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THE ROLE OF THE CONDITIONALITY OF EU MEMBERSHIP IN MIGRANT CRIMINALIZATION IN THE WESTERN BALKANS

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ABSTRACT

The Role of the Conditionality of EU Membership in Migrant Criminalization in the Western Balkans

The EU's responses to migration challenges exceed the territory of its member states. Through externalization of border control they spill over into the countries of the Western Balkans (WB), which is crossed by one of the most important migration routes from the Middle East and Africa to the EU. While the WB countries show indifference towards migrants and consider them an "EU problem", the latter conditions European integration with the establishment of migration management structures similar to those in the EU. The transposition of the EU acquis also increases the criminalization of migrants, which highlights the problematic role of the EU and national legislators in WB in relation to the fundamental rights of migrants.

KEY WORDS: migration, detention, migrant criminalization, European Union, Western Balkans

IZVLEČEK

Pomen pogojevanja za članstvo v EU na področju kriminalizacije migracij v državah Zahodnega Balkana

Odzivanje Evropske unije (EU) na migracijske izzive presega ozemlje njenih držav članic. Prek pozunanjenja mejnega nadzora se preliva na ozemlje Zahodnega Balkana (ZB), ki ga preči ena najpomembnejših migracijskih poti s Srednjega vzhoda in Afrike proti Evropski uniji. Medtem ko države ZB ne kažejo interesa za migrante in jih štejejo za problem EU, ta evropsko integracijo pogojuje z vzpostavitvijo struktur upravljanja z migracijami, podobnimi tistim v EU. Prenos prava EU pa povečuje tudi stopnjo kriminalizacije migracij, kar kaže na problematično vlogo EU in nacionalnih zakonodajalcev na ZB v razmerju do temeljnih pravic migrantov.

KLJUČNE BESEDE: migracije, pridržanje, kriminalizacija migracij, Evropska unija, Zahodni Balkan

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THE CREATION OF THE MIGRATION MANAGEMENT SYSTEM AND THE IMPACT OF THE EU

In the past, the institutional development of migration management in the Western Balkan (WB)[1] countries was driven by the countries' own internal needs when they received refugees fleeing the wars of the 1990s. In the last decade, however, this development has mostly been driven by external factors such as prospective European Union (EU) membership. The international actors which are most intensively involved in the development of asylum institutions and procedures in the region are UNHCR (Feijen 2008: 413), which played a crucial role in setting up the basic asylum mechanisms at the beginning of the new millennium, and the EU, which is seeking to "promote its model of border management as a first step in the process of integrating these countries into the EU" (Celador, Juncos 2012: 202). EU incentives to create migration management mechanisms have led to the creation of a WB "buffer zone" (Wolff 2008), serving to minimize irregular migration to the EU (Celador, Juncos 2012: 202; Trauner 2007; Luli 2015). At the same time, incentives to increase the migration management capacity of WB functions as the externalization of the EU's border control (Marin, 2011; Spijkerboer, 2017; de Vries, Guild, 2018). This paper focuses on whether and how the conditions for EU membership, the EU's support for institutional development in asylum and migration management and hence the externalization of migration control to the Western Balkans is causing migrant criminalization in this region.

METHODOLOGY

In order to determine the extent of migrant criminalization in the Western Balkans, the research focused on several aspects of migration management structures. The first focus was on the legislation and how it has changed in the last ten years – have new definitions of offences related to migration and border crossing been added to the law? Have the sanctions foreseen for these offences changed? Is irregular crossing of state borders a crime or a misdemeanour? The second focus was on detention – who funded the construction of new incarceration facilities? What is the law and practice of detaining asylum seekers? The third focus was on return – what kind of return is taking place, on what grounds and where to? Is there evidence of push-backs, i.e. informal forced returns?

1 The term Western Balkans is both geographic and political. It was initially used by US and European policymakers to describe the part of the Balkan Peninsula that remained outside of NATO and the European Union since the early 1990s. It includes all seven states that were formed after the dissolution of Yugoslavia (Bosnia-Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia) together with Albania, which has been emerging from international isolation (Oxford Bibliographies 2017). This paper and the research on which it is based covers all of the countries in question except for Slovenia and Croatia, now EU members, and Albania, which was not a part of the former Yugoslavia.

