



**THE ROLE OF THE EUROPEAN UNION'S VISA POLICY:
COMPARATIVE CASE STUDY OF VISA LIBERALIZATION IN WESTERN
BALKANS WITH A SPECIAL FOCUS ON ASYLUM SEEKERS**

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EXECUTIVE SUMMARY

The purpose of this study is to provide suggestions how the objectives of the European Union's visa policy and right of asylum seekers to seek asylum can be balanced when designing visa policies. The main research question is approached by answering three sub-questions. Firstly, the EU's objectives and justifications for maintaining a visa policy are reviewed. Secondly, the effects of the EU's visa policy on the procedural right of asylum seekers to *seek* asylum are analyzed by comparing international and European human rights instruments and case law. Thirdly, a comparative case study of visa liberalization in five Western Balkan countries is conducted in order to examine the regulatory efficiency of the EU's visa policy. The comparative case study analyzes measurable implications experienced in Finland and in the EU as a whole before and after visa liberalization in Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia. Comparisons are drawn also from other individual EU Member States. The main sources of data in the case study are statistics, national legislations and secondary data. Also political and legal reactions to visa liberalization are discussed. The findings of this study show that the EU's current visa policy may not be the most efficient tool to reach the desired objectives and that different types of measures are needed. It is found that the EU's objectives tend to take a priority without considering human rights of asylum seekers and in certain situations the visa policy may violate right to *seek* asylum. This study concludes that the right to control borders must be recognized but within the limitations of international human rights law.

This thesis does not represent in any circumstances the view of the Ministry for Foreign Affairs of Finland but is based entirely on my personal judgments.

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LIST OF ABBREVIATIONS

EC	European Community
ECHR	European Convention on Human Rights, <i>formally</i> Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-governmental organization
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

Introduction

Everyday across the world people are forced to make the decision to leave their homes to run from persecution, war, human rights violations or for economic and environmental reasons. The phenomenon of people migrating in order to find a safer or more prosperous life has always existed in the world. It is certain that migration will continue to occur also in the future due to global insecurities, growing inequalities, climate change and competition for resources. People moving across borders in a search for a safe place to live will be a feature of our future.

Most of the people fleeing their homes seek protection from neighboring countries. Others try to find better life in the western world. Serious misconceptions exist about asylum seekers and refugees. It should not be forgotten that in 2011 four-fifths of the world's refugees were hosted by the developing countries.¹ In 2011 the European Union (EU) registered 277400 asylum applications in total, which made it the biggest receiver of asylum seekers in the western world.² However, before drawing any conclusion these statistics must be put in perspective. For instance, a single refugee camp Dadaab in Kenya hosted a population of 450000 refugees in 2011.³ According to UNHCR, in general the relative importance of western world as a destination for asylum seekers has decreased during the recent years.⁴

A common perception in the European minds is that the EU is flooded with asylum seekers. The thought of poor black immigrants arriving in crowded boats is imagined with fear and rejection. In public perception the line between genuine asylum seekers and illegal

¹ United Nations High Commissioner for Refugees (UNHCR), "UNHCR Global Trends 2011: A Year of crises," June 18, 2012, p. 2, <http://www.unhcr.org/4fd6f87f9.html>.

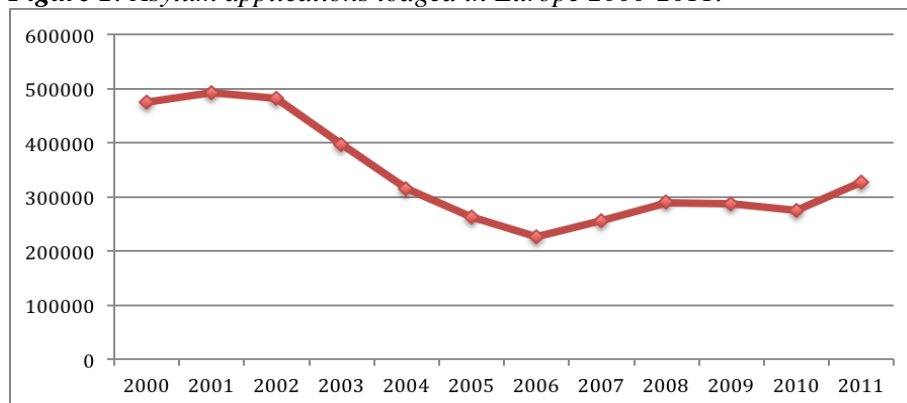
² UNHCR, "Asylum Levels and Trends in Industrialized Countries. Statistical overview of asylum applications lodged in Europe and selected non-European countries," March 27, 2012, p. 7, <http://www.unhcr.org/4e9beaa19.htm>.

