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Serbian Border Protection Practices in the Case of Illegal Border Crossers

- **ABSTRACT:** *The paper analyses the legal framework of the Republic of Serbia relevant to border control and access to the territory, as well as the practices of the national authorities in the case of persons crossing the border illegally. After a brief outline of the applicable international standards that obligate the Serbian authorities in cases of illegal entry, the author focuses on the examination of the most prominent provisions of three legislative acts: the Law on Border Control, the Law on Aliens, and the Law on Asylum and Temporary Protection. Although certain legislative solutions leave room for minor criticism, the normative framework is assessed as adequate and generally in line with Serbia's international commitments and the European Union (EU) acquis. However, the part of the paper focusing on the practices of the competent Serbian authorities is much more critical. Certain border practices related to illegal entries have been considered problematic by both the EU and international human rights bodies and documented by reputable non-governmental organisations active in the field of asylum. Of the problematic practices presented, three have received judicial responses. The final part of the paper, therefore, examines the adequacy of the review of such practices by national courts. While some progress has been made in the practice of misdemeanour courts in applying the principle of non-punishment for illegal entry with respect to persons expressing their intention to seek asylum in Serbia, the decisions of the Constitutional Court relevant to illegal entry are assessed as partially satisfactory. While its response to pushbacks can be considered largely in line with applicable international standards, the Constitutional Court's position on detention in the transit zone of Belgrade Airport has been criticised.*
- **KEYWORDS:** illegal entry, border control, migrants, persons in need of international protection, Serbia

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1. Introduction

The Republic of Serbia is predominantly perceived as a country of transit for migrants and persons in need of international protection and rarely as a country in which the latter intend to seek and/or obtain asylum. This assertion is supported by the available statistical data that reveal a large discrepancy between the number of persons entering the territory of the Republic of Serbia and those actually involved in asylum procedures. In 2022, 4,181 persons declared their intention to apply for asylum in the Republic of Serbia, while 119,127 persons arrived at asylum centres and reception-transit centres operated by the Commissariat for Refugees and Migration of the Republic of Serbia.¹ The figures also show that out of 4,181 persons who declared their intention to apply for asylum, only 320 of them actually submitted an asylum application to the Asylum Office of the Republic of Serbia, which is the body responsible for examining the asylum application in the first instance, while the Asylum Office, as the second-instance body, granted asylum to 30 persons, rejected 63 applications, and dismissed 2 applications.² It is also worth noting that from 2008, when the asylum system of the Republic of Serbia was established, until the end of 2022, only 238 persons were granted asylum.³

However, statistics on the number of persons who crossed the border illegally or were prevented from entering the territory of the Republic of Serbia illegally are either unavailable or inaccurate. Among the 119,127 persons who arrived at various asylum and reception-transit centres in 2022, there are certainly many whose entry could be considered illegal on the grounds prescribed by the relevant Serbian legislation. However, in addition to those who managed to enter the territory of the Republic of Serbia, a significant number of persons were prevented from doing so. According to the Ministry of the Interior of the Republic of Serbia, more than 2,000 persons were prevented from illegally crossing the border in the last 3 years;⁴ the figures were even higher in the period 2019–2020 when a total of 58,447 persons were prevented by the Border Police from illegally entering the territory, either by ‘being caught trying to cross the state border illegally’ or by ‘giving up after being spotted by the authorities responsible for securing the state border.’⁵

1 Trifunović (ed.), 2023, p. 15.

2 Ibid., p. 18. Similar trends appear to have continued during the first four months in 2023. According to data collected by the UNHCR, out of 20,330 new entries in various centres operated by the Commissariat, only 440 persons expressed their intention to seek asylum, whereas 92 of them decided to officially start the asylum procedure before the Asylum Office by submitting asylum applications. See UNHCR, 2023, p. 1.

3 Trifunović (ed.), 2023, p. 19.

4 Glavonjić, 2023.

5 Ministry of the Interior of the Republic of Serbia, 2021, p. 10.

The statistical data outlined above point to practices that require in-depth examination, both from the perspective of Serbia's international obligations and that of its national legislation. Namely, the obligations Serbian authorities have towards persons who succeed in their attempt to enter the territory illegally, especially those who claim to need international protection, should be examined. With regard to persons whose illegal entry into the territory fails due to the so-called pushbacks, the analysis will identify applicable international and national standards aimed at ensuring that the refusal of entry does not amount to refoulement.

Therefore, this paper begins with a brief outline of the rules contained in the international conventions to which the Republic of Serbia is a party, as well as the standards established by the case law of the European Court of Human Rights (ECtHR) concerning the right of aliens to access the territory and the obligations of the respective states in situations of illegal border crossing (2). This is followed by an analysis of Serbian legislation on illegal entry (3). Three legal acts have been analysed. The Serbian Law on Border Control (LBC) explicitly identifies the prevention of irregular migration as one of its objectives and provides for new procedures related to border control that were not provided for in previous legislation and that directly relate to situations of illegal border crossing by migrants (3.1).⁶ The Law on Aliens (LA) applies to persons other than those applying for asylum in Serbia and defines illegal entry and the corresponding procedures and guarantees for refusal of entry (3.2).⁷ In addition, access to the territory is analysed from the perspective of the Law on Asylum and Temporary Protection of the Republic of Serbia (3.3) (LATP).⁸ The final part of the paper focuses on the practices of competent Serbian authorities considered problematic and contrary to both Serbia's international obligations and its national laws (4). Such practices have been criticised by the European Union (EU) and international human rights bodies, such as the Human Rights Committee (HRC) and the Committee against Torture (CAT) (4.1), as well as by reputable non-governmental organisations (NGOs) active in the field of asylum (4.2). Border-control practices have also been scrutinised by national judicial bodies (4.3). A relatively recent twist in the practice of misdemeanour courts regarding impunity for illegal entry suggests that adequate training of judges serves the purpose of at least partially eliminating bad practices (4.3.1), while the Constitutional Court of Serbia recognised in 2021 that problematic border practices by Serbian police officers amounted to violations

6 The Law on Border Control of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 24/2018.

7 The Law on Aliens of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 24/18 and 31/2019.

8 The Law on Asylum and Temporary Protection of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 24/2018.

of certain constitutional rights (4.3.2). The concluding remarks summarise the results of the analysis (5).

