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Visa Liberalisation and Roma Migration in the Western Balkans

Author: Alisa Mayer
Supervisor: Dr. Júlia Mink

Abstract

This thesis deals with the consequences of visa liberalisation in the Western Balkans, with a particular focus on Serbia and Macedonia. As a reaction to the significant increase of allegedly unfounded asylum applications by citizens of the Western Balkans in several EU countries, which according to the European Commission mostly stem from Roma, the countries have adopted a series of measures to comply with EU demands, “to reduce the influx of asylum seekers.” The main focus of the thesis is a critical examination of the specific measures the countries have adopted as a reaction to EU pressure, in particular the use of ethnic profiling at the borders as a violation of the principle of non-discrimination as well as violations of the right to leave one’s country and the right to seek asylum. Moreover, the thesis critically examines EU responsibility and argues that the Commission has instructed the governments, to de facto discriminate against their Roma population. In addition to assessing the possible violations of human rights, this thesis aims at analysing the underlying dynamics of the main elements of EU migration policy which are securitisation and the externalisation of migration control and which are both evident in the visa liberalisation process.

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1 INTRODUCTION

This thesis deals with the consequences of visa liberalisation in the Western Balkans, and in particular with the discriminatory effects of the measures the governments of the region have adopted as a result to EU pressure, in order to decrease the numbers of (Roma) asylum seekers.

In 2009/10 the EU lifted visa-requirements for citizens of Macedonia, Serbia, Montenegro Bosnia and Herzegovina and Albania. This meant that a region with around 21 million citizens became eligible to travel to the Schengen area without visas for up to 90 days per six months period. Soon after the visa liberalisation, a few EU Member States like Germany, Belgium and Sweden noted a sharp increase in (allegedly) unfounded asylum applications, the majority of these stemming from Serbian and Macedonian Roma. As a reaction, these Member States as well as the European Commission, called upon the Western Balkan governments “to take all the necessary measures”¹ to promptly and effectively reduce the influx of asylum seekers, threatening to re-introduce visa requirements for their citizens. In 2011, the pressure was once more intensified, when the European Commission put forward a proposal to temporarily suspend the visa liberalisation in case Member States would witness a significant increase of illegal migrants and asylum seekers.

In its post-visa liberalisation monitoring reports, the Commission thus called for targeted and result-oriented measures against the “abuse of visa liberalisation” by the citizens of the Western Balkans. Moreover, it confirmed the “*common profile* of asylum seekers” stating “the vast majority of claims stems from persons belonging to the Roma minority, who often arrive with their families.”²

As a result to this pressure, the governments of Macedonia and Serbia have taken a series of measure to prevent people from entering the EU, including, pre-screening at the borders on the basis of ethnic profiling, the criminalisation of “abuse of the visa-free

¹ European Stability Initiative, <http://www.esiweb.org/pdf/presentation%20-%20asylum%20issue%20-%2030%20June%202011.pdf>, accessed on 23 March 2014.

² European Commission, SEC (2011) 695 final.

regime”, the revocation of passports of those who have been forcibly returned, as well as the introduction of carrier sanctions and information campaigns. According to the most recent available data, from the day the EU lifted the visa restrictions until November 2012 about 7,000 Macedonian citizens – the majority of them being of Roma ethnic origin, were not allowed to leave the country and had their travel documents confiscated.³

Furthermore, according to the Commission, their asylum claims are based on economic reasons and “false perceptions of financial advantages they will acquire by requesting asylum in certain Member States.”⁴ The majority of asylum applications are thus rejected as manifestly unfounded and claims are processed in accelerated procedures, where decisions are handed down in just a few days.

Research aim and hypothesis

Although states can legitimately regulate immigration, the right to leave is an established human right, recognised in international and European Law and is also protected by the constitutions of the states of the Western Balkans. Moreover, the right to leave is a necessary precondition to access a number of other rights, most importantly the right to seek asylum and to be protected from persecution. Although the majority of these asylum seekers tries to escape poverty and desperateness in their home countries, their situation is a result of cumulative discrimination on account on their ethnicity and there are cases where Roma are victims of ethnically motivated violence and ill-treatment.

Thus, it is the aim of this thesis to examine the specific measures adopted by the Western Balkans as a possible violation of the principle of non-discrimination, the right to leave one’s country and the right to seek asylum.

Moreover I will argue that, as a result of the pressure from the European Commission and the Member States, the governments in the region have been instructed to de facto discriminate against the Roma population by using ethnic profiling at the borders. Ethnic profiling is a violation of the principle of equal treatment and a form of racial

³ ERRC, Factsheet: Freedom of movement for Roma in Macedonia.

⁴ European Commission, SEC (2011) 659 final, 19.10.2011.

discrimination that is prohibited under international law. The principle of non-discrimination is not only guaranteed in the Charter of Fundamental Rights which is binding to EU institutions, it is also recognised as one of the core values of the European Union as set out in Article 2 TEU which every country wishing to become a Member State must respect. *By instructing other countries to discriminate against Roma, the EU is not only violating international human rights law, but also its self-proclaimed values and fundamental rights.*

The research approach for this study is two-fold: It consists of a legal analysis of the human rights concerned, but also aims at analysing the policies and dynamics underlying the visa liberalisation process in light of the EU's current approach to control immigration. Thus I want to discuss the dynamics surrounding the *externalisation of migration control* and the underlying notion of *securitisation*. Furthermore, through a detailed analysis of the post- visa liberalisation process I want to show how securitisation works on the ground, and how it is overriding concerns about equal treatment and fundamental rights.

Theoretical Outline and previous research

In previous studies, visa liberalisation in the Western Balkans has mainly been examined in the context of EU conditionality, as a powerful tool to make countries comply with the EU Justice and Home Affairs acquis (Trauner and Kruse 2008, Trauner 2011, 2014) or as means to transform the citizenship regimes of the countries concerned (Kacarska 2012). Furthermore, the Council of Europe Commissioner for Human Rights (2013) has published an Issue Paper on the right to leave one's country, which inter alia deals with the restrictions of this right in the Western Balkans. The above mentioned concepts of securitisation and externalisation of migration have been widely discussed in the academic literature. The topic of security and immigration and the tendency to increasingly interpret migration as a security problem has been broadly discussed by Bigo (2002) or Huysmans (2001). The issue of externalisation of migration control, which takes the form of increased cooperation with third countries to externalise traditional tools of domestic or EU migration control has been dealt with by various scholars such as Boswell 2003, Doukouré and Oger 2007, Rijma and Cremona 2007.

Bigo and Guild (2005) argue that externalisation takes the form of “policing at the distance” which encompasses the redefinition of the physical border and state sovereignty. Lavanex (2004) has referred to the shifting of the EU acquis beyond EU frontiers as a mode of external governance. Other scholars have dealt with the particular external dimension in the Area of Freedom, Security and Justice which is based on the distinction between a safe(r) inside and an unsafe(r) outside through external border control and through which a buffer zone around the European Union is created (Monar 2001, 2012, Lavanex and Wagner 2007).

Structure of the thesis

The first chapter after the introduction shall present the legal basis for the analysis and is aimed at identifying the scope of the main human rights concerned. These are the principle of non-discrimination, the right to leave a country, including one’s own as well as the right to seek and enjoy asylum from persecution. The first section discusses the principle of non-discrimination, as one of the cornerstones of international human rights law as well as its interpretation by the European Court of Human Rights. The cases of *D.H and others v the Czech Republic* as well as *Timishev v. Russia* are discussed in greater detail. The latter is of particular importance as it also sets a core standard on ethnic profiling to date. Furthermore I will look into the implementation of the principle in EU law, in particular, the Fundamental Rights Charter which is not only binding for the Member States but also for the also to the bodies, offices and agencies of the Union and is applicable also to the Unions external actions. Furthermore I will discuss ethnic profiling as a violation of the principle of non-discrimination and relevant case law dealing with the issue. The second part consists of a detailed analysis of the right to leave a country, including one’s own which is recognised both in international and European law, as well as relevant case law of the ECtHR. The third part aims at discussing the rights of asylum seekers and contains a three-part analysis of the right to access the territory of the destination state, the right to access an asylum procedure as well as the principle of non-refoulement. This part critically examines the EU’s current asylum legislation which is aimed at preventing asylum-seekers from arriving in the EU.

The third chapter aims at setting the frame for the EU policies in the Western Balkans. It discusses the development of the current EU migration policy and the area of freedom security and justice and touches upon the underlying dynamics of securitization. Furthermore the concepts of externalisation of border control or policing at the distance are explained, as well as the various measures linked to these concepts.

Chapter four describes the process of the visa liberalisation in the Western Balkans and the reactions of the Member States and the Commission to the increase in numbers of asylum seekers, in particular the implementation of the post-visa liberalisation monitoring regime and the introduction of the safeguard clause to temporarily suspend the visa-waiver. Furthermore the characteristics of asylum applications as well as the reactions of the Member States are discussed briefly.

The fifth chapter consists of a case study of Serbia and Macedonia, since citizens of these countries make up the majority of asylum seekers. The first part gives an overview of the socio-economic situation of Roma in the two countries as a background for the question whether asylum claims of Roma are unfounded. The second part consists of a detailed analysis of the measures that the countries have taken up as a reaction to EU pressure to decrease the influx of asylum seekers and prevent people from leaving.

The final concluding chapter contains a human rights assessment and shall give a summary of the main findings of the thesis.

2 LEGAL BASIS – THE RIGHTS OF ROMA ASYLUM SEEKERS/ MIGRANTS UNDER INTERNATIONAL LAW AND EU LAW

The following chapter discusses the principle of non-discrimination with a particular focus on ethnic profiling as a violation of this principle, the right to leave one's country as well as the rights of asylum seekers.

2.1 The principle of non-discrimination

The principle of non-discrimination is one of the cornerstones of international human rights protection. Discrimination is an assault on human dignity as people are treated unfavourably not because of their behaviour but on account of their characteristics like sex, skin-colour, ethnicity, language, religion etc. The conceptual starting point for the principle of non-discrimination is the principle of equality before the law and equal protection of the law.⁵ The principle of equality requires not only to treat equals equally but also to fairly reflect the factual circumstances when these circumstances are essentially different and require a differential treatment.⁶

2.1.1 The principle of non- discrimination in international law

The right to equality and non-discrimination is recognised in Article 2 of the Universal Declaration of Human Rights (UDHR) and is a part and parcel of numerous UN human rights instruments such as Article 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2 of the Convention of the Rights of the Child (CRC) and Article 7 of the Convention on the Rights of Migrant Workers and their Families. In addition there are two major UN human rights instruments established to explicitly prohibit and eliminate racism, the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination against Women (CEDAW).

⁵ Kalin 2009, p. 345.

⁶ Ibid. p.346.

2.1.2 The European Convention on Human Rights

Article 14 of the European Convention on Human Rights (ECHR) prohibits discrimination on a non-extensive lists of grounds⁷ in the enjoyment of the rights protected in the convention. However the Court held, that the application of Article 14 does not necessarily presuppose the violation of one of the rights guaranteed in the Convention. It is sufficient when the claim comes within the ambit of one or more provisions protected in the Convention. In addition, where domestic law expands the right guaranteed in the Convention, Article 14 applies also to those rights falling within the scope of any Article of the Convention.⁸ Nevertheless Article 14 does not provide a freestanding right against discrimination. In order to fill this gap and to strengthen racial equality, the Council of Europe in 2000 adopted Protocol 12 to the ECHR which guarantees equal treatment of any right, including rights under national law.⁹ Until now it has been ratified by 19 countries in total, including all 5 countries of the Western Balkans but not yet by all EU member states.¹⁰

In the view of the European Court of Human Rights (ECtHR), discrimination means "differential treatment of persons in relevantly similar situations without an objective and reasonable justification, that is, unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized."¹¹ The determination whether a measure is proportionate to the objective pursued, requires that a fair balance has to be struck between individual rights and the protection of the public interest. This entails also that the means used are suitable, and that among the various means, the measure that entails the least restrictions of rights and freedoms is adopted.¹²

⁷ such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁸ Open Society Foundation, Case digest ethnic profiling, p. 18.

⁹ FRA, Handbook on European non- discrimination law, p. 13.

¹⁰ Council of Europe, Protocol No. 12 , Ratifications as of 4/7/2014, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=&DF=&CL=ENG>, accessed on 4 July 2014.

¹¹ Open Society Foundation, Case digest ethnic profiling, p. 18.

¹² De Schutter and Ringelheim, 2008, p. 366.

2.1.2.1 ECtHR case law

In its recent case law, the court insisted that racial discrimination was "a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction".¹³ In *D.H. and others v the Czech Republic*, a case which concerned the placement of Roma pupils in special schools, the Court has stated that "where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible."¹⁴ However in *Timishev v Russia* the Court goes even further in stating that "no difference in treatment which is based exclusively or to a decisive extent on a persons' ethnic origin is capable of being objectively justified in a contemporary democratic society build on the principles of pluralism and respect for different cultures".¹⁵

2.1.2.2 Timishev v. Russia

This case is particularly relevant as it concerns the alleged violation of the right to freedom of movement pursuant to Article 2 of Protocol No 4 in conjunction with Article 14 of the Convention. Mr. Timishev, is an ethnic Chechen who was forced to move to Nalchik, Kabardino-Balkar Republic of the Russian Federation after his property in Grozny was destroyed as a result of a military operation. His application for registration as a permanent resident of Nalchik had been rejected due to a law prohibiting former residents of the Chechen Republic a permanent residence in Kabardino-Balkar. In June 1999 when he was travelling from the Republic of Ingushetia to Nalchik he was stopped at a checkpoint at the administrative border between the two Republics and refused entry. The officers referred to an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit persons of Chechen ethnic origin. In assessing the violation of Article 2 of Protocol No 4, the Court found that as the restriction did not have a lawful basis as it had only been based on an oral order given by the Republics Ministry of Interior and was not properly formalised. Therefore the Court found a

¹³ ECtHR, *Timishev v. Russia*, 13 December 2005, application numbers 55762/00 and 55974/00, paragraph 56.

¹⁴ ECtHR, *D.H. and others v the Czech Republic*, 13 November 2007, paragraph 196.

¹⁵ ECtHR, *Timishev v Russia*, 13 December 2005, para 58.

violation and saw no need to further examine whether the restriction pursued a legitimate aim and was necessary in a democratic society.¹⁶

Regarding the issue of discrimination, the Court noted that as a persons' ethnic origin is not listed anywhere in Russian identity documents, the oral order precluded passage not only of any person who actually was of Chechen ethnicity, but also of those who were merely perceived as belonging to that ethnic group. The travel companion of the applicant spoke Russian with a Chechen accent and their car had a registration plate from the Chechen Republic. No evidence could be established that any other ethnic group was subject to similar restrictions which, in the Courts view represented a clear inequality of treatment.¹⁷

The Court held that a differential treatment of persons in relatively similar situations, without an objective and reasonable justification, constitutes discrimination. The court noted that the government did not offer any other justification for the difference in treatment, than the allegation that the applicant had attempted to jump the queue, which it dismissed as not sustainable. Remarkably, the Court did not simply note that the government did not provide a justification for the difference in treatment, but it added that "no difference in treatment which is based exclusively or to a decisive extent on a persons' ethnic origin is capable of being objectively justified".¹⁸ The court concluded that there has been a violation of Article 14 in taken in conjunction with Article 2 of Protocol No 4 "since the applicant's right to liberty of movement was restricted solely on the ground of his ethnic origin".

The decision is ground-breaking as it seems to impose an *absolute* prohibition on any difference in treatment on grounds of race or ethnic origin, when the decision-making process is based on this criterion alone or to a decisive extent. Furthermore, it suggests that in such a context the proportionality test becomes no longer relevant.¹⁹

Timishev also sets the core standard to date on ethnic profiling as it is clearly stating that law enforcement decisions that are solely based on a person's ethnic belonging, or

¹⁶ Ibid. paragraph 45.

¹⁷ Ibid. paragraphs 51-54.

¹⁸ ECtHR, *Timishev v Russia*, 13 December 2005, paragraph 58.

¹⁹ De Schutter and Ringelheim, 2008, p. 368.

perceived ethnic belonging is prohibited. However in this case the facts were clear as it could be proven that there was an oral order in this case where that was prohibiting passage for Chechens only.

2.1.3 Non-discrimination in EU law

2.1.3.1 Treaty of the European Union (TEU)

The principle of non-discrimination is also one of the Treaty objectives of the European Union. Article 2 of the TEU states: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”²⁰

Furthermore Article 3 TEU states that “The Union shall [...] combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.”

2.1.3.2 The Charter of Fundamental Rights of the European Union

With the entering into force of the Lisbon Treaty in 2009, the Charter of Fundamental Rights became a legally binding document and part of EU primary law.²¹ According to Article 51, “the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiary and to the Member States only when they are implementing Union law.”

The Charter is innovative in being the first legal instrument that contains both economic, social and cultural rights along with more traditional civil and political rights, many drawn from the ECHR.²² According to Article 52 the meaning and scope of those rights which correspond to the ECHR shall be the same. Article 20 states that

²⁰ Consolidated Version of the Treaty of the European Union, C83/13, 30.3.2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:en:PDF>, accessed on 18 March 2014.

²¹ Lenaerts, 2012, p. 375.

²² Scott, 2011, p. 651.

"Everyone is equal before the law." Article 21 of the Charter contains a prohibition of discrimination on various grounds.²³

The Court of Justice of the European Union is the prime guardian of the Charter rights. According to Article 263 and 265 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union (CJEU) has jurisdiction over any action or act of omission by the EU's institutions, bodies and agencies. Individuals can complain about EU legislation or national legislation that implements Union law if they feel that it does not comply with the Charter. The Court will strike down legislation adopted by the EU's institutions or implemented by the Member States that contravenes it.²⁴

In October 2010, the European Commission issued a Communication on a strategy for the effective implementation of the Charter.²⁵ It was noted that the Charter applies *primarily* to the institutions and bodies of the Union, and concerns in particular "the legislative and decision-making work of the Commission, Parliament and the Council, the legal acts of which must be in full conformity with the Charter."²⁶ Furthermore the Communication points out, that the Charter does not only apply to the Unions internal policies but also to its *external* action and that the EU should be exemplary and above reproach when it comes to fundamental rights.²⁷ According to Article 67 TEU, any action that is carried out in the Area of Freedom Security and Justice must respect fundamental rights.

The notion that the EU would try to position itself as a human rights organisation in its own has been scrutinized by various scholars. It has been particularly criticised that the EUs strong insistence on fundamental rights protection in its external relations did not

²³ Article 21 (1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

(2.) Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

²⁴ Lenaerts, 2012, p. 375.

²⁵ European Commission, Communication on a Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573, Brussels, 19 October 2010(g).

²⁶ *Ibid.* p.3.