³ UNHCR, "Global Appeal 2012-13: Kenya," November 2011, p. 64, <http://www.unhcr.org/4ec230fbb.html>.

⁴ UNHCR, "Asylum Levels and Trends in Industrialized Countries," p. 8.

migrants is not clear.⁵ As can be seen from the UNHCR's statistics presented in Figure 1, a flood is not truly the case. Figure 1 illustrates the asylum applications lodged in Europe between 2000 and 2011. Europe was selected as an example instead of the EU, since the Union has enlarged during the time period in question. Obviously the number of asylum seekers in Europe depends on the world events. For instance, 19 percent increase in asylum applications in 2011 compared to 2010 can at least partly be explained by the events of the 'Arab Spring' in North Africa. Although the number of asylum applications has slowly increased after 2006, the figures are still far from the peak in 2000-2002, as can be seen in Figure 1 below.

Figure 1: *Asylum applications lodged in Europe 2000-2011.*



Source: UNHCR, "Asylum Levels and Trends in Industrialized Countries."

Despite that a flood of asylum seekers can be said to be a misconception, as the recent statistics illustrate the EU has definitely a role to play in deciding the destiny of thousands of asylum seekers from around the world. However, the EU's border policies signal that asylum seekers are not very welcome in the territory of the Member States. Instead of tackling the root causes that make people flee their homes, preventing migration at source by externalizing control policies has been the strategy in Europe since 1980s.⁶ By externalizing

⁵ Violeta Moreno Lax, "Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees," *European Journal of Migration and Law*, 10 (2008): p. 316.

⁶ Virginie Guiraudon and Christian Joppke, *Controlling a New Migration World* (London: Routledge, 2001), p. 13.

its borders with different tools, the EU has restricted asylum seekers from even exiting their country of origin and therefore reaching the territory of the Union. The whole concept of borders has significantly changed and they are not tied to the territorial boundary of a state.⁷ According to Guild “borders are no longer a physical place but a legal one”.⁸ The justification given for extraterritorially screening people before they even embark is the avoidance of painful and expensive problems when possibly having to send them back.⁹ Visa requirements, carrier sanctions, liaison officers and Frontex are all extraterritorial immigration control tools used by the EU to control migration flows. This thesis focuses specifically only on visa policy.

Visa policy is a topic that provokes much discussion. The EU and its Member States have their own legal, political and security objectives that the visa policy is maintained for. When the objectives of the EU are referred to in this current study, it does not mean that every individual Member State necessarily has the same objectives. However, being part of the EU all Member States have to agree on certain common objectives, which are then reflected in the EU regulations that apply to all Member States. Although the EU has various justifications for maintaining a visa policy, it is clear and has been acknowledged by many

⁷ The shifting borders and their multidimensional character has been recognized for instance by scholars such as Elspeth Guild, “Moving the Borders of Europe” (Inaugural lecture delivered on the occasion of the assumption of the professorship of the CPO Wisselleerstoel at the University of Nijmegen, May 30, 2001); Boldizsár Nagy, “From the national border to the national eleven: A (partial and partisan) appraisal of the state system’s performance since the end of the Cold War,” in *Select Proceedings of the European Society of International Law*, Volume 3, 2010, eds. James Crawford and Sarah Nouwen (Oxford: Hart Publishing, 2012), pp. 185-198; Alison Kesby, “The Shifting and Multiple Border and International Law,” *Oxford Journal of Legal Studies* 27, no. 1 (2007): pp. 101-119.

⁸ Elspeth Guild, “Moving the Borders of Europe” (Inaugural lecture delivered on the occasion of the assumption of the professorship of the CPO Wisselleerstoel at the University of Nijmegen, May 30, 2001) p. 68.

