



The **right** to **leave** a **country**

Issue
Paper



COMMISSIONER
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The right to leave a country

Issue Paper
by the Council of Europe
Commissioner for Human Rights

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Summary

This Issue Paper deals with the right to leave a country, including one’s own, guaranteed notably in Article 2 of Protocol No. 4 to the European Convention on Human Rights (the Convention). The right to leave a country, whether it is one’s country of citizenship or current presence, is a necessary prerequisite to the enjoyment of a number of other human rights, most notably the right to international protection from torture, inhuman or degrading treatment or punishment. States are entitled to place restrictions on the right to leave a country where these are justified in accordance with the Convention and as interpreted by the European Court of Human Rights (the Court). The European challenges, particularly to the right to leave one’s country, come in a variety of forms, especially through measures adopted by states at the instigation of other states in pursuance of their immigration and border control policies. This type of restriction on the right to leave, which can take the form of laws which criminalise leaving a country where the authorities have a suspicion that the individual may not be entitled to enter the country of destination lawfully, or the creation of criminal offences related to being expelled from another country, create serious obstacles to the enjoyment of the right to leave one’s country.

The Issue Paper consists of the following six sections: the right to leave a country, including one’s own; the right to seek and enjoy asylum; non-nationals’ right to leave a country; prohibited discrimination as regards the right to leave a country; the situation in the Western Balkans; and the impact of the EU externalisation of border control policies on the right to leave a country.

The right to leave a country, including one’s own

This right is inscribed in most major human rights instruments and is intended to ensure that people can move freely, including out of the country they are in, without unjustified obstacles. States are permitted to place restrictions on the right to leave but any such restrictions must be necessary and are subject to a proportionality test. The European Court of Human Rights has an extensive jurisprudence on the right to leave, as well as on the liberty of movement at domestic level, and restrictions which states have placed on the right. Most recently it has considered a travel ban imposed on an individual on the basis that he had been expelled from another country. At the heart of the case was the objective of the state in placing such a restriction on a person on account of their expulsion. As the travel ban meant that the individual could no longer travel at all and as the objective put forward by the state concerned was that such measure reduced the risk of its citizens being subject to entry obstacles by the other country, the Court questioned whether the objectives were lawful at all according to Article 2 of Protocol No. 4 to the Convention.

The temptation of countries to prevent their citizens leaving the state in order to please a foreign country is not necessarily consistent with the right of the individual to leave the state.

The right to seek and enjoy asylum

While the right to seek asylum is found in the Universal Declaration of Human Rights and the right to enjoy asylum is found in numerous international instruments, states which seek to persecute their citizens often attempt to prevent those persons from leaving the state. Preventing people leaving a state is often justified by states as a measure to stop their people seeking asylum elsewhere, on the grounds that their claims are unjustified and their act of seeking asylum sullies the reputation of the state. But the right to leave a state is a central element of international protection. Unless a person can escape his or her country and get to another country to seek asylum, he or she will not even begin to be able to exercise the right to asylum. Whether a claim to international protection is justified or not is a matter for the authorities of the state where the application is made to decide, not for the state of origin to pre-empt.

Non-nationals' right to leave a country

The right to leave a state belongs not only to citizens but also to foreigners. States are not entitled to place obstacles in the way of foreigners leaving their countries irrespective of where the foreigners seek to go. The expulsion of foreigners from other countries and state authorities' fear that they will seek to return to the country from which they have been expelled are not permissible grounds for their detention, nor for the interference with the right to leave the state.

The right to leave and prohibited discrimination

One of the most worrying aspects of recent interferences in Europe with the right to leave is evidence that such measures are taken against specific ethnic groups, in particular the Roma. Discrimination on any ground 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 in the exercise of the right to leave is prohibited by Article 14 of the Convention. That state officials suspect persons of specific ethnic groups of being more likely to exercise their right to leave and, having done so, to exercise their right to seek and enjoy asylum, can only reinforce international concerns that persons of that ethnic group are indeed in need of international protection as their human rights are not fully protected in their own country.

The situation in the Western Balkans

Visa liberalisation towards the Western Balkan states has been accompanied by concerns in a number of EU member states that nationals of those states are “abusing” the liberalisation and entering the EU for periods of time, activities or reasons which were not foreseen or intended by the programme. The recent years' rise in asylum applicants from the Western Balkans in certain EU states has led to the intensification of legal and other measures by Western Balkan governments aimed at managing and stemming migration flows to, including seeking asylum in, western Europe. Although the migrants' numbers are not alarming, seen through the overall EU migration figures, the measures taken by certain Western Balkan states raise serious issues of compatibility with human rights standards, including the right to seek and enjoy asylum. They are also inconsistent with the principle of non-discrimination given that the social group primarily targeted and affected by these measures is, in practice, the Roma, who continue to suffer in the Western Balkans from institutionalised discrimination and social exclusion.

The impact of the EU externalisation of border control policies on the right to leave a country

EU member states have adopted a panoply of measures which have the effect of preventing people from leaving the country in which they are on the grounds that if these people are allowed to leave they might enter irregularly into the EU. These measures range from mandatory visa requirements which only prevent some people from leaving the state to go to the destination state (but not to all states); sanctions on carriers linked with airport liaison activities where state officials based in third countries advise carriers which passengers to allow to travel and which to refuse, subject to penalties on carriers that do not comply (which activities may constitute prohibited discrimination depending on the criteria used); to readmission agreements which have the effect of enabling EU member states to send back anyone, citizen or foreigner, who is found irregularly present in the former (and who has passed through or is a citizen of the latter). These agreements are often linked to measures which the state of origin of the person must take to prevent persons expelled from leaving again. Finally, the most obviously problematic measures are the so-called push-backs, where states prevent people from leaving their state by pushing them back, usually on the high seas, to their state of departure, though such push-backs also occur at green (land) borders. These measures, which are increasingly used by some European states, have varying degrees of impact on the right to leave, from minor to highly problematic. However, all the measures may be suspect if ethnic discrimination is at play.

This Issue Paper concludes that all Council of Europe states must examine or re-examine their laws, policies and practices in order to fully align them with the Convention and the Court's case law, in particular:

- the issue of travel documents and the legitimacy of any obstacles to such issue;
- the validity of their laws, policies and practices regarding the withdrawal or refusal of travel documents to citizens to ensure that they are fully consistent with the Convention right to leave a country;
- those states which have a record of failure to respect the right to leave must take particular care to ensure that their legislation and its application is brought into line with their human rights obligations;
- there must be no direct or indirect discrimination on the basis of ethnicity as regards the right to leave the country, irrespective of doubts which state officials may have about the intentions of people leaving;
- EU states must review their border and immigration control laws, policies and practices to ensure that they do not constitute or establish incentives for other states to interfere with the right of all people to leave the country they are in;
- EU states singly and together must stop, with immediate effect, push-backs which prevent people from leaving the country of origin or from reaching the EU, and from exercising their human right to seek and enjoy asylum.

Introduction

Human rights are expressed in international agreements, signed and ratified by states, for the express purpose of guaranteeing those rights to all people within the states' jurisdiction. The human right to leave a country is then the right to depart from a state and its institutions and to go somewhere else where the same human rights may or may not be guaranteed. When people leave their state they may go to other states or set sail in boats in the direction of the high seas. Their state of origin (whether that be of nationality or residence) may warn them about the dangers of leaving. Indeed, many states in Europe have dedicated websites which are aimed at keeping their people informed of the state of safety which exists in other countries so that they can make an informed choice of whether to go somewhere or not. But what states cannot do is prevent their people from leaving (except in the most extraordinary circumstances).

This Issue Paper examines the right to leave a state and what it means both as a right in international human rights instruments and as interpreted by European courts. The reason for this Issue Paper is that there are an increasing number of documented instances of states in Europe seeking to prevent their people from leaving the country. It is, therefore, time to set out the standards of human rights protection of this right to leave and the importance of its protection.

There seem to be a number of reasons why states attempt to prevent their people from leaving, all of which raise profound issues of human rights compliance. Regimes which practise persecution and torture are notorious for impeding and preventing their victims from leaving the state. The careful rationing of foreign travel by governments in totalitarian states has been well documented, as in some parts of central and eastern Europe before the changes which started with the fall of the Berlin Wall in 1989. However, currently in Europe the most invidious reason for restrictions on departure is that states are seeking to implement immigration and border control policies of their neighbours. This is very much the situation regarding the neighbourhood of the European Union. As the EU has adopted an approach to border controls and immigration which includes an important element of encouraging, negotiating with and paying neighbouring countries to ensure that unwanted persons do not arrive at the EU's external borders, those countries around the EU which are under this pressure not only have to look to controlling people passing through their states but also to their own citizens who might want to travel. By, for example, depriving their own citizens of travel documents, states can easily make it very difficult for people to leave the country.

This first problem of seeking to please the powerful neighbours by preventing citizens from travelling there produces a number of additional problems as fundamental as the breach of the right to leave a state. The first relates to the right to flee to seek international protection. Refugee recognition and protection

are possible only once asylum seekers have left their country of origin. One of the most egregious human rights abuses common to totalitarian regimes is the closure of their borders so that their people cannot flee persecution and torture by state authorities. As refugees are not recognised under international law until they have crossed an international border and are no longer in their country of nationality or habitual residence, measures which prevent them 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.

The second is closely related to this first problem. People who seek to flee their state because they are suffering persecution or torture, do so for a reason. The state authorities, or authorities tolerated by or beyond the control of the state, persecute and torture people for various reasons – according to the 1951 Convention relating to the Status of Refugees (Refugee Convention) the reasons are: race, religion, nationality, membership of a particular social group or political opinion. Where a person flees torture in particular, the UN Convention against Torture does not require the individual to show the reason for his or her treatment. People do not necessarily have to be singled out, one by one, for persecution in order to be entitled to protection under the international protection instruments. Cumulative discrimination on the basis of ethnicity can reach the intensity of persecution or treatment which qualifies as inhuman or degrading treatment or punishment. Intentionality on the part of the state is also not necessary for someone to be entitled to international protection. State inaction, such as the failure to investigate or condemn pogroms against minority communities which result in killing, destruction of property and destitution of the minority members, may well also give rise to international protection for the victims. People who wish to escape violence in their state are entitled to leave their state to seek international protection elsewhere.

It is not only citizens of states who may feel the long arm of the state preventing them from leaving for fear that they may annoy the neighbours. Foreigners too may find themselves blocked in a state, their documents confiscated and, all too often, themselves subjected to administrative detention not exclusively for the purpose of expelling them back to their country of origin as often there are no real steps taken in that regard. The secondary reason may be because they have been expelled back to the intermediate country from a neighbouring state on the grounds that these individuals accessed the territory of the latter after a stay in the former. Among the reasons for a person's detention may be to prevent them from seeking to return to the neighbouring state where they want to be. Indeed, the detention centres where people in such situations are held are often paid for with funds from the neighbouring state provided specifically for this purpose.

At the centre of this Issue Paper is the problem of the displacement of border control and immigration policies in Europe and the impacts this is having on

human rights in the region and beyond. The collective weight of the European Union's 28 member states is not lost on the neighbours, particularly when it comes with well-organised funding. The EU's policies in this field specifically target neighbouring states with the objective of persuading them to carry out border controls to prevent persons potentially unwelcome in the EU from ever arriving there. But the victim of such policies may well be the human rights of people living in or travelling to those countries. In such circumstances, is it only the states carrying out the policies in breach of their human rights obligations who are responsible or are those states which incite them to do so also responsible?

These issues are at the core of this Issue Paper. In the second decade of the 21st century, many people thought that the spectre of the state preventing its citizens from leaving the country had left Europe. This had been an important human rights issue during the Cold War but with the fall of the Berlin Wall and the end of the Cold War, this behaviour by liberal states seemed to have vanished. Sadly, 20 years later, we are seeing the development of policies which mimic Cold War obstacles to movement of people but which are being put into place at the behest of those states which had been among the greatest critics of this practice by the Communist regimes.

Section 1 – The right to leave a country, including one’s own

United Nations human rights instruments

The starting place in respect of the right to leave a country is Article 13.2 of the Universal Declaration of Human Rights: “Everyone has the right to leave any country, including his own, and to return to his country.”¹ In accordance with UN human rights practices, the Declaration was given specific form in Article 12.2 of the International Covenant on Civil and Political Rights (ICCPR):² “Everyone shall be free to leave any country, including his own.” The UN Human Rights Committee in 1999, in its General Comment No. 27³ provided guidance on the meaning of Article 12.2 ICCPR commencing with the clarification 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” (paragraph 8).

The UN Human Rights Committee recognises that in order for the right to leave one’s country to be effective the state must issue the individual with travel documents, in particular a passport: “Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere” (paragraph 9). Thus the right to leave one’s country contained in Article 12.2 ICCPR includes a positive duty on states – to issue documents – as well as a passive one – to refrain from placing obstacles in the way of an individual seeking to leave.

Article 12.3 ICCPR permits states to place restrictions on the right to leave but those restrictions must be provided by law, necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and be consistent with the other rights recognised by the ICCPR. All restrictions of the right to leave must be narrowly interpreted. In General Comment No. 27, the Human Rights Committee warns that any restrictions must not impair the essence of the right and that the relationship of the norm to the exception must not be reversed. Restrictions

1. Universal Declaration of Human Rights, adopted and proclaimed by G.A. Res. 217 A (III) of 10 December 1948, Article 13.

2. All Council of Europe member states are parties to the ICCPR.

3. Available at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/6c76e1b8ee1710e380256824005a10a9>.

should use precise criteria and not confer unfettered discretion on those charged with their execution (paragraph 13). Where there is a permissible purpose, the restrictions must also be necessary to protect that purpose (paragraph 14). Furthermore, the principle of proportionality must be respected not only in the law but also in the administrative practices (paragraph 15).