2. Serbia's international obligations regarding border control and access to territory

According to Article 16 of the Serbian Constitution, international treaties ratified by the Republic of Serbia form a part of its legal system and are directly applicable.⁹ As stipulated in Article 18, provisions on human rights shall be interpreted in accordance with the international standards and practices of international institutions that monitor their implementation. These two constitutional provisions define the general position of international law in the national legal system of the Republic of Serbia. More importantly, they make international conventions and standards established in the practice of the ECtHR and other international human rights bodies mandatory for the actions of all national bodies, including those involved in border control. Therefore, it is necessary to briefly examine what international obligations and standards are binding to the Serbian border guards and the other national bodies responsible for reviewing their practices.

There is no explicit guarantee in international law of foreigners' right to enter the State's territory. On the contrary. According to the principle of sovereignty over territory, states have the right to control their borders and determine the conditions under which a person may cross them. However, this does not mean that the exercise of sovereign powers by the State at borders is unrestricted. These powers are limited to the extent that international refugee law provides that measures taken at the border may not prevent persons from seeking asylum,¹⁰ but restrictions also derive from international human rights law, which defines the State's obligations towards all non-nationals within its jurisdiction. An implicit guarantee of the right of access to territory is contained in Article 14 of the Universal Declaration of Human Rights, as the right to asylum implies the right to an asylum procedure, which, in turn, cannot be realised without access to the territory.¹¹ Similarly, certain provisions of the 1951 UN Convention on the Status of Refugees can be interpreted as implicitly guaranteeing the right to access the territory for persons in need of international protection.¹² Article 33 prohibits expulsion 'by any means,' which, according to the official interpretation of the UN High

9 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 98/2006.

10 UNHCR, 2020–2021, p. 1.

11 Dagen and Čepo, 2021, p. 856; Costello, 2012, p. 287.

12 This relates to Art. 1(A,2) of the Convention that defines the term refugee and insists upon the declaratory character of the act of recognizing such status by the contracting parties, Art. 31 that regulates unlawful entry, but most importantly Art. 33 on the prohibition of expulsion or return.

Commission for Refugees (UNHCR), includes ‘refusal at the border’,¹³ suggesting that the prohibition of expulsion protects persons who are already in the territory of the State party as well as those who have not yet formally entered it.¹⁴

However, the content of the right of aliens to enter territory has been largely determined by the case law of the ECtHR in Article 3 (prohibition of torture) and Article 4 of Protocol 4 (prohibition of collective expulsion of aliens). The ECtHR has provided valuable standards to answer two important questions: first, when is refusal of entry to be considered a violation of the European Convention on Human Rights and Fundamental Freedoms (ECHR), and second, in what situations and under what conditions should refusal of access to the territory not be considered a violation of the Convention?

By identifying the positive duties of the State in relation to Article 3, the ECtHR has established clear criteria for assessing the lawfulness of various border practices and measures adopted by national authorities. Two situations can be distinguished as follows. If the person at the border expresses an intention to seek asylum and indicates a risk of ill-treatment in the event of a refusal of entry or return, the State is obliged to initiate an asylum procedure to examine these allegations. If, however, there is no indication at the border of an intention to seek asylum or of risk of ill-treatment, the State authorities have an active role to play¹⁵ and are obliged to establish the reasons for which a person seeks to enter the territory, even if it is assumed that the reason for entering the territory is the need for international protection, either because the person has presented himself at the border without documents or because he has not tried to conceal the fact that he does not have a valid document or authorisation for entry.¹⁶

Standards established within the scope of Article 4 of Protocol No. 4 may also serve as limits on the practices of the State authorities at the border. The ECtHR distinguishes between two possible scenarios. If a group of persons attempts to enter the territory through legal/official border crossings, the standards established in its case law in relation to Article 3, as explained above, apply.¹⁷ However, in the case of an attempt to cross the border outside official border-crossing points, access to the territory may be denied under two conditions: first, the State has ensured real and effective access to the means of legal entry, and, second, the persons had no cogent reasons for not using the means of legal entry to access the territory.¹⁸ As an exception to the general standard of Article 4 of Protocol 4,

13 UNHCR, 2007, para. 7.

14 Shaw and Gibson, 2017, pp. 99–100.

15 Gatta, 2019, pp. 119–120.

16 ECtHR, *M.A. and Others v. Lithuania* (Application No. 59793/17), Judgement, 11 December 2018, paras. 105, 107 and 113; ECtHR, *M.K. and Others v. Poland* (Applications Nos. 40503/17, 42902/17 and 43643/17), Judgement, 23 July 2020, paras. 174, 178 and 179.

17 ECtHR, *M.K. and Others v. Poland*, para. 204.

18 ECtHR, *N.D. and N.T. v. Spain* (Applications Nos. 8675/15 and 8697/15), Judgement of the Grand Chamber, 13 February 2020, para. 201.

which implies an obligation on the part of the State to make individual decisions on refusal of entry based on an examination of the individual circumstances of each member of the group, a two-part test should be applied restrictively.¹⁹ Whether the two conditions are met must be determined based on an assessment of all circumstances. The standards established in the most recent case law of the ECtHR provide guidance in this respect as they imply that national authorities must offer non-nationals a real possibility of requesting protection at the border, which is assessed based on not only the applicable normative framework but also how it is applied in practice. In other words, for the exception to apply, the means of legal border crossing must meet several conditions: they must exist at the time when the persons enter the territory, and they must be available, real, and effective, particularly for obtaining protection based on Article 3 of the Convention, with interpreters and legal aid available.²⁰ In any case, for the competent national authorities to be on the safe side as regards the compatibility of their border practices with the ECHR obligations, the obligations arising from Articles 3 and 4 of Protocol No. 4 should be seen as complementary, in order to provide persons seeking to enter the territory, whether legally or illegally, with adequate, full, and effective protection against the risk of ill-treatment in the event of refusal of entry, primarily based on the absolute nature of Article 3 of the ECHR.