⁹ Elspeth Guild and Didier Bigo, “The Transformation of European Border Controls,” in *Extraterritorial Immigration Control: Legal Challenges*, eds. Bernard Ryan and Valsamis Mitsilegas (Leiden: Brill, 2010), p. 257.

scholars, for instance Brolan¹⁰ and Salt¹¹ among others, that strict border controls and increase in illegal immigration are connected to each other. The more difficult it is for a person to enter the EU, the more needed is the use of illegal services. The need to seek asylum does not disappear along with more restrictive visa policies. Therefore, states are faced with the trade-off between strict visa policies and illegal immigration.

Not only do states' objectives conflict with each other but also individuals have their own personal interests and right to cross a border. This thesis approaches visa policy from a specific perspective of asylum seekers and their individual right to seek asylum. According to UNHCR, "asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined".¹² The right to seek asylum is established for instance in Article 14(1) of the Universal Declaration of Human Rights, in the Convention Relating to the Status of Refugees and its Protocol and in Article 18 of the Charter of Fundamental Rights of the European Union.¹³ For the purposes of this thesis, the right to *seek* asylum will be approached as a procedural right; the right to an asylum procedure. Although the EU has externalized its border control visa policy being one part of it, the asylum procedures are still tied to the territory of the Member States. The asylum system begins to function only when the asylum seeker has reached the territory of the destination country. Therefore, in the current study the term asylum seeker refers also to those persons who want to make an application for asylum but might not yet have reached the

¹⁰ Claire Brolan, "An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea from a Refugee Protection Perspective," *International Journal of Refugee Law* 14, no. 4 (2002): pp. 561-596.

¹¹ John Salt, "Trafficking and Human Smuggling: A European Perspective," *International Migration*, Special Issue 1 (2000): pp. 31-54.

¹² UNHCR, "2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless People," June 15, 2010, p. 23, <http://www.unhcr.org/4c11f0be9.pdf>.

¹³ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [*hereinafter* UDHR], Art. 14(1); Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951) [*hereinafter* Refugee Convention]; Protocol relating to the Status of Refugees, 606 U.N.T.S. 267 (1967); Charter of Fundamental Rights of the European Union, 2000 O.J. (2000/C 364/01) [*hereinafter* EU Charter], Art. 18.

EU territory. In other words they are potential refugees-to-be. In order to reach the territory of the EU and be able to make an asylum application, asylum seekers are subject to the same immigration controls as all other migrants. It is clear that visas pose a major barrier for asylum seekers to access the territory of the EU.¹⁴

Based on the above line of thought, it is argued in this study that asylum seekers, visa policy and the use of illegal migration services are all interconnected. Serious questions arise about the balance between the objectives of the EU and the legitimate rights of asylum seekers to seek asylum. Koser presents an alarming argument that if the European countries manage to combat illegal migration with current policies of closing down the borders, there will be no legal nor illegal way for asylum seekers to enter.¹⁵ Therefore, the EU's and its Member States' right to control their borders with visa policy and asylum seekers' right to seek asylum must be balanced.

The aim of this thesis is to provide suggestions how the objectives of the EU's visa policy and right of asylum seekers to seek asylum can be balanced when designing visa policies. As was already mentioned, visas are major obstacle for asylum seekers to access the territory of the EU and as a consequence to access an asylum procedure. In setting up the research problem, this study assumes that one of the objectives of the EU's visa policy is to control the flow of asylum seekers. The research problem is approached through a specific case study of a comparative analysis on five Western Balkan countries Serbia, Macedonia, Montenegro, Albania and Bosnia and Herzegovina. In all five countries visa liberalization with the EU entered into force in December 2009 or in December 2010.¹⁶ Measurable

¹⁴ Boldizsár Nagy, "From the national border to the national eleven: A (partial and partisan) appraisal of the state system's performance since the end of the Cold War," in *Select Proceedings of the European Society of International Law*, Volume 3, 2010, eds. James Crawford and Sarah Nouwen (Oxford: Hart Publishing, 2012), p. 190.

¹⁵ Khalid Koser, "Refugees, Transnationalism and the State," *Journal of Ethnic and Migration Studies* 33, no. 2 (2007): p. 250.