Finally, the UN Human Rights Committee in General Comment No. 27 warns that “the application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in 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” (paragraph 18). The discrimination on the basis of ethnicity is prohibited under the ground of “other status”. This aspect is particularly important to the subject of this Issue Paper.

The UN Human Rights Committee, sitting in its capacity as a dispute resolution body under the ICCPR Optional Protocol, has considered Articles 12.2 and 12.3 on a number of occasions.⁴ The Committee has consistently upheld the position it took in General Comment No. 27 that the refusal to issue passports constitutes a breach of Article 12.2 and therefore any state taking this action must justify it under Article 12.3 ICCPR.⁵ In respect of justifications, the Committee has held that withholding passport facilities (i.e. access to obtaining a passport) from persons who have not yet completed their military service was not necessarily inconsistent with Article 12.2.⁶

The right to leave a country is also found in other UN human rights treaties. The 1966 UN Convention on the Elimination of All Forms of Racial Discrimination⁷ contains in Article 5 a prohibition on racial discrimination in the exercise of the right to leave one’s country:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

4. Harvey, Colin and Barnidge, Robert Jr (2005), *The right to leave one’s own country under international law*, Global Commission on International Migration.

5. See for instance *Lichtensztein v. Uruguay*, Communication No. 77/1980, which is widely followed subsequently.

6. *Peltonen v. Finland*, Communication No. 492/1992.

7. All Council of Europe member states are parties to this convention.

(ii) The right to leave any country, including one’s own, and to return to one’s country;

Racial discrimination in the Convention is defined as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Article 1.1).

The right to leave a country is also enshrined in the 1990 UN Convention on the Rights of the Child.⁸ In pursuit of the child’s right to be with his or her parents, Article 10.2 provides that:

States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present Convention.

Similarly, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁹ provides in Article 8.1 that:

Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.

The similarity of the wording of the right to leave a country, including one’s own, in all of these human rights conventions indicates the importance of the right and the objective of coherence in its interpretation and application by states.

The 2000 UN Convention against Transnational Organized Crime contains two protocols relevant to the issue of the right to leave a country: the protocol to prevent, suppress and punish trafficking in persons, especially women and children, and the protocol against the smuggling of migrants by land, sea and air. Both these protocols have an impact on the right of people to leave countries. The protocol against trafficking requires states to establish criminal offences in respect of persons who coerce others to move for the purposes of exploitation. The protocol includes a number of provisions intended to provide

8. All Council of Europe member states are parties to this convention.

9. Four Council of Europe member states have signed and ratified this convention: Albania, Azerbaijan, Bosnia and Herzegovina and Turkey. A further two have signed but not yet ratified it: Montenegro and Serbia.

protection to these victims. Article 8 of the protocol provides for the repatriation of the victim to his or her country of nationality or permanent residence. The implementation of this provision by states parties needs to be carried out in a manner consistent with the individual's right to leave. The protocol against smuggling of persons by land, sea and air requires states to establish criminal offences of smuggling of migrants across borders and related activities, such as manufacture of false documents, etc. It specifically states in Article 5 that migrants shall not be subject to prosecution under the protocol.

The European Convention on Human Rights

The special position of the European Convention on Human Rights in the hierarchy of human rights norms in Europe is unchallenged. The 47 member states of the Council of Europe accept this human rights text as constitutive of their right to be members of the Council of Europe. The importance and seriousness of the obligation to deliver to everyone within their jurisdiction the rights contained in the Convention is acknowledged by all member states and reinforced by the duty on all of them to accept the right of complaint to the European Court of Human Rights of any individual who considers that his or her human rights as set out in the Convention have been breached by one or more of those states.

The right to leave a state does not appear in the original Convention. It makes its first appearance in Article 2.2 of Protocol No. 4 to the Convention entering into force on 2 May 1968. So far only Greece and Switzerland have yet to sign this protocol, Turkey and the UK have not yet ratified it. Article 2.2 states first that: "Everyone shall be free to leave any country, including his own." Article 2.3 then provides that: "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." Like the right to leave a country contained in the UN instruments, the wording of the Convention right is consistent with its UN counterparts and the limitations on restrictions are also worded in the same way.

An overview of the European Court of Human Rights' case law concerning the right to leave one's country

The European Court of Human Rights can only receive a complaint from an individual claiming a breach of his or her human rights as contained in the Convention (and protocols) after the exhaustion of all domestic remedies. There have been numerous judgments on Article 2 of Protocol No. 4 to the Convention regarding the right to leave one's state and the right to move freely within a state

between 2006 and 2012.¹⁰ Three judgments relating to the internal freedom of movement are relevant to this paper because of the Court's findings in the first that the breach of the right to free movement was based on the ethnic origin of the individual contrary to Article 14 of the Convention,¹¹ while the second engaged a profound violation of the rule of law,¹² and the third concerned the right of a citizen to be registered in order to exercise her right to free movement.¹³ The respondent states in all other cases were part of the former Soviet bloc – while the internal movement cases were against Russia, the judgments of a breach of the right to leave one's country were against Bulgaria,¹⁴ Romania¹⁵ and Hungary.¹⁶ Cases against other Council of Europe states regarding breaches of Article 2 of Protocol No. 4 to the Convention date from the 1990s and before, with very few exceptions.¹⁷

All of the judgments in respect of the right to leave one's country, except the most recent one (*Stamose*, see below), involved disputes about tax and customs liabilities or criminal activity and prosecution (including bankruptcy) within the state. The jurisprudence of longer date relates to military service obligations, mental illness and minor children. The final judgment considered here, *Stamose v. Bulgaria*, is of particular importance as it relates to a travel ban and the withdrawal of passport facilities because the individual had been expelled from a foreign country back to Bulgaria. However, some of the other judgments are key to understanding the scope of Article 2 of Protocol No. 4 to the Convention not least as they deal with the justifications of travel bans.

In the 2006 judgment *Riener v. Bulgaria*, the Court considered a travel ban and withdrawal of passport facilities on the basis of a tax dispute between

10. The full list can be found at paragraph 29, *Stamose v. Bulgaria*, 27 November 2012, application number 29713/05.

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

12. *Karpacheva and Karpachev v. Russia*, 27 January 2011, application number 34861/04.

13. *Tatishvili v. Russia*, 22 February 2007, application number 1509/02.

14. *Stamose v. Bulgaria*, 27 November 2012, application number 29713/05; *Makedonski v. Bulgaria*, 20 January 2011, application number 36036/04; *Nalbantski v. Bulgaria*, 10 February 2011, application number 30943/04; *Pfeifer v. Bulgaria*, 17 February 2011, application number 24733/04; *Prescher v. Bulgaria*, 7 June 2011, application number 6767/04; *Gochev v. Bulgaria*, 26 November 2009, application number 34383/03; *Riener v. Bulgaria*, 23 May 2006, application number 46343/99. The *Riener* judgment involves a dual national and so two aspects of Article 2 of Protocol No. 4 – on the one hand the right to leave one's own country and on the other the right to leave any country (in so far as Ms *Riener* was an Austrian national in Bulgaria this second aspect was relevant). The right of people to leave countries of which they are not nationals is examined in section 3.

15. *Sissanis v. Romania*, 25 January 2007, application number 23468/02.

16. *Földes and Földesné Hajlik v. Hungary*, 31 October 2006, application number 41463/02; *Bessenyei v. Hungary*, 21 October 2008, application number 37509/06.

17. See *Napijalo v. Croatia*, 13 November 2003, application number 66485/01 which relates to a travel ban as part of criminal proceedings and *Diamante and Pelliccioni v. San Marino*, 27 September 2011, application number 32250/08 regarding bans on the travel of minor children.

Ms Riener and the Bulgarian authorities.¹⁸ The Court considered relevant Article 12 ICCPR as it stated that this served as the basis for the drafting of the Convention counterpart (paragraph 81). It further considered, with approval, the UN Human Rights Committee's General Comment No. 27, in particular the necessity that any restrictions serve a permissible purpose and are necessary to protect that purpose. The General Comment's insistence on a proportionality test to any interference with the right to leave was also welcomed by the Court (paragraph 83). The Court cited with favour a decision of the Human Rights Committee in an individual complaint indicating the intention that the interpretation of Article 12 ICCPR and Article 2 of Protocol No. 4 to the Convention should be convergent (paragraphs 84 and 121).¹⁹ Thus, it is evident that the right to leave one's country also engages a duty on the state to issue travel documents so that the person can exercise the right. Similarly, the withdrawal of travel documents which results in the individual being unable to leave the state lawfully is a breach of Article 2 of Protocol No. 4 to the Convention unless the state can justify its actions on a permissible ground and demonstrate that it is necessary to protect the specific interest. There is a convergence of the interpretation by the UN bodies and the Strasbourg Court of the right to leave one's country. The interpretative guidance and decisions of UN bodies are relevant to understanding the scope of the Convention counterpart.

On the facts of the Riener case, the Court found a violation of the right to leave because although the state had a legitimate aim, its action was disproportionate to that aim. Also, the law lacked clarity as did a number of the practices carried out under it thus making the travel ban an automatic measure of indefinite duration (paragraphs 127, 130). The 2007 judgment in *Sissanis v. Romania* is also about a travel ban based on a tax dispute. Here, although the individual had his passport, it was no longer valid for the purpose of leaving the state, which the Court found to be an interference with Article 2 of Protocol No. 4 to the Convention. Once again the Court accepted that a tax dispute might be a legitimate basis for withdrawing the right to leave a state but there was a breach of the right because the condition of predictability which any such law must fulfil was absent (paragraph 66). National law was too vague for the individual to be able to modify his or her behaviour to comply with it and the secret instructions on its application breached the foreseeability requirement (paragraphs 67-68). In this same category can be put the *Gochev v. Bulgaria* judgment of 2009 for, while it is not about a tax dispute with the state, it is about a ban on leaving the state imposed to enforce a debt. Once again the Court accepted that in principle such a ban could be consistent with Article

18. This type of travel ban has been considered by the Court in previous cases – see *Hentrich v. France*, 22 September 1994, application number 13616/88.

19. *Miguel González del Río v. Peru*, 2 November 1992, Communication No. 263/1987 (UN Human Rights Committee).

2 of Protocol No. 4 to the Convention so long as it is justified and only for so long as it furthers the aim of guaranteeing recovery of the debt (paragraph 49). However, the Court found that the ban was of an automatic nature with no limit on its scope or duration and therefore was not justified and proportionate to the legitimate interest which it was purported to pursue (paragraph 57).

Two Court judgments of 2006 and 2011, respectively, on travel bans relating to criminal proceedings found violations of Article 2 of Protocol No. 4 to the Convention.²⁰ In the first,²¹ the Court insisted that any interference with the right to leave one's country must strike a fair balance between the public interest and the individual's right to leave (paragraph 32). While the Court found that the aim was legitimate, the way in which it was carried out was not. It was characterised by automaticity and constituted a measure of indefinite duration, thus a breach of the right (paragraphs 35-36). In the second case,²² again the Court found the objective was legitimate as it was the maintenance of public order (paragraph 63). However, it did not find the ban necessary in a democratic society as the authorities failed to carry out an assessment of the proportionality of the restriction or to provide sufficient justification for it (paragraph 66).

European Court of Human Rights' case law concerning internal restrictions on movement

Before turning to the Stamose judgment, it is worth shortly considering the three judgments against Russia – *Timishev*,²³ *Tatishvili*,²⁴ and *Karpacheva and Karpachev*.²⁵ The first, *Timishev*, will also appear in section 4 of this paper on the consequences of discrimination on the basis of ethnicity in state interferences with the freedom of movement, but it merits consideration here because of its importance. Mr *Timishev* was seeking to move between two republics in the Russian Federation when he was prevented by state authorities from doing so on the basis of his ethnicity. In finding a breach of Article 2 of Protocol No. 4 to the Convention, the Court noted that the structure of the provision is similar to Articles 8-11 of the Convention and thus the restriction must be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society (paragraph 45). In finding a violation, the Court found that the order was not properly formalised or recorded in some traceable way, which resulted in the Court being unable to carry out an assessment of its contents, scope and legal basis. Thus the restriction on the individual's freedom of movement was not in

20. *Földes and Földesné Hajlik v. Hungary*, 31 October 2006, application number 41463/02; *Nalbantski v. Bulgaria*, 10 February 2011, application number 30943/04.

21. *Földes and Földesné Hajlik v. Hungary*, 31 October 2006, application number 41463/02.

22. *Nalbantski v. Bulgaria*, 10 February 2011, application number 30943/04.

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

24. *Tatishvili v. Russia*, 22 February 2007, application number 1509/02.

25. *Karpacheva and Karpachev v. Russia*, 27 January 2011, application number 34861/04.

accordance with the law (paragraphs 48-49). In *Tatishvili*,²⁶ the state authorities refused to register Ms Tatishvili as a resident, claiming that she was an irregularly present stateless person. This claim was found to be unjustified by the Court and thus her freedom of movement under Article 2 of Protocol No. 4 to the Convention was engaged. She could only exercise this freedom if she was registered as this was the only way she could access state services. The third case, *Karpacheva and Karpachev*,²⁷ is also about the obligation to be registered in a town. Here the main interest is the insistence of the Court on the application of the rule of law. Informal measures and measures of an administrative nature which run counter to the rule of law will constitute a breach of Article 2 of Protocol No. 4 to the Convention.

