine, Syria, Somalia and North Africa.

<sup>14</sup> The numbers presented are according the Frontex estimate. The CoE numbers are bigger for 100.000 for the same period of time.

<sup>15</sup> “The Western Balkans: Frontline of the migrant crisis”, European Parliament Briefing, January 2016.

but were left to be the external frontier of the Union. This case only showed that border controls cannot solve the refugee crises. The irony of the whole situation is that such policies increase the reliance of refugees and migrants on smugglers as well as the likelihood that people go underground.

## CHALLENGES FOR THE WESTERN BALKAN COUNTRIES

Western Balkan countries had many internal hurdles in the past 25 years. The refugee crisis now poses new challenges to these countries which are weak democracies and have unstable institutions. Huge burden has been put on the countries’ infrastructure, the social structure and the health structure as well.

Despite the fact the Western Balkan countries have relevant laws and migration management systems in place, the high number of crossings have put a strain on their legislative system as well. The main challenges these countries face are how to ensure consistent implementation of the relevant legislation without having sufficient capacity to receive migrants and to comply with the international standards.

The countries on the Western Balkan route are in a different stage of their EU integration: Serbia and Montenegro had opened the negotiation process to join the Union, Albania and Macedonia are candidate countries, while Bosnia and Herzegovina is a potential candidate country. Although their status differs, they are all largely harmonized with the EU *acquis*. However, there is still need to further adjust and improve the legal and institutional framework for migration management.

Table 1. Key laws that regulate international protection in Western Balkan countries (the data in the table is according to IOM)

Republic of Macedonia	Law on asylum and temporary protection
Albania	Law on asylum, on the integration and family reunion of persons granted asylum in the Republic of Albania
Serbia	Law on asylum of the Republic of Serbia
Montenegro	Law on asylum of Montenegro
BiH	Law on the movement and stay of foreigners and on asylum
Kosovo	Law on asylum

**Table 2. First-instance institutions deciding on asylum requests**  
(the data in the table is according to IOM)

Republic of Macedonia	Asylum Department at the Ministry of Interior
Albania	Directorate for Nationality and Refugees at the Ministry of Interior
Serbia	Office for Asylum at the Ministry of Interior
Montenegro	Office for Asylum at the Ministry of Interior
BiH	Asylum Department at the Ministry of Security
Kosovo	Department of Citizenship, Asylum and Migration at the Ministry of Interior

## THE CASE OF THE REPUBLIC OF MACEDONIA

Republic of Macedonia is a young country that gained its independence with the breakup of the former Yugoslav federation. It has a history of hosting refugees – during the wars in former Yugoslavia in 1990s and in 1999 during the Kosovo conflict. In August 2015, Republic of Macedonia declared a situation of crisis at both its southern and northern border – with Greece and Serbia. The tension was high and it escalated with violence on the border with Greece. This was due to lack of human resources to register migrants in a timely manner and ensure their transport to the next border.

Although the country has aligned its legal framework with the international standards, there were shortcomings in its implementation. The right to asylum is granted in the Macedonian Constitution<sup>16</sup> and is further regulated in the Law on asylum and temporary protection. The EU Commission in its 2015 Progress Report noted that Republic of Macedonia is 'moderately prepared to implement the *acquis* in the asylum area. Therefore, the Law on asylum and temporary protection<sup>17</sup> was amended in June 2015 as a temporary solution for the present crisis. The restrictive rules that existed in the law were proven to be ineffective and the lack of capacities in the country placed the inhuman treatment in the center of the media attention in the country. Moreover, those rules were responsible for the push-backs at the border. Therefore, they were replaced by a procedure allowing people to register their intention to seek asylum at the border and grants them a 72-hour legal stay in the country, before formally seeking asylum. The Law

<sup>16</sup> Constitution of the Republic of Macedonia, *Official Gazette*, No.5 2/1991.

<sup>17</sup> Law on asylum and temporary protection, *Official Gazette*, No. 49/2003.

was further amended during 2016 – in March and April, referring mainly to the rights of the family members and the definition of the safe countries. The asylum procedure is the responsibility of the Ministry of Interior and the Ministry of Labour and Social Policy, while the Crisis Management Centre coordinates activities on the ground.