3. National legal framework relevant to the case of persons crossing the state border illegally

Access to and crossing of the state borders of the Republic of Serbia are regulated by three legal acts that are applied in a complementary manner, as their scope varies and they are relevant to specific categories of persons. The LBC, as a general act, applies to all persons, both nationals and non-nationals, attempting to cross the border of the Republic of Serbia and regulate border control, the powers of the police in carrying out border control, and the powers of other authorities responsible for integrated border control (3.1). However, the LA applies to the entry, movement, stay, and return of aliens and regulates the respective competencies of Serbian authorities (3.2). Finally, the LATP is most specific and applies to a single category of foreigners: those applying for international protection (3.3).

¹⁹ Čučković, 2022, pp. 140–142.

²⁰ ECtHR, *M.H. and Others v. Croatia* (Applications Nos. 15670/18 and 43115/18), Judgement, 18 November 2021, paras. 295 and 300; ECtHR, *Shahzad v. Hungary* (Application No. 12625/17), Judgement, 8 July 2021, paras. 62–65.

■ 3.1. LBC: *Prevention of irregular migration as a purpose of border control*

From the beginning, the LBC identifies the prevention of irregular migration as one of the main purposes of border control²¹ and designates the Border Police Directorate, the organisational unit of the Police Directorate within the Ministry of the Interior, as the body responsible for its implementation.²² According to Article 12, border crossing is considered legal if it is carried out ‘at a border-crossing point with a valid travel document or another document prescribed for crossing the state border.’ Otherwise, the border may be crossed outside an official border-crossing point only with a border permit issued by the Border Police²³ or in exceptional cases of natural disasters.²⁴ The LBC distinguishes between three types of border control, two of which are new under current law. Border control can be carried out at and outside the border-crossing point, respectively, and in a state of heightened risk. According to Article 66, the Border Police are entitled to carry out their border-control tasks outside the area of a border-crossing point to detect criminal offences and misdemeanours in the field of irregular migration ‘on the basis of analyses of risks to border security.’ Furthermore, Article 29 provides that in situations of increased risk of non-military challenges and risks that may endanger the state border, public safety, persons, and property in the border area, police officers and other organisational units of the Ministry may assist the Border Police in performing border-control tasks, as well as members and means of the Serbian Armed Forces. In such cases, the LBC provides that the decision must be taken by the Minister of the Interior, that is, the President of Serbia, in the case of army deployment. However, the decision on blocking, which is regulated by Article 11 of the LBC, is within the government’s scope. This provision stipulates that not only traffic routes and roads but also entire ‘areas not used for lawful crossing of the state border may be blocked in order to prevent illegal crossing of the state border outside the location of the border crossing point.’ Both the solution provided for in Article 29 and that of Article 11 were inspired by the ‘experience of the MoI (Ministry of the Interior) in managing the migration crisis of 2015’²⁵ and, subsequently, introduced in the current law, and both have potentially far-reaching consequences for persons trying to enter the territory illegally in the context of massive influxes. While blocking as a means of border control has not yet been implemented, certain border practices involving the Army of the

21 Art. 2 of the LBC.

22 Art. 3 of the LBC.

23 Art. 13 of the LBC.

24 Art. 14 of the LBC.

25 Jugović, 2018, p. 289.

Republic of Serbia, which took place prior to the adoption of the LBC, can now be considered regularised and fall within the scope of Article 29 of the LBC.²⁶

Finally, Article 30 provides for restrictions on the performance of any task related to border control and stipulates that in the exercise of their police powers, police officers shall act in accordance with the following principles: impartiality, equality and non-discrimination, humaneness, respect for dignity and reputation, respect for human rights and freedoms, and respect for the rights of vulnerable persons.²⁷ Article 30 exclusively refers to the police, leaving the armed forces involved in border control activities outside its scope. Members of the armed forces, as part of its *de jure* organs, are obliged to comply with Serbia's international obligations, in particular, those concerning fundamental human rights and freedoms and ensuring humane and equal treatment of any person trying to enter Serbian territory. Thus, although this omission should not have any practical consequences, Article 30 should be amended to explicitly provide for restrictions on any national body carrying out tasks related to border controls, whether it be the police, the armed forces, or others.

■ 3.2. The LA: Distinction between legal and illegal entry

Similar to the LBC, the 2018 LA defines entry as 'the arrival of a foreigner on the territory of the Republic of Serbia after crossing the state border, i.e. a border crossing point under border control.'²⁸ However, it further provides, in Article 14, a list of situations in which entry is considered illegal. These include entry

- (1) away from the place designated for crossing the state border;
- (2) by evading border control;
- (3) without the travel or other document required for crossing the state border;
- (4) by using an invalid or forged travel or other document of another person;
- (5) by providing false information to the Border Police;
- (6) during the period in which

26 In 2016, during the European migrant crisis, the Government of the Republic of Serbia adopted a decision on forming joint teams comprising members of the police and armed forces, tasked to control the border of the Republic of Serbia with North Macedonia and Bulgaria. The decision was in force for 20 months, until April 2018. Ministry of Defense of the Republic of Serbia, End of Engagement of the Joint Forces of the Serbian Army and MoI, 02 April 2018 [Online]. Available at: https://www.vs.rs/sr_lat/vesti/61CFE4D9413C11E8AF6A0050568F5424/prestanak-angazovanja-zajednickih-snaga-vojske-srbije-i-mup (Accessed: 16 June 2023).

27 Mole et al., 2019, p. 43.

28 Art. 3(1)(5) of the LA. The same article provides that access to the transit area of an international airport, port anchorage or harbour shall not be regarded as entry into the territory of the Republic of Serbia. The solution has been criticised for not complying with the standards of the ECtHR as persons staying in the transit zones are considered to be within the jurisdiction of the state, thus, making the state responsible in case it fails to provide access to asylum procedures. See Mole et al., 2019, p. 45.

the protective measure of removal or the security measure of expulsion is in force or during the period of a ban on entry.