European Court of Human Rights' case law concerning travel bans and the immigration laws of foreign countries

On 27 November 2012, the Strasbourg Court delivered its judgment in *Stamose v. Bulgaria*.²⁸ Mr Stamose, a Bulgarian national, was deported in 2003 from the USA to Bulgaria for overstaying his permitted period of stay in the country. On his forced return to Bulgaria, the Bulgarian authorities imposed a two-year travel ban on him, having regard, *inter alia*, to a letter from the US embassy sent to the Bulgarian international co-operation division. The travel ban was upheld by the national court on the ground that it was consistent with the aim of the law to impede Bulgarian citizens who had breached the immigration rules of foreign countries from travelling freely (paragraph 12). The Court had regard to academic literature on travel ban legislation in Bulgaria and documents from the European Commission which revealed that EU institutional pressure on Bulgaria in the context of the accession process to diminish irregular migration from Bulgaria to the EU member states had been particularly important in the adoption of the Bulgarian law under which Mr Stamose was banned from international travel (paragraphs 22-23).

The Court noted that this was the first time it had been called upon to determine the compatibility of legislation on travel bans designed to prevent breaches of domestic or foreign immigration laws (paragraph 29). It held that the principles set out in its early jurisprudence on travel bans imposed for other reasons are applicable also to this ground for a travel ban. The objective of the Bulgarian law was to discourage and prevent breaches of the immigration laws of other states and thus reduce the likelihood of those states refusing Bulgarian nationals entry to their territory or toughening or refusing to relax their visa regimes in respect of Bulgarian nationals (paragraph 32). The Court had doubts whether

these objectives actually come within the permitted exceptions of Article 2.3 of Protocol No. 4 to the Convention. It is not evident that this objective pursues the legitimate aims of maintenance of public order or the protection of the rights of others (paragraph 32). But it did not make a finding on this point. Instead it found a breach of Article 2 of Protocol No. 4 to the Convention on the ground that it can never be proportionate automatically to prohibit an individual from travelling to any and every foreign country on account of his or her having committed a breach of the immigration laws of one particular country (paragraph 33). The normal consequence, according to the Court, of a breach of immigration laws is that the individual is expelled and may be banned from entering the country from which he or she has been expelled. That the state of origin of the individual should then multiply that penalty by preventing the individual from travelling anywhere for a period of time is disproportionate.

The arguments of the Bulgarian authorities that such bans are necessary for reasons of international comity and practical reasons to assist other states in the implementation of their immigration rules and policies were not sufficiently persuasive on their own. Even though the Court recognised that the Bulgarian authorities had designed the law as part of a package to allay the fears of EU states in respect of irregular emigration from Bulgaria, this was not sufficient to avoid a breach of the right to leave one's state. The Court held that although it might be prepared to accept that a prohibition to leave one's country imposed in relation to breaches of the immigration laws of another state might in certain compelling circumstances be regarded as justified, the automatic imposition of such a measure without regard to the individual's situation is not necessary in a democratic society (paragraph 36).

Finally, in the 2012 *Nada* case, the Court's Grand Chamber had to consider the claim of an Italian national that his right to respect for private and family life (Article 8) had been breached by the Swiss authorities as they had applied a comprehensive ban on his assets and travel in accordance with a UN Sanctions Committee instruction.²⁹ The result was that he became effectively a prisoner in the Italian enclave of Campione d'Italia, surrounded by the Swiss canton of Ticino, unable to attend a mosque or visit his doctor. The Court held that there was a violation of Article 8 and Article 13 (the right to an effective remedy) because of the actions of the Swiss authorities preventing him from leaving the enclave. Article 2 of Protocol No. 4 to the Convention was not applicable as Switzerland has neither signed nor ratified it. The finding of a violation, however, shows that the right to leave a country is not only embodied in the Convention system through Protocol No. 4, but also constitutes a central element in the exercise of other human rights which states have undertaken to respect.

29. *Nada v. Switzerland*, 12 September 2012, application number 10593/08.

26. *Tatishvili v. Russia*, 22 February 2007, application number 1509/02.

27. *Karpacheva and Karpachev v. Russia*, 27 January 2011, application number 34861/04.

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

The European Union right of all citizens to free movement

As is apparent in the jurisprudence of the Strasbourg Court on the right to leave one's country, a number of EU states have been found in violation of Article 2 of Protocol No. 4 to the Convention. It is worth noting as well that Mr Stamose, the Bulgarian national whose passport was withdrawn by his authorities because he had been expelled from the USA, actually moved to the UK on the basis of his identity document as soon as Bulgaria joined the EU on 1 January 2007 and was living there throughout the Court case. EU law provides a right for all EU nationals and their family members of any nationality to move freely and reside anywhere in the EU for three months without formalities and for longer periods if they are economically active or self-sufficient. The Court of Justice of the European Union (CJEU) has been faced with questions regarding travel bans on EU citizens and their consistency with the EU right of free movement.

The first time the CJEU was faced with the question was in 2008 when a Romanian national, Mr Jipa, challenged a three-year travel ban placed on him in 2007 on account of the fact that he had been expelled from Belgium in 2006 on account of his "illegal residence" there.³⁰ The CJEU applied its jurisprudence on the circumstances in which an EU member state may expel a national of another member state to the latter if this member state sought to prevent its national from leaving. The threshold which a member state must demonstrate has been met before such a ban on movement will be lawful in EU law is that the individual's personal conduct must constitute a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it.

This decision was followed by three more cases, all involving Bulgarian nationals subject to travel bans by the Bulgarian authorities. Mr Gaydarov, a Bulgarian national, had been convicted of drug smuggling in Serbia and served his sentence there. While in prison in Serbia, the Bulgarian authorities withdrew his passport (but for return to Bulgaria). When Mr Gaydarov was released from prison and returned to Bulgaria he challenged the denial of passport facilities on the basis of his EU right to free movement. The CJEU repeated its jurisprudence in Jipa but added also that any denial of the right to free movement must be subject to effective judicial review on both the facts and the law.³¹ In the next case the CJEU went a little further: Mr Aladzhov, a Bulgarian national, was in a tax dispute with the Bulgarian authorities who applied a travel ban to him until such time as the dispute was resolved. The CJEU found that if the travel ban was based exclusively on the tax liability of his company and without any

specific assessment of Mr Aladzhov's conduct and there was no reference to his threat to public policy, the ban was not consistent with EU law. In such circumstances the prohibition would not be appropriate to achieve the objective pursued and went beyond what would be necessary to attain it.³² Finally, Mr Byankov was banned from leaving Bulgaria on the basis of a personal debt which he owed. He did not challenge the ban until three years later when the decision was final. He claimed that the ban interfered with his right to move and leave Bulgaria to go to any other EU country. This time the CJEU was clearer about its position on the right to leave. It held that a travel ban based solely on the grounds of a private law debt was inconsistent with EU law. Further, the right to an effective remedy required the Bulgarian authorities to permit the reopening of the case for Mr Byankov to challenge the ban.³³

Conclusion

The right to leave a country, including one's own, and the right to movement within one's country are an integral part of international human rights law. The importance of the right has been emphasised by the UN Human Rights Committee and interpreted both in a General Comment and in Communications. Any restriction on the right to leave a country must be in accordance with the law, pursue a legitimate aim recognised in international human rights law and be necessary to achieve that aim. The individual circumstances of the person must be taken into account and any interference with the right to leave must be proportionate.

These findings regarding the right to leave one's country have been upheld by the European Court of Human Rights in a series of judgments. While most of these decisions relate to travel bans imposed in relation to various criminal and civil proceedings against the individual, in 2012 the Court applied the same principles to a case where a travel ban was imposed because the individual had breached a foreign country's immigration rules. The Court found that imposing a ban on all foreign travel on a person because he or she had broken one other country's immigration rules was draconian. Further, the legitimacy of the aim of such a travel ban was unclear. The grounds on which a state can establish an exception to the right to leave are set out in the Convention and cannot be unilaterally widened. Neither the requirements of the maintenance of public order nor of the protection of the rights of others were at issue. Unless a travel ban, which by its nature is an interference with the right to leave one's country, can be brought within one of the exceptions, it will not be consistent with European human rights law.

30. C-33/07 *Jipa* [2008] ECR I-5157.

31. C-430/10 *Gaydarov* [2011] ECR I-0000.

32. C-434/10 *Aladzhov* [2011] ECR I-0000.

33. C-249/11 *Byankov* [2012] ECR I-0000.

Section 2 – The right to seek and enjoy asylum

The international framework

The right to seek and enjoy asylum is deeply embedded in the international human rights system. It first appears, in its post WWII form, in the 1948 UN Universal Declaration of Human Rights: under Article 14.1 “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” The recognition by states of refugee status was subsequently given treaty form in the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol. This right accrues to refugees who are defined in the Convention under Article 1 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 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.” The protection which the refugee receives is, first and foremost, a guarantee that he or she will not be sent back to a country where he or she would suffer persecution (*refoulement* – prohibited by Article 33). There are cessation and exclusion provisions which mean that some people, even if they meet the definition of a refugee, may lose refugee status or be excluded from protection on the grounds provided for by Article 1 C-F of the Refugee Convention.

The 1984 UN Convention against Torture extends the *non-refoulement* duty to anyone who is at risk of torture. Article 3.1 states: “[N]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” This prohibition is absolute and does not admit any exception.

As is apparent from the definition of a refugee and beneficiary of protection against torture, refugee recognition is possible once the applicant is outside his or her country of origin. So long as the person is still within his or her state of origin or habitual residence then he or she cannot be recognised as a refugee under the UN Refugee Convention. Similarly, a person who fears torture cannot receive international protection if he or she is still in his or her country of origin or habitual residence. The person must cross an international border and get to another country in order to be able to seek and enjoy asylum and protection from *refoulement*. The right to seek and enjoy asylum has been enshrined, *inter alia*, in the Universal Declaration of Human Rights and Article 18 of the Charter of Fundamental Rights of the European Union, however, it has not become a justiciable human right. Thus there is a gap between the individual seeking to flee persecution or torture and the duty of states parties to the

Refugee Convention and the Convention against Torture not to send them back. A concern of the UN High Commissioner for Refugees is that many states, in Europe and elsewhere, are exploiting this gap 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.

A central question in international refugee and human rights law is the extent to which the obligation on states to refrain from *refoule*-ing a person also engages a duty to allow them to arrive at the borders of the state in order to seek protection. On 7 January 2011, the UN High Commissioner for Refugees issued a briefing note on the right to flee stating: “We are concerned whenever states propose measures that aim at preventing irregular migrants from entering their territory without simultaneously putting concrete guarantees in place for those seeking international protection.”³⁴ He went on to state in the context of the specific situation at the Greek-Turkish border: “While every State has the right to control its borders, it is clear that among the many people crossing Turkey toward the European Union, there are a significant number who are fleeing violence and persecution. Establishing border control mechanisms which are sensitive to the needs of people seeking protection is therefore vital.” The particular problem that the High Commissioner was addressing was the building of a wall on the Greek-Turkish border to prevent people crossing from Turkey into Greece. The human rights issue is the right to flee and to arrive at the borders of a state where the person can seek protection. The more general concern which the High Commissioner is addressing is the introduction by state authorities of measures and mechanisms to prevent people fleeing persecution and torture from arriving at their borders or entering their territory.

There are three other state border control practices which are important to the right to leave one’s country to flee persecution. First there are practices which make arrival of someone fleeing persecution difficult. The most traditional of these is an obligatory visa requirement. Visa requirements are imposed by one state on all the nationals of specified other states (with exceptions of diplomats, etc.). They may act as an obstacle to people of the state subject to the visa requirement to flee to the state which has imposed the visa requirement as in most such cases states do not have specific visas available for people who seek to leave to apply for asylum in the destination state. Further, people who are fleeing persecution rarely have the necessary documents and supporting information to obtain visas for other purposes such as tourism. Taking the

34. UN High Commissioner for Refugees, *As states increase border controls, UNHCR calls for sensitivity for those fleeing persecution*, 7 January 2011, available at: www.refworld.org/docid/4d2ac6962.html, accessed 22 May 2013.

European Union as an example, the majority of refugee producing countries vis-à-vis applications for international protection in the EU member states are on the EU’s visa black list. This means that these persons must obtain visas before travelling to the EU or otherwise arrive irregularly.³⁵ The debate in 2013 regarding the rise in asylum seekers from Albania, Serbia and “the former Yugoslav Republic of Macedonia” in some EU member states following the abolition of visa requirements for these countries in 2009 and 2010 evidences this aspect.³⁶ This issue will be discussed in greater depth in section 5 below.

Another type of border control related practice in this group that can have a detrimental effect on seeking asylum is the question of certain states’ systems of advance passenger information which have the effect of keeping people at a distance from their border controls unless and until the state authorities are satisfied that these are people they are willing to admit. Among these practices with generalised effect are those of states which collect advance passenger information from airlines regarding the identities and basic information of persons who intend to board planes with destinations in their country. The USA ESTA programme is perhaps the best known of these practices. Under this system, every non-US national who seeks to board any commercial flight headed for the USA must already have provided their details by Internet to the US authorities and have received clearance to board the plane. The ESTA system is designed to protect the US territory from people who are threats to its security. The USA is not the only country which has an ESTA system, an increasing number of states use some type of electronic advance information system. These practices may impede people seeking to flee to apply for asylum in another country though the effects are limited to flight to one specific country. So far there is no publicly available information indicating that states which apply advance authorisation systems screen applications for indications that the applicant comes within a category likely to apply for asylum if authorised to fly.

The second type of border control related practice which has consequences for people seeking to flee to apply for international protection relates to some states’ practices of sending immigration liaison officers to third states to assist airlines in identifying persons who should not be permitted to board planes to arrive in their state. One example of this kind of practice was made particularly public in 2004 in a UK court decision. In 2001, the UK and the Czech Republic (before the latter’s accession to the EU) entered into an agreement whereby British immigration officers were posted at Prague airport to advise airlines

35. Regulation 539/2001 establishing visa list (OJ 2001 L 81/1) as amended and Eurostat News Release 48/2013, “Asylum in the EU27”, 22 March 2013, available at: <http://epp.eurostat.ec.europa.eu/cache>, accessed 22 May 2013.