The analysis focused on five countries in the WB region – Bosnia and Herzegovina, Kosovo, FYR Macedonia, Montenegro and Serbia. The research was done on the basis of a literature survey, the conducting of seven skype interviews with representatives of national or international organizations working in these countries in the field of migration, and interviews with five legal consultants who are experts in the field of migration, one for each country. The selection of respondents and experts who participated in data collection was based on their expertise. The anonymity of the interview respondents and experts is intentional. The collection of data took place between December 2017 and May 2018. The data is kept in protected electronic format.

FROM "LAISSER-FAIRE" TO SYSTEMATIC DETENTION AND PUSHBACKS

The countries of the WB region, complex and diverse in itself, are responding differently to incentives offered by the EU. But what they all have in common is that reforms are visible mostly in relation to formal building of structures, procedures and institutions (Wolff 2008). As Grabbe points out, the EU agenda for the new member states is not so much about strengthening shared values as it is about building the countries' capacities to participate in the common market and implement similar policies (2014: 42). The fact that the WB countries have not become a safe haven for migrants and asylum seekers can be seen from our fieldwork results. The outcomes show that some countries take a relaxed approach, register a relatively low number of people and maintain limited accommodation capacities, while others take the political pressure seriously but also use relatively harsh methods which are questionable from the perspective of basic procedural and human rights standards.

Overall, the level of criminalization strongly depends on the exposure of an individual country to migration on one hand, and on the political and public attitudes towards migration on the other. It is therefore not possible to draw the simple conclusion that those countries that are most exposed have also resorted to the most restrictive responses or more repression. There are numerous examples of countries that have been highly exposed to migration but have not resorted to intensive criminalization (e.g. Serbia), as well as countries that in the past have not been exposed at all, but have showed a very strict approach which functioned as a political statement aimed at supressing migration (e.g. BiH). The countries' policies have also been fluid, swinging between tolerant attitudes towards transit migration in one period and restrictions and border closures in another.

Serbia, for instance, was strongly affected by the refugee crisis from the very beginning when the number of arrivals began to rise in 2014. About 800,000 migrants and refugees from the Middle East and North Africa crossed the country in 2015. Responding to EU demands to safeguard its borders and consequently to reduce the arrivals of refugees, in the early stages of the mass migration movements the Serbian government introduced a registration system for people entering the country.

The registration system began as a loose arrangement and the authorities gradually introduced stricter and more precise controls in response to criticisms expressed by several EU member states (EI5; EI6; EI7). Since migrants perceive Serbia as a transit country (Lukić 2016), as on average they spent less than two days on its territory during the crisis, the authorities mostly avoided any kind of intervention which would cause or even incentivize the prolongation of their stay (EI5; EI6; EI7).

Until September 2015, there was no legal framework for differentiating people in need of international protection but not willing to stay in Serbia from those who were willing to stay. However, in September 2015 the Serbian government issued a decree introducing the issuance of "transit certificates" to people who expressed the intention to seek asylum. These certificates, issued from December 2015 to February 2016, gave the holder the right to remain in the country legally for 72 hours (Article 22(1) of the Asylum Act, Official Gazette of the Republic of Serbia, No. 109/2007; 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, No. 81/2015). In order to properly initiate the asylum procedure, holders had to report to the accommodation centre indicated on the document within 15 days to officially submit the asylum request and benefit from the reception conditions (EI5; EI6; EI7). After Hungary completed the border fence and the EU-Turkey agreement on stricter controls on migratory movement from Turkey was signed, Serbia's approach changed as well. The Serbian government started focusing on border security, which also meant that people entering the country were no longer able to leave as easily. The EU's plans to externalize border control (cf. Badalič 2018) and at the same time use border security as a condition for EU membership were thus clearly manifested in Serbia (ibid.).