For the abovementioned reasons, as well as for other reasons listed in Article 15 Paragraph 1 of the LA, the alien shall be refused entry. The decision to refuse entry is the responsibility of the Border Police, which is issued in a standardised form²⁹ and must state the reasons for refusing entry;³⁰ an appeal against the decision to refuse entry is possible.³¹ The LA provides exceptions where entry may be granted despite grounds for refusal. The exceptions relate to humanitarian reasons, the interests of the Republic of Serbia, and most importantly, if it is required by Serbia's international obligations.³²

Although most migrants attempting to enter the territory of the Republic of Serbia illegally met the criteria set out in the LA for their entry to be considered illegal, the exemption should be read in three important ways. First, it suggests that persons in need of international protection are excluded from the application of Articles 14 and 15. This follows not only from Article 2, which explicitly provides that the LA does not apply to foreign nationals who have applied for asylum in the Republic of Serbia, but also from Serbia's international obligations towards persons in need of international protection. Second, Serbia's international obligations, as explained in the second part of the paper, relate to all persons in need of international protection who enter its territory, whether legally or illegally, and are not limited to persons who officially initiate the asylum procedure, as can be inferred from the wording used by the legislator in Article 2 of the LA. Third, the exception in Article 15(3) can only be properly applied if it is interpreted as including the obligation of the Border Police to take appropriate measures to assess whether a person entering or attempting to enter the territory illegally requires international protection. However, the LA itself is silent on this point and provides, in Article 9, the principles and procedures for assessing the risks that the alien may pose to the Republic of Serbia and its citizens,³³ not the assessment of the risks that the alien would face in the case of refusal of entry.

■ 3.3. *The LAMP: How does the asylum application and its outcome determine the course of the procedure?*

The LAMP guarantees the right to express intention to apply for asylum in the Republic of Serbia. Although according to Article 4 of the LAMP, this right is

29 This solution is welcome as before the entry into force of the Law on Foreigners, the norm was to simply provide verbal denial of entry to the foreigner, with an indication in his/her travel document. See Krstić, 2018, p. 80.

30 Art. 15(2) of the LA.

31 Art. 15(6) of the LA. However, the appeal against the decision on the refusal of entry does not have an automatic suspensive effect.

32 Art. 15(3) of the LA.

33 Jugović, 2018, pp. 290–291.

granted to ‘an alien who is in the territory of the Republic of Serbia,’ the relevant provision should be interpreted in line with international standards and include persons who are at the borders and in airport transit zones.³⁴ The LATP further stipulates that the right to express the intention to apply for asylum is guaranteed regardless of whether the entry was lawful, that the intention must be expressed “without delay,” and that the foreigner is only obliged to provide ‘a reasonable explanation for his/her unlawful entry.’³⁵ These conditions activate the principle of non-punishment for illegal entry.

The asylum procedure officially begins with the submission of the asylum application to the Asylum Office, an organisational unit of the MoI, which is responsible for examining the asylum application in the first instance.³⁶ Article 95 of the LATP provides for the right to appeal to the Asylum Commission within 15 days of receipt of the first instance decision, which has a suspensive effect.³⁷ An appeal against the decision of the Asylum Commission may be lodged with the Administrative Court and also suspends the enforcement of the second-instance decision.³⁸

The provisions of the LATP suggest that a person’s illegal entry/stay in the Republic of Serbia is tolerated as long as the asylum procedure continues. Once the final decision of the authority is reached, there are two possibilities. On the one hand, if the asylum application is accepted and the person is granted international protection, the person’s stay is regulated in accordance with rules applicable to the relevant form of protection (refugee status, subsidiary protection, humanitarian protection, and temporary protection). On the other hand, if the final asylum decision is negative, the LA is reactivated, in particular its Article 74, which stipulates that the stay of a person whose ‘application for asylum has been rejected or has been the subject of a final decision’ is considered unlawful and the return decision is issued by the competent authority. In such cases, the return decision specifies the time left for a voluntary return³⁹ with the right of appeal against it, after which the person is forcibly removed in accordance with Article 81 of the LA.

Finally, it should be noted that both the LATP (Article 6) and LA (Article 83) guarantee the principle of non-refoulement in similar terms. Both stipulate

34 Mole et al., 2019, p. 46. According to available statistical data, during 2022, the intention to seek asylum was most often expressed in police stations (2,498), at border crossings (888), and in airports (689) and less frequently in the Asylum Office (102) and detention centres (4). See Trifunović (ed.), 2023, p. 18.

35 Art. 8 of the LATP.

36 Art. 36 of the LATP.

37 The Asylum Commission comprises of the Chairperson and eight members. They are appointed by the Government of the Republic of Serbia for a four-year term. To be appointed, the person must hold Serbian citizenship, have a university degree in law, minimum five years of working experience and ‘must have an understanding of the human rights legislation.’ Art. 21 of the LATP.

38 Art. 96 of the LATP.

39 Art. 77 of the LA.

that no one can be returned to a territory where he or she would be subjected to torture, inhuman or degrading treatment, or punishment, while the LA offers a wider scope of protection and prohibits forcible return in case of the risk of the death penalty or the threat of a serious violation of rights guaranteed by the Constitution of the Republic of Serbia.

4. Practices of competent authorities – problems and challenges

Despite some critical remarks made in the previous part of the paper, Serbia's normative framework on access to its territory is generally considered to be "solid."⁴⁰ However, certain practices of competent Serbian authorities have been identified as problematic by both international institutions (4.1) and civil society organisations active in the field of asylum (4.2), followed by relevant responses from national judicial bodies (4.3).

■ 4.1. Serbian border practices from the perspective of relevant international organisations and bodies

In its 2022 Progress Report on Serbia, the European Commission confirmed that Serbia's asylum legal framework is 'largely aligned with the EU *acquis*' but that further legislative alignment is needed, including with regard to 'effective access to the procedure.'⁴¹ More specifically, the Commission noted that improvements are needed in access to and provision of information on the asylum procedure, an essential element of protection for those entering the territory illegally; it identified practices at Belgrade International Airport as problematic, because 'transit procedures provided for in the Asylum Law are not yet implemented' and that those entering Serbia via Nikola Tesla Airport are not properly informed about asylum procedures or legal counselling opportunities.⁴² The Commission also noted that the principle of non-refoulement was not adequately implemented with regard to persons 'subject to extradition procedures,' as they were not given effective access to asylum.⁴³ The European Commission made the same remark on Serbia's border control legislation. Although it described it as 'largely aligned with the EU *acquis*,'⁴⁴ the Commission made it clear that 'significant investment is needed in human, financial and technical resources for border control (second line checks, border surveillance and equipment for detecting forged documents) and in infrastructure at border crossing points in line with Schengen requirements.'⁴⁵ This observation

40 Krstić, 2018, p. 82.

41 European Commission, 2022, p. 62.

42 *Ibid.*, p. 63.