36. Report from the European Commission to the European Parliament and the Council: “Third Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010”, COM(2012) 472 final.

which persons to refuse to carry to the UK. The UK's objective in sending its officials to Prague was to reduce the number of Czech nationals arriving in the UK and applying for asylum. The basis on which the UK officials indicated which people should not be admitted to the planes was ethnicity – that they looked like Roma, as Czech Roma were the majority of those who were applying for asylum in the UK. The practice was challenged by a non-governmental organisation together with some people who had been refused the possibility to board flights to the UK. The matter came before the UK's House of Lords, the highest court of law in the UK at that time.³⁷ Baroness Hale, providing the lead opinion with which the majority of the court agreed, stated that “[t]he inevitable conclusion is that the operation was inherently and systemically discriminatory [on the basis of ethnicity] and unlawful” (paragraph 97).

The third border control practice which is of concern regarding the right to leave a country to seek and enjoy asylum is notably physical blockades by states that prevent asylum seekers from reaching their territory. An early example of this practice was by the US authorities in the 1980s under the title interdiction. According to the US Coast Guard, interdiction is the practice whereby US Coast Guard patrols prevent persons from arriving in US waters and shores as irregular migrants and return them to their country of origin.³⁸ The USA practised interdiction in respect of Haitians on the basis of a presidential decree in 1981 specifically returning any Haitians found trying to leave Haiti by boat to their state. Many of these people were fleeing to seek asylum, as the evidence in the court decisions indicates. The US Supreme Court held that the practice was not a violation of the Refugee Convention prohibition on *refoulement*.³⁹ The UNHCR as *amicus curiae* in the case argued the contrary.

When the matter came before the Inter-American Commission on Human Rights, it took the opposite position, finding that the practice was an unlawful form of *refoulement*:

156. An important provision of the 1951 Convention is Article 33(1) which provides that: “No Contracting State shall expel or return (‘refouler’) a refugee in any manner 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.” The Supreme Court of the United States, in the case of *Sale, Acting Commissioner, Immigration and Naturalization Service, Et. Al. v. Haitian Centers Council, INC., Et. AL.*, No. 92-344, decided June 21, 1993, construed this provision as not being applicable in a situation where a person is

37. *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55.

38. Alien migrant interdiction, available at: www.uscg.mil/hq/cg5/cg531/amio/amio.asp, accessed 22 May 2013.

39. *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993).

returned from the high seas to the territory from which he or she fled. Specifically, the Supreme Court held that the principle of non-refoulement in Article 33 did not apply to the Haitians interdicted on the high seas and not in the United States' territory.

157. The Commission does not agree with this finding. The Commission shares the view advanced by the United Nations High Commissioner for Refugees in its *Amicus Curiae* brief in its argument before the Supreme Court, that Article 33 had no geographical limitations.⁴⁰

Preventing people from leaving their country of origin or a third country by blocking departure or travel by sea is common in the Mediterranean. As regards these practices by countries on the northern shores of the Mediterranean, there is little attention as to whether the people in the small boats are nationals of the state from which they are fleeing or those of some other country who are in transit.⁴¹ The European Court of Human Rights has taken a similar position to that of the Inter-American Commission, which will be discussed further below.

The European human rights framework

The Convention does not contain any specific provision in respect of refugees. However, Article 3 prohibits torture, inhuman or degrading treatment or punishment. The jurisprudence of the Court has interpreted Article 3 consistently with developments in international human rights law as not only prohibiting the practice of torture and other ill-treatment but also the return of a person to any country where there is a real risk that he or she would be subjected to torture, inhuman or degrading treatment or punishment that falls in the ambit of Article 3 of the Convention.⁴² This means that Council of Europe states are prohibited from sending someone to a country where there is such a risk. The question here is to what extent does that prohibition also oblige states to permit people seeking to flee persecution to leave the countries in which they are physically, in order to seek protection in Europe.

The Strasbourg Court has not had to determine the extent to which visa requirements or advance passenger information may be compatible or otherwise with the *non-refoulement* prohibition contained in Article 3. Similarly, the question of the activities of immigration liaison officers has not been brought before it.

However, on 23 February 2012, the Court's Grand Chamber handed down judgment in a case where Italy had practised a form of interdiction, by collecting

40. *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).

41. FRONTEX Report on HERA III Operation 2012, available at: www.frontex.europa.eu, accessed 22 May 2013.

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

people on the high seas and returning them to Libya.⁴³ The applicants, 11 Somali nationals and 13 Eritrean nationals, were part of a group of about 200 individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. The Italian coast guard intercepted their vessels and they were transferred onto Italian military ships and returned to Tripoli, Libya. All of the applicants were fleeing Libya to seek asylum in Italy. The Court found a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of being subjected to ill-treatment in Libya; 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; a violation of Article 4 of Protocol No. 4 to the Convention (the prohibition on collective expulsion) and a violation of the right to an effective remedy (Article 13) in respect of Article 4 of Protocol No. 4 to the Convention.

This brings European jurisprudence into line with that of the Inter-American Commission on Human Rights and the position of UNHCR on the meaning of the prohibition on *refoulement*.

Other provisions of the Convention are also relevant to the right of individuals to enter and remain in a state because of their fears regarding their treatment in their country of origin. Article 2, which guarantees the right to life, is engaged in the same manner as Article 3 where there is a risk of extrajudicial killing and following the entry into force of Protocol No. 13 to the Convention, where there is a risk of the death penalty. Similarly, Article 6, which protects the right to a fair trial in criminal and civil proceedings may be a bar to sending someone to a country where he or she would be subject to trial where the evidence is tainted by torture.⁴⁴

The European Union gave legally binding force to its Charter of Fundamental Rights in December 2009. The Charter includes two provisions which provide protection to people fearing expulsion from an EU state. The first, Article 18, creates a right to asylum with due respect to the Refugee Convention. The Court of Justice of the European Union has, on a number of occasions, made reference to this article. Secondly, Article 19 not only prohibits collective expulsion but also prohibits the removal, expulsion or extradition of a person to any country 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.

Conclusion

The right to seek and enjoy asylum which appears in the Universal Declaration of Human Rights finds expression in the UN Refugee Convention and human

rights treaties in a modified form which prohibits *refoulement* of someone in need of international protection. As a number of states have put into place practices which have the effect of making access to their territory and protection more difficult for potential refugees, and indeed even practices of containment of people in their state of origin rather than letting them travel to a particular state, the question of the correct breadth of a protection right has become critical within the international community.

While one branch of legal reasoning holds that it is for the individual to find his or her way to a state of protection and only once there can the person claim the right to seek and enjoy asylum and to be protected from *refoulement*, international and regional instances have increasingly given the *refoulement* prohibition a wider and more purposive interpretation that may allow the inclusion therein of those who have become entangled in the anti-migration practices of states which have prevented them from arriving within the clearly demarcated sovereign territory of the state. This legal debate has not yet reached its end, yet the UN and regional human rights instances are in accordance that a wide interpretation is necessary to ensure that states fulfil their human rights obligations.

Key to the right to seek and enjoy asylum and to be protected from *refoulement* is the right of people to leave their countries. Until they have done so they cannot be recognised as refugees – only internally displaced persons. The international protection right is only triggered once the individual has managed to cross an international border. For this reason the right to leave one's country is central to the right to enjoy international protection.

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

44. *Othman (Abu Qatada) v. the United Kingdom*, 17 January 2012, application number 8139/09.

Section 3 – Non-nationals’ right to leave a country where they are residents or present

The UN framework

Article 13.2 of the Universal Declaration of Human Rights makes it clear that the right to leave a country is not limited to citizens, it applies to anyone and everyone no matter where he or she is.⁴⁵ This wording is repeated in Article 12.2 ICCPR and elsewhere in human rights treaties which include the right to leave a country, including one’s own. While Article 12.1 ICCPR on the right to move freely within a state is qualified by one’s lawful residence in a state, Article 12.2 ICCPR is not. Thus foreigners who are irregularly present in the territory of a state have the right to leave. The ICCPR is silent on where the individual may go, but the Human Rights Committee has provided some clarification. In its General Comment No. 27 the Committee states that: “As the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State.”

There are a number of aspects which are important here. First the choice of country to which to go is initially at the election of the individual subject to the proposed receiving country agreeing. Second, if the only country to which an individual may go is that of his or her citizenship but the person has a reasonable fear of persecution, or there is a real risk of torture or inhuman or degrading treatment or punishment there then he or she cannot be forced to go there. The person is then entitled to international protection where he or she is present. Third, even if an individual has been expelled from a neighbouring country back to a country of which he or she is not a citizen, the person still has the right to leave again.

The question which then arises regarding the right to leave a country of which one is not a national, relates to the conditions and limitations which can be placed on that right. According to the Human Rights Committee states may restrict the right only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognised in the Covenant (paragraph 11 of General Comment No. 27). Any restriction must be contained in law and must not impair the essence of the

45. Article 13.2 UNDHR: “Everyone has the right to leave any country, including his own, and to return to his country.”

right. The restrictions must not only be permissible but must be necessary to protect the purpose; they must conform to the principle of proportionality and be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result and be proportionate to the interest to be protected (paragraph 14).

The European framework

Article 2.2 of Protocol No. 4 to the Convention follows its counterpart in the ICCPR including as regards the restrictions contained in Article 2.3. The Court has considered on a few occasions the rights of foreigners to leave countries. Recently in a judgment regarding a French national seeking to leave Poland the Court found a violation of Article 2 of Protocol No. 4 to the Convention.⁴⁶ The state had placed the prohibition on departure as part of pre-trial measures to prevent the defendant from leaving the state. The measures were in place for five years and two months (paragraph 25). The Court applied the same reasoning to the question of the right to leave a state where the person is a foreigner as it applies to citizens seeking to leave their state. While it accepted that the measure was in accordance with Polish law the question was whether it was also necessary in a democratic society. The Court had regard to its jurisprudence (set out in section 1 above), but also took into account the fact that the situation cannot be compared to a restriction on an applicant's freedom of movement imposed on him or her in his or her own country (paragraph 39). This is particularly so as the person's family and life are elsewhere – in the country of citizenship where in this case he was seeking to go.

The Court considered that the comparative duration of the restriction in itself cannot be taken as the sole basis for determining whether a fair balance was struck between the general interest in the proper conduct of the criminal proceedings and the applicant's personal interest in enjoying freedom of movement. This issue must be assessed according to all the special features of the case. The restriction may be justified in a given case only if there are clear indications of a genuine public interest which outweigh the individual's right to freedom of movement (paragraph 35). The individual had made nine applications for the travel ban to be lifted and explained he was deprived of contact with his family and that his poor financial situation and his deteriorating health were the result of the ban (paragraph 37). In the Court's opinion, such a travel ban cannot be compared to a restriction on an individual's freedom of movement in his or her own country (paragraph 39). Even though by the time the matter arrived before the Court the travel ban had been lifted, the

46. *Miażdżyk v. Poland*, 24 January 2012, application number 23592/07.

Court found that there had been a violation of Article 2 of Protocol No. 4 to the Convention.⁴⁷

One of the problematic issues regarding the right to leave a country where one is a foreigner which arises in Europe, relates to persons categorised as irregularly present. There has been an increase in the use of detention of foreigners in Europe for the purposes of their expulsion or to prevent their irregular arrival.⁴⁸ The conditions of detention are a matter of increasing concern in a number of Council of Europe countries. The UN Special Rapporteur on the Human Rights of Migrants in his 2012 report on detention of migrants in Greece stated: "The medical services offered in some of the facilities by ... [the] Hellenic Centre for Disease Control and Prevention were highly insufficient. Most of the detention facilities I visited lacked heating and hot water, and the detainees complained about insufficient amounts and poor quality of food, lack of soap and other hygiene products, as well as insufficient clothing and blankets. Of all the detention facilities I visited, Korinthos was the only [one] which allowed the migrants to keep their mobile phones. In the other facilities, access to a phone was not guaranteed for those who did not have money to pay for the calls themselves."⁴⁹ Of perhaps more concern is his report on Turkey where he noted: "I remain troubled about the detention in 'removal centers' of some apprehended migrants in an irregular situation, including families and children. Alternatives to detention must always be explored, especially when families and children are concerned. I have observed that the EU focus on heightening border security has led to an increased prioritization of detention as a solution, including plans for the funding of new detention centers in Turkey by the EU."⁵⁰ In addition he highlighted: "The pending conclusion of the EU-Turkish readmission agreement has also been flagged as a relevant issue regarding EU-Turkish migration dealings. I urge both parties to ensure that the implementation of this agreement is not conducted at the expense of human rights of migrants. In particular, efforts should be made to ensure individual

47. In *Riener v. Bulgaria*, 23 May 2006, application number 46343/99, the Court was faced with a travel ban on a dual Austrian/Bulgarian in Bulgaria. The authorities had confiscated both passports of the individual to prevent travel. While the individual had sought to renounce her Bulgarian citizenship, this had been refused. Although the individual's family life was primarily in Austria, she was nonetheless also a citizen of Bulgaria.

48. Parliamentary Assembly, "The detention of asylum seekers and irregular migrants in Europe", Doc. 12105, 11 January 2010.

49. UN Special Rapporteur on the human rights of migrants concludes the fourth and last country visit in his regional study on the human rights of migrants at the borders of the European Union: Greece, 3 December 2012, available at: www.ohchr.org/EN, accessed 24 May 2013.