The approach of the Macedonian government was a mixture of even more extreme securitization aspects on one hand and more lenient de-securitization measures on the other. In harmonizing its migration management policy with the EU *acquis*, the government opted for further restrictions. However, in 2015 when the authorities on the Balkan route decided not to stop migrants and refugees[2] who were on their way north-west, the Macedonian government followed the Serbian example and provided short-term transit certificates to those who entered irregularly. For this purpose, amendments to the Law on Asylum and Temporary Protection entered into force in June 2015 that allowed asylum-seekers to declare their intention to claim asylum to any police officer (EI3, EI4). These amendments provided for more flexibility in claiming international protection by removing the restrictive previous requirement, according to which applications for asylum had to be made at the border when entering the country or at the nearest police station. Instead of being held in police custody in order to be transferred to the reception centre, the migrants' and refugees' stay in Macedonia was regularized for a period of 72 hours,

2 This refers to the 2015/16 period, when Germany decided not to impose the Dublin rules for Syrian refugees. For more on this subject see Kogovšek 2017.

with full freedom of movement, and they were allowed to formally submit their asylum application within the prescribed time limit. However, most of the people who received such 72-hour certificates left the country. Out of the one million people who transited Macedonia during the "refugee crisis", only 100 applied for asylum (EQ3). Later, when the EU started to pressure the Western Balkan countries to close the route, the Macedonian government resorted to different kinds of measures – detention and pushbacks.

While one could observe sharp policy changes in the countries on the main migration route, such as Macedonia and Serbia, the countries off the main migration route have been slowly but steadily sharping their responses. Montenegro and Kosovo, for instance, have seen a slight increase of new arrivals as the conditions on the main migration route have tightened, and have consequently adjusted their policies to the new situation.

Migrant criminalization can take several forms and shapes. In our research we have identified some of these forms in the Western Balkan countries, including but not limited to: new definitions of felonies and misdemeanours being added to the law, irregular border crossing being transformed from a misdemeanour to a felony, increased numbers of migrant detainees, increased capacities of detention centres, informal collective expulsions (pushbacks), imposition of penalties for misdemeanours on potential asylum seekers, criminalizing the provision of services to migrants and imposing new obligations on non-immigration authorities to report migrants to law enforcement.

Expansion of Definitions of Misdemeanours

All Western Balkan countries covered by our research now have a longer list of felonies and misdemeanours related to migration. This is a direct result of the harmonization of the countries' migration legislation with the EU *acquis*. In BiH, for instance, the number of definitions of minor offences in the field of migration has slightly increased in the last decade (ES1) and in 2015 new types of misdemeanours appeared in the law as a result of the adoption of the former Aliens Act (BiH Official Gazette No. 88/2015, 17. 11. 2015). In Kosovo, a number of new misdemeanours have been added to the legislation on foreigners, and out of 34 definitions of offences identified, 24 are very recent, all originating in the law of 2012 (ES2). In Macedonia, 30 offences related to migration were identified in the law, some having been added recently (ES3). In Montenegro, in total 61 definitions of offences have been identified in relation to migration and border crossing, of which 11 were added in 2011, 2013 and 2014 (ES4; also Foreigners Law, Official Gazette of Montenegro, No. 56/14 and Criminal Code of Montenegro, Official Gazette of Montenegro, No. 40/2013 and 56/2013). Similarly in Serbia, several changes have taken place in the recent years as new definitions of offences were added by the legislator to the list of offences related to migration

and border crossing, while the sanctions for existing offences became stricter (ES5). These developments show a very clear trend of increased legislative criminalization.

Macedonian law in the field of migrant criminalization contains a unique feature in that the Macedonian Foreigners Law includes both misdemeanours and felonies, which is rare in the WB region. In the legal tradition of the WB region, felonies were always covered by a single law – the penal code. Felonies, unlike misdemeanours, were never introduced in other pieces of legislation. The Macedonian example showcases a situation where both criminal and administrative sanctions related to migration are grouped in one document, which is in itself an explicit manifestation of crimmigration (Stumpf 2006), i.e. the phenomenon of the merging of administrative and criminal law elements.

Irregular Border Crossing – Felony or Misdemeanour?