43 *Ibid.*

44 *Ibid.*, p. 64.

45 *Ibid.*, p. 65.

is relevant for assessing the requirements identified by the ECtHR as necessary to qualify a border-crossing point that offers real and effective access to the means of legal entry—a precondition for considering refusal of entry compatible with the ECHR in cases of collective illegal entry.

However, universal human rights bodies appear to have been far more critical, and, importantly, their comments were very specific and related to problematic border practices. In its Concluding Observations on Serbia's Third Periodic Report, the HRC expressed concern about, *inter alia*, 'reported cases of efforts to deny access to Serbian territory and asylum procedures' and 'collective expulsions'.⁴⁶ A more recent assessment of Serbia's practices came from another UN treaty body, the CAT. In its 2021 Concluding Observations on Serbia's Third Periodic Report, the CAT noted that

asylum seekers are prevented from accessing the asylum procedure and being identified at an early stage due to insufficient procedural safeguards for the assessment of claims and the granting of international protection, particularly in the transit zone of Nikola Tesla International Airport in Belgrade and at the border entry points.⁴⁷

The CAT recommends that Serbia

ensures access to the territory and sufficient and effective protection from refoulement at Nikola Tesla International Airport by making sure that persons detained in the transit zone of the airport receive information about their right to seek asylum, including effective access to the asylum procedure, immediately and in language they understand

and establishes a border monitoring mechanism to ensure that 'border authorities act in accordance with the principle of non-refoulement and the prohibition of collective expulsion'.⁴⁸ Notably, the concerns expressed by the HRC in 2017 largely coincided with those expressed by the CAT in 2021, suggesting that Serbia's practices had not changed significantly. Although very important, the

46 HRC, 2017, p. 6. The Committee recommended Serbia to 'strictly respect its national and international obligations by: (a) ensuring that access to formal procedures for asylum applications is available at all border points, notably in international airports and transit zones, and that all persons engaging directly with refugees or migrants are appropriately trained; (b) ensuring that all asylum applications are assessed promptly on an individual basis with full respect for the principle of non-refoulement and that decisions of denial can be challenged through suspensive proceedings; (c) refraining from collective expulsion of aliens.' *Ibid.*

47 CAT, 2021, p. 7.

48 *Ibid.*

reports of international organisations and bodies do not provide information on the specific practices that gave rise to their concerns. As international monitoring mechanisms largely rely on the so-called shadow reports submitted by civil society, it is worth outlining their respective findings.

■ 4.2. *Practices criticised by NGOs active in the field of asylum*

In contrast to the reports published a few years ago, which focused on problematic pushback practices to Northern Macedonia and Bulgaria and arbitrary returns from Belgrade Airport,⁴⁹ recent reports by reputable civil society organisations and activists do not refer to pushback at the borders to such an extent, while certain problematic practices regarding access to asylum procedures seem to persist, as well as problems with procedures in the transit zone not only of Belgrade Airport but also of other international airports.

The lower frequency of pushback practices is explained by the current absence or limited presence of civil society organisations at these borders, with the caveat that there is ‘a very high probability that such practices still exist,’ which is confirmed by UNHCR data that 576 refugees and migrants were pushed back to North Macedonia in 2022.⁵⁰ In addition, a barbed-wire fence appears to be under construction on the border with North Macedonia. According to Klikaktiv, ‘between June 2021 and June 2022, a minimum of additional 10–15 km were built;’ the fence has three layers, is three to four metres high, and ‘between the doubled fence, there is a space for patrolling army and police vehicles.’⁵¹ The novelty of the border with Bulgaria is the deployment of FRONTEX officers based on the Status Agreement on border management cooperation between the EU and Serbia, which entered into force in 2021.⁵² Generally, the Status Agreement has the potential to improve the quality of border-control activities in at least three ways. First, while regulating the tasks and powers of the members of border-control teams, the Agreement provides for soft or indirect monitoring of the activities carried out. Namely, according to Article 5(3) of the Agreement, the coordinating officer of the European Border and Coast Guard Agency ‘may communicate its views to the competent authority of the Republic of Serbia on the instructions given to the team,’ and ‘in cases where the instructions issued to the team are not in compliance with the operational plan, the coordinating officer shall immediately report to the executive director of the Agency,’ which may even lead to the suspension or termination of an operation. Second, and more specifically, Article 6 explicitly states that a ‘breach of fundamental rights or violations of the principle of non-refoulement’ shall be considered grounds for suspension or termination of an operation. Last but not least, the Agreement in Article 9 emphasises the importance of the respect

49 Belgrade Centre for Human Rights and International Rescue Committee, 2018, p. 3.

50 Kovačević, 2023.

51 Klikaktiv, 2022, p. 7.

52 Kovačević, 2023.

for fundamental rights in performing joint border-control activities, explicitly requiring the members of the teams to exercise their powers in accordance with the right to ‘access asylum procedures, human dignity and the prohibition of torture, inhuman or degrading treatment, the right to liberty, the principle of non-refoulement and the prohibition of collective expulsions.’ Persons who are not prevented from entering the territory of the Republic of Serbia illegally, but manage to do so, confront various problematic practices. Namely, they are rarely informed about the possibility of registering their intention to seek asylum and the consequences of such registration.⁵³ At their first contact with the police officer, either in the green zone or inside the territory, several options arise. The police officer can automatically register the intention to apply for asylum, initiate a misdemeanour procedure for illegal entry, or issue a refusal to enter the Republic of Serbia.⁵⁴ Even in the best-case scenario of automatic registration of the intention to seek asylum, reports from civil society organisations indicate that the practice of issuing such registrations only in Serbian and Cyrillic continues.⁵⁵ Consequently, most asylum seekers do not understand the content of the registration certificate, which includes instructions to report to the designated asylum or reception-transit centre within 72 hours. As official asylum and reception centres are not easily accessible, while asylum seekers do not have the relevant information or means to do so within 72 hours, they ‘may be at risk of refoulement.’⁵⁶ This is due to another problematic practice, namely that their failure to report to the asylum or reception centre within the prescribed time limit may result in the refusal to issue a new registration certificate, thus, rendering their stay irregular.⁵⁷