50. UN Special Rapporteur on the human rights of migrants concludes second country visit in his regional study on the human rights of migrants at the borders of the European Union: Visit to Turkey, 29 June 2012, available at: www.ohchr.org/en, accessed 24 May 2013.

case assessment to avoid the removal or readmission of vulnerable categories of persons in line with international human rights standards.”⁵¹

The juxtaposition of the EU’s funding for the building of detention centres in Turkey and the conclusion of a readmission agreement with Turkey raises questions whether those persons, who are neither EU nor Turkish nationals, expelled from the EU to Turkey under the readmission agreement will not find themselves in detention centres to prevent them from leaving Turkey, as the EU member states’ fear is that they may seek to return to one of them. The consequence, however, is a potential breach by Turkey of Article 2 of Protocol No. 4 to the Convention, the right of these people to leave the state, together with a potential breach of Article 5 of the Convention, the right to liberty. There will be more discussion of this issue in section 6.

Conclusion

The right to leave a country of which one is not a citizen is fully protected both in international human rights treaties and the Convention. The exceptions to the right must be narrowly interpreted and are subject to even higher standards of safeguard by the Strasbourg Court than in respect of citizens who are blocked in their own country by travel bans. Migrants classified by states as irregular are always entitled to exercise their right to leave the country they are in, by virtue of Article 2 of Protocol No. 4 to the Convention. State authorities risk breaching Article 2 of Protocol No. 4 to the Convention where they put migrants into administrative detention with the objective of preventing them leaving the country altogether. The fact that the conditions of detention of foreigners in some Council of Europe countries violate Article 3, in that they are inhuman and degrading, is unacceptable and makes even more problematic the detention of foreigners altogether.

51. Ibid.

Section 4 – Prohibited discrimination as regards the right to leave a country

The right to leave a country also engages the duty of states to refrain from discrimination on prohibited grounds. This is evident in the ICCPR where Article 2.1 provides that all states parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This aspect of the right to leave has been particularly important, historically, where states have prevented dissidents from leaving the country on the basis that they would undermine the reputation of the country while abroad. Similarly, the practices of some states which prevent women from leaving the state unless they fulfil conditions which are not applicable to men (for instance, permission from male members to their families for the proposed travel) have been criticised by the UN Human Rights Committee as inconsistent with the right to leave on the grounds that the restriction constitutes discrimination on the basis of gender. These and other forms of prohibited discrimination as regards the right to leave, continue to be practised by some authoritarian states. When the state selects individuals who are not permitted to leave the territory (or are refused travel documents), the grounds for that selection must always be examined with anxious scrutiny to ensure that the criteria do not, either directly or indirectly, discriminate on prohibited grounds.

The UN Human Rights Committee has provided guidance on this aspect of the right to leave in General Comment No. 27:

18. The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in 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. In examining State reports, the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of article 12.

The 1966 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) similarly prohibits discrimination in the exercise of the right to leave one’s country. Article 5(d)(ii) specifically prohibits discrimination in the exercise of the right to leave any country, including one’s own, and to return to one’s country. It excludes from its scope state actions based on differences between citizens and non-citizens and legal provisions of states

concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality. The Committee established by the convention issued a General Recommendation on Article 5 in 1996 which provides clarification that the obligation is one to prohibit discrimination in the exercise of rights rather than the creation of rights.⁵² No specific mention is made of the right to leave one's country.

The Convention, like the ICCPR and CERD, prohibits discrimination in the exercise of Convention rights. Article 14 of the Convention states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground 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." This prohibition also applies to Article 2 of Protocol No. 4 to the Convention and is reinforced by Article 1.1 of Protocol No. 12: "The enjoyment of any right set forth by law shall be secured without discrimination on any ground 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." Article 1.2 adds that no one shall be discriminated against by any public authority on any mentioned grounds.

It is important to bear in mind that in its jurisprudence the Court has interpreted the inclusion of "other status" among the grounds of prohibited discrimination as including discrimination on the basis of nationality:

According to the Court's case-law, a difference of treatment is discriminatory, for the purposes of Article 14 (art. 14), if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. Moreover the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention (paragraph 42).⁵³

The Court had to consider the interplay between Article 2 of Protocol No. 4 to the Convention and the prohibition on discrimination in a ground-breaking judgment in 2005. The facts of the case related to the internal movement within a country but provided an opportunity for a clarification on the relationship of the two provisions with implications far beyond the specific facts.⁵⁴ The applicant, Mr Timishev, was an ethnic Chechen whose property in Grozny, Chechnya

had been destroyed in a military operation. He moved to Nalchik, in a neighbouring republic, Kabardino-Balkar, but his application for registration was rejected. On a trip from one part of Russia (Ingushetia) to Kabardino-Balkar he encountered a state checkpoint. The officers at the checkpoint refused him permission to cross into Kabardino-Balkar on the basis of an oral instruction from the Ministry of Interior of the republic not to admit persons of Chechen ethnic origin (paragraph 13). Mr Timishev claimed a breach of Article 2 of Protocol No. 4 in conjunction with Article 14 of the Convention.

For the purpose of the definition of racial discrimination in the judgment, the Court had regard to Article 1 CERD, thus favouring a common approach to the definition of discrimination. In finding a violation of Article 2 of Protocol No. 4, the Court once again held that any restriction on the right to move must be in accordance with the law, which means there must be a law which applies to it. Further, there must be a legitimate aim and that aim must be necessary in a democratic society (paragraph 45). As the discriminatory instruction was based on an oral message, these criteria had not been fulfilled. Regarding the issue of discrimination, the Court noted that the Russian government in its own submissions stated that the instruction barred the 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 (paragraph 54). The Court held that racial discrimination is a particularly invidious kind of discrimination. The Convention requires states to have special vigilance and vigorous reaction in respect of discrimination. The Court considered that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (paragraph 58). Accordingly the Court found that there had been a violation of Article 14 in conjunction with Article 2 of Protocol No. 4 to the Convention.

The reasoning of the Court is clearly also applicable to situations where people are hindered or prevented from leaving a country (including the withdrawal of travel documents or the refusal to issue them) on the basis of their ethnicity, actual or imputed.

Conclusion

The intersection of the right to leave a country and the prohibition of unlawful discrimination is particularly important and salient in Europe. In a Council of Europe where the recognition of the right of free movement of persons has made substantial advances over the past 20 years, the incidences of violation of this right have sometimes been characterised by discrimination first on the basis of political opinion and more recently on the basis of ethnic origin. This

52. General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art. 5): 15/03/1996. Gen. Rec. No. 20 (General Comments).

53. *Gaygusuz v. Austria*, 16 September 1996, application number 17371/90.

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

nexus between free movement and ethnic origin is of particular concern. In the next section, we will examine this in greater depth through the state of affairs in the Western Balkans in particular regarding the Roma.

Section 5 – The situation in the Western Balkans

On 19 December 2009 the EU lifted mandatory visa requirements for short-stay travel of nationals of “the former Yugoslav Republic of Macedonia”, Montenegro and Serbia.⁵⁵ On 15 December 2010, visa requirements were also lifted for nationals of Albania, and of Bosnia and Herzegovina. Visa-free travel to the EU for nationals of these states was premised on individuals obtaining new biometric passports from their states. Visa-free travel is extremely popular with nationals of the Western Balkan countries; it brings their situation into line with that of Croatian nationals (formerly part of Yugoslavia, like all the others except Albania) who have not been subject to visa requirements and whose country acceded to the EU on 1 July 2013. Slovenian nationals became EU citizens on 1 May 2004. Thus there is a symmetry to the EU’s treatment of the Western Balkan region with which the visa liberalisation programme is consistent. Kosovo⁵⁶ is yet to benefit from visa liberalisation, once all conditions set by the EU are met.⁵⁷

Visa liberalisation towards the Western Balkan states has been accompanied by concerns in a number of EU member states that nationals of those states are “abusing” the liberalisation and entering the EU for periods of time, activities or for reasons which were not foreseen or intended by the programme. The issue of periods of time relates to the limitation on time which non-EU nationals (third-country nationals) can spend in the area in the capacity of visitor or tourist, which is three months per six-month period.⁵⁸ Those who stay longer than three months are often called overstayers. The activities which are of concern regarding people from the Western Balkan states are primarily employment related – taking jobs or entering into self-employment when the terms of the short-stay visit do not permit this.

This category is somewhat complicated by the fact that the EU short-stay entry permission does not regulate what people can do during their stay in any one state. This is a matter of national law of the 26 states which participate in the Schengen arrangements. Generally speaking, however, short-stay visitors are not permitted to enter into long-term employment or self-employment. Another

55. This did not affect the visa requirements maintained by Ireland and the UK which do not participate in the common EU visa policy.

56. Throughout this text, all reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

57. Visa liberalisation with Kosovo-Roadmap, available at: <http://eeas.europa.eu>, accessed 27 June 2013.

58. Schengen Borders Code, Regulation 562/2006, 15 March 2006.

aspect of this concern relates to criminal offences in which short-stay visitors may be involved. The third category is the most delicate as it engages a number of the issues already discussed in this Issue Paper – applying for international protection either as a refugee or as someone in respect of whom there is a real risk that he or she would suffer torture, inhuman or degrading treatment or punishment if forced to return to his or her country of origin.

The EU countries which registered a significant increase in asylum applications in 2011 intensified their calls on the Western Balkan governments concerned to properly manage their migration outflows, and a number of bilateral and regional meetings on the matter were held thereafter. Various calls were also addressed by EU officials to the authorities of the respective countries pointing out that it was crucial for them to take all the necessary measures to counteract the increase in asylum seekers promptly and effectively, stressing that if the problem continued the visa liberalisation process would be jeopardised and visa requirements reintroduced. The pressure upon the countries in the region became even greater in May 2011, when the European Commission put forward a proposal to temporarily suspend the visa waiver systems agreed for Serbia, “the former Yugoslav Republic of Macedonia”, Bosnia and Herzegovina, Albania and Montenegro. Under this proposal such a suspension would be possible if a group of EU member states experienced a rise in asylum seekers from these countries above a certain threshold.⁵⁹

On 24 October 2012, EUObserver, a reputable news outlet on EU affairs, published an article on the issue of visa liberalisation stating that six EU member states, that is, Germany, Belgium, France, Luxembourg, the Netherlands and Sweden, were demanding a reintroduction of visas for nationals of the five Western Balkan states. According to EUObserver the reason was the increase in asylum claims from nationals of those states.⁶⁰ The Cypriot Presidency of the EU during the second six-month period of 2012 placed the issue not in the context of asylum but of trafficking in human beings, stressing the need for the Western Balkan states to take action to prevent trafficking in human beings from their countries to the EU.⁶¹ The pressure from the six states, however, has not let up. While mandatory visa requirements have not been reintroduced for the five Western Balkan countries, the pressure has been intense. On 12 September 2013 the European Parliament eventually adopted a visa waiver suspension mechanism to allow the EU to reimpose visa requirements in emergencies. The

59. 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, CommDH(2013)4, paragraph 97.

60. <http://euobserver.com>, accessed 3 June 2013.

61. www.cy2012.eu, accessed 3 June 2013.

mechanism targets all countries that benefit from visa-free travel to the EU and is to be used as a temporary measure in situations such as a sudden high inflow of irregular migrants or a sudden increase of unfounded asylum requests from those countries.⁶² Before examining the political issue it is important to look at the scale of the problem and reflect on whether the numbers merit the political turmoil in the EU or the concern in the Western Balkan states.

The EU’s External Borders Agency, FRONTEX, produces regular risk analyses with information regarding the numbers of persons seeking to enter the EU annually, those refused and those expelled. The Annual Risk Analysis 2013⁶³ provides the following information about movement of persons from the Western Balkan states to the EU and back. The FRONTEX report confirms that there is no systematic collection of data on the numbers of third-country nationals entering the EU annually. However, a one-off data collection effort by the Council in 2009 that only measured movement of people into and out of the EU as a whole during one week (31 August–6 September 2009) revealed that there were 2 130 256 entries and exits by non-visa third-country nationals and 1 464 660 entries and exits by visa nationals.⁶⁴ This indicates that there may be more than 182 million entries and exits by third-country nationals into and out of the EU annually. FRONTEX itself in its risk analysis indicates that in 2012 there were 23 million entries and exits of passengers at the Slovenian/Croatian borders alone.⁶⁵ It is important to remember these overall figures when considering the data below. If more than 3.5 million third-country nationals enter and exit the EU every week, the overall figures on refusal of entry, overstaying and return reveal an extremely lawful EU external border as regards movement of persons. Further, the figures regarding nationals of the Western Balkans are, in light of the overall numbers, insignificant.

Regarding irregular border crossing (persons apprehended crossing into the EU otherwise than at official border crossing points), the only Western Balkan countries subject to visa liberalisation which appear on the FRONTEX statistical table are Albania and “the former Yugoslav Republic of Macedonia” regarding unauthorised border crossing into Greece. As these two countries enjoy long land borders and few official border crossing points it is not perhaps surprising that people cross where there are village and agricultural roads. The figures are as follows:

62. www.europarl.europa.eu, accessed 16 September 2013.

63. www.frontex.europa.eu, accessed 3 June 2013.

64. Council Document 13267/09, 22 September 2009, www.statewatch.org.

65. FRONTEX Annual Risk Analysis 2013, p. 14.

| Unauthorised crossings | 2010 | 2011 | 2012 |
|---|---------|---------|----------------------|
| Albania | 32 451 | 5 022 | 5 398 |
| “The former Yugoslav Republic of Macedonia” | 49 | 23 | 36 |
| Total (all nationalities) | 104 060 | 141 051 | 72 437 ⁶⁶ |

Clearly, visa liberalisation appears to have had the effect of reducing substantially the irregular border crossings of Albanians into Greece. The reported number of nationals of “the former Yugoslav Republic of Macedonia” so crossing is very low.