²⁷ *Ibid.* p. 4.

match with its internal commitment to fundamental rights, and that Member States have deliberately sought to constrain the powers of the EU in this field.²⁸ This is particularly obvious in the policies surrounding the EU's aim to establish an "Area of Freedom, Security and Justice", which will be explained in greater detail in the following chapter. The most common criticism however, is that there is still a much stronger focus on fundamental freedoms, serving the aim of a common market which is still the prevailing objective. According to De Schutter,

fundamental rights complement the establishment of the internal market, by providing a shield against the risks of a destructive regulatory competition between the Member States, and they help cement the area of freedom, security and justice by creating mutual trust between the Member state, allowing for mutual cooperation between, judicial, police and administrative national authorities.²⁹

In this, the EU system differs from traditional national constitutions and human rights regimes. But when fundamental rights are predominately seen as a limit to the exercise of powers under EU law, states are neither encouraged nor do they have incentives to develop human rights beyond the minimal obligations to respect them.³⁰

2.1.3.3 Racial Equality Directive

The Racial Equality Directive 2000/43/EC³¹ of June 2000 implements the principle of equal treatment between persons irrespective of racial or ethnic origin in the Member States. Under the Directive Member States are obliged to adopt a legal and procedural framework to implement the aims of the Directive³² including specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin³³. Furthermore Member States shall establish bodies for the promotion of equal treatment. The directive applies to both the public and the private sector including public bodies in relation to employment and working conditions and access to goods and services. However, the

²⁸ Vries/Bernitz/Weatherhill, 2013, p. 7.

²⁹ De Schutter, 2010, p.2.

³⁰ De Schutter, 2004, p. 4.

³¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

³² *Ibid*, Article 16 (Implementation)

³³ *Ibid*, Article 5 (Positive action).

directive is only applicable to nationals of EU states, and the discrimination grounds of nationality is altogether excluded from its scope. The preamble states clearly, that the Directive does not cover provisions governing the entry and residence of third-country nationals and their access to employment and occupation.³⁴ According to Hepple, this illustrates “how the fundamental human right to be free from discrimination is undermined by the EU’s rules relating to the conditions under which TNCs are permitted to work, reside and move within the EU’s borders.”³⁵

2.2 Ethnic Profiling as a violation of the principle of non-discrimination

Ethnic profiling constitutes a violation of the principle of non-discrimination as it charges suspicion on persons not because of their individual behaviour but rather because of their perceived ethnicity or religion. It reinforces stereotypes and prejudices of majority societies towards minorities as the Roma and strengthens the notion of them being second class citizens. The European Commission against Racism and Intolerance (ECRI) in its General Policy Recommendation No 11 on combating Racism and Racial Discrimination in Policing, defines racial profiling as: “The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities.”³⁶

According to De Schutter and Ringelheim, ethnic profiling can be defined as “the practice of using “race” or ethnic origin, religion, or national origin, as either the sole factor, or one of several factors in law enforcement decisions, on a systematic basis, whether or not concerned individuals are identified by automatic means.”³⁷

However, using a profile, for instance in criminal investigations is not unlawful in itself and is seen as a legitimate law enforcement tool.³⁸ Criminal profiling is an investigative

³⁴ Hepple 2004, p.6.

³⁵ Hepple 2004, p.7.

³⁶ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No 11 on combating Racism and Racial Discrimination in Policing, adopted on 29 June 2007.

³⁷ De Schutter and Ringelheim, 2008, p. 363.

³⁸ ENAR Factsheet on Ethnic Profiling, October 2009, p. 2.

method designed to construct a description of a criminal by determining specific behavioural or psychological characteristics on the basis of objective, statistical information.³⁹ Since 2001, the technique of profiling has been increasingly applied in the area of counter-terrorism. Based on characteristics such as nationality, age, birthplace or psycho-sociological characteristics, terrorist-profiles are aimed at identifying terrorists before they can execute the act. Contrary to criminal profiling, where the profiles are descriptive, based on the facts of a specific crime that has already been committed, most likely by an individual, profiles used in counter-terrorism or border control have a predictive function and are thus more likely to be based on generalisations about groups of people.⁴⁰ The Fundamental Rights Agency (FRA) in its guide on the prevention of ethnic profiling suggests that:

To avoid being considered discriminatory any decision to exercise police powers should be based on factors additional to a person's race, ethnicity or religion, even when race, ethnicity or religion are relevant to the particular operation or policy.⁴¹

While ethnic profiling has widely been studied by Anglo-American scholars since the 1990s, in Europe research on the topic is still scarce and the legal framework is characterised by gaps and an only evolving case law.

2.2.1 The legal framework

Neither in international nor in European law exists an explicit prohibition of ethnic profiling as such. However, both the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the European Commission against Racism and Intolerance (ECRI) condemn the use of ethnic profiling as a violation of the international prohibition of discrimination.⁴² This view is also supported by the

³⁹ De Schutter and Ringelheim, 2008, p. 361.

⁴⁰ Ibid. 362.

⁴¹ Fundamental Rights Agency 2010, Towards More Effective Policing, Understanding and Preventing Discriminatory Ethnic Profiling: A Guide, pp. 22

⁴² Committee for the Elimination of Racial Discrimination (CERD), General Recommendation No. 31: Administration of the Criminal Justice System, para. 20., and European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 11 on combating racism and racial discrimination in policing (adopted on 29 June 2007), CRI/Council of Europe (2007).

European Parliament which addressed the issue in its recommendation on profiling on the basis of ethnicity and race.⁴³

The main legal instrument is therefore Article 14 of the European Convention on Human Rights. In EU law, the issue of ethnic profiling has not been addressed yet. According to De Schutter "this may seem paradoxical, since, after the 1997 Amsterdam Treaty inserted the new Article 13 in the EC Treaty, the fight against discrimination based inter alia on ethnic origin and religion has become a priority of the European Union."⁴⁴ The Race Equality Directive 2000/43/EC which was adopted in 2000 on the basis of said Article 13, prohibits discrimination on the grounds of racial or ethnic origin in and beyond employment, both in the public and private sector and including public bodies. However, its scope of application does not include policing exercised by law enforcement authorities.⁴⁵

2.2.2 Case Law on Ethnic Profiling

Immigration decision making, is by definition based on the nationality and visa status of the person wishing to cross borders and does therefore not constitute as illegal profiling. However, as stated before, where different groups of persons of the same nationality are treated differently on such grounds, it clearly constitutes as ethnic profiling and has been found unlawful by the UK House of Lords. The court in its judgement *R. v. Immigration Officer at Prague Airport*⁴⁶ from 2004 considered the practice of UK immigration officers to single out Roma travelling to the UK as clearly discriminatory. Following an increase of asylum applications of nationals of the Czech Republic in the United Kingdom, in 2001 the two governments entered into an agreement whereby British immigration officers were posted at the Prague airport to pre-vet passengers before they boarded flights to the UK. The aim was to stem the flow of asylum seekers,

⁴³ European Parliament recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control.

⁴⁴ De Schutter and Ringelheim 2008, p. 370.

⁴⁵ Ibid. 370.

⁴⁶ UKHL, *R v. Immigration Officer at Prague Airport ex parte Roma Rights Centre and Others*, UKHL 55, Judgment of Sept. 17, 2004.

the majority of which were of Roma ethnicity.⁴⁷ Thus there was a clear difference in treatment of non-Roma and Roma by the Immigration officers. Statistics showed that Roma were 400 times more likely to be refused to leave to enter.⁴⁸ The leading judge in the decision, Baroness Hale of Richmond held:

The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.⁴⁹

Furthermore she stated that:

setting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systemically discriminatory and unlawful.⁵⁰

It was held that although there was a good reason to treat Roma more sceptically than non-Roma it could still not be justified.

What may be true of a group may not be true of a significant number of individuals within that group (...)The object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group.⁵¹

In *D.H. and Others v the Czech Republic* the Court affirmed that a difference in treatment resulting from policies or measures that are not necessarily designed with a discriminatory intent may amount to “indirect discrimination”, which constitutes a violation of Article 14 ECHR.⁵²

⁴⁷ Ibid. paragraph 4.

⁴⁸ Ibid. paragraph 34.

⁴⁹ Ibid. paragraph 74.

⁵⁰ Ibid. paragraph 97.

⁵¹ Ibid. paragraph 82.

⁵² ECtHR, *D.H. and others v the Czech Republic*, 13 November 2007, para. 184.

2.2.3 Ethnic data collection and monitoring

The cases also show the importance of statistical evidence, in order to prove that profiling practices overwhelmingly affect one ethnic group.⁵³ The European Commission against Racism and Intolerance in its General Policy Recommendation No 11 also recommends the collection of “data broken down by grounds such as national or ethnic origin, language, religion and nationality in respect of relevant police activities” in order to effectively monitor police activities and identify racial profiling practices.⁵⁴ In *D.H. and Others*, the Grand Chamber has noted that reliable statistical evidence proving broad patterns of discrimination will be sufficient "to constitute the prima facie evidence the applicant is required to provide"⁵⁵, resulting in a shifting burden of proof to the responded State, "which must show that the difference in treatment is not discriminatory".⁵⁶

Within the Member States, there is still very little research and monitoring carried out and states are still reluctant to collect ethnic data. One reason is that the collection of ethnic data in police activities is a very sensitive issue as it can itself facilitate ethnic profiling and prejudice when the data is misused by politicians, e.g. when referring to the overrepresentation of certain groups in crime statistics. ECRI has highlighted that data should only be collected with due respect to the principles of confidentiality, informed consent and the voluntary self-identification of the persons concerned.⁵⁷ Still, many Roma are opposed to any form of ethnic data collection, arguing that in the past it has always been used against them, the most horrible example being the lists used to identify Roma for the Romani Holocaust during the Second World.⁵⁸ Proving ethnic profiling in courts is therefore often extremely difficult and the proof will most often be indirect.

⁵³ De Schutter and Ringelheim 2008, p 369.

⁵⁴ ECRI, General Policy Recommendation No 11 on combating Racism and Racial Discrimination in Policing, adopted on 29 June 2007.

⁵⁵ *D.H. and others v the Czech Republic*, 13 November 2007, paragraph 188.

⁵⁶ *Ibid.* para 189.

⁵⁷ ECRI, General Policy Recommendation No 11 on combating Racism and Racial Discrimination in Policing, adopted on 29 June 2007, Paragraph 41.

⁵⁸ Council of Europe, MG-S-ROM (2000), Roma and Statistics.

2.3 The right to leave a country, including one's own

This right is inscribed in most international human rights instruments and is intended to ensure that people can move freely, either from their country of citizenship or current presence, without unjustified obstacles. States are allowed to restrict this right, however restrictions must be subject to a proportionality test. Nevertheless, it is important to note, that there is no equivalent right of entry in another country. The right to entry is regulated by national immigration law in accordance with respective EU and human rights law. However, as the Council of Europe Commissioner for Human Rights, in a special issue paper on the right to leave one's country notes:

The authorities of third states change their rules, regulations and practices in order to assist the EU in its objectives regarding controls on persons. However, these modifications by third states to aid EU objectives may result in human rights violations, in particular of the right to leave a country, including one's own, the prohibition of collective expulsion and the right to seek and enjoy asylum.⁵⁹

The right to leave a country is a necessary precondition for the access to a number of other rights, most importantly the right of an individual to seek and enjoy asylum. In order to be able to apply for asylum and to be recognised as a refugee under the 1951 Refugee Convention, a person must be "outside the country of his nationality" or "outside his former habitual residence."⁶⁰ To decide whether a claim to international protection is based on well-founded fear and is thus justified, is a matter for the authorities of the state where the application is made, not for the state origin.⁶¹ Thus, "measures which prevent people from leaving their state (often based on a suspicion that they will seek international protection if they get out) frustrate the right to seek and enjoy asylum."⁶²

⁵⁹ Ibid. p. 53.

⁶⁰ 1951 Geneva Convention and 1967 Protocol relating to the Status of Refugees, Article 1, A(2): Definition of the Term Refugee

⁶¹ Council of Europe, Commissioner for Human Rights, Issue Paper, 2013, The right to leave a country p.6.

⁶² Ibid. p. 10.

2.3.1 The right to leave under International Law

2.3.1.1 United Nations human rights instruments

Article 13.2 of the Universal Declaration of Human Rights states: “Everyone has the right to leave any country, including his own, and to return to his country.” It became legally binding through its incorporation in Article 12.2 of the International Covenant on Civil and Political Rights (ICCPR): “Everyone shall be free to leave any country, including its own.” In General Comment No 27, the Human Rights Committee clarified, that the right “may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country”.⁶³ Likewise, the right to choose the state of destination is covered in this guarantee. Furthermore the Committee noted, that the right to leave a country includes the positive duty of states to issue the necessary travel documents and the refusal of a state to issue a passport may deprive the person of this right.⁶⁴

Article 12.3 ICCPR sets out the permitted restrictions on the right to leave, which must be provided by law, necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and must be consistent with the other rights recognized in the Covenant. The UN Human Rights Committee in General Comment No 27 holds that restrictions must not impair the essence of the right and that restrictive measures must conform to the principle of proportionality⁶⁵; they must be appropriate to achieve their protective function; and they must be the least intrusive instrument amongst those which might achieve the desired result.⁶⁶ Paragraph 15 warns, that the principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.⁶⁷

Furthermore, the Committee states that “the application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in

⁶³ Human Rights Committee, General Comment No. 27: Freedom of movement (Art.12) of 1999, paragraph 8.

⁶⁴ Ibid. paragraph 9.

⁶⁵ Ibid. paragraph 12.

⁶⁶ Ibid. paragraph 14.

⁶⁷ Ibid.

the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁸

Other UN instruments that contain the right to leave are the 1966 UN Convention on the Elimination on All Forms of Racial Discrimination (Article 5), the 1990 UN Convention on the Rights of the Child (Article 10.2), the 1990 Convention on the protection of the Rights of All Migrant Workers and Members of Their Families (Article 8.1). The fact that the right to leave a country is enshrined in all these human rights Convention and their wording is similar "indicates the importance of the right and the objective of coherence in its interpretation and application by states."⁶⁹

2.3.1.2 The European Convention on Human Rights

The right to leave a state is not part of the original ECHR but was added in Article 2.2 of Protocol No 4, which entered into force in 1968. The protocol has yet to be signed by Greece and Switzerland, Turkey and UK have not yet ratified it. Article 2.3. concerns restrictions of freedom of movement within the territory of a state as well as the freedom to choose ones' residence. According to Article 2.3 "No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." The wording of Article 2.2. of Protocol No 4 is consistent with the wording of the above mentioned UN documents, also as regards the wording of restrictions and limitations.

⁶⁸ Ibid. paragraph 18.

⁶⁹ Council of Europe, Commissioner for Human Rights, Issue Paper, 2013, The right to leave a country, p 15.

2.3.1.3 ECtHR Case Law

In *Riener v Bulgaria*⁷⁰, a case that concerned a travel ban and withdrawal of passport facilities on the basis of a tax dispute, the Strasbourg court cited a decision by the Human Rights Committee as well as its observations concerning restrictions in its General Comment No 27, therefore indicating the intention of convergence of the interpretation of Article 12 ICCPR and Article 2 of Protocol No 4.⁷¹ Furthermore, the court recognised that the right to leave one's country does include the positive duty of the state to issue travel documents and the negative obligation to refrain from withdrawing these documents unless the state can justify its actions on a permissible ground⁷² and demonstrate that it is necessary to protect the specific interest. In the *Riener* case the court found, that although the travel ban had a legitimate aim, the measure was disproportionate to that aim pursued and the law lacked clarity.⁷³

Two judgements by the ECtHR are of particular importance. The first is *Timishev v Russia*⁷⁴, which has been mentioned above (see 2.1.2.2.). The second case, *Stamose v. Bulgaria*⁷⁵ is of particular importance as it was the first time the Court dealt with travel bans designed to prevent breaches of domestic or foreign immigration laws. Formerly the Court has only considered travel bans imposed in connection with pending criminal proceedings, refusal to pay custom penalties or bankruptcy proceedings among others.

Stamose v Bulgaria

The applicant, Mr Stamose, is a Bulgarian National who had entered the United States on a student visa. After having abandoned his studies to take up employment and thereby breaching the terms and conditions of his visa, he was deported to Bulgaria in October 2003. Relying on Article 2 of Protocol No 4. to the Convention, Mr Stamose alleged that the two-year travel ban, the Bulgarian border police subsequently imposed on him, as well as the seizure of his passport had been unjustified and disproportionate

⁷⁰ ECtHR, *Riener v Bulgaria*, 23 May 2006, application number 46343/99.

⁷¹ Council of Europe, Commissioner for Human Rights, Issue Paper, 2013, *The right to leave a country* .p. 18

⁷² In accordance with the limitations under Article 2.3.

⁷³ Council of Europe, Commissioner for Human Rights, Issue Paper, 2013, *The right to leave a country* .p. 18

⁷⁴ ECtHR, *Timishev v. Russia*, 13 December 2005.

⁷⁵ ECtHR, *Stamose v. Bulgaria*, 27 November 2012, application number 29713/05.

and that it had prevented him from travelling to the United States, where his mother and brother lived. The decision was upheld by the Supreme Administrative Court on the ground that it was consistent with the aim of the law, which was to impede Bulgarian citizens who had breached the immigration rules of foreign countries from travelling freely.

The Court had regard to academic literature and a report by the European Commission and noted that the law in question was the result of EU pressure to combat illegal migration to the Member States as a price for removing the visa requirements for Bulgaria.⁷⁶ Although the Court had doubts whether the aim of the statutory provision in question ("to reduce the likelihood of States refusing other Bulgarian nationals entry to their territory or toughening or refusing to relax the visa regime with respect to Bulgarian nationals") served the legitimate aim of maintenance of ordre public or the protection of the rights of others, it did not make a finding on this point.⁷⁷

Rather it considered, that it cannot be "proportionate to automatically prohibit the applicant from travelling to any and every foreign country on account of his having committed a breach of the immigration laws of one particular country."⁷⁸ According to the Court, the normal consequences of a breach of immigration law would be the expulsion from the country and the prohibition to re-enter its territory for a period of time.⁷⁹

The Court held that neither the law enabling the impugned measure nor the measure itself, can be justified by the argument of the Bulgarian state to consider it necessary for reasons of international comity and practical reasons, to assist other States in the implementation of their immigration rules and policies. Even though the Court recognised that the law was "enacted and subsequently tightened as part of a package of measures designed to allay the fears of, amongst others, the then Member States of the European Union in respect of illegal emigration from Bulgaria"⁸⁰ it did not consider it a

⁷⁶ Ibid. paragraphs 21-23.

⁷⁷ Ibid. paragraph 32.

⁷⁸ Ibid. paragraph 33.

⁷⁹ Ibid. paragraph 34

⁸⁰ Ibid. paragraph 36

sufficient justification to restrict the applicants right to leave the state. The Court held that,

although the Court might be prepared to accept that a prohibition on leaving one's own country imposed in relation to breaches of the immigration laws of another State may in certain compelling situations be regarded as justified, it does not consider that the *automatic* imposition of such a measure without any regard to the individual circumstances of the person concerned may be characterised as necessary in a democratic society.⁸¹

The above mentioned judgement of *Timishev v Russia* was ground-breaking as it clarified the relationship between Article 2 of Protocol No 4 and the prohibition of discrimination. Although it concerned restriction of freedom of movement within the territory of a state, the reasoning of the case is also applicable to situations where people are denied exit on the basis of their actual or presumed ethnicity. The case *Stamose v. Bulgaria* is of particular importance as it was the first time the Court dealt with travel bans designed to prevent breaches of domestic or foreign immigration laws, and in particular as a reaction to EU pressure.