The question of whether irregular border crossing is considered a felony or a misdemeanour is considered to be a litmus test for determining the level of migrant criminalization in an individual country. Among the researched countries only Kosovo defines irregular border crossing as a felony. While this conduct is not considered a felony but "only" a misdemeanour in the rest of the region, for which only a fine is foreseen, Kosovo's penal legislation foresees a fine *or* imprisonment of up to six months for unauthorized border crossing (Criminal Code of the Republic of Kosovo, Code No. 04/L-082, 2. 4. 2012). A closer look reveals that that Kosovo's legislation is a copy of American law. In contrast, only four EU member states define irregular border crossing as a felony. Hence in the Western Balkan region Kosovo stands out in the sense that it is not only the EU that has a strong influence on how migration and asylum policy is developing, but also the United States. In other countries in the region where irregular border crossing remains a misdemeanour, only aggravated forms of this offence are considered a felony. In Montenegro, for instance, irregular border crossing is prosecuted as a felony if the non-citizen crossing is armed or crosses by force (EQ4). In Macedonia, providing assistance to irregular border crossers is considered a felony (Foreigners Law, Official Gazette of the Republic of Macedonia, No. 35/2006 as amended).

Detention of Migrants and Asylum Seekers

Detention is one of the key restrictive policy measures used for migration control and deterrence. All of the countries analysed have operating detention centres and are resorting to detention of both irregular migrants and (in most cases) also of asylum seekers. There are, however, specific features in how detention is used in each of the countries. BiH, e.g., is characterized by systematic detention of all irregular non-nationals. A measure formally called "placement under surveillance" is prescribed with

an aim of the expulsion of people irregularly present in BiH (Art. 118(1) Aliens Act). Even though the authorities are not allowed to detain asylum seekers, half of all asylum seekers were not identified as such at their first contact with the authorities. Instead, they were treated as irregular migrants, placed in detention and could only apply for asylum from the immigration detention centre, as provided by Article 33 of the Asylum Act (BiH Official Gazette No. 11/2016, 19. 2. 2016). The fact that they are claiming asylum does not lead to their release. Instead, the people remain detained until the expiration of the "surveillance measure" (EQ1).

Even though the European Court of Human Rights in Saadi v UK (2008) endorsed the administrative detention of asylum seekers, specifically ruling out the requirement of necessity, the detention of asylum seekers, especially if it is systematic, is subject to criticism (O'Nions 2008). Critics of this policy claim that it is in breach of Article 31 of the 1951 Geneva Convention which prohibits the penalization of refugees entering or staying irregularly. They emphasize that restrictions on movement should not be applied to refugees in general but only in exceptional cases (EI1, EI2).

The following statistics show the number of non-nationals detained in the detention centre per year and reflect the increase in the number of those apprehended on BiH territory. In 2017, a total of 860 non-nationals were placed under surveillance in the centre, which represents an increase of 166.53% (ibid.: 41) and constitutes the highest number of detentions per year in the last decade.

Table 1: Detention statistics in BiH (2008–2016)

Year	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
Detainees	198	191	312	218	453	236	218	193	311	860

Source: EQ1

My previous research from 2014 showed that the aim of such restrictive detention policy was to deter new arrivals. At the same time, systematic detention was only possible because the numbers were low and hence manageable (Kogovšek Šalamon 2015). This finding has been recently confirmed. After the release of EU-Turkey statement on 18 March 2016 (European Council 2016), the closure of the border between Hungary and Serbia (2015/16) and stricter border controls between Croatia and Serbia, the main migration route moved south-west, to Albania, Montenegro, BiH and Croatia. Consequently, in 2018 BiH saw a considerable increase in the numbers of transiting migrants and refugees.[3] Thousands of irregularly present migrants and refugees are now stranded on the territory of BiH, near the city of Velika Kladuša, without access to asylum procedure and basic care (Kramberger, 2018; Videmšek,

3 In this paper I do not make a clear distinction between migrants and refugees. As Jalušič points out, the legal division between them is unsubstantiated and artificial (2017: 531).

2018).[4] They experience difficulties with moving onwards as first the Slovenian, and then also Croatian authorities have been carrying out pushbacks to BiH territory (Amnesty International 2018). They are not provided housing or assistance by the authorities, but they are also not detained as there is no space for them.

A policy of systematic detention was also pursued by Macedonia while it was still possible given the new realities of increased migration flows. In 2015, when the numbers of arrivals to Macedonia started to rise, the approach of the Macedonian authorities towards migration which included systematic detention became unsustainable. The Gazi Baba detention centre located in the Macedonian capital Skopje was heavily overcrowded. Return was not possible due to the lack of cooperation with Greece, with which Macedonia was in a dispute over its name.[5] At the same time the only interest of the transiting migrants was to leave the country as soon as possible and continue their way north-west. As the data shows, more than one million people arrived in the European Union irregularly from the Middle East and North Africa in 2015/16 (European Commission 2017), a large majority of whom travelled through Macedonia. The table below shows the drop in the number of people held at the detention centre.