¹⁶ Council Regulation (EC) No 1244/2009 of November 2009 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the

impacts are compared before and after the visa liberalization entered into force in these countries to find out whether the EU's visa policy actually has met the objectives it was maintained for in Western Balkan countries. A special focus will be put on asylum seekers. The migration target country examined in the case study is Finland. However, comparisons will be drawn also from the experiences of other EU Member States and the EU as a whole.

The current study aims to answer the question: *How to balance the objectives of the European Union's visa policy and rights of asylum seekers when designing visa policies?* This question will be approached by answering the following sub-questions: *How does the European Union justify the necessity to maintain a visa policy? How does the European Union's visa policy affect the rights of asylum seekers to seek asylum?* In order to come up with suggestions for the balancing dilemma, the findings of the comparative case study will provide an answer to the following question: *Has the European Union's visa policy met the objectives it was introduced for in the Western Balkan countries?* The current study examines the regulatory efficiency of the EU's visa policy as a tool to control migration. This study argues that the current visa policy of the EU violates right to *seek* asylum in certain situations. It is shown that the EU's objectives tend to prevail without adequate justification and without consideration of human rights of asylum seekers. The EU's right to control its borders must be recognized but within the limits of human rights law.

The main purpose of this current study is to contribute to the existing literature by combining the specific perspective of asylum seekers to the analysis of the role of visa policy. This thesis looks at the EU's visa policy from the human rights perspective of asylum seekers. Scholars have analyzed separately the role and effectiveness of border control

external borders and those whose nationals are exempt from that requirement, 2009 O.J. (L 336/1); Regulation (EU) No 1091/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, 2010 O.J. (L 329/1).

policies. For instance, Cornelius concluded that border control policies implemented by the US have largely failed.¹⁷ However, he focuses solely on the US context and does not address the human rights of asylum seekers or visa policy specifically. Similarly, the work of Cornelius and Salehyan focuses on the migration from Mexico to the US. Their main argument is that illegal migration to the US has been influenced by stricter border controls only to a minor extent.¹⁸ However, neither visa policies nor the rights of asylum seekers are examined in the study. Bhagwati argues that not much can be done to reduce immigration since governments have lost their control although their desire to limit migration has increased at the same time.¹⁹ Bhagwati's study lacks more detailed analysis of specific border control tools as well as human rights aspects. Quite little emphasis is put on the academic literature on human rights in the bigger picture of migration control policies.

Relatively little quantitative empirical research has been made on the role and efficiency of visa policies. Mayda and Hatton have investigated the determinants of migration, border policies being only one aspect. They both concluded that less restrictive border control of the destination country strengthen the pull effects to migrate.²⁰ However, neither of those studies discusses visa policies nor asylum seekers specifically. Hatton has published another study, which focuses only on asylum. He examined the influences on asylum trends and determinants of asylum flows using econometric evidence. Although he touches upon visa policy, the main focus is on ever-stricter asylum policies in the developed

¹⁷ Wayne A. Cornelius, "Controlling 'Unwanted' Immigration: Lessons from the United States, 1993-2004," *Journal of Ethnic and Migration Studies* 31, no. 4 (2005): pp. 775-794.

¹⁸ Wayne A. Cornelius and Idean Salehyan, "Does border enforcement deter unauthorized immigration? The case of Mexican migration to the United States of America," *Regulation and Governance* 1, no. 2 (2007): p. 149.

¹⁹ Jagdish Bhagwati, "Borders Beyond Control," *Foreign Affairs* 82, no. 1 (2003): p. 99.

²⁰ Anna Maria Mayda, "International Migration: a panel data analysis of the determinants of bilateral flows," *Journal of Population Economics* 23, no. 4 (2010): pp. 1249-1274; Timothy J. Hatton, "Explaining Trends in UK Immigration," *Journal of Population Economics* 18, no. 4 (2005): pp. 719-740.

world that have a reducing influence on the volume of asylum applications.²¹ This current thesis focuses on right to seek asylum as a right to *access* an asylum procedure. In order to do that, an asylum seeker must first access the territory of the destination country. Visa policy arguably restricts access to the territory and as a consequence asylum seekers are not able to access an asylum procedure. The steps of the actual asylum procedure once the asylum seeker has managed to submit his or her application are not in the scope of this study. Not many authors have focused on how restricting the alternatives of asylum seekers through strict visa policy has been justified by the states and analyzed the efficiency by comparing the actual consequences after visa requirements have been removed. That is what this thesis seeks to address.