When it comes to the reception centres, the country has very limited resources. There is a reception centre for asylumseekers in the town of Gevgelija at the border with Greece, while the "Tabanovce" refugee aid point is at the border with Serbia, and the "Vizbegovo" reception centre in Skopje. Since the country was in the midst of a political crisis with fragile institutions and political stability, the fact that the country became an external frontier of the EU during the refugee crisis meant that it needs lots of EU support to handle the situation. There are numerous ongoing EU-funded projects primarily focus on renovating border police stations, fighting against trafficking in human beings and strengthening police capacities for border management.<sup>18</sup> In any case, more needs to be done for successful handling of the situation in the future.

## CONCLUSION

As a result of the refugee crisis, Republic of Macedonia and Serbia have come under serious strain. These countries are to some extent victims of the EU's handling of the situation. This is mainly due to the fact that Greece actively assisted the flow of refugees into Macedonia, and Croatia, Slovenia, and Hungary closed their borders or restricted entry to refugees heading north. The refugees transiting mainly through these two countries and the other countries on the Western Balkan route, have strained already overstretched institutional capacities to breaking point. The domino effect of closed borders also caused bilateral tensions in the region.

The main focus of the EU in the Balkans was mainly on financial assistance and the establishment of "Hotspot" reception centres in the region. In November 2015, the EU convened a mini-summit that included Balkan countries. This produced promises of greater coordination and information sharing but also financial and technical assistance. However, there was no effort to include the countries of the Western Balkans in institutional mechanisms to deal with the crises, such as the refugee relocation mechanism. Europe has so far failed to find a proper, sustainable response to the refugee and migration crisis in the Western Balkans. The unilateral actions of

<sup>18</sup> "The Western Balkans: Frontline of the migrant crisis", European Parliament Briefing, January 2016.

different Member States have undermined the mutual trust and confidence. In Europe the focus has shifted mainly to border controls. This approach was the worst solution for the Western Balkan countries. The response to all the problems connected with the refugee crisis cannot be the money. Europe's response to the Western Balkans refugee and migration crisis must be based on genuine acceptance of certain basic principles, such as respect of human rights and the rule of law. The crisis can be overcome only with an approach that is based on solidarity, collective action and sharing of responsibility. This can be done only with full respect of refugees and migrants and the basic principles of international and European law.

## **Réinstallation – Admission humanitaire : solutions d'avenir pour protéger les réfugiés ou cheval de Troie du droit international des réfugiés ?**

*Marion TISSIER-RAFFIN*

**Résumé** – Si les procédures de réinstallation et d'admission humanitaire ne sont pas nouvelles, elles sont de plus en plus évoquées comme un outil de protection qui permettrait de contourner les politiques de blocage des frontières et garantir une meilleure effectivité du droit international des réfugiés. En effet, de nombreux acteurs aux intérêts *a priori* divergents les soutiennent (UNHCR – États – ONG) et dans les faits, de plus en plus d'États (notamment européens) ont concrètement mis en place depuis une dizaine d'années de telles procédures. Face à l'arrivée massive de syriens, elles ont même été présentées comme une solution incontestable de leur protection. La question à laquelle tente de répondre cet article est alors de vérifier par l'analyse si la réinstallation/l'admission humanitaire peut-être aujourd'hui considérée comme un outil permettant de garantir l'effectivité du droit international des réfugiés. À la lumière des pratiques développées par les États, encore largement dictées par des motifs contingents et discrétionnaires, de la redéfinition actuelle de l'utilité de ces procédures par une approche dite « stratégique » et du contexte politique largement dominé par les politiques de non-entrée dans laquelle elles sont insérées, l'article tente de montrer en quoi la réinstallation/admission humanitaire peut au contraire devenir le cheval de Troie du droit international des réfugiés.

**Mots-clés** – Statut de réfugié, Convention de 1951 relative au statut des réfugiés, Réinstallation, Admission humanitaire, Régime d'asile européen commun, Crise migratoire, Externalisation.