2.3.2 A right to enter under European migration law?

Under international law there is no genuine right of entry into another country. The crossing of external borders of EU member states is regulated by the respective national laws in accordance with human rights and EU obligations. Citizens of the European Union enjoy the right to free movement within the territory of the member states as regulated by the Free Movement Directive (Directive 200/38/EC). EU Membership obliges states to admit EU citizens and their family members for a period of up to three months without any formalities. Restrictions on the right of entry can only be justified on the grounds of public policy, public security or public health.⁸²

The conditions of entry for non-EU citizens to the European Union are regulated in the Schengen Borders Code and the Schengen Convention. Third-country nationals may enter the Schengen zone for stays not exceeding three months per-six month period if

⁸¹ Ibid.

⁸² Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, Article 27.

they do not pose a threat to public order security and health and there has not been in alert in the Schengen Information System (SIS). According to Article 5, Schengen Borders Code, third-country nationals are subject to thorough checks and must be able to provide valid travel documents, a valid visa (in case they come from a country whose nationals are subject to visa requirements)⁸³, justify the purpose and conditions of stay and have sufficient means of subsistence for the period of stay and their return.⁸⁴

However, the Schengen Borders Code as well as the "Schengen Handbook" for border guards⁸⁵ contains an explicit prohibition of discrimination. Article 6.2 of the Schengen Borders Code concerning the conduct of border checks states that “while carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” The Frontex Guide on "Ethics of Border Controls"⁸⁶ states that the prohibition of discrimination laid down in this two documents should be applied to the profiling process.

The European Parliament stresses that cooperation in border control must “comply with international law as well as European norms and values on equal treatment and proper legal protection, not least so that the EU does not undermine its credibility as a promoter of human rights within its borders and at international level.”⁸⁷ However the task of border control has been outsourced to third countries, which prevent their citizens from leaving before they can even reach the EU border.

In conclusion it can be said that there is no right of entry into another country, but there is clearly a prohibition of discrimination in the way border controls are applied.

⁸³ Pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001.

⁸⁴ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

⁸⁵ Commission's Recommendation establishing a common "Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States competent authorities when carrying out the border control of persons.

⁸⁶ FRONTEX, Ethics of Border Security p, 26.

⁸⁷ European Parliament recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control.

Restrictions to the right to leave must be in accordance with permissible grounds under Article 2.3. of Protocol No 4. As Guild notes,

where member states collude or incite third countries to prevent their nationals from leaving their states of origin (or current residence) out of fear that the individuals might become 'illegal' immigrants in a European state, there is certainly a question of liability under this Article [2.3. of Protocol No 4].⁸⁸

2.4 The rights of asylum seekers

In international law, there is no substantial right of asylum (i.e. the right to be granted asylum) that is enforceable by an individual vis-a-vis the state. However, scholars agree that there clearly exists a right to an asylum procedure, laid down in Article 14 (1) of the Universal Declaration of Human Rights from 1948, which states that: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Although the UDHR is a non-binding declaration, it is widely acknowledged certain provisions of it had become part of international customary law. Moreover, most of the rights listed in the declaration have been implemented in conventions, which are binding to the contracting parties. In case of Article 14, this was done in the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol. According to Gammeloft Hansen and Gammeloft Hansen, the wording of Article 14, clearly implies a procedural right and "imposes a corresponding obligation on the international society and states to respect this rights to an asylum procedure, i.e. to grant access to refugee status determination."⁸⁹

Article 1 of the Geneva Refugee Convention, defines a refugee as "a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the

⁸⁸ Guild 2010, p. 14.

⁸⁹ Gammeloft Hansen and Gammeloft Hansen 2008, p. 446.

country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

This obligation to respect the right to an asylum procedure has further been supported by the inclusion of fundamental principles in the 1951 Geneva Convention such as the principle of non-discrimination (Article 3), non-penalization (Article 31) and most importantly *non-refoulement* (Article 33). The non-penalization principle recognises that in order to be able to seek asylum, refugees *may breach immigration rules and shall not be penalized for their illegal entry or stay*. The fundamental principle of *non-refoulement* provides that no one shall expel or return ("*refouler*") a refugee to a territory where his or her life or freedom would be threatened.

The right to asylum is also enshrined in the Charter of Fundamental Rights of the European Union. Article 18 guarantees the right to asylum with due respect to the rules of the Geneva Convention. Article 19 prohibits collective expulsions as well as the removal, extradition or expulsion to a state where there is a serious risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment.

However, as it is apparent from the definition of a refugee under the 1951 Refugee Convention, in order to be recognised as a refugee and to be protected from *refoulement*, a person must be "outside the country of his nationality" or "outside his former habitual residence."⁹⁰ Therefore the right to leave the country is a necessary precondition in order to enjoy the right to an asylum procedure.

2.4.1 Access to the territory

As has been stated above, the actual asylum procedure can only be started once a person has reached the borders of the destination country. However, countries of origin have adopted a number of measures to prevent asylum seekers from gaining access to the territory of a potential host state. The first group of measures consists of pre-entry measures by extraterritorial means of control, like visa regulations and carrier sanctions, but concern also measures that can be subsumed under the term of externalisation of

⁹⁰ Article 1. A (2)

border control, or policing at the distance. These measures will be discussed in detail in the following chapters. The second group consists of post-entry measures that allow for the immediate allocation of potential asylum seekers. They have a reparative function, insofar as they are aimed at cutting short their presence on the territory. An example is the application of concepts like safe-third country, whereby applicants can be send back through countries of transit, given they are deemed as being safe. This has been described as protection elsewhere.⁹¹ However more important in the case of asylum applications from the Western Balkans is the concept of safe-country of origin (SCO) which implies that applications from these countries are generally seen as unfounded as the situation in the country is presumed to be safe, and which in turn triggers an accelerated procedure.

2.4.2 The right to access an (full-fledged) asylum procedure

As has been mentioned above, the procedural right to seek asylum is laid down in Article 14 UDHR. While states are under no obligation to grant asylum, the contracting parties to the Convention are legally bound to grant refugee status to those that manage to submit their application and who fulfil the criteria set out in the Convention under Article 1(A) (2).

The fundamental right to access to a fair asylum procedure is recognised within the EU. The 1999 Tampere Programme, which laid down the political objectives for a harmonised EU asylum and migration policy, affirmed the "absolute respect for the right to seek asylum".⁹² Article 18 of the Charter of Fundamental Rights of the European Union states that "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community."

However, there exists a huge gap between discourse, legislation and actual practice. According to Gammeloft Hansen and Gammeloft Hansen, "the harmonisation process in the asylum and immigration area so far can to a large extent be described as various

⁹¹ Noll, 2000, pp. 108 – 111.

⁹² Tampere European Council 15 and 16 October 1999, Presidency Conclusions.

attempts to prevent access to asylum procedures – at least within the EU."⁹³ According to Costello, the driving factor for the establishment of a "Common European Asylum System" (CEAS) is the assumption that movements of asylum seekers are driven by pull-factors in the reception countries and that the manipulation of these factors would reduce the numbers of asylum seekers.⁹⁴ This is based on the assumption that asylum seekers are rational actors, choosing a destination country that offers the highest level of protection and benefits. These factors, together with the desire to equally "share the burden" of asylum applications gave impetus to tighten and harmonise EU asylum legislation in the area of reception conditions, asylum procedures standards and qualification of protection status and led to the adoption of the related Directives within the Common European Asylum System. These are the Reception Conditions Directive⁹⁵, the Asylum Qualification Directive⁹⁶, and the Asylum Procedures Directive.⁹⁷

In this context the EU Asylum Procedures Directive is of particular relevance. It deals with issues such as detention, the examination of applications, personal interviews, and legal assistance. It also defines concepts such as the first country of asylum, safe countries of origin and safe third countries. After its adoption, the Directive was extensively criticised by UNHCR, ECRE and various NGOs for its numerous exceptions, discretionary and optional provisions, leading to divergent and often problematic procedures below the basic agreed standards in the different Member States.⁹⁸ Therefore the Directive had been subject to a substantive recast process which led to the adoption of a new Recast Directive that will enter into force in July 2015⁹⁹.

⁹³ Gammeloft Hansen and Gammeloft-Hansen, 2008, p.448.

⁹⁴ Costello, 2005, p. 37.

⁹⁵ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

⁹⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

⁹⁷ Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

⁹⁸ UNHCR comments on Com 2011/319/final, p. 2.

⁹⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

The safe country of origin concept is particularly relevant in the context of the Western Balkans and will therefore be discussed in the following section.

2.4.2.1 Safe Country of Origin Concept (CSO)

The safe country of origin concept is based on the presumption that certain countries can be designated as generally safe, when “it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC [Qualification Directive], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict”. Applications from these countries are generally presumed to be unfounded and therefore subject to accelerated procedures.¹⁰⁰

According to Article 23 (3) of the 2005 Asylum Procedures Directive (APD), Member States may “prioritize” or “accelerate” procedures, without defining these terms. Furthermore, the Directive does not contain restrictions on the grounds on which an examination may be accelerated. Due to criticism by the United Nations Refugee Agency (UNHCR), the 2013 Recast Directive introduced a safeguard provision by which persons in need of special procedural guarantees¹⁰¹ cannot be channelled into accelerated procedures.¹⁰²

As Costello points out, the concept of safe country of origin has no legal basis in the Geneva Refugee Convention and has been criticized as a potential violation of Article 3 of the Convention¹⁰³, which provides that the Convention shall apply without discrimination as to race, religion or country of origin.¹⁰⁴ UNHCR does not oppose the concept in general "as long as it is used as a procedural tool to prioritize and/or accelerate examination of an application in very carefully circumscribed situations." However, UNHCR points out that it is critical to guarantee certain procedural safeguards such as individual assessment of each application based on its merits, the

¹⁰⁰ UNHCR, 2010, *Improving Procedures*, p 331.

¹⁰¹ Article 23 (3) refers to applicants in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence.

¹⁰² Article 23 (3) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast).

¹⁰³ Costello 2005, p. 50.

¹⁰⁴ Article 3, 1951 Geneva Convention and 1967 Protocol relating to the Status of Refugees.

opportunity for the applicant to rebut the presumption of safety of the country of origin in the specific individual circumstances, to not increase the burden of proof on the applicant as well as the right to an effective remedy in negative decisions. Article 31 of the 2005 Directive or Article 36 of the Recast Directive stipulates that an application from a country designated as safe must be subject to an individual examination where the presumption of safety can be rebutted. Moreover Recital No. 21 APD 2005 or No. 42 Recast Directive states that: “The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country.”

Under the 2005 Directive there are two procedures for the designation of safe countries of origin. Initially, Article 29 of the APD foresaw a procedure for the adoption of a common list of safe countries of origin, according to which the Council acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, should adopt a minimum common list of third countries, regarded as safe by the Member States. However, by decision of the CJEU, this Article was annulled for its non-compliance with EC law.¹⁰⁵ So far no common list has been established. The second procedure is the national designation procedure under Article 30 of the 2005 Directive or Article 37 of the Recast Directive 2013/32/EU. UNHCR criticized both Articles for its generic formulation, leading to wide divergences in the designation criteria among the Member States and to different outcomes in designation results, thus undermining the objective of harmonisation among the Member States.¹⁰⁶ Furthermore UNHCR's research revealed that the examination criteria used by some Member States does not fully comply with minimum standards laid out in the Directives¹⁰⁷, or with international refugee and human rights law.¹⁰⁸

¹⁰⁵ CJEU, C-133/06, *European Parliament v. Council of the European Union*, C-133/06, 6 May 2008, <http://www.unhcr.org/refworld/docid/4832ddb92.html>. As a result of the judgement, as regards the adoption of a list of safe countries and their amendment, the Council must proceed in compliance with the procedures established by the Treaty on the Functioning of the European Union.

¹⁰⁶ UNHCR, 2010, *Improving Procedures*, p. 335.

¹⁰⁷ see Article 30(1) in Annex II of the 2005 Directive/ Article 37(1) Annex I of the Recast Directive:

"In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

(a) the relevant laws and regulations of the country and the manner in which they are applied;

There is a similar procedure for designating safe-third countries – countries of transit which are considered as safe, where an asylum seekers might have found protection and thus can be returned to. Serbia was designated a safe-third country, however the Hungarian Helsinki Committee in a detailed Report found that Serbia cannot be considered as a safe third country as asylum seekers face destitution, limited access to protection and a real danger of chain refoulement when being sent back to Serbia.¹⁰⁹

2.4.3 Non-refoulement

Non-refoulement means the prohibition to “expel or return a refugee in any manners whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹¹⁰

The principle is further extended in Article 3 of the 1984 UN Convention against Torture as well as in Article 3 ECHR. The jurisprudence of the Strasbourg court has interpreted Article 3 in line with the UN Convention, prohibiting also the return of a person to any country where there is a real risk that he or she would be subject to torture, inhuman or degrading treatment or punishment.¹¹¹ This prohibition is absolute (jus cogens) and does not allow for any exceptions or derogations.¹¹² According to Guild, “a central question in international refugee and human rights law is the extent to which the obligation on states to refrain from refouling a person also engages a duty to allow them to arrive at the borders of the state in order to seek protection.”¹¹³

(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the United Nations Convention against Torture, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention;

(c) respect for the non-refoulement principle in accordance with the Geneva Convention;

(d) provision for a system of effective remedies against violations of those rights and freedoms.”

¹⁰⁸ UNHCR, 2010, Improving Procedures. 340.

¹⁰⁹ Hungarian Helsinki Committee 2011, Serbia is not a safe-third country, http://helsinki.hu/wp-content/uploads/Serbia_as_a_safe_third_country_A_wrong_presumption_HHC.pdf, accessed on 17 April 2014

¹¹⁰ Article 33, 1951 Convention relating to the Status of Refugees.

¹¹¹ Soering v. the United Kingdom, 7 July 1989, application number 14038/88.

¹¹² Article 53 of the Vienna Convention on the Law of Treaties and Article 42 § 1 of the United Nations Convention relating to the Status of Refugees and Article VII § 1 of the 1967 Protocol.

¹¹³ Council of Europe, Commissioner for Human Rights, Issue Paper, 2013, The right to leave a country, p. 26.

In the case of *Hirsi Jamaa and Others v. Italy* of February 2012¹¹⁴, the Grand Chamber decided that the interception of vessels with refugees on the high seas by the Italian Coastguard and the following push-back of the applicants to Libya, constituted a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of non-refoulement. The applicants, 11 Somali and 13 Eritrean nationals, left Libya with the aim of reaching the Italian coast. After the interception, the applicants were transferred onto Italian military ships and returned to Tripoli where they were handed over to the Libyan authorities. The Italian authorities stated that the operation was based on a bilateral agreement concluded with Libya to combat clandestine migration. The court observed, that though such an agreement existed, Italy cannot evade its own responsibility under the Convention.¹¹⁵ The Court held unanimously that there has been a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of being repatriated to Somalia and Eritrea, as well as a violation of the prohibition on collective expulsions (Article 4 of Protocol No 4 to the Convention) and the violation of the right to an effective remedy (Article 13).

In his concurring opinion judge Pinto de Albuquerque states that,

As the determination of refugee status is merely declaratory, the principle of non-refoulement applies to those who have not yet had their status declared (asylum-seekers) and even to those who have not expressed their wish to be protected.¹¹⁶

He acknowledges that “the right to seek asylum requires the complementary right to leave one’s country to seek asylum. States cannot therefore restrict the right to leave a country and find effective protection outside.”¹¹⁷

To sum up, the responsibility to decide whether a claim to international protection is based on well-founded fear and is thus justified, is a matter for the authorities of the state where the application is made, not for the state of origin. Theoretically the responsibility of a breach of the right to leave lies within the country of origin, a breach

¹¹⁴ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, application number 27765/09.

¹¹⁵ *Ibid.* paragraph 129.

¹¹⁶ Concurring opinion of judge Pinto de Albuquerque in ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, application number 27765/09.

¹¹⁷ *Ibid.*

of the right to access a fair asylum procedure within the country of destination. However, countries of destination have not only adopted internal non-arrival measures such as visa-regimes¹¹⁸, they have also – particularly in case these measures can no longer be applied - externalised their migration policies and urged third-states to change their rules, regulation and practices to assist their objectives of migration control. The result is a gap of responsibility that is exploited by countries of destination to avoid their protection obligations.

So long as measures are in place which prevent the person from leaving their state of origin or arriving at the destination state to seek asylum, then refugees do not “exist” in the states’ eyes or are not the responsibility of the state which has put the measures in place.¹¹⁹

But even if asylum seekers manage to leave the country, they are faced with post-entry measures that serve to cut off their access to a full-fledged procedure and to remove them swiftly from the territory.

The following chapter aims to shed light on the development of the externalisation of migration policies and explores the underlying dynamic of securitization.

¹¹⁸ Lindstrom, 2005, p. 589.

¹¹⁹ Guild CoE, p. 26

3 EU MIGRATION POLICY – SECURITISATION AND THE EXTERNAL DIMENSION

The following chapter aims at explaining the underlying mentality of the EU's migration policy and to outline its two main elements which can both be found in the visa liberalization process. The first concerns the securitization of migration which was triggered by the abolishment of internal borders and the aim of the Union to provide its citizens with an area of freedom, security and justice. The securitization of migration implies the notion of risks or threats that need to be controlled by compensatory measures which include methods of risk management, profiling and surveillance at the external borders. In this regard the externalization of migration control constitutes the second element. It combines technologies of policing at the distance as well as preventive approaches to tackle root causes of migration. By making the Schengen acquis conditional for candidate states the EU is outsourcing standards and technologies of migration control, thereby creating a buffer zone around Europe to stop unwanted migration and facilitate the movement of goods and “the desired ones”.