In respect of third-country nationals staying irregularly in the EU member states (this category is primarily of persons overstaying their permitted period of entry) the FRONTEX report indicates that only Albanian nationals figure in the top ten nationalities of third-country nationals reported as irregularly staying in the EU. The figures are as follows:

| Irregular stays | 2009 | 2010 | 2011 | 2012 |
|---------------------------|---------|---------|---------|-----------------------|
| Albania | 28 810 | 20 682 | 10 207 | 13 264 |
| Total (all nationalities) | 412 125 | 353 077 | 350 948 | 344 928 ⁶⁷ |

The drop from 2010 to 2011 would indicate that in fact visa liberalisation has had a positive effect on overstaying. This may mean that Albanians who enter the EU no longer feel that they have to stay in the EU, albeit irregularly, as they will have so much difficulty getting back in should they leave. Instead they can go home within the period of their permitted stay with the knowledge that when they next want to come back to the EU they can do so without having to go through the onerous procedure of obtaining a visa. Nationals of the remaining Western Balkan states do not appear among the listed nationalities of the top ten overstayers.

The FRONTEX figures on refusal of entry into the EU are slightly more concerning. Three Western Balkan states come within the top ten: Albania, Croatia and Serbia. The figures are as follows:

| Refusals of entry | 2009 | 2010 | 2011 | 2012 |
|---------------------------|---------|---------|---------|-----------------------|
| Albania | 1 672 | 2 324 | 15 947 | 12 036 |
| Croatia | 4 944 | 4 305 | 3 756 | 3 849 |
| Serbia | 3 544 | 6 543 | 6 672 | 5 639 |
| Total (all nationalities) | 113 029 | 108 651 | 118 111 | 115 305 ⁶⁸ |

66. FRONTEX Annual Risk Analysis 2013, p. 65.

67. FRONTEX Annual Risk Analysis 2013, p. 69.

68. FRONTEX Annual Risk Analysis 2013, p. 70.

The number of Croatians refused entry into the EU will drop in the 2013 statistics, since from 1 July 2013 they are citizens of the EU entitled to entry.

The reasons for refusal of Western Balkan nationals’ entry into the EU in 2012 were as follows:

| Albania | Total refused: 12 036 |
|--|-----------------------|
| <i>Top four reasons in order of importance</i> | |
| The individual’s name was entered into the Schengen Information System (SIS) as a person to be refused admission | 6 030 |
| Insufficient means for the visit | 2 920 |
| No adequate justification for the visit | 1 867 |
| False travel documents | 1 083 |

| Croatia | Total refused: 3 849 |
|--|----------------------|
| <i>Top four reasons in order of importance</i> | |
| No valid travel documents | 1 072 |
| Already stayed three months in the Schengen area | 954 |
| Threat to public policy or internal security | 905 |
| SIS entry | 763 |

| Serbia | Total refused: 5 639 |
|--|----------------------|
| <i>Top four reasons in order of importance</i> | |
| SIS entry | 2 056 |
| Already stayed three months | 1 365 |
| Insufficient means for the visit | 965 |
| No valid visa | 644 ⁶⁹ |

What these statistics indicate is the banality of the vast majority of the reasons for refusal of entry, other than the Croatians refused on security grounds. The lack of subsistence resources only appears twice in the list and never as the most common ground for refusal. The justification of insufficient means for the visit appears twice in respect of Albanians and Serbians. For Albanians, it is the second most common reason for their refusal of entry.

Turning then to the available statistics on asylum applications by nationals of the Western Balkan countries in the EU, again according to FRONTEX, the only country which figures in the EU top 10 countries of origin of asylum seekers is Serbia.

69. FRONTEX Annual Risk Analysis 2013, p. 72.

| Applications for asylum | 2009 | 2010 | 2011 | 2012 |
|------------------------------|---------|---------|---------|------------------------------|
| Serbia | 4 819 | 15 460 | 12 416 | 15 940 (5.9% of EU total) |
| Total (top 10 nationalities) | 219 814 | 203 880 | 254 054 | 272 208 |

The statistical information set out above provides a background to the current debates around visa liberalisation in the Western Balkans and in particular the concerns by some EU member states that some nationals of Western Balkan countries are abusing the possibility of visa-free travel. Clearly, for the Western Balkan countries, visa-free travel to the EU is important for a variety of reasons. First, the procedure for obtaining visas to travel to the EU is cumbersome, expensive and many find it humiliating. Many documents must be produced, the individual must be fingerprinted and photographed and all the elements of the visa application are stored in an EU database, the Visa Information System (VIS), and made available to all law enforcement agencies in the EU. For nationals of countries which are not on the mandatory visa list, these obstacles to travel do not apply. The threat of removing a country from the EU's visa white list has important political implications in any of the Western Balkan countries as such a move would undoubtedly be unfavourable for the party in power should it happen. Thus the threat by the EU of a possible removal of the privileged status can be anticipated to result in state activity to reduce the irritant causing the threat.

As is apparent from the EU concerns, the nub of the question is the arrival of nationals from Western Balkan countries seeking asylum in EU states, in particular the six, Germany, Belgium, France, Luxembourg, the Netherlands and Sweden. All indications are, regarding the grounds on which Western Balkan nationals seek asylum in EU member states, that cumulative discrimination against them as persons of Roma ethnicity is central.⁷⁰ Their claims for asylum appear primarily to be based on persecution or inhuman and degrading treatment or punishment on account of their ethnicity. The definition of who is Roma is a highly contested one not least as within groups of persons who might be categorised as Roma there is a deep suspicion of the category, the collection of ethnic data and the purposes to which it may be put. This is expressed in the Council of Europe's report on Roma and Statistics of 2000:

70. See also Council of Europe Commissioner for Human Rights and OSCE High Commissioner on National Minorities, "Recent migration of Roma in Europe", 2nd edition, October 2010, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1536357>.

a good proportion of the Roma/Gypsy representatives and populations who are opposed to any form of collection of data on an ethnic basis argue that in the past these data have always been used against them, the most terrible example being the Holocaust during the second world war, which was made possible by the existence of lists identifying the Roma/Gypsy population. In addition, it has to be borne in mind that the police services in many member States make frequent use of crime statistics compiled on an ethnic basis, which reinforce the prejudices and stereotypes of the majority population.⁷¹

The human rights issues which face Roma in many parts of Europe, not only the Western Balkans, are evidenced most poignantly by the judgments of the European Court of Human Rights regarding abuses:⁷²

- ill-treatment by law enforcement authorities ("the former Yugoslav Republic of Macedonia", Romania, Bulgaria);
- publication in government-funded publications of anti-Roma sentiment (Turkey);
- forced or coerced sterilisation of Roma women (Slovakia);
- forced eviction from caravan sites (UK, Bulgaria);
- racially biased police investigations including failure to investigate racist homicide (Greece, Croatia, Romania, Bulgaria);
- attacks on Roma villages and destruction of property (Romania, Slovakia);
- segregation in schools (Czech Republic, Greece, Croatia, Hungary);
- validity of marriages (refusal of survivors' pensions) (Spain);
- prohibition of standing for election (Bosnia and Herzegovina).

A 2012 joint EU Fundamental Rights Agency and United Nations Development Programme report on the situation of Roma in 11 EU member states (including both central and eastern European states but also western European ones)⁷³ found that:

- 20% of Roma were on average not covered for health care;
- 45% live in housing lacking at least one basic amenity (indoor kitchen, indoor toilet, indoor shower/bath or electricity);
- 90% live in households with income below national poverty standards;

71. Council of Europe, MG-S-ROM (2000) 13, 22-23 May 2000.

72. See Court's Factsheet on Roma and Travellers, May 2013, available at: www.echr.coe, accessed 29 July 2013. See also Council of Europe Commissioner for Human Rights (2012), Human rights of Roma and Travellers in Europe, Council of Europe, Strasbourg, available at: www.coe.int, accessed 29 July 2013, and below in section 6.

73. FRA/UNDP, The situation of Roma in 11 EU member states, Luxembourg, 2012. The 11 member states included in the survey were: Bulgaria, the Czech Republic, Greece, Spain, France, Hungary, Italy, Poland, Portugal, Romania and Slovakia.

- 40% live in households where somebody had to go to bed hungry at least once in the last month because they could not afford to buy food.

In a situation where there is such generalised discrimination, racism and social exclusion in evidence, the possibility that some individuals will find themselves singled out for persecution rises substantially. What appears to be happening in the Western Balkans is that as EU member states increase pressure on these states to the effect that if the numbers of their nationals applying for asylum in the EU does not decrease, then all nationals of the state will be subjected to a mandatory visa requirement (again), the authorities of these states are seeking to restrict the departure of individuals who they consider at risk of applying for asylum, that is, the Roma.

The Council of Europe Commissioner for Human Rights in his report following his visit to “the former Yugoslav Republic of Macedonia” in November 2012⁷⁴ was advised by the Minister of Interior that between December 2009 until the end of November 2012 about 7 000 citizens of this state had not been allowed to leave the country. He also received indications that passports are regularly confiscated from those returned to the country by EU member states’ authorities. Further exit control measures are planned. A law was adopted in October 2011 which permits the confiscation of passports for up to one year where the individual has been returned by force to the country, and a new criminal offence of transporting or facilitating the transport of people to an EU member state contrary to the law of the EU was added to the criminal code.⁷⁵ The Commissioner has also been informed that in December 2012 a new offence was introduced into the Serbian criminal code. The offence concerns “enabling abuse of claiming asylum rights in a foreign country” and consists of criminalising the provision of assistance, through, for example, transportation, thus obtaining material benefits, to citizens of Serbia seeking asylum out of that country.

These are not isolated cases. This picture of developments mirrors what happened in Romania between 1997 and 2001 when the country was struggling to convince the EU to take it off the visa black list. According to the Commission’s report on the exemption of Romanian citizens from visa requirements,⁷⁶ in 1997 and 1998 the Romanian authorities created new laws making it a criminal offence to try to emigrate to the EU irregularly (paragraph 2.1.1). Among the penalties for such an attempt was withdrawal of passports. This penalty

74. 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, CommDH(2013)4, 9 April 2013.

75. Ibid., p. 24.

76. Report from the Commission to the Council, “Exemption of Romanian citizens from visa requirements”, COM(2001) 361 final.

was automatic in respect of repatriated Romanians. Between 1998 and 2001, 59 602 Romanians were deprived of their passports on these grounds. Another 27 409 were forbidden from exiting the country (paragraph 2.1.3). That the majority of these people were probably of Roma ethnicity is apparent from the Commission’s recognition that economic and social circumstances drove Romanians to seek to emigrate to the EU and that for this reason special efforts had to be directed towards Romanian Roma (paragraph 2.3). This issue disappeared as one of border controls exclusively when Romania became an EU member state on 1 January 2007.

These measures reveal the interplay between action taken in accordance with the objectives of the EU’s Global Approach to Migration and Mobility⁷⁷ and the actions of the authorities of states around the EU to assist the EU in the pursuit of its migration and mobility related goals.

In light of the importance which asylum statistics have played in the political debate, it is worth remembering, before we leave this issue, that there have been very wide variations in asylum applications from nationals of the Western Balkan states over the 2010-13 period. For instance, information from FRONTEX indicates that the number of asylum applications by Western Balkan nationals, in the top five EU/Schengen states, decreased by 44% in January 2013 compared to the same month in 2012 (–61% for Serbia, –45 % for Montenegro and –46% for “the former Yugoslav Republic of Macedonia”). However, there was a considerable increase of asylum seekers from Albania (+74%) and Bosnia and Herzegovina (+51%).⁷⁸ Devising policy on the basis of such fluidity in numbers may not necessarily be wise.

Conclusion

The statistical information available on mobility of persons from the Western Balkans shows that visa liberalisation does not appear to have had a dramatic impact on the operation, effectiveness or application of EU external border controls. Indeed, since the lifting of visa requirements for nationals of Western Balkan countries, there appears to have been a substantial drop in the numbers of Albanians staying in the EU irregularly – no doubt the consequence of the knowledge that if they go back to Albania, they will not necessarily be blocked by the visa requirement from coming back to the EU. There has been a substantial rise in the refusals of entry into the EU to Albanian nationals. This was accompanied by a spike in the number of Serbian nationals refused

77. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “The global approach to migration and mobility”, COM(2011) 743.

78. Report from the Commission to the European Parliament and the Council, “Third biannual report on the functioning of the Schengen area 1 November 2012-30 April 2013”, p. 6.

entry after liberalisation but this appears to be dropping off. The reason for the refusal of entry to Albanians is primarily because they are persons whose identity has been entered into the EU database (Schengen Information System) to be refused entry into the EU. This may also explain the number of Albanians refused for using false documents (including genuine documents which do not belong to the person presenting them). For Serbian nationals as well, a Schengen Information System entry is the most common ground for refusal of entry.

In view of the number of third-country nationals entering and leaving the EU annually, the number of Western Balkan nationals who are refused admission or identified as irregularly staying in the EU is so low as to be statistically insignificant. Turning to the issue of asylum applications in the EU, Serbia is the only Western Balkan country in the top ten countries of origin of asylum seekers in the EU and accounted in 2012 for 5.9% of the total. Available evidence indicates that the majority of these asylum seekers are Roma who seek asylum because of the degree of social exclusion which they suffer in Serbia. This is also the case in respect of asylum seekers from the rest of the Western Balkans, though their numbers are substantially lower than those of Serbian nationals. The asylum determination authorities of the main EU states where nationals of the Western Balkan countries make their applications for international protection only determine that there is a need for protection in few cases. It is because of these low recognition rates that those member states concerned have raised the possibility of the reintroduction of visas for some Western Balkan states in order to prevent potential asylum seekers from coming to the EU.