All the reviewed studies above were published only in the first decade of the 21st century. Examining the efficiency and usefulness of visa policies is relatively new topic in the academic literature. A pioneer in researching EU Justice and Home Affairs, including border controls, immigration and asylum is Elspeth Guild. Together with Didier Bigo she has for instance edited a book “Controlling Frontiers: Free Movement Into and Within Europe”.²² In this book the authors examine the role of borders and the issue of who decides who is entitled to cross those borders.²³ Some of the works of Guild and Bigo are referred in this thesis to support the arguments made.

However, more academic research is needed in the context of the EU. The individual destination countries in Europe vary and the spread of asylum seekers is not equal. This thesis will contribute to the gap in the existing literature by focusing on a comparative case study in order to understand better the individual country contexts for efficiency of visa

²¹ Timothy J. Hatton, “The Rise and Fall of Asylum: What Happened and Why?,” *The Economic Journal* 119, no. 535 (2009): pp. 183–213.

²² Didier Bigo and Elspeth Guild, eds., *Controlling frontiers: free movement into and within Europe* (Aldershot: Ashgate Publishing Limited, 2005).

²³ Elspeth Guild has researched the concept of borders in Europe more widely, e.g. Guild, “Moving the Borders of Europe,”; Guild and Bigo, “The Transformation of European Border Controls,” pp. 257-280.

policy and asylum trends. Migration is a major part of the dialogue between the EU and its Eastern neighbors. It is an important political tool in the negotiations for Eastern enlargement of the Union. The EU is using visas as a strategic tool in the development of its relations for instance with the Western Balkan countries by offering them visa liberalization and obtaining a consent to readmission agreements in return.²⁴ Five Western Balkan countries were chosen for the case study since they all have signed a visa liberalization agreement with the EU. Therefore, it is possible to compare the measurable impacts before and after the visa requirements were removed.

Some NGOs²⁵ have conducted research on visa liberalization in the Western Balkans as well as the European Commission in its three post-visa liberalization monitoring reports.²⁶ Also Frontex has made risk analysis on Western Balkans countries in 2011 and 2012.²⁷ European Stability Initiative has probably done the broadest research on the visa liberalization in the Western Balkans.²⁸ The non-profit research and policy institute is an open supporter of visa liberalization. However, the lack of academic research and knowledge is evident. In media and public discussion negative fears are often associated with visa

²⁴ European Council on Refugees and Exiles (ECRE), “Defending Refugees’ Access to Protection in Europe,” December, 2007, p. 26, <http://www.ecre.org/component/content/article/57-policy-papers/95-defending-refugees-access-to-protection-in-europe.html>.

²⁵ For instance Chachipe, several relevant documents are available at “Visa liberalization vs. asylum.” Chachipe, accessed November 24, 2012, <http://romarights.wordpress.com/visa-liberalisation-vs-asylum>. See also Analytica, “Ending ‘Ghettoisation’ of the Western Balkans: Visa Liberalization Prospects,” March 20, 2009, <http://pdc.ceu.hu/archive/00005273>.

²⁶ Commission Staff Working Paper on the post-visa liberalisation monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010, SEC (2011) 695 final (May 30, 2011); Commission Staff Working Paper, Second report on the post-visa liberalisation monitoring for the Western Balkan countries in accordance with the Commission Statement of 8 November 2010, SEC (2011) 1570 final (December 7, 2011); 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 (August 28, 2012).

²⁷ Frontex, “Western Balkans Annual Risk Analysis 2011,” April, 2011, Warsaw, <http://www.frontex.europa.eu/news/western-balkans-annual-risk-analysis-2011-nEPAcO>; Frontex, “Western Balkans Annual Risk Analysis 2012,” April, 2012, Warsaw, <http://www.frontex.europa.eu/news/western-balkans-annual-risk-analysis-2012-K8uVsa>.