3.1 The emergence of external border and the need for compensatory measures

The process of European Integration and the aim to establish a common market with unrestricted mobility of goods, persons, services and capital led to the dismantling of internal controls and created a new external border and thus the need for enhanced cooperation between the Member States in the area of migration control. In 1985, five of the ten Member States of the European Economic Community (EEC) signed the Schengen Agreement which proposed the gradual abolition of border checks at internal borders between participating states. It marked the beginning of a new era of external borders and created the need for “compensatory measures” to deal with the loss of traditional controlling measures.¹²⁰ It was argued that criminals, traffickers, terrorists and illegal immigrants would exploit the new situation. According to Huysmans “the linking

¹²⁰ Monar, 2001, p. 754.

of internal and external borders of the European Community has played an important role in the production of a spillover of the socio-economic project of the internal market into an internal security project.”¹²¹ The 1990 Schengen Convention¹²², which supplemented the Agreement defined the conditions for free movement of persons and introduced standards for the harmonisation of external border checks, a common visa policy, the Schengen Information System (SIS), provisions on police cooperation and border police cooperation as well as the responsibility for processing asylum applications.¹²³ Other examples of compensatory measures are the 1990 Dublin Convention, which defines responsibility for the examination of asylum applications and which is almost identical to the regulations in the Schengen Convention, as well as the introduction of Eurodac¹²⁴ and the setting up of Europol.¹²⁵

The 1992 Maastricht Treaty divided community matters into three pillars. Migration was brought under the third pillar on “Justice and Home Affairs” (JHA) which is characterised by an intergovernmental approach. JHA established nine areas of “common interest” including asylum policy; external border control; immigration (entry, circulation, stay and fight against illegal immigration); the fight against drugs and international crime; judicial cooperation in civil and criminal matters as well as custom and police cooperation.¹²⁶

Huysmans pinpoints the creation of a “security continuum” with he defines as “an institutionalized mode of policy-making that allows the transfer of the security connotations of terrorism, drugs traffic and money-laundering to the area of migration.”¹²⁷ Treating crime, terrorism and (illegal) migration and asylum as interconnected issues made it possible to also transfer traditional policing technologies used for crime prevention to the field of migration control, e.g. the creation of electronic

¹²¹ Huysmans, 2000, p. 760.

¹²² Schengen Convention implementing the Schengen Agreement from of 14 June 1985 between the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

¹²³ Trauner, 2011, p.18.

¹²⁴ A database of fingerprints from asylum applicants.

¹²⁵ Monar, 2001, p. 751.

¹²⁶ Kaunert and Leonard, 2011, p. 145.

¹²⁷ Huysmans, 2000, p. 760.

databases and fingerprinting, the creation of risk profiles and the use of (racial) profiling for singling out potential asylum seekers.

3.2 Securitisation and the creation of the Area of Freedom Security and Justice

The establishment of the “Area of Freedom Security and Justice” (AFSJ) in the 1997 Amsterdam Treaty (entering into force in 1999) cemented the security continuum and made it a Treaty objective. The aim of the Union was to offer its citizens an area of freedom, security and justice “in which the free movement of persons is assured in conjunction with *appropriate measures* with respect to external border controls, asylum, immigration and the prevention and combating of crime”¹²⁸. The entering into force of the Treaty of Amsterdam also brought considerable changes with regard to EU external action in the field of Justice and Home Affairs. The prospect Central and Eastern European Countries joining the EU created the need to extend the JHA acquis to the applicant countries. Their strategic geographic position on major transit routes for migrants and asylum seekers has prompted the Member States at an early stage to outsource EU standards of migration control. Accordingly with Amsterdam, the Schengen acquis was integrated into the EU legal framework (*acquis communautaire*) which made its incorporation conditional for candidate countries.

Many scholars have highlighted the changing conceptions of security¹²⁹ as the underlying dynamic for the establishment of the area of freedom security and justice and its further expansion to the top of EU's policy making agenda.¹³⁰ Lavanex and Wagner point out, that “at first glance, the Area of Freedom, Security and Justice envisioned in the Amsterdam Treaty comprises three aims on an equal footing, (however) the concept of security appears to underpin the concepts of both freedom and justice.”¹³¹ According to Monar, the aim to provide EU citizens with a high level of safety, is based on the inevitable distinction between ‘safe(r) inside’ and an ‘unsafe(r)

¹²⁸ Ex Article 2 TEU, now Article 3 TEU (Lisbon Treaty).

¹²⁹ Bigo and Guild, 2005a; Huysmans, 2000; Monar 2001, Lavanex and Wagner 2007.

¹³⁰ Trauner and Kruse, 2008, p.2.

¹³¹ Lavanex and Wagner, 2007, p. 229.

outside’, with the EU’s frontiers as the dividing line and law enforcement and border controls as key instruments to maintain and further enhance this distinction.”¹³²

Securitisation as understood by Waeber, is a discursive act of elites who declare something a security problem. He defines security as a speech act whereby the actual definition of security depends on its successful construction in discourse.¹³³ The Paris School with its leading scholar Didier Bigo, focuses more on action on the ground and argues that the crucial concept in the EU’s border management is the notion of risk, where surveillance is central. Based on the notion of Foucault’s panopticon in which everybody is under surveillance, Bigo argues that the current regime of migration control rather takes the form of *ban-opticon* “in which the technologies of surveillance sort out who needs to be under surveillance and who is free of surveillance, because of his profile.” In the immigration ban-opticon surveillance is targeted at risk groups only in order to sort out the *bona fide* traveller from the *mala fide* traveller. The ban-opticon uses a range of proactive and anticipative technologies such as population profiling, risk assessment, statistical calculations about migrants and asylum seekers in terms of *flows* and includes technologies of “remote control” like carrier sanctions and visa policies.¹³⁴

One of the main actors in the EU in terms of surveillance and risk management at the EU’s external border is the European Agency for Border Management, FRONTEX¹³⁵. One of the main tasks of the Agency is the preparation of a so called “(Annual) Risk Analysis” which identifies short- medium and long-term migration trends and identifies risks and threats at the external borders.¹³⁶ In its Western Balkans Annual Risk Analysis 2013, FRONTEX highlights under the heading “Risk of large and sustained abuse of legal travel channels by nationals from the Western Balkan countries” the related “*threats*” of “asylum misuse” and “illegal stay and document fraud” and confirms the

¹³² Monar, 2001, p. 762.

¹³³ Benam 2011, p. 149.

¹³⁴ Bigo 2002.

¹³⁵ European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

¹³⁶ FRONTEX, Risk Analysis, <http://frontex.europa.eu/intelligence/risk-analysis>, accessed on 8 June 2014.

“prevailing ethnic profile of asylum applicants” which are of Roma ethnic background.¹³⁷

The inclusion of the Schengen Acquis within the Treaty of Amsterdam enabled the Union to outsource its migration control standards and risk management technologies to the surrounding candidate countries, thus creating a buffer zone around Europe to optimise migration prevention.

3.3 Externalisation of Migration Control

At the Special European Council on Justice and Home Affairs in 1999 in Tampere on how to realize the Area of Freedom Security and Justice, the EU for the first time officially referred to the “external dimension” of EU asylum and immigration policies.¹³⁸ However, the external dimension in this field has been evident since the idea of a European area without internal borders was born and common “compensatory measures” at the intergovernmental level were introduced. Several scholars¹³⁹ have termed this as “externalisation” of migration control which in a broader sense can be understood as

the reproduction of European internal migration policy at the external level, which entails burden sharing in the policing of European borders with bordering countries, and the setting up of migration management policies in the countries of origin, and especially illegal migration, following European interests.¹⁴⁰

Boswell identifies two distinct concepts of the external dimension: The first involves the externalization of traditional tools of domestic or EU border control to engage migrant-sending or transit countries in the control of migration flows. It includes the outsourcing of border control measures and capacity building of asylum systems and migration management as well as the facilitation of return of illegal migrants through

¹³⁷ FRONTEX, Western Balkans Annual Risk Analysis 2013, pp. 24-25.

¹³⁸ European Union, Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999, Paragraph 59.

¹³⁹ Boswell, 2003; Lavenex, 2004; Doukouré and Oger, 2007; Papadopulos, 2007; Rijma and Cremona 2007

¹⁴⁰ Doukouré and Oger, 2007, p.2.

readmission agreements as well as the adoption of EU acquis. The second approach are “preventive measures” in order to tackle root-causes of migration to prevent people from leaving or to influence migrant’s decisions on destination countries.¹⁴¹

Rijpma and Cremona (2007) suggest the term “extra-territorialisation” of EU migration policies which “covers the means by which the EU attempts to push back the EU external borders or rather to police them at the distance in order to control unwanted migration flows.”¹⁴² It implies action taken by the EU itself, through its Visa Regulation, rules on carrier sanctions and operational coordination through FRONTEX. Second, it occurs in the context of external community action which requires cooperation with third countries e.g. through immigration liaison officers posted by member states, established thorough Regulation (EC) No 377/2004 or the signing of readmission agreements. Thirdly, it covers the adoption of the EU acquis by third countries.¹⁴³

Lavanex has referred to the shifting of the EU acquis beyond EU frontiers and its impact on the legislative structure and policies of third countries as a new mode of “external governance”. Therefore, according to Lavanex, “the crucial criterion for external governance is the extension of the legal boundary of authority beyond institutional integration.”¹⁴⁴

Another important element of the externalisation is the redefinition of the physical border and state sovereignty. As Bigo and Guild highlight,

The concept of border is breaking away from the territory in a sense that it is no longer the physical boundary, the limit or the envelope. [...] The individual meets the virtual border long before physically crossing the border of sovereignty.¹⁴⁵

Rather than referring to “*remote control*”, Bigo introduced the term of “*policing at the distance*”, which is the “the control by specific procedures and technologies of the

¹⁴¹ Boswell 2003, p. 619

¹⁴² Rijpma and Cremona 2007, p. 12.

¹⁴³ Ibid. p. 13-15.

¹⁴⁴ Lavanex 2004, p. 683

¹⁴⁵ Bigo and Guild, 2005, p. 203.

movement of people before individuals enter a given territory.”¹⁴⁶ However, controls are no longer carried out by the officials at national borders but are passed on to foreign officials at the external border of the EU and to private carriers who have the obligation to check if the person has valid travel documents. This is based on the assumption that each state has to control its own population and if they fail, other states have the rights to intervene and to “assist” them to control their citizens, in order to preserve the present international order.¹⁴⁷

All these elements can be found in the 1999 Tampere Agenda which called for a common EU asylum and migration policy alongside partnership with countries of origin, including measures like capacity-building in order to tackle root causes of migration, information campaigns in countries of origin, and fostering readmission agreements and voluntary return.¹⁴⁸ The Hague Programme, adopted in 2004 in continuation of the Tampere Agenda referred to the external dimension of asylum and migration in the following areas: Partnership with countries and regions of transit, return and readmission policy, border checks and the fight against illegal migration, biometrics and information systems, and visa policy.¹⁴⁹ The Programme called for the development of an integrated border management (IBM) at the Union’s external borders and the establishment of a specialised agency. The latter, FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders has been set up in 2004.¹⁵⁰ In October 2004, the Commission drafted the Guidelines for Integrated Border Management in the Western Balkans. In January 2007 before the EU signed visa-facilitation agreements with the Western Balkans the Commission published an updated version of the Guidelines which define the IBM concept for the Western Balkans as follows:

“IBM covers coordination and cooperation among all the relevant authorities and agencies involved in border security and trade facilitation to

¹⁴⁶ Ibid. p. 204.

¹⁴⁷ Bigo and Guild 2010, p. 5.

¹⁴⁸ Ibid.

¹⁴⁹ Council of the European Union, Brussels European Council 4/5 November 2004, Presidency Conclusions on the Hague Programme.

¹⁵⁰ Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (2005/C53/01).

establish effective, efficient and integrated border management systems, in order to reach the common goal of *open, but controlled and secure borders*”.¹⁵¹

Furthermore, the sharing and collection of data for intelligence is a crucial element of the IBM concept to achieve its objective.¹⁵²

3.3.1 Readmission Agreements

Aimed at the swift removal of unauthorised aliens, readmission agreements are a crucial element in the fight against illegal migration and have become part and parcel of the externalisation of migration control. The first such agreement was concluded between the Schengen States and Poland in 1991. The Treaty of Amsterdam conferred powers to the European Commission to negotiate and conclude readmission agreements with third countries on behalf of the Member States. Those agreements substantiate the obligation of states under international customary law, to readmit their own nationals. However, all EU readmission agreements that have been concluded with non-member states, apply not only to nationals of the contracting parties, but also to third-country nationals that transited through the territory of these states, which does not constitute an obligation under international law.¹⁵³ According to Trauner, the current readmission policy of the EU is aimed at “extending the redistributive system for the examination of asylum claims to non-EU countries and expelling irregular immigration to outside territories.”¹⁵⁴

3.3.2 Carrier Sanctions

Carrier sanctions, that is imposing fines on private or public travel companies which transport persons who do not hold the necessary visas or travel documents, are one of the complementary mechanisms that have been in place since the mid-1980s when the EU introduced common regulations within the Schengen framework. Article 26 paragraph 1 (b) of the Schengen Convention established an obligation of private and

¹⁵¹ European Commission, Guidelines for Integrated Border Management in the Western Balkans, Updated Version, January 2007.

¹⁵² European Commission, Guidelines for Integrated Border Management in the Western Balkans, Updated Version, January 2007, p. 76

¹⁵³ Cassarino, 2010, pp.12.

¹⁵⁴ Trauner, 2008, p. 8

public travel companies “to take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories of the Contracting Parties.” Paragraph 2 of Article 26 imposes penalties on carriers which do not fulfil their obligations.¹⁵⁵ In 2001, the EU introduced a Directive regulating minimum amounts for fines between 3000 and 5000 Euros.¹⁵⁶ Thus, carrier liability serves as a delegation of control function from the state to private actors which implement the Unions risk management strategies, e.g. through trainings of airline security staff in profiling techniques to identify suspicious travellers.

The imposition of obligations on private transport companies to pre-screen passengers at embarkation and subsequently take responsibility for any inadmissible persons marks not only an externalisation of control mechanisms, but even their privatisation, in which the EU’s ability to control migration is enhanced by delegating responsibility for control to private companies.¹⁵⁷

As the Report of the Commissioner of Human Rights points out, “once the visa requirement is lifted, transport companies are still under a duty to ensure that passengers have valid travel documents, but their obligations end there.”¹⁵⁸ However, the third European Commission Monitoring Report on visa liberalisation suggests the increase of control of travel agencies and transport companies “potentially involved in misinforming citizens about asylum benefits.”¹⁵⁹ As a result of increased pressure on private travel companies in the Western Balkans, many providers refused to sell tickets to Roma.¹⁶⁰

¹⁵⁵ Convention implementing the Schengen Agreement of 14 June 1985.

¹⁵⁶ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

¹⁵⁷ Gammeloft Hansen, 2006, p. 26

¹⁵⁸ Council of Europe, Commissioner for Human Rights, Issue Paper, 2013, The right to leave a country, p. 56

¹⁵⁹ European Commission, COM (2012) 472 final, Third Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries.

¹⁶⁰ Badische Zeitung, Eine Mauer gegen Europas Roma, <http://www.badische-zeitung.de/ausland-1/eine-mauer-gegen-europas-roma--67222493.html>, accessed on 11 June 2014.

3.3.3 Root-cause approach - The EU's Roma policy and its link to migration

Until the 1990s Roma were not part of any EU policies. According to Guglielmo and Waters, when the European institutions started to deal with Roma issues, the approach was mainly driven by “concerns about the potentially destabilizing effects of westwards migration.”¹⁶¹ Only later, when Roma of CEE were to become EU citizens a rhetorical change towards non-discrimination and positive minority rights as “common values” of the EU member states occurred. This can be highlighted by the fact, that right after the establishment of the High Commissioner of National Minorities (HCNM) in 1993 who has a mandate for conflict prevention, the OSCE committee on senior officials (on which all EU states are represented) requested him to report on “the social, economic and humanitarian problems relating to the Roma population in some participating states” and to analyse them “in the larger category of migration problems”.¹⁶²

The report issued by the HCNM concluded that:

The aim, in short, should be to improve the quality of life in migration producing countries for the sake of such improvements, but also for the reduction in pressures on international migration. (...) Such efforts are likely to encourage people to continue their lives where they already are.¹⁶³

In 2000, the HCNM issued a second report on the situation of Roma that shows a rhetorical shift from security and migration related concerns to a more rights-based approach with concerns regarding minority protection and non-discrimination as part of the “common values” of the Member States. With eastern enlargement moving closer, the Commissions’ Directorate-General (DG) on Enlargement in 1998 began to allocate funds to Roma programmes in Bulgaria, the Czech Republic, Hungary, Romania and Slovakia through its *Phare* programme. Between 1998 and 2002, about 96 Mio. Euros were allocated to programmes to address the socio-economic exclusion of Roma communities in these countries. The programme did not bring considerable changes, mainly because it failed to address Roma unemployment, although it has been identified

¹⁶¹ Guglielmo and Waters, 2005, p. 764.

¹⁶² Ibid. p. 767.

¹⁶³ HCNM 1993, p. 11 cit. Guglielmo and Waters 2005, p. 768 (original emphasis).

as the most pressing need (only 9% of *Phare* assistance was used to tackle unemployment)¹⁶⁴. Furthermore it failed to include broader social inclusion strategies and to address the issue of racial discrimination as a key factor for the exclusion from the labour market.¹⁶⁵

On the one hand - apart from the fact that programmes were ineffectively designed and implemented - Roma became increasingly part of EUs concern and minority protection part of Europe's self-image. On the other hand, the underlying security and migration concerns that drove pre - accession policy are still evident in the current EU Roma policy.

3.3.3.1 Roma and EU accession

Following two waves of enlargement in 2004 and 2007, about 4,5 million more Roma became EU citizens. After Romania and Bulgaria entered the EU in 2007, Romanian and Bulgarian Roma started to exercise their right to free movement and migrated by tens of thousands to Member States in search for a better life. In 2008, Italy saw an outbreak of violent attacks against Roma living in so-called "nomad camps", followed by waves of mass expulsions that were accompanied by an open discriminatory rhetoric by public authorities and state officials. In 2010, France followed Italy's bad example. Like in Italy, the dismantling of illegal Roma camps and the subsequent mass expulsions went hand in hand with the stigmatization of Roma and an inflammatory and openly discriminatory rhetoric in the political discourse. The EU Commission reacted by warning France to launch infringement proceedings and Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding called the French policy a disgrace and compared it to Second World War deportations¹⁶⁶. However, France continued to expel Roma like before, and the Commission, after its initial outrage remained silent and French actions saw no legal consequences.

¹⁶⁴ Guy, 2012, <http://www.errc.org/article/roma-rights-2011-funding-roma-rights-challenges-and-prospects/4062/1>, accessed on 29 April 2014.

¹⁶⁵ McGarry 2011, pp.129,

¹⁶⁶ Viviane Reding, Statement on the latest developments on the Roma situation; Brussels 14.September 2010: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/428>, accessed on 29 April 2014

After the Kosovo war in 1999, the EU launched the Stabilisation and Association Process and granted all countries of the Western Balkans the status of potential candidates for EU membership. In the previous rounds of accession, unaddressed problems of the Roma population led to increased anti-Roma resentments in the new member states and to increased westwards migration. To avoid this happening again the Commission in its enlargement strategy for the countries of the Western Balkans and the annual Progress Reports as well as the European and Accession Partnership Agreements, generally acknowledges the difficult situation of Roma in the Western Balkans and calls upon the governments to increase their efforts. Furthermore all countries in the Western Balkans have adopted national strategies for the integration of Roma along with action plans for their implementation. However, only a few projects that have been adopted so far target the implementation of those strategies and not all relevant projects mainstream Roma.¹⁶⁷ As Jovanovic and Müller in their examination of the previous approach towards Roma inclusion within the enlargement process conclude:

The European Commission has not applied a comprehensive and sustainable long-term approach. Only individual projects have yet to be proposed in the Annual Programs of the Western Balkans countries, and these projects cannot be considered as sufficient steps toward considerably improving the lives of Roma and ending anti-Roma discrimination.¹⁶⁸

Although the EU with its pre-accession strategy would have a powerful tool in its hand to exert political pressure to address Roma inclusion and provide the governments with financial and technical support, so far success has been limited.