Table 3: Detention of irregular migrants in Macedonia per year

Year	2014	2015	2016	2017
Detainees	896	1,346	389	100*

*The official statistics for 2017 were not available at the time of the information was being collected. According to expert estimations there were approximately 100 detainees in 2017.

Source: EQ3

Even though it is less crowded than it used to be, the detention facility in Gazi Baba is still in operation. In 2015, due to its overcrowding, many international and domestic human rights watchdogs pressured the Macedonian Government to close it down (AIS, 2015a and 2015b) and, as a result, all the detainees were released and allowed to seek asylum (EQ3).

This de-securitization trend soon changed. The majority of irregular migrants are now once again being detained and are not given access to asylum procedure

4 In August 2018, the European Commission provided support of EUR 6 million to Bosnia and Herzegovina to improve its capacity for identification, registration and referral of third-country nationals crossing the border, provide accommodation and basic services for refugees, asylum seekers and migrants and strengthen the capacity for border control and surveillance, hence also contributing to the prevention of and fight against the trafficking of human beings (European Commission 2018b).

5 Greece did not allow Macedonia to use the name of Republic of Macedonia because of the northern Greek region also named Macedonia. Hence Macedonia the country was forced to use the acronym FYROM (Former Yugoslav Republic of Macedonia) after its declaration of independence in 1991. In 2018 Macedonia and Greece reached an agreement on the name (Northern Macedonia instead of FYROM).

prior to release. The majority of asylum seekers (56 % in 2016 and 58 % in 2017) were allowed to apply for asylum only after release from immigration detention (ibid.).

In contrast, Serbia never resorted to the systematic detention of migrants despite being faced with mass transit migration. Like all other WB countries, Serbia also has just one detention centre, but according to common opinion, detention is not the normal way of treating migrants in Serbia, as the policy of tolerance and openness declared by the authorities was widely promoted by national media (ibid.). As is also evident from the statistics below, there is a decreasing trend in detaining migrants and a very small percentage of new arrivals are detained.

Table 6: Detention of asylum seekers in Serbia per year compared to the number of people who expressed the intent to apply for asylum

Year	2015	2016	2017
No. of detainees who expressed intention to apply for asylum	474	43	29
Total number of expressions of intent	487,124	12,821	6,199

Source: EQ5

Montenegro also did not embark on a systematic detention approach. Until 2017 no asylum seekers were detained in Montenegro as this was not allowed by law. While the Asylum Law guaranteed full freedom of movement for asylum seekers, in the past there was a problem of the *de facto* limitation of the movement of minor asylum seekers. Before opening of the asylum centre in 2014, minor migrants and asylum seekers were being placed in the Ljubovic migrant detention centre even in cases where the legal conditions for detention were not met. The Montenegrin government claimed that there are no other more appropriate reception facilities available for unaccompanied minors. This issue was later resolved and for a few years Montenegro has stood out in the region for its non-incarceration asylum policy. However, this did not last long: in 2018 legal provisions were introduced which now allow the detention of asylum seekers (ibid.). With this development Montenegro is joining all the other countries in the region that already provide for restriction of freedom of movement for asylum seekers under legally defined conditions.

While asylum seekers may only be detained as of 2018, the detention of irregular migrants who did not apply for asylum was already possible in Montenegro. Until 2013 Montenegro did not have a migrant detention centre. The placement of irregular migrants who were apprehended in the territory of Montenegro was solved variously, on a case-by-case basis, by placing them in facilities such as NGO shelters and hotels, or by renting private residential facilities with security provided by the police. The number of detainees remained steady as there had been no increase in the legal grounds for detention of irregular migrants in the recent years.

Table 4: Detention of irregular migrants in Montenegro per year

Year	2012	2013	2014	2015	2016	2017
Detainees	219	75	42	112	132	234

Source: EQ4

Kosovo is also not among countries that practise the mass incarceration of migrants. The seemingly harsh legislative picture with irregular border crossing being defined as a felony, which might give an indication that Kosovo is tough on migrants and refugees, is not reflected in this area, as detaining asylum seekers is not practised at all in Kosovo (EQ2; also Law No. 04/L-219 on Foreigners, Official Gazette of the Republic of Kosovo, No. 35, 5. 9. 2013). The only detention centre for foreigners in the country started functioning in June 2015. It is not used for asylum seekers, but for irregular migrants for the purpose of the deportation procedure. As evident from the statistics below, even the number of migrants detained remains relatively low.