NGOs have identified illegal entry practices at airports as particularly problematic. This is confirmed by the available statistics for 2022. First, no significant difference is observed between the number of persons declaring their intention to seek asylum at border crossings (888) and airports (689).⁵⁸ Second, compared to 2021, an increase was observed in the number of asylum seekers registered at airports in 2022.⁵⁹ Finally, compared to 689 persons whose intentions to seek asylum were registered at Serbian airports, 4,092 persons were denied entry to the territory at airports of the Republic of Serbia for various reasons that constitute illegal entry and denial of entry in accordance with the relevant provisions of

53 Trifunović (ed.), 2023, p. 29.

54 Krstić, 2018, p. 83.

55 Trifunović (ed.), 2023, p. 28.

56 Ibid., p. 29.

57 Petrović (ed.), 2017, p. 29.

58 Trifunović (ed.), 2023, p. 18.

59 Ibid., p. 31.

the LA.⁶⁰ Problematic practices identified by reputable civil society organisations include registration of the intention to seek asylum only after the intervention of legal aid providers, alleged disregard by police officers of oral and written requests for access to the asylum procedure, non-issuance of individual decisions to all foreigners refused entry to Serbia, non-availability of interpreters, and subsequent difficulties both in providing relevant information on asylum procedures and obtaining necessary information on the reasons for attempting to enter Serbian territory.⁶¹ Other sources have reported that people arriving at Serbian international airports are also detained and even subjected to ill-treatment.⁶²

■ 4.3. National court responses

Three problematic practices of various Serbian bodies with competence in matters relating to illegal border crossings have received judicial responses. An improvement has been observed in the practice of the misdemeanour courts in applying the principle of non-punishment for illegal entry to persons expressing an intention to seek asylum in Serbia (4.3.1); however, the decisions of the Constitutional Court are partially satisfactory. While its response to refoulement practices can be considered largely in line with national law and international standards, its position on detention in the transit zone of Belgrade Airport has been criticised (4.3.2).

4.3.1. Practice of misdemeanour courts in punishing illegal entry

Illegal entry is considered a misdemeanour under both the LBC⁶³ and LA.⁶⁴ However, according to Article 8 of the LATP, an alien cannot be punished for illegal entry if he or she expresses the intention to apply for asylum in the Republic of Serbia. Based on the available analyses of the case law of Serbian misdemeanour courts, a significant improvement can be observed in the application of the principle of non-punishment for illegal entry for persons in need of international protection, and this gradual shift has continued since 2015.⁶⁵ Prior to 2015, police officers regularly issued requests for the initiation of misdemeanour proceedings against persons entering the territory illegally, while misdemeanour courts found persons guilty of illegal entry, regardless of whether they needed international

60 Ibid., p. 32. Notably, statistics contained in the Belgrade Centre for Human Rights' 2022 report were received from the Ministry of the Interior. Figures from other sources are much higher. For example, in his AIDA Country Report, Kovačević outlines that 8,682 persons were denied entry at Belgrade Airport during 2022, with additional 228 entry refusals in Niš Airport. See Kovačević, 2023.

61 Trifunović (ed.), 2023, pp. 33–37.

62 Kovačević, 2023.

63 Art. 71 of the LBC.

64 Art. 121 of the LA.

65 Buha et al., 2020, p. 13.

protection.⁶⁶ However, in 2015, this practice began to change, and the principle of non-punishment for illegal entry was correctly applied in several hundred cases.⁶⁷ The number of foreigners guilty of illegal entry decreased significantly in 2016. Although those found guilty still included persons from countries with a high likelihood of producing persons in need of international protection,⁶⁸ some misdemeanour courts were praised for their good practice of discontinuing misdemeanour proceedings once the intention to seek asylum was expressed.⁶⁹ Similar trends were observed in subsequent years.⁷⁰ Despite considerable improvements, proceedings before the Serbian misdemeanour courts are still criticised for not offering every foreigner the basic procedural guarantee of being able to use his or her own language, while the decisions of the misdemeanour courts regularly lack substantive facts and subsequent explanations as to how the assessment of the foreigner's need for international protection was made.⁷¹

4.3.2. *The response of the Constitutional Court to bad border practices*

In 2020, the Constitutional Court of Serbia issued an important decision concerning Serbian Border Police officers' pushback practices.⁷² The case involved 17 Afghan nationals who, as part of a larger group of 24 people, illegally crossed the border between Serbia and Bulgaria in December 2017 and were arrested by the Serbian Border Police. After spending the night in detention, the group was brought before the Pirot Misdemeanour Court, which, after recognising them as persons in need of international protection, closed the case and instructed the police to issue them with registrations of the intention to seek asylum in the Republic of Serbia. Despite these instructions, police officers drove the group to the green border zone and ordered them to leave the territory of Serbia. The Constitutional Court found that the border guards had violated the Afghan nationals' right to liberty and security by denying them the opportunity to challenge the legality of their detention and to be assisted by a legal representative.⁷³ Most importantly, the Constitutional Court also found that by deporting the group to Bulgaria, Serbian Border Police officers violated Article 39(3) of the Constitution (prohibition of return) in conjunction with

66 The Belgrade Centre for Human Rights stated, in its 2015 Right to Asylum in the Republic of Serbia report, that 8,881 foreigners were punished by misdemeanour courts for illegal entry out of approximately 13,000 applications submitted by the police. See Petrović (ed.), 2016, p. 51.