Concluding remarks

The gradual process of European integration and the diminishing of internal borders has not only shifted the borders of Europe, it created the need for a strong external border and a harmonisation of asylum and migration rules. Restrictions of migration flows and the need for reducing the number of asylum seekers were legitimized by a security logic, which eventually led to the establishment of the Area of freedom security and

¹⁶⁷ Jovanovic and Müller 2010, p. 9

¹⁶⁸ Ibid.

justice with the Treaty of Amsterdam. The perspective of eastern enlargement was a driving factor for further strengthening the external dimension of the EU's migration policy by integrating the Schengen acquis into the *acquis communautaire* and thus making it a condition for states wishing to join the EU. Neighbouring states were increasingly seen as "buffer zones" around the EU, which through the adoption of EU rules and regulations assist the Member States in their attempt to control migration. The two distinct approaches are, the externalisation of traditional domestic or EU border control measures to transit and sending countries and a preventive root-cause approach. Before the eastern enlargement, the EU was openly concerned with the destabilizing effect of massive migration of Roma and sought to address the root causes of migration. Although the official rhetoric has changed and Roma inclusion is addressed within the debate around common values and fundamental rights, the logic remains the same.

As I will show in the next chapter, in the process of visa liberalisation in the Western Balkans, the Commission seems to follow both approaches. Besides obligations in the realm of Justice and Home Affairs, also the implementation of relevant policies regarding the inclusion of minorities and in particular Roma had been included in the requirements the countries had to fulfil in order to be granted visa liberalisation. Therefore the next chapter also examines visa-liberalisation in the light of EU conditionality and looks at the outcomes of the post-visa liberalisation process, which due to the prevailing security logic had a detrimental effect by fuelling discrimination of Roma and limiting their rights to free movement.

4 VISA LIBERALISATION IN THE WESTERN BALKANS

The first part of the following chapter looks at visa liberalization in terms of EU-conditionality – as a powerful tool to make third-countries comply with the EU acquis in the realm of justice and home affairs. As has been stated above, in previous rounds of EU eastern enlargement, Member States were confronted with large numbers of Roma migrants. This is why, in the visa liberalization process of the Western Balkans, the EU included specific reference to minority rights in the visa liberalization roadmaps. However, as I will show, the main focus was given to obligations relating to Justice and Home Affairs rather than to minority rights. Following the increase of asylum applications after the lifting of visa requirements the Western Balkan countries as a reaction to EU pressure implemented measures that had the detrimental effect of restricting mobility rights of marginalized groups and further enhancing their stigmatization.

4.1 Visa Free Dialogues and EU-conditionality

Through the launching of the Stabilisation and Association Process by the EU after the Kosovo war, all states of the Western Balkans were granted the status of “potential candidates for EU membership”. The conditions for membership were set out in the so called Copenhagen criteria which require inter alia “the ability to take on and implement effectively the obligations of membership”, which require the candidate’s adoption, implementation and enforcement of all EU rules (the *acquis communautaire*). Since membership is a long term perspective, the EU has focused on priority areas of the *acquis*, such as the fight against organised crime including human trafficking, strengthening of public order and police, re-organisation of the external border system and the alignment of European standards in the area of migration and asylum.¹⁶⁹ At the European Council of Thessaloniki in June 2003, the visa-free regime was recognised as a long term perspective, since the EU expected “major reforms in areas such as the strengthening of the rule of law, combating organised crime, corruption and illegal

¹⁶⁹ Trauner, 2011, p. 36.

migration, strengthening border control and security in documents.”¹⁷⁰ Eventually in 2007, the EU signed visa-facilitation agreements with Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia which entered into force in 2008.

In legal terms, visa liberalisation means to be removed from the EU’s “visa black list”, established in Annex 1 of the Council Regulation (EC) No 539/2001 of March 2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders of the EU. Visa liberalisation does not imply the right to unrestricted travel to the European Union. Citizens of these countries are still subjected to the entry conditions as set out in Article 5.1. of the Schengen Border Code¹⁷¹ which imply that stays are not exceeding three months within a six-month period as well as the possession of a valid travel document, the justification of the purpose and conditions of the intended stay and of sufficient means of subsistence, both for the duration of the intended stay and for their return.

According to Trauner “visa Free Dialogues are powerful instruments in terms of making third countries comply with a range of EU-set conditions in the realm of Justice and Home Affairs.”¹⁷² Since these agreements are linked to the signing of EU readmission agreements they are seen as beneficial for both sides. Third countries benefit from facilitated process for the issuing of visas and the perspective of complete abolishment of EU visa requirements. Second, they “provide the EU with a strong lever to make third countries sign readmission agreements and increase the reform efforts in their domestic justice and home affairs sector.”¹⁷³ Moreover, due to the long term perspective of enlargement, visa liberalisation can be considered to have stronger leverage than enlargement. For local governments, visa free travel is an important political tool at their hands and compared to the offer of Stabilisation and Association Agreements it has proven to be more efficient.¹⁷⁴

¹⁷⁰ Council of Europe, 2003 Thessaloniki Agenda.

¹⁷¹ Regulation (EC) No 562/2006 of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

¹⁷² Trauner and Manigrassi 2014, p. 3.

¹⁷³ Ibid.

¹⁷⁴ Ibid. p. 5.

4.2 The Road to Visa Liberalisation

Following the launch of visa free dialogues with Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia in early 2008, the European Commission formulated requirements that the countries would have to meet in order to qualify for visa waiver. These requirements were listed in so-called visa roadmaps that contained specific benchmarks, structured in four blocks: 1) document security; 2) illegal migration including readmission; 3) public order and security; and 4) external relations and fundamental rights. The requirements of the first three blocks were part of the Justice and Home affairs acquis is closely related to the area of freedom, security and justice. The requirements in the fourth Block however have been newly introduced and where not part of the discussions of the visa waiver in Bulgaria and Romania in 2001. In the fourth block the commission dealt with two policy areas: Freedom of movement and access to travel documents, as well as citizens' rights including protection of minorities, including Roma.¹⁷⁵ In detail Block 4 consisted of the following benchmarks:

Freedom of movement of nationals

The respective country should:

- ensure that freedom of movement of citizens is not subject to unjustified restrictions, including measures of a discriminatory nature, based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

Conditions and procedures for the issue of identity documents

The respective country should:

- ensure full and effective access to travel and identity documents for all citizens including women, children, people with disabilities, people belonging to minorities and other vulnerable groups;
- ensure full and effective access to identity documents for IDPs and refugees.

¹⁷⁵ Kacarska, 2012, pp. 1-2.

Citizens' rights including protection of minorities

The respective country should:

- adopt and enforce legislation to ensure effective protection against discrimination; specify conditions and circumstances for acquisition of citizenship;
- *ensure investigation of ethnically motivated incidents by law enforcement officers in the area of freedom of movement, including cases targeting members of minorities;*
- ensure that constitutional provisions on protection of minorities are observed;
- *implement relevant policies regarding all minorities, including Roma.*¹⁷⁶

During 2009 and 2010 the Western Balkan governments submitted regular progress reports on all the stipulated benchmarks. Detailed on-the-ground assessment in the form of peer missions organised by the EC, where experts from the EC and member states were sent on the ground to verify the progress, however, were limited to the first three blocks of the visa liberalisation roadmap.¹⁷⁷ Concerning block 4, the Commission was content with a one-day meeting that was held in each country with EC experts, where primarily questions related to anti-discrimination have been discussed.¹⁷⁸ According to Kacarska,

Overall, the issues in this block were assessed on paper, as no one went into Roma settlements in the country to really see what they looked like or talked to NGOs about anti-discrimination. (..) Not surprisingly, at the national level the stakeholders involved in the process considered the block to be irrelevant and with no significance for the outcome of the visa liberalisation process.¹⁷⁹

Indeed, the fact that Macedonia - which was considered to have made most progress in the first three blocks - was granted visa liberalisation without having finally adopted a

¹⁷⁶ See for example: Serbia's Roadmap, <http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Roadmap%20Serbia.pdf>.

¹⁷⁷ Kacarska, 2012, p 7.

¹⁷⁸ Ibid., p.7.

¹⁷⁹ Kacarska, 2012, pp. 7-8.

framework of anti-discrimination law, proved it right.¹⁸⁰ As has been examined by Kacarska, the biggest effort in implementing the benchmarks from Block 4 was put into the issue of document security. It is clear that the visa-free dialogues had a security driven approach with the primary interest in effective cooperation on border control, readmission and document security. Issues of social inclusion and human rights were formally included, however received less attention in practice.¹⁸¹ The security driven approach in the visa-liberalisation process can also be explained by the leading role of the Commissions' DG Home Affairs thereby pushing DG enlargement more in the background. A commissions official from DG Home Affairs, interviewed by Trauner explains it as

a matter of credibility towards the member states; DG Enlargement has become softer when drafting its country reports. This is why at the moment the Council trusts more the work of DG Home which focuses on security issues. Its main concern is not to promote a wider Union but rather to ensure the proper implementation and sustainability of the reforms.¹⁸²

4.3 Post-visa liberalization

On 19 December 2009, visa liberalisation was granted to Serbia, Montenegro and the Former Yugoslav Republic of Macedonia and at the end of 2010, Albania and Bosnia-Herzegovina followed. This meant an extension of visa-free travel for a region with almost 21 million inhabitants. The positive effects, of the visa liberalisation as pointed out in the FRONTEX Western Balkans Annual Risk Analysis Report from 2012 were: reduced costs, both financial and in terms of time or planning needed for travelling to the EU; new legal travel channels for marginal groups that have previously been non-eligible; a significant reduction in demand for smuggling services to enable illegal border crossing as well as a bigger choice of available travel methods and entry points.¹⁸³

¹⁸⁰ Ibid. 12

¹⁸¹ Trauner and Manigrassi 2014, p. 12.

¹⁸² Ibid., p.13.

¹⁸³ FRONTEX, 2012, Western Balkans, Annual Risk Analysis 2012.

However these positive effects have received far less attention in the public and media debate. Rather, the debate was focused on the issue of the sharp increase of unfounded asylum applications by citizens of the Western Balkans after the introduction of the visa-free travel. Western European Media quickly reported on “waves of bogus asylum seekers”, the majority of them being Roma.¹⁸⁴

	2009 (no visa free travel)	2010 (visa free travel for Serbia, Macedonia, Montenegro)	2011 (all 5 WB states visa free)	2012 (all 5 WB states visa free)
Serbia	5.290	17.715	13.890	18.540
Macedonia	940	7.550	5.545	9.410
Bosnia and Herzegovina	1.320	2.105	2.595	6.725
Albania	2060	1.905	3.060	5.595
Montenegro	205	405	630	1.220
Total of the 5 WB countries	9.860	29.680	25.810	41.490
All asylum seekers in EU	266.395	260.835	303.105	-
Share of WB citizens	3,7%	11,4%	8,5%	-

Source: European Stability Initiative¹⁸⁵, Data for 2012 not yet complete¹⁸⁶

A crucial factor is that asylum applications are not evenly distributed among the Member States and a few countries have been particularly affected. In 2010 Germany, Belgium and Sweden received 76% of all Western Balkan asylum claims. In 2011, the claims accounted for 75% and in 2012 their share was even higher.¹⁸⁷ Germany as the most targeted country recorded an increase in asylum applications of 546% from 2009

¹⁸⁴ E.g. The Economist, Sticks, Carrots and Schengen, Nov 10th 2010, http://www.economist.com/blogs/easternapproaches/2010/11/visas_western_balkans

¹⁸⁵ European Stability Initiative, Statistical Update: asylum seekers from the western Balkans, 15 February 2013.

¹⁸⁶, The data for December 2012 was missing from Austria, Belgium, France, Greece, Hungary, Ireland, Italy, Luxembourg, Romania, Sweden and the United Kingdom. The Netherlands had not yet provided any data for 2012.

¹⁸⁷ Ibid., p. 9.

to 2011. Whereas in 2009 only 1.450 asylum claims were made by Western Balkan nationals, the number increased to 10.835 in 2010.¹⁸⁸

4.3.1 Reactions by EU Institutions: Increasing pressure

Following pressure from the main target states, the Commissioner for Enlargement Štefan Füle, urged the foreign affairs ministers of Serbia and Macedonia to “take all the necessary measures to reduce the influx of asylum seekers without any delay.”¹⁸⁹ Furthermore, both the Commissioner for Enlargement and Commissioner for Justice and Home Affairs, Cecilia Malmström, wrote letters to the two governments warning to re-introduce visa requirements in case the current inflow of asylum seekers would not be stopped.¹⁹⁰

On 8 November 2010, when the visa requirements were lifted for citizens of Albania and Bosnia and Herzegovina, several EU member states called for the introduction of a visa-safeguard mechanism, that would allow for the temporary suspension of the visa waiver, in case of a massive inflow of citizens of these countries. On the same occasion, the JHA Council of the European Commission decided to establish the post-visa liberalisation monitoring regime, a follow-up mechanism that allowed the Commission to keep track on the implementation of the established requirements and to push for further reforms.¹⁹¹

4.3.1.1 The Monitoring Regime

In practice monitoring is carried out by the a Steering Committee, chaired by the Commission and including representatives of FRONTEX, Europol, the current and incoming Council Presidency, as well as the Secretariat of the Police Cooperation Convention for South-East Europe (PCC SEE). The scope and structure of the mechanism is twofold. Firstly it entails the assessment on the continued implementation of benchmarks undertaken during the visa liberalisation dialogues based on (1) detailed

¹⁸⁸ Ibid. p. 11.

¹⁸⁹ Quote according to European Stability Initiative, <http://www.esiweb.org/pdf/presentation%20-%20asylum%20issue%20-%2030%20June%202011.pdf>, accessed on 23 March 2014.

¹⁹⁰ Chachipe, 2011, p. 9.

¹⁹¹ Ibid.

reports provided by the countries and (2) information exchanged in the framework of Stabilisation and Association Process meetings. Secondly, monitoring acts as an “alert and prevention mechanism” to counter the abuse of visa liberalisation. FRONTEX has developed a “tailored risk analysis” as well as an “operational task force” to identify specificities of migration flows between the Western Balkans and react to “crisis situations”.¹⁹²

In April and May 2011 the Commission organised monitoring missions to Serbia and Macedonia that again did not deal with Block 4 requirements of the roadmaps.¹⁹³ In its first three monitoring reports the commission assessed on a country-by-country basis on the one hand “the continued implementation of measures by the Western Balkans to comply with visa liberalisation roadmap requirements” and on the other hand the implementation of the “prevention mechanism against abuse of visa liberalisation by citizens from the Western Balkan countries”. In its first monitoring report of June 2011, the Commission concluded that:

The current problem of the high numbers of unfounded asylum applications in certain Member States appears to relate to large extent to the situation of minority populations in their country of origin, as the *large majority of these persons are of Roma origin* with extremely poor living conditions and no prospect of improvement in the near future. *Their main reason for leaving their country of origin is economic, based on false perceptions of financial advantages that they will acquire by requesting asylum in certain Member States.*¹⁹⁴

The “common profile” of the asylum seekers was also confirmed in the second¹⁹⁵ and third¹⁹⁶ monitoring reports where it was stated that “the *vast majority of the claims* continues to be from persons belonging the *Roma minority*, who often arrive with their families.” Also the FRONTEX Annual Risk Analysis 2013 for the Western Balkans confirms:

¹⁹² European Commission, SEC(2011) 695 final.

¹⁹³ Kacarska, 2012, p. 17.

¹⁹⁴ European Commission, SEC (2011) 659 final, 19.10.2011.

¹⁹⁵ European Commission, SEC (2011) 836 final, 7.12.2011.

¹⁹⁶ European Commission, COM (2012) 472 final, 28.8.2012.

during 2011, available data suggests that majority of all asylum seekers from the Western Balkans were of Roma ethnic background. [...] In the case of Sweden the authorities conducted a study during the autumn 2012 peak period to re-examine the prevailing *ethnic profile* of asylum applicants from the Western Balkans.¹⁹⁷

All monitoring reports call for measures like enhanced cooperation between Western Balkans, the Commission and the Member States, the investigation of facilitators like travel agencies or transport companies, increased efforts to strengthen of exit controls, targeted information campaigns and for an increase of assistance to minority populations, in particular Roma.¹⁹⁸ According to Kacarska, “the proposed solutions have taken the shape of two initiatives: devising legal ways of criminalising the abuse of the visa free regime and pressure on the border police to profile people when exiting the country.”¹⁹⁹ The implementation of these measure will be examined in detail in the following Chapter.

4.3.1.2 The Safeguard Clause

As a result of ongoing pressure by Member States, in May 2011 the Commission proposed²⁰⁰ the introduction of a visa safeguard clause for suspending visa liberalisation in case of “emergency situations” such as “in the event of sudden inflow of nationals of one or more third countries, including nationals of the Western Balkans, to one or more Member States”. According to the proposal, a member state may request the Commission to suspend for a short term period the visa waiver, when it is confronted by a sudden increase in the number of irregular migrants, unfounded asylum requests or rejected readmissions, of at least 50% over a six months period in comparison with the same period in the previous year.²⁰¹ On 12 September 2013, the European Parliament adopted a visa waiver suspension mechanism, applying to all countries that benefit or

¹⁹⁷ FRONTEX, Western Balkans Annual Risk Analysis 2013, p. 25.

¹⁹⁸ For example SEC (2011) 1570 final, Brussels 7.12.2011 (Second report).

¹⁹⁹ Kacarska, 2012, p. 17.

²⁰⁰ European Commission, COM/2011/0290 final: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

²⁰¹ Article 1 a – Safeguard Clause of COM/2011/029 final.

will benefit from visa-free travel to the EU in the future.²⁰² The adoption of this measure led to further increase in pressure on the Western Balkan governments, in particular on Serbia and Macedonia to control the movement of people.