Table 2: Detention of irregular migrants in Kosovo per year

Year	2013	2014	2015*	2016	2017	2018**
Detainees	0	0	47	78	42	26

*From June 2015 when the Detention centre for foreigners was fully operational until the end of the year the number of irregular migrants detained was 47.

**Up to 12 June 2018.

Source: EQ2

In the recent years, the detention capacity has mostly increased in all of the states. The states have either opened new detention centres (e.g. Montenegro, Kosovo), or have increased the number of beds at the existing centres. In BiH in 2008 the detention centre's capacity was increased from 40 to the current 120 beds (BiH 2018). In Serbia the current capacity of the detention centre in Padinska Skela of 66 beds will be increased to 100 beds (EQ5).

Based on these findings, no single trend in migrant incarceration in the Western Balkans can be identified. There are a number of different practices and approaches, indicating that the policy approach depends on various factors such as EU pressure (which correlates with the scope of transit migration), the country's detention capacities, the level of repression that otherwise exists in the country, and the trust of the authorities in detention being an effective tool of prevention and deterrence of irregular migration.

Funding for Detention Centres

Another issue in the region that should be highlighted in the context of the conditioning of EU accession is the provision of funding for the construction or renovation of detention centres. The BiH detention centre began operating in 2008, when the former Law on Foreigners, which allowed foreigners to be placed under surveillance, came into effect (BiH 2009). Its construction was funded by the EU fund "Instrument for Pre-accession Assistance" – IPA (EQ1). As in the case of BiH, the construction of the detention centre in Montenegro, used for incarceration of irregular migrants, was financed by an IPA 2008 project titled "Support to Migration Management in Montenegro" which provided for 50% co-financing from the European Union (EQ4). The reconstruction of the centre in Kosovo was similarly supported by EU funds (EQ2). Here it should be added that despite the low numbers of detainees in Kosovo, the issue of detention and the fact that the detention facility was renovated with EU funds are of particular importance. Namely, there are very few returns taking place from Kosovo, as the country has signed very few useful readmission agreements that would enable returns. This is relevant as the only allowed purpose of detention under the EU Directive 2008/115/EC is the prospect of return. If the possibility to return is absent, detention is not legally justifiable and does not make sense. Hence I argue that the use of EU funds for detention that serves no legally acceptable purpose is highly illegitimate.

Unlike in most of the other WB countries, the renovation of the detention centre in Serbia will not be funded by the EU, but by the Swiss Embassy in Belgrade and the International Organization for Migration (IOM) (EQ5). There are plans to increase the detention capacity, not by building a new detention centre but by increasing the number of beds and creating a separate section for women. While on one hand the provision of funding may improve the living conditions and procedures within the existing centres, it may also provide an incentive to build and operate a centre in the first place. Thus it needs to be taken into account that by funding the construction of detention centres the EU is contributing to migrant criminalization. Since systematic detention in BiH is particularly problematic from the fundamental rights point of view, that fact that the EU is funding such a detention centre should be of particular concern.

Pushbacks

Even though they are highly problematic from the aspect of human rights and constitutional guarantees, pushbacks are becoming a more and more frequent phenomenon in Southeast Europe (HRW 2016; ECRE 2018). Pushbacks have already been reported in the region, in particular from Macedonia and Serbia. From 19 November 2015 until 31 May 2017, according to monitoring organizations, the Macedonian authorities pushed back 10,377 refugees and migrants to Greece.

Following the final closure of the Balkan route on 18 March 2016, pushbacks increased significantly and continued throughout 2017 (EQ3). Pushback practices have also been confirmed by the Macedonian authorities (ibid.). Serbia has joined the group of the countries that carry out informal pushbacks to its neighbours (EI5; EI6; EI7). There are reports of such pushbacks to Macedonia and Bulgaria from 2016 and 2017. At the same time, it is experiencing pushbacks to its own territory from Hungary and Croatia (EQ5).