67 Petrović (ed.), 2016, p. 52.

68 In 2016, a total of 2,221 foreigners were found guilty for illegally crossing the border, out of which 1,062 came from refugee-producing countries. See Petrović (ed.), 2017, p. 34.

69 Ibid., p. 35.

70 Tošković (ed.), 2018, pp. 29–30; Petrović (ed.), 2019, pp. 36–37; Trifunović (ed.), 2020, p. 36; Trifunović (ed.), 2021, p. 35.

71 Krstić and Davinić, 2019, pp. 59–65.

72 Constitutional Court of Serbia, Už-1823/2017, 29 December 2020.

73 Ibid., pp. 19–21.

Article 4 of Protocol 4 of the ECHR (prohibition of collective expulsion of aliens).⁷⁴ The Court also found that the acts of the police officers contained elements of inhuman treatment because of the circumstances in which the applicants were expelled to Bulgaria. Namely, they were expelled in a forest, during a freezing night after confiscating the documents previously issued to them. The Court, thus, concluded that

due to the actions of members of the state authority, there was a violation of the guarantee of the prohibition of expulsion, with elements of inhuman treatment, which is reflected in the obligation to implement the legal procedure in relation to migrants, i.e. the possibility of expelling foreigners only on the basis of the decision of the competent authority carried out in accordance with the procedure prescribed by law.⁷⁵

The Constitutional Court should be commended not only for drawing extensively on the relevant case law of the ECtHR but also for directly applying the prohibition of the collective expulsion of aliens contained in Article 4 of Protocol 4 to the ECHR, despite the absence of an explicit guarantee in the Serbian Constitution.

However, the Constitutional Court rejected the constitutional complaint concerning the detention of an Iranian refugee at Belgrade Airport for 30 days without access to the asylum procedure, interpreter, or legal counsel.⁷⁶ According to Kovačević, the Court's arguments were based solely on the fact that the legal framework in force at the time 'did not envisage the procedure in which a foreigner can be deprived of liberty in the transit zone.'⁷⁷ Thus, the Serbian Constitutional Court failed to apply the well-established standards of the ECtHR and independently assess the relevant criteria for classifying the person's situation as a deprivation of liberty.⁷⁸

5. Conclusion

The above analysis shows that the Serbian normative framework on border control, foreigners, and asylum is, with minor exceptions, in line with international and

74 Ibid., p. 28.

75 Ibid., p. 27.

76 The judgement is not available on the website of the Constitutional Court. Information about this judgement has, therefore, been retrieved from the available AIDA Country Report. See Kovačević, 2023.

77 Ibid.

78 Ibid.

EU rules applicable to migrants and refugees trying to illegally enter the territory of the Republic of Serbia. Academic writing and relevant reports of international organisations confirm this state of affairs. However, the real-world practices of the competent Serbian authorities are less than satisfactory. The most problematic aspect seems to be the failure of various national authorities that come into contact with persons entering the country illegally to properly distinguish between those in need of international protection and other migrants. This *prima facie* distinction is crucial and determines the further course of the procedures to be followed, as well as the rights and obligations of the alien. Given the absolute nature of the principle of non-refoulement, national authorities responsible for illegal entry should be constantly reminded that their acts or omissions may have serious consequences for the most vulnerable category of persons—those in need of international protection. With the experience gained during the 2015 migrant crisis and the significant resources and efforts invested by various international organisations in the training and education of national authorities, some progress and improvements are visible. However, two observations need to be made. First, bad practices at the borders are not eliminated. The available data show that pushbacks still occur, albeit to a lesser extent than a few years ago, that much remains to be done to improve access to asylum procedures, and that national courts, especially the Constitutional Court, need to be more rigorous in reviewing the practices of other bodies in matters of illegal entry. Second, practices documented in the previous period have yet to receive an international judicial response. In contrast to other countries in the region, Serbia's border practices have not yet been followed by the ECtHR. This may change soon, as several cases are either pending before the ECtHR or have been communicated to the Serbian Government.⁷⁹

79 ECtHR, *O.H. and Others v. Serbia* (Application No. 57185/17), Application communicated to the Serbian Government on 23 June 2021; *A.H. v. Serbia and North Macedonia* (Applications Nos. 60417/16 and 79749/16), Applications communicated to the Serbian Government on 27 May 2021; *M.W. v. Serbia* (Application No. 70923/17), Application communicated to the Serbian Government on 26 March 2019.