4.4 Characteristics of Asylum Applications

Although Member States do not officially collect ethnic data, and therefore no exact numbers on the proportion of claims stemming from Roma exist, FRONTEX in its 2013 Western Balkan Annual Risk Analysis found that Roma are still the overwhelming majority of all asylum seekers from visa-free states.²⁰³

As we can see from the table above, Serbian citizens constitute the largest share of asylum seekers, followed by citizens from Macedonia, Albania and Bosnia and Herzegovina and lastly Montenegro. In 2011, Serbia ranked on place 5 of all claims of asylum seekers in the entire EU, after Afghanistan, Russia, Pakistan and Iraq.²⁰⁴ In 2012, Serbian citizens constituted the largest group of asylum seekers in Germany, followed by Syrians, Afghans and Macedonians.²⁰⁵

According to the European Stability Initiative (ESI), the main targeted countries in the years from 2010 to 2012 were Germany, Belgium and Sweden, France, Luxembourg and the Netherlands.²⁰⁶ This trend is confirmed by the European Asylum Support Office also for the second half of 2013.²⁰⁷

As examined by the ESI²⁰⁸ and the European Asylum Support Office, the length of the asylum procedure and the financial assistance offered to asylum applicants are a crucial factor for the migrants' choice of destination. Until recently, the three main target countries (Germany, Belgium and Sweden) had the longest procedures of around 3

²⁰² European Commission, Press Release, Cecilia Malmström on the adoption of a visa waiver suspension mechanism, Brussels, 12 September 2013.

²⁰³ European Commission, COM (2013) 836 final, Brussels 28.11.2013, p. 15.

²⁰⁴ Ibid. p. 4.

²⁰⁵ Ibid. p. 7.

²⁰⁶ ESI Statistical update: asylum seekers from the Western Balkans, February 2013, p. 9

²⁰⁷ European Asylum Support Office (EASO), Asylum Applications from the Western Balkans, Comparative Analysis of Trends, Push-Pull Factors and Responses, p. 17.

²⁰⁸ European Stability Initiative, Saving visa-free travel, Visa, asylum and the EU roadmap policy, January 2013, http://www.esiweb.org/pdf/esi_document_id_132.pdf, accessed on 22 May 2014.

months until the first instance decision and up to 8 months until the final decision, and offered asylum seekers housing and assistance.

Moreover, the asylum applications follow seasonal trends with major peaks just before the winter. This is particularly the case for asylum applications from Serbia and Macedonia, which are supposedly correlated with the specific factors affecting the Roma population.²⁰⁹

Western Balkan citizens face one of the highest rejection rates among the countries of origin. In 2011, protection was granted to 2,1% of the individuals claiming asylum. As for citizens of Serbia for example out of 11.280 decisions made, 155 received refugee status under the Geneva Convention and 10 subsidiary protection.²¹⁰ However recognizing refugee status of 155 people is still a significant number and refutes the general assumption of all claims being unfounded.

4.5 Reactions by the Member States

Although the focus of this study is on the measures that countries of origin apply in reaction to pressure from Member States and the European Commission, the reactions of the Member States in order to deal with the increase of asylum applications shall also be mentioned briefly.

Since the length of procedures and financial benefits have been identified as the most important pull-factors, countries of destination have adopted measures to reduce the average length of procedures, mainly through the use of the safe-country of origin concept (see 2.4.2.1.) or by promoting voluntary return as well as minimizing daily allowances.

Member States that introduced a safe-country of origin list are Belgium, Luxembourg and France. By an amendment of the Belgian Immigration legislation of January 19, 2012, the concept of safe third countries was introduced and a list containing Albania, Bosnia-Herzegovina, Macedonia, Kosovo, Serbia, Montenegro and India was

²⁰⁹ EASO, p. 32.

²¹⁰ ESI Statistical update, p. 8.

adopted.²¹¹ Since Luxembourg added Kosovo to the list of safe countries at the end of June 2013, all Western Balkan States are considered as safe countries. The designation triggers an accelerated procedure, however, each application must be subject to an individual assessment beforehand.²¹² France placed Macedonia, Bosnia and Herzegovina and Serbia on the safe-country list. By decision of the Conseil d'Etat (the French highest administrative court) of March 2012, Kosovo and Albania were withdrawn from the list. Applicants are subject to an accelerated procedure of maximum 15 days and appeals do not have suspensive effect.

Other countries such as Austria, Germany, Sweden, Denmark or Switzerland did not introduce a SCO-list, nonetheless, they apply special procedures for nationals of the Western Balkans under the SCO-concept. Among these measures are 48-hour procedures, as introduced by Switzerland, accelerated procedures with a 7 days processing period and measures to promote voluntary return for citizens for Serbia, Macedonia and Kosovo (Austria), or accelerated procedures and re-entry bans as well as the promotion of voluntary return in Sweden.²¹³

In September 2012, Germany decided to prioritise applications from Serbian and Macedonian citizens in a so-called “absolute direct procedure” (*Absolutes Direktverfahren*). The special procedure has no legal basis but included a series of administrative measures (mostly focusing by drafting extra staff or staff usually engaged on other activities) with the aim of processing as many claims as possible in a shorter-time frame. Within the procedure interviews should be conducted on the same day of the applications, and decisions handed down within one week. However, in 2013, the average length of procedures for Serbian and Macedonian nationals was still 2,4 months compared to 5,6 months in 2011.²¹⁴

As Heuser notes, “a decent preparation for the very demanding interview, e.g. by legal and asylum procedural counselling, which has to be provided by EU-member states, is

²¹¹ European Migration Network, National Contact Point Belgium, <http://www.emnbelgium.be/news/list-safe-countries-origin-approved-council-ministers>, accessed on 4.4. 2014.

²¹² EASO, p. 61.

²¹³ EASO, p. 63 – 68.

²¹⁴ Asylum Information Database, <http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/regular-procedure>, accessed on 11 June 2014.

not possible in that short period of time. In my experience, a preparation is very important for Roma who may have asylum-relevant reasons to flee but who have often internalized discrimination as normal. ²¹⁵

An analysis of 35 interview protocols conducted within the procedure has shown that the average duration of interviews was reduced to 40 minutes from which 30 minutes were used for formal questions about personal data and only 10 minutes elaborate on the grounds for asylum. Interviewers were not checking any details even if a person mentioned possibly relevant circumstances. A retrial, which is a standard procedure, was not offered. 100% of claims were rejected as manifestly unfounded: The consequence of such a decision is a reduction of the time to appeal to the court to one week and the deadline to leave the country after a final decision to one week.²¹⁶

4.5.1 Readmission and Deportation

According to the Serbian Ministry of Interior, in 2012, 7,709 applications for readmission under the EC and bilateral readmission agreements have been filed for citizens of Serbia, from which 6,581 applications were granted and 1,128 were refused.²¹⁷ According to data from Eurostat, in 2012, 10,159 citizens of Serbia and 2,815 citizens of Macedonia have been returned from European Member States (plus Norway) following an order to leave.

²¹⁵ Heuser (2014), forthcoming issue of ERRRC, Roma Rights No1/2014, (no page numbers available yet.)

²¹⁶ Ibid.

²¹⁷ Ministry of Interior of the Republic of Serbia, Measures taken in order to maintain the visa-free travel regime, http://www.seio.gov.rs/upload/documents/ekspertske%20misije/07_pvlm_report_january_september2013.pdf, accessed on 4 June 2014.

5 CASE STUDY MACEDONIA AND SERBIA

In order to better understand the push-factors for migration and to examine the question of unfounded asylum claims, the first part of this chapter explains the economic situation of Roma in Macedonia and Serbia and gives an overview of relevant anti-discrimination laws and Roma policies that have been implemented. The second part discusses in detail the measures the Macedonian and Serbian government have adopted and how they have particularly affected Roma. The chapter ends with a human rights assessment.

5.1 Socio-economic situation of Roma in Macedonia and Serbia

As has been stated above, Serbia and Macedonia are presumed to be safe countries of origin, with the effect that applications from these countries are generally treated as being unfounded and are thus processed in accelerated procedures – which in almost all the cases end in a negative decision. However, the European Asylum Support Office (EASO) in its report on the Western Balkans notes that “it should be stressed that not all asylum applications are considered unfounded and, in some cases, cumulative measures of discrimination may amount to persecution, which is a ground for protection.”²¹⁸ By looking at the socio-economic situation of Roma we can see widespread and institutionalized discrimination with regard to the right to education and the right to housing, in access to employment and to medical assistance as well as incidents of police-violence and ill-treatment. It is therefore to argue that Roma, in many cases, do have a genuine protection need.

5.1.1 Roma population in Serbia and Macedonia

It is well known that Roma are Europe’s largest ethnic minority and the most disadvantaged and vulnerable ethnic group. The situation of Roma living in the Western Balkans is particularly hard – due to lasting repercussions of the recent wars in the region, the generally bad economic situation and the lack of attention and political will to improve the situation of the Roma population. According to the latest census in 2011,

²¹⁸ EASO, p. 9.

147,604 Roma live in Serbia, comprising 2,05% of the country's population, making them the second largest minority in the country after Hungarians.²¹⁹ Unofficial estimates however, suggest that the actual number of Roma ranges between 250.000 and 500.000.²²⁰ The huge gap between official data and actual numbers can be explained by the fact that many Roma prefer not to declare themselves as Roma, for various reasons. In Macedonia, 53,879 people declared themselves of Roma origin in the 2002 census, which makes a percentage of 2,66% of the total population (2,022,547). The actual number ranges between 150,000 and 260,000.²²¹

5.1.2 The right to education

In Serbia and Macedonia, Romani children are still overrepresented in special education which may suggest discrimination on the basis of ethnicity. The 2013 Progress Report of the European Commission on Macedonia, addresses this issue and highlights that no comprehensive measures have been taken to address overrepresentation.²²² While in Macedonia overrepresentation increased in recent years²²³, in Serbia the number of children enrolled into special schools decreased from 8% to 6%.²²⁴ The reasons for this overrepresentation are misdiagnosis of mental-illness by expert commissions, insufficient assistance to children to stay in mainstream schools, limited information for parents and a treatment of Roma children in mainstream education that is characterised by negligence by teachers and humiliation by peers.²²⁵ According to data from the 2011 population census, more than 15% of all Roma in Serbia above the age of 10 are illiterate compared to the national average of 2%. 69% of illiterate Roma are women. In Macedonia the illiteracy rate of adult Roma is 17%, with a literacy gap between Roma and non-Roma of 13%, increasing to 20% for Roma-women. In Serbia 34.2% of Roma have incomplete primary education, compared to 11% of the general population. Only

²¹⁹ Open Society Foundation, <http://www.opensocietyfoundations.org/voices/roma-feel-less-fear-and-more-hope-after-census>, accessed on 9 June 2014.

²²⁰ ERRC Country Profile Serbia 2011-2012, p. 7.

²²¹ ERRC Country Profile Macedonia 2011-2012, p. 7

²²² European Commission, the FYROM Progress Report 2013.

²²³ ERRC, Parallel Report concerning Macedonia, To the Human Rights Councils Universal Periodic Review, for consideration at its 18th session (January – February 2014), p. 8.

²²⁴ ERRC, Country Profile Serbia 2011-2012.

²²⁵ ERRC, A Long way to go, Overrepresentation of Romani Children in “Special Schools” in Serbia, January 2014, p 7.

11% finish secondary education, in comparison to almost half of the overall population (48,93%).²²⁶ In Macedonia pre-school enrolment is also lower for Roma children (only 16% compared to 25% among non-Roma) so as enrolment in compulsory primary education (74% compared to 90% in 2011).²²⁷

5.1.3 Access to employment

The 2013 European Commission Progress Report on Serbia highlights that Roma, and in particularly Roma women are the most discriminated group on the labour market.²²⁸ The 2011 ECRI Report on Serbia highlights high levels of discrimination against Roma in the employment sector. They face high unemployment rates, low economic activity and almost total exclusion from the public sector. When employed, Roma perform more difficult and dangerous tasks and earn about 48% less than the majority population. The majority of Roma households depend on income from seasonal work in agriculture and construction or collecting scrap metal for recycling.²²⁹ The overall employment rate of Roma in Serbia is 26%, compared to 43% of the overall population - which means that only one in five Roma at the age of 15-64 is working. The unemployment rate for Roma is 49% compared to 27% for non-Roma.²³⁰

The situation in Macedonia is similar. The European Commission Progress Report on Macedonia from 2013 noted that “open discrimination against Roma continues, particularly in employment.”²³¹ Only 23% of Roma are employed, compared to 37% of non-Roma. The unemployment rate for the working-age Roma population is 53% compared to 27% for non-Roma. However, youth unemployment among Roma is particularly high, with 71% in comparison to 61% of the non-Roma population.

²²⁶ ERRC Country Profile Serbia 2011-2012, p. 9.

²²⁷ UNDP/WB/EC regional Roma survey 2011, results for Macedonia, <http://www.eurasia.undp.org/content/rbec/en/home/ourwork/povertyreduction/roma-in-central-and-southeast-europe/roma-data/>, accessed on 4 June 2014.

²²⁸ European Commission, Progress Report on Serbia 2013, p. 47.

²²⁹ ECRI Report on Serbia, 2011, p. 18.

²³⁰ UNDP/WB/EC regional Roma survey 2011, results for Serbia.

²³¹ European Commission, the FYROM Progress Report 2013, p. 46.

Informal employment is higher among Roma (64% compared to 25%) and particularly high among Roma-women (68% compared to 19% of non-Roma women).²³²

5.1.4 Health

Statistics on life expectancy and child mortality show that the overall health status of Roma is much worse than of the overall population. In Macedonia, the life expectancy for Roma is ten years shorter than the national average, and the infant mortality rates both in Serbia and Macedonia are double the country average.²³³ According to a regional survey by UNDP, the World Bank and the European Commission on the vulnerability of Roma, there are no major discrepancies in access to medical services among Roma and non-Roma in Serbia and Macedonia. Health insurance coverage is high for both Roma and non-Roma (92% for Roma and 97% for non-Roma in Macedonia and 93% for Roma and non-Roma in Serbia). However, the differences in access to essential drugs for Roma and non-Roma are alarming: In Macedonia 68% of the Roma respondents couldn't afford to buy medicine they needed, compared to 32% of the general population. In Serbia the percentage is 66% for Roma and 32% for non-Roma.

5.1.5 The right to adequate housing

Housing is one of the areas where institutionalised discrimination of Roma is most visible. Lack of security of tenure, which is key to the right to adequate housing, is one of the major problems for Roma in Serbia. 38% are without access to secure housing, compared to 10% of the non-Roma population, 22% do not have access to improved water sources (compared to 12% of non-Roma), and 39% lack access to improved sanitation (in comparison with 16% of non-Roma).²³⁴

Although the Constitution of Serbia does not provide explicit protection of the right to adequate housing or protection from forced eviction, the right is guaranteed through the stipulated direct implementation of international human rights treaties. Since 2009, 18 forced evictions have been conducted in Belgrade, affecting 2,824 individuals. The

²³² UNDP/WB/EC regional Roma survey 2011, results for Macedonia.

²³³ ERRC Country Profiles Serbia and Macedonia 2011-2012.

²³⁴ UNDP/WB/EC regional Roma survey 2011, results for Serbia.

NGO *Praxis* points out, that these forced evictions are not conducted in accordance with international human rights standards, due to a lack of consultation with the residents of the affected settlements at the different stages of the eviction process, lack of access to legal remedy and the failure to provide evictees with adequate (or in fact any) alternative accommodation.²³⁵ In the case of Belgrade's biggest informal settlement *Gazela*, families were relocated to container settlements. The metal housing containers the families were provided with, fail to meet the standards of habitability as set out in international legal standards on the right to adequate housing.²³⁶ The containers are not weatherised and lack insulation, the sites lack sufficient and functioning toilet facilities. Moreover, even after forced evictions and resettlement, Roma are subject to discriminatory provisions²³⁷ for the termination of the contract of mobile housing units, which again deprives them from security of tenure and leaves room for arbitrary actions of the city administration.²³⁸ After *Praxis* lodged a complaint against the Secretariat of Social Welfare, the Commissioner for Protection of Equality recommended that the provision should be amended.²³⁹ In the case of the eviction of 974 Roma from the informal settlement *Belvil*, families were forcedly resettled on the outskirts of Belgrade or to their last place of residence.

According to the ERRC, housing is “the most immediate and pressing issue identified by the Romani community in Macedonia”. 25% of the Roma in Macedonia don't have access to secure housing the majority of Roma live in segregated settlements in cities which are characterised by substandard living conditions. Although the Macedonian government adopted a Plan on Housing within the Decade of Roma Inclusion (2005-

²³⁵ PRAXIS, Analysis of the main obstacles and problems in access of Roma to the right to adequate housing, May 2013, Belgrade.

²³⁶ ERRC Country Profile Serbia 2011-2012.

²³⁷ E.g. “if the beneficiary does not show an active attitude towards the activities of the City Administration, aimed at socialization of an individual and his or her family, including pre-school and educational institutions for children, education and employment of adults capable of working, good conduct towards the representatives of the Secretariat and other competent institutions.” (Article 11 of the contract on the use of mobile housing units. see PRAXIS 2013).

²³⁸ PRAXIS, Analysis of the main obstacles and problems in access of Roma to the right to adequate housing, May 2013, Belgrade.

²³⁹ Commissioner for Protection of Equality, Regular Annual Report for 2012, Belgrade, March 2013, http://www.ravnopravnost.gov.rs/jdownloads/files/cpe_annual_report_2012.pdf, p. 58

2015), housing conditions are even worse than when the Decade started.²⁴⁰ Furthermore, due to lack of legal security of tenure from which 25% of the Roma population are affected²⁴¹, they are easy victims for forced evictions.

5.1.6 Legally-invisible persons

As many as 100.000 Roma were forced to leave Kosovo during and after the conflict in 1999. Around 40.000 to 50.000 fled to Serbia, but only 22.000 were registered as internally displaced persons.²⁴² This is why, also in other post-Yugoslav states many Roma ended up as “legally invisible persons”²⁴³ whose existence due to the lack of birth certificates or similar documents is not recognised before the law and thereby lacking access to the enjoyment of other basic rights. In Serbia thousands of IDPs from Kosovo, have been living in slums for ten years. In August 2012 Serbia, through a law amendment introduced a court procedure whereby “legally invisible persons” can establish birth facts. However, the judicial decision on establishing birth facts is not binding for the authority deciding on citizenship and the effectiveness of the procedure thus questionable.²⁴⁴

5.1.7 Violence and Police Ill-Treatment

The ERRC country profile on Serbia notes that “hate speech and violence against Roma are ongoing problems in Serbia.” Incidents occur throughout the country, and include attacks by individuals, groups, private entities and policemen. Victims include individuals or entire communities. Although Serbia has adopted legislation that covers hate crimes, or criminal offences with a biased element, law enforcement and judicial bodies often refuse to acknowledge and prosecute them as such. Therefore the ERRC noted “the situation as it stands continues an environment of impunity for anti-Roma hate crimes.”²⁴⁵

²⁴⁰ ERRC Country Profile Macedonia 2011-2012, p. 29.

²⁴¹ UNDP/WB/EC regional survey 2011, results for Serbia.

²⁴² Müller and Jovanovic, 2011, p. 22.

²⁴³ PRAXIS, Legally Invisible Persons in Serbia, Still without a solution, Belgrade: PRAXIS 2011.

²⁴⁴ ERRC Country Profile Serbia 2011-2012, p15.

²⁴⁵ ERRC Country Profile Serbia 2011-2012, p. 24.