Pushbacks, for which there is no universally accepted definition, are generally characterized as informal collective expulsions (Hirsi Jamaa and Others v. Italy) of people who irregularly enter a country back to the country they entered from, through the application of procedures that take place outside legally defined rules in protocols or agreements signed by the neighbouring countries. In pushbacks, access to seeking asylum is usually restricted, and police violence is often used to execute them. Pushbacks are often informal, including in the sense that even the authorities of the neighbouring ("receiving") country are not informed about them. Pushbacks are problematic for a variety of reasons, e.g. there is no democratic or judicial control over these processes (as there is no decision to appeal against); there is no differentiation between people who are in need of protection and those who are not; they enable returns to jurisdictions with the risk of torture, inhumane and degrading treatment and punishment; and there is a lack of documentation of the procedures. If pushbacks are accompanied by police violence, the lack of documentation and evidence that pushbacks took place and that individuals were in contact with the police render the recourse to legal remedies and redress for the people affected nearly impossible.

Sanctioning Migrants for Misdemeanours

While the legislative situation resembles those in the rest of the WB region, a specific widespread practice of sanctioning migrants for misdemeanours was reported in Serbia. During 2015 when the numbers of mass arrivals were at their peak, the Serbian Ministry of the Interior was initiating misdemeanour proceedings for irregular entry or stay against people who could be prima facie refugees, as most of the sanctioned individuals came from Syria, Afghanistan and Iraq, and the sanctions were being imposed by the misdemeanour courts. People were sanctioned according to the Law on Foreigners (Official Gazette of the Republic of Serbia, No. 97/2008), State Border Protection Law (Official Gazette of the Republic of Serbia, No. 24/2018) and Misdemeanour Law (Official Gazette of the Republic of Serbia, No. 65/2013, 13/2016 and 98/2016 – Constitutional Court Decision). In the recent years the statistics show that this practice has decreased.

Table 5: No. of sanctions issued by misdemeanour courts in Serbia against potential refugees per year

Year	2015	2016	2017
No. of sanctions	9,134	2,221	920

Source: EQ5

The recognition that the practice of sanctioning people for irregular entry is problematic if used against people who are seeking protection has been highlighted by the National Preventive Mechanism (NPM) in Serbia, a state mechanism mandated to supervise the treatment of people in detention in line with the Optional Protocol to the Convention against Torture, Inhuman and Degrading Treatment or Punishment. The Serbian NPM issued recommendations to the police and misdemeanour courts to terminate this practice and training was carried out to equip the state officials involved with knowledge about the Geneva Convention standards on non-penalization of refugees (EQ5).

THE EFFECTS OF EU CONDITIONALITY ON MIGRANT CRIMINALIZATION

Based on our research outcomes we can conclude that not all severe forms of migrant criminalization are overwhelmingly present in the Western Balkans region. For instance, assistance to migrants is not criminalized. In only one out of the five countries analysed (Kosovo, which is heavily influenced by the US) is the crossing of borders considered to be a crime punishable with imprisonment (i.e. a felony), while in all others this is still considered a misdemeanour, which is also the most common situation among the EU member states. Also, being a migrant is not an aggravating circumstance in sentencing for crimes unrelated to migration.

However, many other indicators of migrant criminalization are present in the region, and they are on the rise. In many of the countries analysed, EU funds are used for the construction or renovation of detention centres, which not only increases the minimum standards in these buildings but also the number of people who can be detained. The EU is exercising pressure on countries to conclude readmission agreements which facilitate return. Non-immigration authorities (health or schools) in general are not obliged to report immigrants to the police. There are a few exceptions, e.g. in Kosovo, public or private healthcare institutions that admit foreigners for treatment are obliged to inform the nearest police station within twenty-four hours that they have treated an irregular migrant. Further, specific crimmigration problems have been identified in each country analysed: BiH with its systematic detention, Kosovo with defining irregular border crossing as a felony, Macedonia with the pushbacks and large-scale incarceration practices, and Serbia with sanctioning of prima facie refugees for minor offences and pushbacks.