This position is of dubious consistency with the member states' obligations under the Refugee Convention and the European Convention on Human Rights. Just because recognition rates are low among nationals of one state seeking asylum in another does not relieve states parties of their duty to provide protection to those who are refugees or otherwise in need of international protection. The obligation on states in international law to provide protection is not dependent on statistics. States are obliged to examine each claim for international protection impartially and in accordance with a fair and effective procedure taking into account all the relevant facts and evidence. Measures which seek to evade or frustrate that obligation are of questionable consistency with the Refugee Convention and the European Convention on Human Rights.⁷⁹

The fact that few people from a specific state are recognised as needing international protection in an EU member state cannot be used to deny the possibility of a need for protection to others from that state. This is particularly critical in

79. The Court had to consider such an issue in its judgment in *M.S.S. v. Belgium and Greece*, 21 January 2011, application number 30696/09; Moreno-Lax, Violeta, "Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*", *European Journal of Migration and Law* 14.1 (2012), pp. 1-31.

an EU where the recognition rates for people from the same state who apply for asylum in different EU countries vary so dramatically. For example, in January 2013 the UN High Commissioner for Refugees noted that two European states (Germany and Sweden) had provided international protection to almost all Syrian asylum seekers, in 19 other European states the recognition rates were more than 70%, while five European states had not granted protection to any Syrian citizens or only in an insignificant number of cases.⁸⁰ The duty of states to consider each application for international protection on its merits should not be undermined by arguments based on statistics. Nor should they be instrumentalised in debates on visa policy. Such a use of asylum statistics risks placing the most vulnerable people in the country on which the visa debate is focused in an even more precarious position. Indeed, it may increase their need for international protection outside their state rather than diminish it. The public policy consequences in the targeted state may well be to seek to prevent their vulnerable citizens from leaving. This aspect will be further developed in the next section.

80. Informal Meeting of the Justice and Home Affairs Council, Dublin, 17 January 2013, Remarks by António Guterres, available at: www.refworld.org/docid/50fe4b322.html, accessed 27 June 2013.

Section 6 – The impact of the EU externalisation of border control policies on the right to leave a country

In this section we will examine the specific EU measures which have the effect of transferring outside the territory of the EU decisions on access to the EU territory. The focus will be on how these measures are applied and how that application impacts states where the measures are carried out. The measures of externalisation of EU border controls on persons are carried out in conjunction with the state authorities of those territories in which the controls take place. Thus 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.⁸¹

The actions of third states are often the result of discussions, advice and assistance by EU actors. The EU press release on 22 May 2013 announcing a mission to support border security in Libya is a good example.⁸² According to the statement, the EU carried out its own needs assessment of Libyan border controls in 2012, which forms the basis of the EU mission's scope. The objective is to provide capacity building for enhancing the security of Libya's land, sea and air borders and of key importance is the management of migration flows (and human rights protection). The EU has allocated €30.3 million for the first twelve months. It is worth remembering that according to FRONTEX "Throughout 2012, detections [of persons seeking to enter the EU irregularly] in the Central Mediterranean region steadily increased to reach an annual total of 10 379 (14% of the total). Most migrants were from sub-Saharan countries and departed from Libya."⁸³ The Strasbourg Court noted in *Hirsi Jamaa*⁸⁴ that the human rights abuses that the Italian authorities carried out in respect of collecting from the sea and returning to Libya the individuals concerned, took place, according to the Italian Minister responsible, in the context of bilateral agreements on border controls between Italy and Libya. The Court also noted

81. See European Court of Human Rights (GC), *Hirsi Jamaa and Others v. Italy*, 23 February 2012, application number 27765/09; Moreno-Lax, Violeta, "*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus extraterritorial migration control?" *Human Rights Law Review* 12.3 (2012), pp. 574-98.

82. Presse 189, Document 9478/13, 22 May 2013, available at: www.consilium.europa.eu, accessed 12 June 2013.

83. FRONTEX Annual Risk Analysis 2013, available at: www.frontex.europa.eu, p. 20, accessed 12 June 2013.

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

that “[a]fter having explained that the operations had been carried out in application of the principle of cooperation between States, the Minister stated that the push-back policy was very effective in combating illegal immigration” (paragraph 13). In light of this history, the EU Border Assistance Mission to support border security in Libya raises concerns about human rights compliance and the right to leave a country particularly in light of the very substantial budget allocated to it.

There are four main EU border control externalisation measures which have the effect of hindering people from leaving countries if the destination is towards the EU:

- visas;
- carrier sanctions on transport companies linked with document controls;
- readmission agreements;
- push-backs.

Visas

The way in which EU visa policy and in particular the possibility of visa-free travel has operated to encourage countries to prevent some of their citizens from travelling has already been raised in the previous section. The pressure on states which want to maintain their visa-free status to take action to prevent some of their citizens leaving the state comes from many sources. For instance, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) voted, on 8 April 2013, in favour of suspending visa-free regimes in case of “substantial and sudden increases” in irregular migrant numbers or unfounded asylum applications. This provision has been adopted in the EU’s new border package.⁸⁵ One of the most problematic aspects of these developments is that EU pressure results in state authorities withdrawing passport facilities from their citizens on the basis of ethnic profiling regarding who is suspected of being likely to cause trouble to the EU (see also the previous section). The Commission’s third report on the post-visa liberalisation monitoring for the Western Balkan countries provides substantial information on this process of knowledge transfer with the objective of changing the strategies of state authorities towards their own nationals.⁸⁶ The objective of the report is to set out the actions undertaken under the post-visa liberalisation monitoring mechanism (of the Commission), to assess

85. “Council and the European Parliament reach a provisional agreement on the Schengen Governance legislative package”, available at: www.consilium.europa.eu, accessed 27 June 2013.

86. Report from the Commission to the European Parliament and the Council, “Third Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries in accordance with the Commission Statement of 8 November 2010”, COM(2012)472 final.

progress made in the relevant Western Balkan countries and to identify next steps and the concrete actions to be taken (by the Western Balkan countries in particular, page 2).

The report examines each Western Balkan state separately and outlines issues which could influence an EU decision to reimpose visas. Regarding Albania, document security and border management are important. The work of the Albanian authorities towards a database linking border crossing points and the civil registry appears to be considered progress. There is no question why such a database is a good idea. The majority of persons on the Albanian civil registry are Albanians. Why is it valuable to track their exits and entries against the civil registry database and why is such tracking consistent with the right to respect for private life in Article 8 of the Convention? No answer is provided and indeed the question is assiduously avoided. The report suggests, immediately after this information about the linking of databases, that risk analysis and threat assessment capacities need to be reinforced by Albania. What is not clear is to whom or what the risk or threat is addressed. In the context of the report, the threat appears to be to the integrity of the EU border control system. But the creation of risk analyses and threat assessments about Albanians seeking to leave their country or re-enter seems to imply profiling of some Albanians as more entitled to leave than others (re-entry does not appear to be a problem for the EU, see below under readmission agreements). Similarly, in respect of Bosnia and Herzegovina, the focus is on document security and border management, including integration of EU border management law into national legislation. For “the former Yugoslav Republic of Macedonia”, again, there is a focus on linking the border crossing points with the central database of the Ministry of Interior which is separate from the national database for foreigners. Montenegro is reported as increasing IT equipment and surveillance at its border crossing points. As regards Serbia, the need to link border crossing points with the central database of the Ministry of Interior is a priority. According to the Commission, the domestic sharing of data and risk profiles remains deficient.

Behind these apparently neutral terms is the question of sharing what data about whom, for what purpose and with whose authority (the Article 8 of the Convention questions), but also the risk profiles. The report itself states that the majority of asylum seekers in the EU from the Western Balkans are Roma. Thus the risk profile, for the EU’s purposes, is likely to include ethnicity if it is to achieve the objective. This raises the question of compatibility of the profile with Article 14 of the Convention (in conjunction with Article 2 of Protocol No. 4 to the Convention) and Protocol No. 12 to the Convention which prohibit discrimination on grounds of ethnic origin. Further, the report itself acknowledges that there has been only a slight improvement in the status of Roma in Serbia and that further serious efforts including financial resources

are needed to improve the status and socio-economic conditions of the Roma. The report recognises that the Serbian Roma continue to be the most vulnerable and marginalised minority. A similar picture emerges regarding the Roma of the other Western Balkan states.

Carrier sanctions

As long as mandatory visa requirements apply to nationals of a state, EU law obliges transport companies to ensure that all people they transport to the EU have the required visas. 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. The Commission report on visa liberalisation⁸⁷ suggests that Western Balkan countries are (correctly) adopting measures to control travel agencies and transport companies “potentially involved in misinforming citizens about asylum benefits”. Bosnia and Herzegovina is reported to be co-ordinating actions of its law enforcement agencies to investigate possible irregularities and has begun prosecutions against some persons (on what criminal charges is not specified). “The former Yugoslav Republic of Macedonia” has introduced a new criminal offence of facilitation of the misuse of the visa-free regime. The consequence of these measures, presented as positive achievements according to the Commission, is that travel businesses are made responsible for the actions of passengers they transport. Other than checking that passengers have valid travel documents, it is beyond the power of travel companies to investigate the objectives and intentions of their passengers. Indeed such efforts are likely to be a breach of contract. By holding businesses responsible for passengers’ actions after they travel, the laws in the Western Balkans place an impossible burden on those businesses to attempt to guess which passengers to transport and which to refuse transport to. If these businesses use the ethnicity-based risk profiles which appear to be advocated elsewhere in the report, they will be in breach of national anti-discrimination legislation, and their state may be in breach of the Convention for failing to control them.⁸⁸

Transport companies are not entirely left on their own in seeking to determine which passengers to carry and which to refuse. In 2004, the EU established a network of immigration liaison officers (ILOs)⁸⁹ consisting of representatives of the member states who are posted in a non-member state in order to facilitate the measures taken by the EU to combat irregular immigration. The reports on the activities of this network are not publicly available and when

87. Ibid.

88. See Council of Europe Commissioner for Human Rights, “Airlines are not immigration authorities”, Human Rights Comment, 12 October 2010, available at: <http://commissioner.cws.coe.int>, accessed 27 June 2013.

89. Regulation 377/2004 on ILO network (OJ 2004 L 64/1) as amended.

information is released under freedom of information requests it is redacted.⁹⁰ In response to a series of questions regarding the activities of ILOs in Africa from the European Parliament, the Council replied with only vague indications of the activities.⁹¹ It is thus difficult to form a clear picture of the impact of the European ILO network on people seeking to flee their state. However, from the available information one of the activities of ILOs appears to be to assist transport companies in determining the validity of documents of potential passengers and their suitability for travel.

Readmission agreements

The EU has established readmission agreements with all the Western Balkan countries.⁹² On 23 February 2011 the Commission issued a communication on the evaluation of the EU readmission agreements in general.⁹³ The objective of EU readmission agreements is to facilitate the expulsion of unwanted persons from the EU first towards their home state (for nationals of the parties to the agreement) and secondly to the state where the unwanted persons last stayed before arriving in the EU (for third-country nationals who transited through the readmission agreement parties’ territory before arriving at the other). Regarding the second category, as the Commission itself acknowledges, “all third countries hold a deep aversion to the [third-country nationals] clause, arguing that they cannot be held responsible for citizens of third countries and that they therefore do not have an obligation to readmit such people.”⁹⁴

According to the data provided by the Commission in this evaluation,⁹⁵ in 2009 (the last year for which the data is provided) 62 675 Albanians were expelled to Albania from EU member states; 845 Bosnians were expelled to their country, 4 105 Serbians, 1 065 citizens of “the former Yugoslav Republic of Macedonia” and 155 Montenegrins, all to their own states. The Commission was not able to determine whether these expulsions took place in accordance with the readmission agreements with the countries. As regards third-country nationals, the EU expelled 1 175 of them to Ukraine in 2009 under the agreement with that country. The Commission considers that readmission agreements are an important tool to tackle irregular migration.⁹⁶ However, among the problems

90. For example: Council Document 8088/12, 3 April 2012 on the ILO report Ukraine.

91. Council Document 16415/07, 11 December 2007.

92. Entry into force: Albania, 1 May 2006 and all the rest on 1 January 2008 (SEC(2011)209).

93. Communication from the Commission to the European Parliament and the Council, “Evaluation of EU Readmission Agreements”, COM(2011)76 final.

94. Ibid., p. 9.

95. Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements, SEC(2011)211.

96. COM(2011)76 final, p. 4.

for the EU with expulsion of people from its member states is how to ensure that those expelled do not return to the EU thereafter. One solution is to put the names of people expelled into the SIS II database to be refused admission. The statistics on the reasons for refusal of entry into the EU to Albanian nationals cited in the previous section indicate that this seems to be common practice as regards nationals of that country.

The Commission's report on visa liberalisation⁹⁷ stresses the importance for the Western Balkan countries to integrate returnees. It applauds the implementation in Serbia of a reintegration strategy which includes a database tracking returnees' access to public services. The compatibility of this database with the right to respect for private life (Article 8 of the Convention) is doubtful. The criterion for tracking citizens' access to public services, on the basis that they have been expelled from another country, is arbitrary. The purpose of the tracking is also highly questionable. If citizens who are expelled from a foreign country do not use public services what is the consequence? The Commission also reports positively that Serbia has opened three reception centres for returnees. The allocation of public housing to persons who are in need, possibly because they have been expelled from a foreign country, is always a good use of public funds. However, the use of the term "reception centres", a phrase normally used for asylum seekers and often including an element of detention, is worrying. These reception centres do not appear to be the equivalent of public housing for those in need. The report also states that "returnees' access to jobs, education, training and recognised qualifications is still limited".⁹⁸ The fact is that returnees are likely to be Roma, that they may well have made asylum applications in EU states which have been rejected and that the reasons for their asylum applications were probably cumulative discrimination amounting to persecution. The recognition of the lack of substantial progress towards the social inclusion of Roma in the Western Balkans undermines the soundness of the measures proposed by the Commission which the countries of origin ought to be taking to prevent their citizens from leaving their state if the authorities suspect they will, in the words of the Commission, "abuse" visa liberalisation by leaving again. There is an incoherence which borders on hypocrisy at the heart of the Commission's report.