²⁸ “Europe’s Border Revolution and the Schengen White List Project.” European Stability Initiative, accessed November 24, 2012, <http://esiweb.org/index.php?lang=en&id=483>.

liberalization. Academic research is needed to examine the actual consequences of visa liberalization. Both academic and practical knowledge is important for improving the regulatory efficiency while ensuring the human rights of asylum seekers. Although migration and asylum seeking are a global phenomenon and visa policies are a worldwide tool to control migration, I argue that in order to gain a deeper understanding of the highly complex and diverse phenomenon as well as designing efficient policy responses on the EU level, better local knowledge is needed. Therefore, Finland was chosen as a target migration country in this study. More detailed justification for the choice of the source and target case countries will be provided in section 3.1. of this thesis.

Finally, asylum seekers will continue to enter industrialized countries whether through legal or illegal means as long as their reasons for fleeing their own home countries do not change. Koser argues that although it is essential to protect the rights of asylum seekers, it is also important to acknowledge that states have a right to control who can cross their borders.²⁹ The conflict between states' right to control their borders and individuals' right to seek asylum means that how far the primacy of states' border control conflicts with the security of individuals, i.e. their right to seek asylum.³⁰ Previous academic work has failed to provide suggestions how the objectives of states and the rights of individuals can be balanced. This thesis provides useful knowledge on how the EU's visa policy meets its original objectives and how it affects the rights of asylum seekers. This knowledge may be especially useful in other ongoing negotiations for visa liberalization in other neighboring countries, for instance in the current debate in the EU on granting visa liberalization for Russia. Also other researchers might find the findings useful and further develop the practical suggestions provided in this thesis.

²⁹ Koser, "Refugees, Transnationalism and the State," pp. 250-251.

³⁰ Salt, "Trafficking and Human Smuggling: A European Perspective," p. 50.

This study consists of three main chapters. A short conclusion section will be provided after each main chapter. The first two chapters present the theoretical and legal framework of the thesis. The first chapter focuses on the objectives of the EU and its Member States to maintain a visa regime. The chapter answers the question how the EU justifies the necessity to maintain a visa policy. The first section reviews the common visa policy of the union. The second section discusses the objectives and justifications presented by the EU for maintaining a visa regime. The trade-offs the EU faces regarding illegal immigration are reviewed as well.

The second chapter of the thesis aims at analyzing the rights of asylum seekers. The chapter answers the question how the current EU's visa policy affects the rights of asylum seekers to seek asylum. Three rights are reviewed separately. The first section discusses the right to exit any country while the second section looks at the procedural right to access the asylum system and submit an asylum application. The third section presents the legal framework for the absolute prohibition of ill treatment. Also the principle of non-refoulement is discussed under the third section. Comparison is made between international and European human rights instruments and relevant case law.

The third main chapter consists of the empirical part of the thesis. A comparative case study of visa liberalization in five Western Balkan countries is conducted. The aim is to explore the measurable implications of visa liberalization. The comparative case study helps to answer the question whether the EU's visa policy has met the objectives it was introduced for in the Western Balkan countries. The data for the case study is collected from statistics, national legislations and secondary data. The chapter consists of four sections. The first section presents the reasons for choosing Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia as source countries and on the other hand Finland as a migration target country in the comparative case study. The second section presents the methodology

used and discusses the limitations of the case study. The third section reviews the bargaining process for reaching a visa liberalization agreement with the EU. The fourth section focuses on analyzing and comparing the statistical and secondary data between the case countries. The measurable consequences of visa liberalization are analyzed according to EU's objectives for maintaining a visa policy. Also reactions on the political and legal level on visa liberalization in Western Balkan countries are discussed.

The final concluding chapter addresses the main research problem and proposes suggestions for the main research question: *How to balance the objectives of the EU's visa policy and rights of asylum seekers when designing visa policies?* Finally, suggestions for further research are provided.