In March 2013 a 17 year old Roma boy died after he was brutally beaten on the street. Although the media reported about four perpetrators only one 14 year old boy had been charged. Though the perpetrator is allegedly the leader of a local skinhead group, the court ruled out a racial motive and charged him only with serious bodily injury with a fatal outcome. The ERRC criticised the procedural deficits in the investigation in particular that DNA from the crime scene had been compromised and could therefore not be used to establish what had happened.²⁴⁶

In 2011/2012 the ERRC in its country profile listed 12 incidents highlighting only some of the key incidents. In November 2012 three Roma including a minor were insulted and beaten on ethnic basis in a police station. As a result of the beating, the minor suffered from a hernia and needed operation. In July 2011 a 15 year old Roma boy was severely beaten by several police officers. The ERRC filed a complaint claiming ill-treatment and torture with a biased element and abuse of office against the officers and the police inspector whom the boy reported the incident and who failed to take action. After the Public Prosecutor dismissed the claim due to lack of grounds, the ERRC filed a request of investigation to the Higher Court in Novi Sad. In May 2012, following the resettlement of Roma after an eviction, 15 to 20 masked individuals attacked the container settlement near Belgrade, shouting racist statements and drawing a swastika on the container. Other cases involve beatings or attacks with knives accompanied by racist insults by groups of private perpetrators against Roma individuals as well as racist graffiti on private and public property.²⁴⁷

In Macedonia incidents of ethnically based violence against Roma in Macedonia are rare and cases of ill-treatment by the police are decreasing. However, of all national minorities Roma are still disproportionally targeted by police ill-treatment and cases remain insufficiently investigated. In many cases victims are afraid to report incidents because they are afraid of reprisals. In October 2012 a 17-year-old Roma boy from Bitola reported ill-treatment by police officers during an interrogation. He was beaten with truncheons and forced to confess something he did not do. During the interrogation he was mistreated by around ten police officers. Also in 2012, a women reported ill-trin

²⁴⁶ ERRC Press Release from 17 March 2014.

²⁴⁷ Ibid. p. 25-26.

Prilep was beaten by police officers and her two sons were pushed and mistreated by security guards; a minor from Gjorche-Petrov was beaten by a police officer, and a 37 year old Roma man reported mistreatment by police in Skopje.²⁴⁸

5.2 Anti-discrimination Legislation and other relevant Roma policies

Macedonia

Although Roma are officially recognised as one of the ethnic communities living in Macedonia and enjoy formal equality under Macedonia's constitution²⁴⁹, they are de-facto the most discriminated against group. In February 2010, the Law for Prevention and Protection against Discrimination was adopted and entered into force in January 2011. Furthermore, a Commission for Protection against Discrimination (CPD), comprising seven members was established. Within its mandate, the CPD can issue recommendations and initiate procedures before the relevant bodies.²⁵⁰ According to the EC progress report, the Commission lacks sufficient human and financial resources in order to fulfil its mandate appropriately. There is also a lack of systematic data collection as well as awareness-raising measures on equality on non-discrimination.²⁵¹ Only 16 out of 195 complaints submitted between January 2011 and April 2013 were filed by Roma on the grounds of ethnic affiliation, indicating a low awareness among Roma on legal protection. Of these, eight cases have been completed and only in one case discrimination was found.²⁵² As one of the founding members of the Decade of Roma Inclusion (2005-2015) Macedonia has launched a National Action Plan in the four areas of housing, employment, education and health. However, as the ERRC notes:

Despite the existence of both a policy framework and measures to address the situation, the impact on the ground has been very limited to date, due to the fact that the implementation of the policies targeting the inclusion of

²⁴⁸ ERRC, Country Profile Macedonia 2011-2012, p. 32-33.

²⁴⁹ Preamble of the Constitution of the Former Yugoslav Republic of Macedonia.

²⁵⁰ ERRC Country Profile Macedonia 2011-2012, p. 13.

²⁵¹ European Commission, Progress Report Macedonia, 2013 p. 36.

²⁵² ERRC Country Profile Macedonia, p. 14.

Roma remains slow, and only a few of the proposed measures have actually been implemented.²⁵³

Serbia

According to the Law on Protection of Rights and Freedoms of National Minorities Roma are officially recognised as a national minority.²⁵⁴ Individual and collective minority rights are also guaranteed under the Serbian Constitution (Article 75), including a prohibition of discrimination (Article 76), right to equality in administering public affairs (Article 77), prohibition of forced assimilation (Article 78) and a right to preservation of specificity (Article 79).²⁵⁵ Serbia has ratified the Council of Europe Framework Convention for the Protection of National Minorities. In 2009 Serbia has adopted the Law on the Prohibition of Discrimination²⁵⁶ followed by the election of the Commissioner for Protection of Equality (CPE) in May 2010, serving as the central national body for fighting against all aspects of discrimination.²⁵⁷ In 2012, the CPE received 68 complaints on account on discrimination based on national affiliation or ethnic origin, of which the highest number of complaints (31) were submitted by Roma. The 2012 annual report notes that “the number of such complaints is still low, considering the widespread nature of discrimination against this national minority.”²⁵⁸ Government policies for Roma Inclusion include the adoption of the 2012-2014 Action Plan for the implementation of the National Strategy for Roma Inclusion²⁵⁹ and the Anti-Discrimination Strategy 2013-2018 which includes specific objectives for Roma in the areas of employment, prevention of intolerance and violence, use of language of national minorities etc.²⁶⁰

To sum up, although formally there exists a protection against discrimination and there are National Action Plans on Roma Integration in place, widespread discrimination

²⁵³ ERRC, Country Profile Macedonia 2011-2012, p. 16.

²⁵⁴ Federal Republic of Yugoslavia: Law of 2002 on Protection of Rights and Freedoms of National Minorities [Serbia].

²⁵⁵ Constitution of the Republic of Serbia, 30 September 2006.

²⁵⁶ Law on Prohibition of Discrimination (Official Gazette of the Republic of Serbia No 22/2009).

²⁵⁷ Commissioner for Protection of Equality, Regular Annual Report for 2012, Belgrade March 2013.

²⁵⁸ Ibid. p. 58

²⁵⁹ European Commission, Serbia Progress Report 2013, p. 47.

²⁶⁰ Republic of Serbia, Anti-Discrimination Strategy for 2013-2018, p. 28-30

.http://www.seio.gov.rs/upload/documents/ekspertske%20misije/2014/ad_strategzy.pdf, accessed on March 2014.

against Roma persists and they are still the most discriminated against group. Furthermore it becomes apparent that efforts to improve their situation have not been carried out effectively and the actual impact has been very limited; in some areas like housing (Serbia and Macedonia) or access to education (Macedonia) the situation has even worsened.

5.3 Asylum seekers – Unfounded claims?

According to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the Geneva Convention, notes that “various measures not in themselves amounting to persecution (e.g. discrimination in various forms), in some cases combined with other adverse factors” may, if taken together, amount as persecution on “cumulative grounds”.²⁶¹

The European Asylum Support Office in its report on asylum applications from the western Balkans has identified the main push-factors for asylum seekers²⁶² that were indicated in the asylum applications in the top 8 destination countries²⁶³. The main reasons stated during the interviews were “societal problems of particular ethnic groups” related to discrimination and social exclusion as well as limited or lack of access to the labour market.²⁶⁴

“The close link between the two issues poses an additional challenge in the context of asylum procedures, whereby a certain challenge (such as unemployment), not being per se a valid ground for claiming international protection, may however still be a manifestation of the underlying discrimination and exclusion, amounting - under certain conditions - to a persecutory treatment.”²⁶⁵

²⁶¹ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, Article 53.

²⁶² The report includes applications from citizens from Kosovo.

²⁶³ Austria, Belgium, Switzerland, Germany, France, Hungary, Luxembourg, Sweden.

²⁶⁴ EASO, Report in Asylum Applications from the Western Balkans, p. 34.

²⁶⁵ Ibid. p. 35.

Access to health care and social benefits as well as issues related to education were stated to a lesser extent.²⁶⁶

According to statistical data, asylum applications have a strong seasonal trend, with the highest shares just before winter. This is particularly the case for applications from Serbia and Macedonia. According to the Belgrade based NGO Grupa 484, seeking asylum for many Roma constitutes “a short-term strategy of surviving”²⁶⁷. In the framework of an information campaign targeted at Roma communities in the city of Belgrade and Southern Serbia (Bujanovac, Vranje) the NGO spoke to large groups of people about their reasons to claim asylum. As Danica Ciric from Grupa 484 explained to me²⁶⁸, the poorest among the poor just leave for the winter. They don’t have money for food and can’t afford wood to heat their houses. Many don’t have access to social welfare and if they do, the 10, 000 - 13, 300 Dinars (about 100 - 130 Euros) they get are not sufficient for a family with more than two children. When applying for asylum in the destination countries, they receive access to heated accommodation in the asylum shelters and financial help. With the prospect of having an additional income through collecting scrap material or finding a temporary job they might be able to save some money and survive for the next months after they come back. Access to health care is another factor that was mentioned by the Roma they talked to. People stated that they would like to leave in order to get access to dental care, to get glasses or be able to get the medicine they need. According to Grupa 484, most of the interviewed persons stated that they didn’t claim discrimination as the reason for asylum.

“They said ‘we are there because we don’t have anything to eat’. They told us that they didn’t speak about that they have problems with the Republic of Serbia or violation of Human Rights. They only mention discrimination in rare cases. When somebody was beaten on the street. But it is hard to proof that this was ethnically motivated. You always have silent discrimination.”

²⁶⁹

²⁶⁶ Ibid.

²⁶⁷ Grupa 484, Challenges of Forced Migration, p. 41.

²⁶⁸ Interview with Danica Ciric, Grupa 484, 8 May 2014, Belgrade.

²⁶⁹ Interview with Danica Ciric, Grupa 484, 8 May 2014, Belgrade.

A major factor why Roma in most of the cases may not state discrimination as a reason for asylum is because permanent discrimination is internalised as something normal, since over generations most of the Roma have never experienced a different situation. In addition, the general discourse about them as having no reasons for asylum and being only economic refugees influences their self-estimation.²⁷⁰ This is why, comprehensive legal consultation before an interview is crucial, in order to detect cumulative incidents of discrimination that the applicants might have experienced and to have it substantiated within the procedure.

5.4 Reactions of Serbia and Macedonia to EU-Pressure

The visa liberalisation monitoring reports realises that “the poor level of integration of local communities, in particular of Roma origin, continues to be a push factor for the vast majority of unfounded asylum applications.” Although the commission calls for increased assistance for the Roma population, it also acknowledges that the improvement of Roma integration is a long-term objective and focuses mainly on enhanced technical cooperation between the Western Balkans, the Commission and the Member States and suggests measures like strengthened exit controls, carrier sanctions as well as targeted information campaigns.

5.4.1 Enhancing Border Controls – Refusal to leave the country

In all its monitoring reports the Commission asks for enhanced exit controls at the borders. All the 5 Western Balkan countries have subsequently sought to strengthen their border control and increased their efforts to pre-screen people at the borders and identify so-called “false asylum seekers.” Macedonia and Serbia have amended their relevant legislation to strengthen these controls.

Macedonia

On 29 December 2010, Macedonia adopted a new Law on Border Surveillance which mainly transposes elements of the Schengen Borders Code into national law and which conferred extensive powers to control persons to the Macedonian border police. Article

²⁷⁰ Heuser 2014

15 of this law defines the elements of so-called “minimum border checks” as defined by Article 7 of the Schengen Borders Code, such as quick checks of the validity of the travel documents. Paragraph 4 of this article holds that “police officers may, on a non-systematic basis, check in the appropriate records and electronic databases if they pose a threat to people, national security, public policy, international relations or a threat to public health.”²⁷¹ According to the Macedonian Minister of Interior, Gordana Jankulovska, the paragraph serves as the basis for the refusal to leave the country for citizens suspected of travelling to the EU “with the purpose of abusing the right to asylum.”²⁷² Subsequently, in 2011, Macedonia started to stamp passports of so-called false asylum seekers, who were refused to exit, with the letters “AZ”, which most probably stands for the Macedonian “Azilant”. According to a statement of Jankulovska, the purpose of this measure is to signal border guards that these persons should be subjected to additional checks, in order to prevent them from “abusing the visa liberalization and damaging the countries’ reputation”.²⁷³ On his visit to Macedonia, the Council of Europe Commissioner for Human Rights was informed, that from the time of the introduction of the visa-free regime in December 2009 until the end of November 2012, about 7000 Macedonian citizens had not been allowed to leave the country.²⁷⁴

Serbia

In June 2011, Serbia adopted a new regulation introducing the legal basis for the pre-departure controls. It sets out in detail the documentation citizens may provide to the border police in addition to their travel documents, including documents providing the purpose of the travel, the proof of possession of sufficient means of subsistence as well as other justifications, invitations or proofs concerning the purpose of the journey.²⁷⁵

²⁷¹ (Article 15, Law on Border Surveillance (Законот за гранична контрола), published in: Official Gazette of the Republic of Macedonia , Nr. 171/10, 30.12.10, see Chachipe p. 35.

²⁷² Gordana Jankulovska in a debate in the Macedonian Parliament of 29.12.2012, Chachipe Report, p. 36

²⁷³ Radio-televizija Srbje, Pečati za lažne azilante, 23 March 2011, <http://www.rts.rs/page/stories/sr/story/11/Region/896248/Pe%C4%8Dati+za+la%C5%BEne+azilante.htm> 1, see Chachipe report, p. 36.

²⁷⁴ Report by Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights, following his visit to “the former Yugoslav Republic of Macedonia”, from 26 to 29 November 2012.

²⁷⁵ Regulation governing in detail the manner of exercising police powers by the border police officers

The head of the Serbian border police, Nenad Banovic described the methodology of these controls as follows:

If someone appears suspicious to us and could be a bogus asylum seeker, we will check his identity. We will [also] check whether he has a return ticket and a travel insurance, whether he has sufficient money with him for his planned stay, we conduct a short interview [in order to assess], where he is travelling and what is the purpose of his trip.²⁷⁶

Anyone who does not fulfil the criteria will be rejected at the border. A person who is banned from travelling gets two stamps in the passport, one annulling the other. No official document or written decision is issued. Furthermore, the regulation does not include guidance on who should be checked and according to which criteria. There is no official information how persons suspected to be “false asylum seekers” are characterised.²⁷⁷ In late 2013, the head of the Serbian border Police, Nenad Banovic, noted that up to now Serbia has “returned 6,500 citizens from the border” because they failed to meet the requirements and that the number of asylum seekers in the EU has decreased by 10% in comparison to 2012.²⁷⁸

5.4.2 Evidence for ethnic profiling and discrimination when exercising the right to free movement

Macedonia

Even though authorities throughout the Western Balkans argue that border controls do not target any particular group, there are clear indications that Roma are disproportionately affected by exit controls and related measures. In its second and third monitoring report, the European Commission confirmed “the *common profile of asylum seekers*”, stating that “the *vast majority of the claims* stems from persons belonging to the *Roma minority*, who often arrive with their families.” The Commission in

and duties of the persons crossing the border (Uredba o bližem uređivanju načina vršenja policijskih ovlašćenja policijskih službenika granične policije i dužnostima lica koje prelazi državnu granicu, Službeni glasnik Republike Srbije, br. 39/2011), Chachipe p 19.

²⁷⁶ Chachipe 2011, p. 20.

²⁷⁷ Grupa 484, Challenges of Forced Migration, 2013, p. 42.

²⁷⁸ UNHCR Serbia, answer to written request from 28 May 2014.

its 2011 Progress Report on Macedonia positively notes, that national authorities introduced “a set of preventive measures like enhanced border controls and *profiling*.”²⁷⁹

In a report following a visit to Macedonia, in November 2012, the Council of Europe Commissioner for Human Rights Nils Muižnieks states, that “it is clear that the Macedonian authorities have developed a profile of a potential “unfounded” or “false” asylum seeker on the basis of information they receive from EU countries.”²⁸⁰

According to research conducted by the European Roma Rights Centre on Macedonia, in the period between 2011 and 2013, the ERRC documented 47 cases where Roma were stopped from leaving their country and 24 cases where passports were confiscated. 90% of the documented cases show that only Roma were asked to justify the purpose of their travels. In 60% of the cases the border officials stated that they did so because they were instructed to restrict the rights of the people concerned and in 30% of the cases, border officials explicitly referred to their ethnicity as grounds to restrict them from border crossing.²⁸¹

A recent judgment by the Basic Court Skopje 2 in May 2014, found discrimination in the practice of border authorities to restrict the right to leave the country. The plaintiff wanted to travel to Italy with his family to attend a wedding of a relative. Although he was in possession of a certificate from the municipality where the wedding was scheduled and enough money for a few days of stay, he and his family was refused to leave the territory and his passport was stamped. The Ministry of Interior justified the act by arguing that the border police officer who refused the plaintiff the right to leave, had the suspicion that the plaintiff would have the intention to seek asylum in a Member State. The Court found a violation of the right to free movement and the right to equality as guaranteed under Article 9 and 27 of the Constitution and determined discrimination based on the Law on Prevention and Protection against Discrimination. The Court noted that “there is no doubt that the state has right when there is risk of violation of the visa-free regime to take actions and measures to prevent its citizens

²⁷⁹ European Commission, (The Former Yugoslav Republic of) Macedonia 2011 Progress Report , p. 66.

²⁸⁰ Report by Report by Nils Muižnieks, Council of Europe Commissioner for Human Rights.

²⁸¹ ERRC, Factsheet: Freedom of movement for Roma in Macedonia.

from crossing the state border in order to abuse the visa-free regime, but in a way that the equality of the citizens would not be violated”²⁸²

Serbia

Article 39 of the Constitution of Serbia states that “everyone has the right to free movement and residence in the Republic of Serbia, as well as the right to leave and return.” However, this freedom of movement and residence, and one’s right to exit, may be restricted “by the law if necessary for the purpose of conducting criminal proceedings, protection of public order, prevention of spreading contagious diseases or defence of the Republic of Serbia.” Moreover, the prohibition of discrimination is enshrined in Article 21 of the Constitution.²⁸³

In its report to the Commission, the Serbian Ministry of Interior notes, that since the adoption of the above mentioned regulation on minimum checks, there haven’t been any complaints by Serbian citizens about discriminatory conduct of the border police. A lawsuit by a Macedonian citizen of Roma ethnic origin filed in 2010 against the Republic of Serbia and the Serbian Ministry of Interior was dismissed as unfounded.²⁸⁴ The man was travelling by van, with 12-13 other Macedonian citizens of Roma ethnic origin, intending to visit his family in Germany. The whole group was collectively prohibited to enter Serbia, and according to witnesses, the border police explained that they “were ordered not to let groups of Roma travel together across the border.”²⁸⁵

Nevertheless, it is clear that Roma have been defined as the primary target for border controls. This is also evident when we look at official statements. Ivica Dacic, Serbian Minister of Interior in May 2011, explained that he will meet with Roma and Albanian communities to tell them they could not jeopardise the visa liberalisation, stating that “no one from those communities will be able to leave the country if they do not have a

²⁸² Macedonian Young Lawyers Association, Press Release 29.05.2014.