The situation in respect of third-country nationals may be even more problematic. When they are sent to a country other than their own, for instance to Ukraine, they have little chance of being integrated into that country. Indeed, Ukraine is likely to be interested in expelling them onwards to their state of origin, if this is possible. However, in the meantime, while the Ukrainian authorities are looking into the possibility of expelling these third-country

97. COM(2012)472 final, p. 13.

98. COM(2012)472 final, p. 13.

nationals onwards somewhere, they need to do something with them. If these people are allowed to make a free choice, there is a strong possibility that they will try to go back to the EU from where they have just been expelled. To prevent such moves, one option is to place them in detention for the purposes of expulsion. However, detention is also an expensive option. It is not surprising then to find that in 2011, according to the Global Detention Project, an interdisciplinary research initiative based at the Graduate Institute, Geneva, the EU allocated 30 million euros to build nine new detention centres in Ukraine.⁹⁹

Push-backs

The UN Special Rapporteur on the rights of migrants stated in his reports on EU border controls:

In relation to the Greek border, Italian authorities confirmed that they are preventing irregular migrants from disembarking from vessels arriving from Greece, thus forcing them to return to Greece. I met with Afghan migrants of minor age who had passed through Greece and experienced these push backs. This has been justified as a case of implementation of the 1999 Greece-Italy readmission agreement, and described as a normal practice between Schengen States ... I heard from migrants who transited through Greece regarding extreme xenophobic violence against migrants, Italy should formally prohibit the practice of informal automatic "push-backs" to Greece.¹⁰⁰

In relation to this, I urge the Greek authorities to undertake all the necessary measures to combat discrimination against migrants. I am deeply concerned about the widespread xenophobic violence and attacks against migrants in Greece, and I strongly condemn the inadequate response by the law enforcement agencies to curb this violence, and to punish those responsible.¹⁰¹

Push-backs are measures which states take, as in the case highlighted by the UN Special Rapporteur, to prevent people entering their territory by pushing them back into the territory which they just left or tried to leave. The practice has been condemned as inconsistent with the Convention prohibition of collective expulsion (Article 4 of Protocol No. 4 to the Convention) and Article 3, the prohibition on torture, inhuman and degrading treatment or punishment.¹⁰² It may also constitute a breach of Article 2 of Protocol No. 4 to the

99. Global Detention Project, "Ukraine detention profile", available at: www.globaldetentionproject.org, accessed 12 June 2013.

100. UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy, 8 October 2012, available at: www.ohchr.org, accessed 24 May 2013.

101. UN Special Rapporteur on the human rights of migrants concludes the fourth and last country visit in his regional study on the human rights of migrants at the borders of the European Union: Greece, 3 December 2012, available at: www.ohchr.org, accessed 24 May 2013.

102. European Court of Human Rights (GC), *Hirsi Jamaa and Others v. Italy*, 23 February 2012, application number 27765/09.

Convention as the effect is to prevent people leaving the country they are in. In its General Report 2011 (the most recent available) FRONTEX provides a list of joint operational activities carried out that year.¹⁰³ It carried out six sea border operations – 365 days in the Atlantic waters between north-western African countries and the Canary Islands, 228 days in the western Mediterranean, 45 days in western Mediterranean sea ports (there is no indication if these are within the EU or outside it), 315 days in the central Mediterranean, 271 days in the central Mediterranean (Ionian Sea) and a permanent operation in the eastern Mediterranean. The opportunity for push-backs is quite substantial. Italy, the state found by the Strasbourg Court to be in breach of its human rights obligations contained in the Convention regarding the push-backs to Libya in 2009, participated in all the operations and indeed led both the operations in the central Mediterranean. These operations appear consistent with the operations in respect of which the UN Special Rapporteur took evidence.

Finally, in this category one must note one of the FRONTEX co-ordinated land border joint operations in which three EU states participated (Austria, Poland and Romania) which took place over 29 days exclusively at the land border between Moldova and Ukraine (neither of which are EU member states, but both of which apparently also participated in the action).¹⁰⁴

Conclusion

The role of the EU as an actor in the border control policies, laws and practices of other states has expanded and developed in the 21st century. Notwithstanding the EU's commitment to human rights and fundamental freedoms, the compatibility of its activities engaging other states to carry out, either alone or with the participation of EU states, border practices which breach Article 2 of Protocol No. 4 to the Convention (the right of all people to leave the country where they are) is questionable. The instrumentalisation of EU visa policy, in particular the incentive of visa-free travel, has been much in evidence. States seeking to obtain or retain visa-free status for their citizens are advised by EU institutions, usually the Commission, to take actions such as withdrawal of passport facilities which may breach the right of their citizens to leave the country. At the behest of EU institutions, travel businesses are encouraged or threatened with prosecution if they do not check the purposes for which their potential customers seek to use their services. In the context of readmission agreements, not only does the EU expel citizens to their own countries but also the primary object of those agreements is to expel third-country nationals to those countries as well. In order to ensure that people the EU has expelled do not

come back to the EU, it pays for detention centres for third-country nationals and encourages its neighbouring states to set up elaborate surveillance systems to make sure that their own citizens are staying put. Finally, when these other measures are insufficient, EU member states' border guards co-ordinated by FRONTEX carry out operations at sea which are intended to keep people away from EU borders, as well as at land borders between third states for the purpose of making sure that third-country nationals never get to EU borders hundreds of kilometres away.

None of these measures are without problems as regards the right of everyone to leave their country. Each one of these measures and policies pushes in the direction of preventing people from leaving their countries and encouraging third states to carry out this work of dubious human rights consistency for them.

103. FRONTEX, "General Report 2011", available at: www.frontex.europa.eu, accessed 16 June 2013.

104. *Ibid.*, p. 43.

General conclusions

This Issue Paper examines the right of every person to leave the country where they are. This is a fundamental right recognised again and again in UN human rights treaties and their regional counterparts not least because many other human rights are dependent on it. The refugee cannot obtain protection if he or she cannot leave his or her country. The person fearing torture, inhuman or degrading treatment or punishment in a country will need to exercise the right to leave in order to find refuge elsewhere. However, the right to leave one's country, which has been so important in Europe throughout the 20th century, has now come into conflict with the border and immigration policies of many of those states which were the strongest supporters of human rights and fundamental freedoms before 1989 and the end of the Cold War. The central problem is the efforts of a number of European states, most of them member states of the European Union, and many of the policies being pursued through the instruments of the EU, to move the effective control of their borders beyond their own territorial borders into those of their neighbours, the high seas or even farther away. The objective of these states is to seek to ensure that unwanted potential migrants do not arrive at the borders of their territories. The unintended victim, however, is the human right to leave a country, including one's own.

The long history of the human right to leave a country is set out in this Issue Paper. Not only is the right found in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights but also in the International Convention on the Elimination of All Forms of Racial Discrimination. It is also found in Article 2 of Protocol No. 4 to the Convention. The European Court of Human Rights has had to consider the consistency of travel bans of various kinds with the right to leave one's country. It has consistently held that the right to leave one's country is paramount and that any interference with that right must be justified pursuant to a legitimate aim recognised in international law and must be necessary to the achievement of that aim. The Court questioned whether seeking to assist governments of other states to implement their immigration laws, for instance by banning from leaving a citizen who has been expelled from another state, is a legitimate aim. This is, not least, an interference that has the effect of preventing the individual from going anywhere. Further, the Court was not convinced that the aim claimed by the state, that other citizens of the state would not be subject to additional controls by the third country, was legitimate. The Court of Justice of the EU, considering similar cases where citizens were subject to travel bans preventing them from leaving one state, found that only a serious ground of public policy could justify such actions.

The intersection of the right to leave a country with other human rights, such as the right to seek and enjoy asylum, is critical. If people cannot leave one

country they cannot seek asylum from persecution, torture, the death penalty or inhuman or degrading treatment or punishment in another. The right to leave one's country is not limited to citizens, it also applies to foreigners, whatever their immigration status in a country. This is clearly stated in both the international human rights instruments and their European counterparts. Further, the prohibition on departure is also subject to the principle of non-discrimination. Recent practices in Europe have given rise to serious concerns that some of those people who are subject to travel bans are designated for this treatment on the basis of their ethnicity, namely, Roma. This is the result of the efforts by some countries surrounding their wealthier neighbours in the EU to seek to pre-empt the departure of members of this socially excluded minority for fear that they might seek asylum elsewhere in Europe. This is particularly problematic at the moment in the Western Balkan states which have been successful in obtaining visa-free travel for their citizens to the EU. The rise in asylum applications from their nationals, mainly of Roma ethnicity, in EU countries has created friction and calls by some EU states for the withdrawal of visa-free travel for nationals of these countries. One of the outcomes of this appears to be that Western Balkan nationals who are expelled from the EU are deprived of their passports. Those who are preparing to leave may be subject to inquiries about their objectives in leaving by their own authorities. Ethnicity seems to play an important role in the choices of state authorities regarding the withdrawal of passport facilities, either directly or indirectly. These actions by state authorities, taken in an effort to satisfy their neighbours, reveal the link between the right to leave a state and the right to seek and enjoy asylum.

Finally, EU measures to “push up stream” their immigration controls and carry them out in third states has aggravated the situation regarding state measures which impede the right to leave. Four types of EU measures stand out as particularly significant: first, visa requirements and the way in which EU states determine the countries whose nationals are liable to visa requirements, as well as the way that their officials carry out the visa issuing process, push the question of the right to leave, at least in so far as it is in the direction of the EU, to the front. Carrier sanctions and document controls at ports of exit of third states also have the effect of hampering the right to leave in so far as people are seeking to go to EU destinations. Readmission agreements also play their part in creating conditions where the right to leave may be breached. This occurs where readmission agreements apply also to third-country nationals and are linked with funding for detention centres on the territory of the weaker party. The objective of such funding for detention centres is clearly to seek to avoid that persons expelled under the terms of a readmission agreement return to the EU state, by exercising their right to leave. There are worrying indications that some countries around the EU may be using such funding for reception centres for their own nationals so expelled, raising even more questions about

the respect for the right to liberty (Article 5 of the Convention). Finally, the engagement of EU state authorities, with the co-ordination of FRONTEX, in push-backs, where people seeking to arrive in the EU are subject to collective expulsions back to their point of departure, has been the subject of condemnation by the Strasbourg Court and other human rights institutions. This is a flagrant denial of the right to leave and such practices are clearly inconsistent with Article 2 of Protocol No. 4 to the Convention.

All Council of Europe states must ensure that they comply with their human rights obligations as contained notably in the Convention. The right to leave a country, including one's own, is such a human right, and implicit also in the right to respect for private and family life provided for in Article 8. Further, the right to leave one's country must be ensured equally to citizens and foreigners and it must never be subject to interference motivated by racial discrimination. In the application of border and immigration controls, all Council of Europe states must examine or re-examine, and fully align with the Convention and the Court's case law, their laws, policies and practices, in particular:

- the issue of travel documents and the legitimacy of any obstacles to such issue;
- the validity of their laws, policies and practices regarding the withdrawal or refusal of travel documents to citizens to ensure that they are fully consistent with the Convention right to leave a country;
- those states which have a record of failure to respect the right to leave must take particular care to ensure that their legislation and its application is brought into line with their human rights obligations;
- there must be no direct or indirect discrimination on the basis of ethnicity as regards the right to leave the country, irrespective of doubts which state officials may have about the intentions of people leaving;
- EU states must review their border and immigration control laws, policies and practices to ensure that they do not constitute or establish incentives for other states to interfere with the right of all people to leave the country they are in;
- EU states singly and together must stop, with immediate effect, push-backs which prevent people from leaving the country of origin or from reaching the EU, and from exercising their human right to seek and enjoy asylum.

The right to leave a country, including one's own, is a necessary prerequisite to the enjoyment of a number of other human rights, most notably the right to seek and enjoy asylum and to be protected against ill-treatment. States are entitled to place restrictions on the right to leave, if they are in compliance with the European Convention on Human Rights and the European Court of Human Rights case law.

A number of measures taken or envisaged in recent years by some Council of Europe member states in the Western Balkans pose serious challenges to the right to leave a country, enshrined in the 1963 Protocol No. 4 to the European Convention on Human Rights, as well as to the right to seek and enjoy asylum. The situation is of particular concern to the Council of Europe Commissioner for Human Rights given that these restrictive, migration-related measures have been adopted at the instigation of EU member states in pursuance of their immigration and border control policies, and have been tainted by discrimination as they have targeted and affected, in practice, the Roma.

This Issue Paper examines the right to leave a country and what it means both as a right in international human rights instruments and as interpreted by European courts and UN treaty bodies. It focuses on six major themes: the right to leave a country, including one's own; the right to seek and enjoy asylum; non-nationals' right to leave a country; prohibited discrimination as regards the right to leave a country; the situation in the Western Balkans; and the impact of the EU externalisation of border control policies on the right to leave a country. The conclusions highlight the need for European states to examine or re-examine their migration laws and policies in order to fully align them with the European Convention on Human Rights and the Court's jurisprudence.

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The Council of Europe is the continent's leading human rights organisation. It includes 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.



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