Bibliography

- Belgrade Centre for Human Rights, International Rescue Committee (2018) *Access to Asylum and Reception Conditions in the Republic of Serbia* [Online]. Available at: <http://azil.rs/en/wp-content/uploads/2018/07/Access-to-Asylum-and-Reception-Conditions-in-the-Republic-of-Serbia.pdf> (Accessed: 12 May 2023).
- Buha, V., Lainović, M., Aćimović, J., Vuletić, B. (2020) *Osvrt na praksu prekršajnih sudova u pogledu postupanja i kažnjavanja stranaca, koji mogu biti u potrebi za međunarodnom zaštitom, za nezakonit ulazak odnosno boravak na teritoriji Republike Srbije u 2019. godini*. Novi Sad: Humanitarni centar za integraciju i toleranciju [Online]. Available at: <http://hčit.rs/wp-content/uploads/2020/04/ANALIZA-PREKR%C5%A0AJNIH-ODLUKA-SUDOVA-U-AP-VOJVODINI-za-2019-fin.pdf> (Accessed: 16 May 2023).
- Committee Against Torture (CAT) (2021) *Concluding Observations on the Third Periodic Report of Serbia*, CAT/C/SRB/CO/3, 20 December 2021.
- Costello, C. (2012) 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored', *Human Rights Law Review*, 12(2), pp. 287–339; <https://doi.org/10.1093/hrlr/ngs011>.
- Čučković, B. (2022) 'Right of Persons in Need of International Protection to Access the Territory: (Un)Clear Standards of the European Court of Human Rights' in Lilić, S. (ed.) *Perspectives of Implementation of European Standards in the Serbian Legal System*. Belgrade: University of Belgrade Faculty of Law, pp. 127–145.
- Dagen, T., Čepo, M. (2021) 'Refugee and Migration Crisis in the European Union – Protection of the Right to Access the Territory or Protection of the Territory?', *Collection of Papers of the Faculty of Law in Split*, 58(3), pp 855–873; <https://doi.org/10.31141/zrpf.2021.58.141.855>.
- European Commission (2022) *Serbia 2022 Report*, SWD, 338 final. Brussels, 12 October 2022.
- Gatta, F.L. (2019) 'Migration and the rule of (human rights) law: two 'crises' looking in the same mirror', *Croatian Yearbook of European Law and Policy (CYELP)*, 2019/15, pp. 99–133; <https://doi.org/10.3935/cyelp.15.2019.346>.
- Glavonjić, Z. (2023) 'Migranti do evropskog sna kroz Srbiju i pod haubom automobile', *Radio Slobodna Evropa*, 31 March 2023. [Online]. Available at: <https://www.slobodnaevropa.org/a/migranti-reskiraju-zivot-prelazak-granice/32341856.html> (Accessed: 3 May 2023).
- Human Rights Committee (2017) *Concluding Observations on the Third Periodic Report on Serbia*, CCCPR/C/SRB/CO/3, 10 April 2017.
- Jugović, S. (2018) 'Legal Novelties in State Border Control of Irregular Migration in the Republic of Serbia' in Lalić, V., Mićović, M., Sikimić, M. (eds) *Collection of Papers from the Regional Scientific Conference on Regional Cooperation in Combatting Cross-Border Crime: Contemporary Challenges of Terrorism and Migrant Crisis*. Banja Luka: University of Banja Luka Faculty of Security Sciences, pp. 285–295.
- Klikaktiv – Center for Development and Social Policies (2022) *The Second Quarterly Report in 2022* [Online]. Available at: <https://drive.google.com/>

- file/d/1apI1SDazIAH15r-xU8861p6zAqMz1UYL/view?pli=1 (Accessed: 18 June 2023).
- Kovačević, N. (2023) *Country Report: Access to the Territory and Push-backs*, AIDA [Online]. Available at: https://asylumineurope.org/reports/country/serbia/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/#_ftnref55 (Accessed: 2 June 2023).
 - Krstić, I. (2018) *Handbook on Migrant Protection in the Republic of Serbia*. Belgrade: IOM.
 - Krstić, I., Davinić, M. (2019) *Vodič za primenu relevantnih propisa u oblasti azila i migracija*. Beograd: Grupa 484.
 - Ministry of the Interior of the Republic of Serbia (2021) *Report on the implementation of the Strategy for Combating Irregular Migration for the period 2018-2020* [Online]. Available at: <https://bit.ly/3Dtss4r> (Accessed: 12 April 2023).
 - Mole, N., Krstić, I., Papadouli, M., Čučković, B., Tidona, A., Valperga, B. (2019) *Handbook on International and European Standards Relating to Asylum and Migration – A Closer Look at Certain Issues*. Belgrade: AIRE Center and International Organization for Migration.
 - Petrović, L. (ed.) (2017) *Right to Asylum in the Republic of Serbia 2016*. Belgrade: Belgrade Centre for Human Rights [Online]. Available at: <https://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2017/03/Right-to-Asylum-in-the-Republic-of-Serbia-2016-2.pdf> (Accessed: 12 May 2023).
 - Petrović, L. (ed.) (2016) *Right to Asylum in the Republic of Serbia 2015*. Belgrade: Belgrade Centre for Human Rights [Online]. Available at: <https://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2016/05/Azil-2016-ENG.pdf> (Accessed: 12 May 2023).
 - Petrović, L. (ed.) (2020) *Right to Asylum in the Republic of Serbia 2019*. Belgrade: Belgrade Centre for Human Rights [Online]. Available at: <http://azil.rs/en/wp-content/uploads/2021/02/Right-to-Asylum-in-Serbia-2019.pdf> (Accessed: 12 May 2023).
 - Shaw, D.B., Gibson, E. (2017) 'Vanishing Protection: Access to Asylum at the Border', *CUNY Law Review*, 21(1), pp. 91–142.
 - Tošković, S. (ed.) (2018) *Right to Asylum in the Republic of Serbia 2017*. Belgrade: Belgrade Centre for Human Rights [Online]. Available at: <http://azil.rs/en/wp-content/uploads/2018/04/Right-to-Asylum-in-the-Republic-of-Serbia-2017.pdf> (Accessed: 12 May 2023).
 - Trifunović, A. (ed.) (2023) *Right to Asylum in the Republic of Serbia 2022*. Belgrade: Belgrade Centre for Human Rights [Online]. Available at: <http://azil.rs/en/wp-content/uploads/2023/03/Right-to-Asylum-in-RS-2022-1.pdf> (Accessed: 12 May 2023).
 - Trifunović, A. (ed.) (2021) *Right to Asylum in the Republic of Serbia 2021*. Belgrade: Belgrade Centre for Human Rights [Online]. Available at: <http://azil.rs/en/wp-content/uploads/2022/03/Right-to-Asylum-in-the-Republic-of-Serbia-2021.pdf> (Accessed: 12 May 2023).
 - Trifunović, A. (ed.) (2020) *Right to Asylum in the Republic of Serbia 2020*. Belgrade: Belgrade Centre for Human Rights [Online]. Available at: <http://azil.rs/en/>

wp-content/uploads/2021/02/Right-to-Asylum-in-Serbia-2020.pdf (Accessed: 12 May 2023).

- UNHCR (2023) *Statistical Snapshot – Serbia* [Online]. Available at: <https://www.unhcr.org/rs/wp-content/uploads/sites/40/2023/05/APRIL-2023-Stat-Snapshot.pdf> (Accessed: 17 June 2023).
- UNHCR (2020–2021) ‘Key Legal Considerations on Access to Territory for Persons in Need of International Protection in the Context of the COVID-19 Response’, *ISIL Year Book of International Humanitarian and Refugee Law*, 20(1), pp. 365–369.
- UNHCR (2007) *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* [Online]. Available at: <https://www.unhcr.org/4d9486929.pdf> (Accessed: 19 May 2023).