²⁸³ Constitution of the Republic of Serbia.

²⁸⁴ Ibid.

²⁸⁵ ERRC, Serbia UPR Submission, p. 7 <http://www.errc.org/cms/upload/file/serbian-un-upr-submission-16-july-2012.pdf>.

return ticket, means to support their stay and cannot state the reason for their journey.”²⁸⁶

5.4.3 Revocation of Passports

On 3 October 2011, the Macedonian parliament adopted an amendment to the Law on Travel Documents, introducing a new Article 37, which introduces the possibility to refuse a request to issue a passport as well as to revoke existing passports for a period of one year, for persons who have been forcibly expelled from another country.²⁸⁷ Between 2009 and 2012, about 7000 Macedonian citizens, most of them Roma, have been denied the right to leave the country and had their travel documents confiscated. In a 7 month period in 2011 alone, more than 1500 citizens were refused to exit from Macedonia.²⁸⁸

In February 2014, the European Roma Rights Centre launched a complaint before the Constitutional Court of Macedonia, claiming that Article 37 is unconstitutional as it breaches Article 27 paragraph 2 of the Constitution which guarantees the right of every citizen to leave the territory of the Republic and to return, except in certain exceptional, clearly defined cases determined by the constitution. For example where it is necessary to protect the security of the state, in case of criminal procedures and for the protection of health.²⁸⁹ Forceful return or expulsion is not among the grounds for restrictions as provided in Article 27, paragraph 3 of the constitution.

Serbian state authorities on a number of occasions announced to consider the temporary confiscation of the passports of false asylum seekers.²⁹⁰ So far there haven't been any amendments to the law on travel documents related to the prevention of misusing the visa liberalisation.

²⁸⁶ Chachipe, 2011, p. 27.

²⁸⁷ ERRC, Macedonia Country Profile, Parallel Report to the Human Rights Councils Universal Periodic Review, for consideration at its 18th session (January – February 2014), p. 8.

²⁸⁸ ERRC, Factsheet: Freedom of movement for Roma in Macedonia.

²⁸⁹ Ibid.

²⁹⁰ Chachipe 2011, p. 23 – 24.

5.4.4 Carrier sanctions

In September 2011, Macedonia adopted an amendment to the Criminal Code aimed at punishment of travel companies. Paragraph 1 of the new Article 418e states:

Whoever recruits, instigates, organizes, shelters or transports persons to a member state of the European Union or of the Schengen Agreement in order to acquire or exercise social, economic or other rights, contrary to the law of the European Union, to the regulations of the member states of the European Union and of the Schengen Agreement and to the international law shall be sentenced to minimum four years of imprisonment.²⁹¹

Pursuant to paragraph 3 of the respective Article for crimes “committed out of covetousness”, the offender shall be sentenced to imprisonment of minimum 8 years.²⁹² According to the Commission, a number of criminal charges have been brought against individuals under this Article.²⁹³

In December 2012, Serbia amended its criminal code to incorporate the criminal offence of “Facilitating the abuse of the right to asylum in a foreign country” and intensified investigations of transport companies and travel agencies suspected of facilitating irregular migration to the EU.²⁹⁴ The new Article 350a reads as follows:

Whoever, with intent to obtain a benefit for themselves or another person, carries out or organises transport, transfer, reception, accommodation, hiding or is in some other way enables a Serbian citizen to seek asylum in a foreign country by misrepresentation of their human rights and freedoms being threatened, shall be punished by imprisonment from three months to three years.²⁹⁵

²⁹¹ Ukaz za poglazuvanje ZAKON ZA IZMENJUVAЊE I DOPOLNUVAЊE NA KRIVICHNIOT ZAKONIK, published in: Official Gazette of the Republic of Macedonia , Nr. 135/11, 3.10.11, p. 15. Article 418-e: Abuse of the visa-free regime with the member states of the European Union and of the Schengen Agreement, see Chachipe 2011, p. 43.

²⁹² Ibid.

²⁹³ European Commission, COM (2013) 836 final, Brussels, 28.11.2013, p. 16.

²⁹⁴ ERRC, Serbia Country Profile 2011-2012, p. 30.

²⁹⁵ Ministry of Interior of the Republic of Serbia, http://www.seio.gov.rs/upload/documents/ekspertske%20misije/07_pvlm_report_january_september2013.pdf

According to the Serbian Ministry of Interior, so far 7 criminal charges based on Article 350a against 8 persons have been filed.²⁹⁶ Due to the lack of a unified database within the Prosecutor's office and courts, the Ministry of Interior does not have information regarding the current status of the indictments and court procedures.²⁹⁷

5.4.5 Information campaigns

From 2011 the Serbian authorities have organised an extensive information campaign which included the distribution of flyers and posters in areas which were identified as the main regions of origin of the “false asylum seekers” and at border crossings and airports. The text on a poster that was distributed said: “False asylum seekers risk everything. They will lose financial assistance. They will be deported to the country [Serbia]. They will be banned from travelling to the European Union for a specific time”. Campaigns are particularly targeted at Roma and Albanians from Southern Serbia who according to the Serbian government make up 95% of the asylum seekers. The most recent campaign included the broadcasting of a radio programme, video clip and the film “I don’t want to seek asylum in the EU” on RTS (Serbian Broadcasting Corporation) which according to the Ministry of Interior has “sent a clear message that persons who seek asylum for economic reasons are jeopardising the current visa-free regime, i.e. visa liberalisation does not offer the right to work and solution for economic problems.”²⁹⁸ In addition flyers and posters with the same title were distributed at police stations in Romani, Albanian and Serbian language.

All these measures show that Roma are the prime target. The arbitrary character highlights their discriminatory nature. Roma are denied to leave their country on the basis of the assumption that they are potential asylum seekers. This along with the media campaigns and rhetoric used by government officials just leads to a further stigmatisation on the Roma as an ethnic group and enforces yet another layer of discrimination.

²⁹⁶ Ibid.

²⁹⁷ UNHCR Serbia, answer to written request from 28 May 2014.

²⁹⁸ Ministry of Interior of the Republic of Serbia, Progress Report to the Commission.

6 Conclusion

Discriminatory border controls, ethnic profiling, and violation of the right to leave one's country

The aim of the thesis was to examine the specific measures adopted by the Western Balkans and the Member States as a possible violation of the principle of non-discrimination, the right to leave one's country and the right to seek asylum. As I have shown above, there is clear evidence that the pressure by the Commission resulted in the application of measures that were targeted against Roma in a discriminatory way. The Council of Europe Commissioner for Human Rights already found that the profile that is used by the border police is based on the information the states have received by the Commission. Due to ongoing pressure of the Commission to strengthen exit controls and to prevent asylum seekers from leaving, the governments were instructed to de facto discriminate against Roma as an ethnic group, by the use of ethnic profiling.

In *Timishev v Russia* the Court held that if ethnicity constitutes an exclusive or decisive basis for law enforcement, it constitutes racial discrimination and cannot be objectively justified.²⁹⁹ Like in *Timishev*, the UK House of Lords in *R. v. Immigration Officer* found that the disproportionate denial to permit Roma travellers to enter the UK was systematically discriminatory and that a difference in treatment which is solely based on ethnic grounds cannot be objectively justified. More importantly the Court explained that even though knowing that more Roma than non-Roma would be seeking asylum in the UK would provide a good reason for the less favourable treatment, the Immigration officers acted solely on racial grounds whereby the reason becomes irrelevant and the different treatment unlawful.³⁰⁰

Statistics clearly show that Roma are disproportionately denied exit and also the European Roma Rights Centre (ERRC) has documented a pattern of exit checks with a disproportionate focus on Roma over a period of time. In 30% of the cases documented

²⁹⁹ ECtHR, *Timishev v. Russia*, 13 December 2005, paragraph 58.

³⁰⁰ UKHL, *R v. Immigration Officer at Prague Airport ex parte Roma Rights Centre and Others*, UKHL 55, Judgment of Sept. 17, 2004, para 82.

by the ERRC, border officials directly referred to their ethnicity as grounds to restrict them from border crossing.³⁰¹

Moreover, the measures adopted by Serbia and Macedonia clearly interfere with the right to leave one's country which is not only guaranteed in Article 2.2. of Protocol No 4 to the ECHR, but also embedded in the constitutions of Serbia and Macedonia. Both countries have introduced legislation which provides the legal basis for extensive border checks, in order to prevent false asylum seekers from "abusing the visa liberalisation and damaging the countries' reputation". As stated in General Comment No 27, when adopting laws providing for restrictions to the right to free movement, restrictions must not impair the essence of the right and the principle of proportionality has to be respected. Furthermore laws have to use precise criteria and may not confer unfettered discretion on those charged with their execution. Moreover the principle of proportionality also has to be respected by the administrative and judicial authorities in applying the law.³⁰² The laws adopted by Serbia and Macedonia basically transposed elements of the Schengen acquis into national law and provided border police with the legal basis to conduct pre-departure controls. However, on the basis of these regulations, border officials denied exit to persons on a broad scale, without issuing written notices or providing reasons or guidance on who should be checked.

The amendment to the Macedonian Law on Travel Documents³⁰³ which provides for the revocation of passports of persons who have been expelled from another country, clearly is a violation of the right to leave one's country. In *Stamose v. Bulgaria* the Court did not consider the automatic imposition of a blanket and indiscriminate travel ban on travelling to any country a proportionate response to an individual's breach of the immigration law of another state. Furthermore, the Court did also not consider the fact that the impugned law was enacted as a result of pressure from the EU Member

³⁰¹ ERRC, Factsheet: Freedom of movement for Roma in Macedonia.

³⁰² Human Right Committee, General Comment No. 27: Freedom of movement (Art.12) of 1999

³⁰³ ERRC, Macedonia Country Profile, Parallel Report to the Human Rights Councils Universal Periodic Review.

States, aimed at restricting the abuse of visa-free travel, a sufficient justification for the travel ban.³⁰⁴

Moreover, the revocation of passports is unconstitutional. The European Roma Rights Centre has therefore launched a complaint before Macedonia's Constitutional Court, claiming that restrictions have to be provided by law, which in the case of Macedonia's Constitution does not include the breach of foreign immigration laws.

The right to seek asylum?

The exit controls and the subsequent denial to leave the country are targeted against persons who are suspected to exercise their human right to seek and enjoy asylum enshrined in Article 14 of the UDHR. The right to asylum with due respect to the rules of the Geneva Refugee Convention is also enshrined in Article 18 of the Charter of Fundamental Rights. However, since this right is not justiciable, at least not until the individual has reached the (border of the) state of destination, there exists a gap of responsibility that the EU deliberately seeks to exploit by the use of policing at the distance or outsourcing border control to the countries of origin.

This protection gap or rather the question whether the obligation on states to refrain from refouling a person also engages a duty to allow them to arrive at the borders of the state in order to seek protection, has partly been addressed in the case of *Hirsi Jamaa and Others v Italy*.³⁰⁵ The Court has found that the practice of the Italian border guards to push-back asylum seekers to the Libyan coast at high seas has violated the principle of non-refoulement. However in this case the push-backs were conducted by the Italian border police, whereas in the case of Macedonia and Serbia, asylum seekers are pushed back at the borders of their own nation states, before they can even exit their country. Nevertheless, as Judge Pinto de Albuquerque in his concurring opinion to the above mentioned decision has argued: "The right to seek asylum requires the complementary right to leave one's country to seek asylum. States cannot therefore restrict the right to leave a country and find effective protection outside." It could be argued that this also applies to the situation in Macedonia and Serbia and therefore the travel-bans are not

³⁰⁴ ECtHR, *Stamose v. Bulgaria*, 27 November 2012

³⁰⁵ ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, application number 27765/09.

only discriminatory and violate the right to leave one's country but do also violate the right to seek asylum.

Although the recognition rate of applications from citizens of the Western Balkans is one of the lowest among all applications submitted in EU Member States, there are still cases where the need of international protection has been recognised. However through the application of the safe country of origin concept and the introduction of accelerated procedures, where interviews are held on the same day as the application was launched, there is the danger that cases are not individually checked but rather collectively rejected as unfounded. Therefore it is of utmost importance that procedural safeguards are complied with, such as an individual assessment of each application, the opportunity for the applicant to rebut the presumption of safety of the country of origin in the specific individual circumstances, as well as the right to an effective remedy in negative decisions.

Externalisation and Securitisation as the prevailing objectives

In the third chapter, I have looked into the underlying dynamics of securitisation and externalisation of migration control as the main objectives of the visa liberalisation process. I have referred to the creation of a “security continuum”, which Huysmans defined as an “institutionalized mode of policy-making that allows the transfer of the security connotations of terrorism, drugs traffic and money laundering to the area of migration.”³⁰⁶ The notion of risk management which is entailed in the security continuum, also allows for the transfer of specific policing technologies to the area of migration, thus legitimising the use of profiling and surveillance. I have also referred to Bigo's concept of the *ban-opticon*³⁰⁷ in which, through the use of profiles, surveillance is targeted at certain risk groups only, in order to sort out the unwanted migrants. The ban-opticon uses a variety of pro-active technologies such as risk assessment, population profiling or statistical calculations about migrants in terms of flows, connected to measures of remote control or policing at the distance. Indeed, the EU has developed a sophisticated system of legislation, institutions and cooperation concerned

³⁰⁶ Huysmans, 2000, p. 760.

³⁰⁷ Bigo 2002

with the managing of risk at the borders. A good example is the EU's external border agency FRONTEX with the primary task to conduct "risk analysis" and create profiles of migratory trends. In its Western Balkan Risk Analysis FRONTEX has also confirmed the "ethnic profile" of asylum seekers. Likewise the integrated border management strategy (IBM) for the Western Balkans, stresses the importance of intelligence and the sharing and collection of data as a crucial element.

Additionally, a range of measures have been set in place that have a reparative function and are aimed at cutting short the presence of asylum seekers or (illegal) migrants. The above mentioned external policies are thus also mirrored in the internal policies of the Member States. Actually, decision making based on profiling, enables the Member States to make generalisations about groups of people and categorise them as bogus asylum seekers on the basis of their nationality and their ethnic origin. Summarising claims from one (ethnic) group as unfounded allows to expel them as fast as possible.

In Chapter four I have examined visa-free dialogues as an important leverage to make third countries comply with EU set conditions in the area of Justice and Home Affairs and to sign EC readmission agreements. Compared to the negative side effects of the loss of visa requirements as an important element of migration control, the EU, through the implementation of the JHA acquis by the target countries, benefits from stronger external borders in compliance with EU standards, thus building a buffer zone around Europe. The signing of EC readmission agreements, which also include the obligation to readmit third-country nationals, contributes to the extension of a redistributive system in terms of burden sharing.

Probably with a view to previous visa liberalisation processes and enlargement rounds in CEE, which led to large numbers of Roma migrating westwards, the EU in the visa-liberalisation roadmaps for the Western Balkans included specific requirements with regard to anti-discrimination legislation and implementation of Roma inclusion policies. These requirements under Block 4 of the visa liberalisation roadmaps, have been newly introduced and were not yet part of the visa liberalisation process in Bulgaria and Romania in 2001. However, although formally included, in practice these benchmarks received much less attention than those related to implementation of the JHA acquis.

Detailed on the ground assessment and peer-missions by EC experts have only been conducted in the first three blocks of the visa liberalisation benchmarks which concerned document security, illegal migration and readmission as well as public order and security. Paradoxically, the requirements of Block 4 contained specific reference to the freedom of movement of minorities, stating that countries should “ensure investigation of ethnically motivated incidents by law enforcement officers in the area of freedom of movement, including cases targeting members of minorities.”³⁰⁸

The consequence of the post-visa liberalisation is therefore extremely contradictory. Through ongoing pressure by the Commission to step up efforts to strengthen border security and exit controls and by defining Roma as the prime target for these controls, the countries have understood that the main priority was to pre-vet their own citizens and to prevent them from leaving. The policies adopted thus far had a detrimental effect to what was stipulated in the pre- visa liberalisation process, resulting in violations of the right to free movement and the principle of non-discrimination. Furthermore, making Roma the scapegoats for the potential loss of the visa-free regime results in a further increase of their stigmatization and resentments against them.

Determining EU responsibility

Through the pressure from the European Commission and the Member States, the governments in the region have been instructed to de facto discriminate against the Roma population by using ethnic profiling at the borders. Ethnic profiling is a violation of the principle of equal treatment and a form of racial discrimination that is prohibited under international law. The principle of non-discrimination is not only guaranteed in the Charter of Fundamental Rights which is binding to EU institutions, it is also recognized as one of the core values of the European Union as set out in Article 2 TEU which every country wishing to become a Member State must respect. Additionally the fight against social exclusion and discrimination and the promotion of social justice is among the Treaty objectives laid down in Article 3 TEU. Furthermore, the Charter does not only apply to the Unions internal policies but also to its external actions and

³⁰⁸ See for example: Serbia’s Roadmap, <http://www.esiweb.org/pdf/White%20List%20Project%20Paper%20-%20Roadmap%20Serbia.pdf>.

cooperation with third states as well as to any act carried out in the Area of Freedom, Security and Justice (Article 67 TEU). In its communication on the effective implementation of the Charter, the Commission has argued that the EU should be exemplary and above reproach when it comes to fundamental rights.³⁰⁹

This is clearly not the case when it comes to the EUs external action in the field of migration. By asserting pressure on the states, the EU obliges states to go against their own laws and violate fundamental human rights. Thus, the process of visa liberalisation is yet another example where the focus on security and the EUs aim to restrict migration overrides human rights concerns.

Concluding remarks

Given the fact that Roma are Europe's largest, most vulnerable and most discriminated against ethnic minority, the European institutions and the EU Member States have stressed their joint responsibility to change this. Thus, they have to act with great care that their own actions and policies do not lead to further discrimination of Roma. Moreover the vast increase of asylum applications by Roma clearly shows that Europe has failed to break the vicious cycle of marginalisation, poverty and discrimination and to end the ongoing injustice against this minority.

Unfortunately, in the present climate of anti-immigration the reactions do not come as a surprise. Indeed, large numbers of unfounded asylum claims do present a burden for the bureaucratic and institutional infrastructure of asylum systems in the Member States. As has been shown, only a few countries have been targeted by Roma asylum seekers, indicating that the length of procedures and benefits received do inform the choice of people where to apply for asylum. The unequal distribution of asylum applications among Member States has been a driving factor for the establishment of a "Common European Asylum System". In this context, the EU Asylum Procedures Directive (2005/85/EC) had been subject to an extensive recast process in order to close the gaps that previously led to divergent and often problematic procedures below the basic agreed standards in the different Member States. However, the new Directive (2013/32/EU) will only enter into force in 2015. Although it has been stated that Roma

³⁰⁹ European Commission, COM(2010) 573.

social inclusion is rather a long term perspective, in the meantime, the EU should further assist the countries in implementing the relevant Roma integration policies by providing additional financial support and by increasing pressure to equally tackle anti-gypsyism as one of the root causes for substantial inequality of the Roma population.

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