While increased border policing prevents mass border crossings, it also allows for pushbacks, which are prohibited by international law. The visa liberalization that promoted change in the Western Balkans (Fererro Turrión 2015: 18) and eased the life of nationals of the WB countries on one hand, increased the criminalization of people arriving in and transiting these countries on the other. It is crucial to ensure that future liberalization processes place more emphasis on the non-security related aspects of these societal and political changes, including those that concern other vulnerable groups such as people from conflict torn areas seeking protection. As EU accession, security, border control, institution-building and introduction of technologies for purposes of border surveillance are top priorities for the candidate and potential candidate countries, universal human rights has become a secondary concern. It is questionable whether this is acceptable in the process in which countries are striving to become members in a club which praises itself for being an area of "freedom, security and justice". It is also questionable what kind of message this is sending to the candidate and potential candidate states – does this club care how migrants and refugees are treated? This is particularly problematic since the EU is already losing the status of a guarantor of stability and democratic institutions (BiEPAG 2016). It is also questionable whether this is the right way of preparing the EU candidate countries for membership – are they going to be able to abide by high human rights standards expected from them when they become EU members? And more importantly, are they going to participate in the solidarity and burden-sharing mechanisms in the field of migration and asylum, as is expected today across the EU?

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POVZETEK

THE ROLE OF THE EU MEMBERSHIP CONDITIONALITY AT MIGRANT CRIMINALISATION IN THE WESTERN BALKAN COUNTRIES

Neža KOGOVŠEK ŠALAMON

Odzivanje Evropske unije (EU) na migracijske izzive presega ozemlje njenih držav članic, saj se prek pozunanjenja mejnega nadzora ta preliva tudi in predvsem na ozemlje držav Zahodnega Balkana (ZB); tam teče ena najpomembnejših migracijskih poti s Srednjega vzhoda in Afrike proti EU. Medtem ko države Zahodnega Balkana ne kažejo interesa za migrante in jih smatrajo za problem EU, ta evropsko integracijo teh držav pogojuje prek vzpostavljanja institucij in postopkov za obravnavo migrantov, podobnim tistim v EU. Prenos prava in ukrepov EU pa povečuje tudi stopnjo kriminalizacije migracij, saj nove norme vsebujejo tudi sankcije, ki jih njihovi pravni sistemi prej niso predvidevali.

Izsledki raziskave na Zahodnem Balkanu niso pokazali vseh najhujših oblik kriminalizacije migracij. Nudenje pomoči migrantom, npr., ni kriminalizirana. Le v eni od analiziranih držav (na Kosovu, kjer pripravo politik močno navdihujejo Združene države Amerike) je nedokumentiran prehod državne meje kaznivo dejanje, ki se kaznuje s kaznijo zapora. V drugih državah regije, kot je to najpogosteje tudi v državah članicah Evropske unije, pa je to le prekršek. Prav tako dejstvo, da je storilec nekega z migracijami nepovezanega kaznivega dejanja migrant, pri določanju višine sankcije ni oteževalna okoliščina. Kljub temu pa nekateri drugi dejavniki – ti so v porastu – kažejo na kriminalizacijo migracij.

V številnih analiziranih državah so centre za pridržanje zgradili ali obnovili s pomočjo sredstev EU, kar pa ne izboljšuje samo bivanjskih razmer, temveč vpliva tudi na povečanje števila pridržanih. EU države spodbuja k sklepanju sporazumov o vračanju, te pa omogočajo deportacije. Uradi, ki v regiji niso pristojni za migracije, na splošno nedokumentiranih migrantov, razen nekaterih izjem, niso dolžni prijavljati policiji. Na Kosovu, npr., morajo zdravstveni zavodi, kjer nedokumentirani migranti poiščejo pomoč, po zakonu te prijaviti policiji. Po posameznih državah so bili identificirani še drugi specifični pojavi krimigracije: v Bosni in Hercegovini sistematično pridržanje vseh neregularnih migrantov, tudi če ti želijo zaprositi za azil, v Srbiji in Makedoniji nezakonita množična prisilna vračanja ter v Srbiji množično sankcioniranje *prima facie* beguncev zaradi nezakonitega prehoda državne meje. Ti pojavi, ki so v veliki meri posledica pogojevanja za vstop med članstvo EU, kažejo tako na problematično vlogo EU kot tudi nacionalnih zakonodajalcev na Zahodnem Balkanu v razmerju do temeljnih pravic migrantov.