1. European Union's visa policy

Visa is defined as a permission granted by a Member State that is needed for a legal entry to stay in that Member State or transit through that Member State.³¹ In other words, visa is a tool to control the movement of people between certain countries and regions. Meloni defines visas as pre-requisites for an access to another state, applying only for specific nationalities and groups of migrants.³² Visas may restrict people both exiting their country of origin and entering the country of destination. By maintaining a visa system, the EU Member States can perform pre-checks on persons before they reach the territorial border of the Union.³³ Therefore, visas may be pre-requisites for even starting a journey. In 2011 over 13 million short-time visas to the Schengen countries were applied.³⁴ The refusal rate was 5,53%.³⁵ The number of visa applications indicates that visas affect significantly the life of millions of people who want to travel to the EU. On the other hand, the refusal rate is relatively low and questions the necessity and effectiveness of the EU's visa policy, especially considering the high costs of maintaining a visa regime.

The purpose of this chapter is to examine the objectives of the EU and its Member States to maintain a visa policy. This chapter therefore focuses on the EU's objective part of the balancing dilemma examined in this thesis. The first section briefly introduces the EU's visa policy. The second section reviews the objectives and justifications for controlling migration with visas. Also the trade-off that states have to face concerning illegal

³¹ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, 2001 O.J. (L 81/1), Art. 2.

³² Annalisa Meloni, *Visa Policy within the European Union Structure* (Berlin: Springer, 2006), p. 31.

³³ Didier Bigo and Elspeth Guild, "Policing at a Distance: Schengen Visa Policies," in *Controlling frontiers: free movement into and within Europe*, eds. Didier Bigo and Elspeth Guild (Aldershot: Ashgate Publishing Limited, 2005), p. 234.

³⁴ European Commission, "Visa Statistics for 2011," accessed October 16, 2012, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm.

³⁵ Ibid. Based on own calculations.

immigration is discussed. This chapter provides an answer to the question *how the European Union justifies the necessity to maintain a visa policy*.

1.1. Schengen acquis

The integration of the European visa policy started through two different paths. One of the paths started on June 14th 1985 when five governments signed an agreement in Schengen “on the gradual abolition of checks at their common borders”.³⁶ Article 20 of the agreement called the parties to harmonize their visa policies. Five years later on June 19th 1990 the same five original Schengen states signed the Convention implementing the Schengen Agreement.³⁷ Chapter 3 of that Convention is devoted solely to visas and Article 9 calls the parties to harmonize their policies on visas.³⁸ Excluding the UK and Ireland, all members of the European Community ratified and acceded to the Convention between 1990 and 1996.³⁹

The other path towards visa integration was the Maasticht Treaty signed in 1992 that introduced Article 100c on visas.⁴⁰ Article 100c established two features of visa policy; a uniform visa and a selection of countries whose nationals must have a visa when crossing the external borders.⁴¹ These two paths were joined in the 1999 Amsterdam Treaty, which incorporated the Schengen acquis in the EU legislation.⁴² “Visas, asylum, immigration and other policies related to free movement of persons” were integrated into Title IV of the EC

³⁶ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, June 14, 1985, 2000 O.J. (L 239).

³⁷ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, June 19, 1990, 2000 O.J. (L 239) [*hereinafter* Convention implementing the Schengen Agreement].

³⁸ Ibid, Chapter 3 and Art. 9.

³⁹ Meloni, *Visa Policy within the European Union Structure*, p. 55.

⁴⁰ Treaty on European Union, February 7, 1992, 1992, O.J. (C 191).

⁴¹ Ibid, Article 100c.

⁴² Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Related Acts, October 2, 1997, 1997, O.J. (C 340).

Treaty.⁴³ An integrated European visa policy means that once a person has entered through the external border, he or she is entitled to travel freely across the EU. Currently 26 countries have lifted the internal border controls.⁴⁴ Abolition of internal borders was compensated with strengthening the control at the external border. Common criteria were established on who will and who will not be admitted to enter the Schengen area.

The two main components of the common visa policy are harmonization of visa requirements and introduction of a uniform visa.⁴⁵ The first component, harmonization of visa requirements means in practice that the location of the European Union's external border is experienced differently depending whether the person is a national of a country included on the 'black list' or on the 'white list'. These two common lists of non-EU countries are defined in a Council Regulation No 539/2001 of 15 March 2001.⁴⁶ A national from the 'black list' country experiences the border before even starting the journey when applying for a visa at the consulate or the embassy of the EU Member State.⁴⁷ In practice the first encounter with the EU border can happen in the person's country of origin or in a third country where the nearest consulate or embassy of the Member State can be found. In some cases it can require traveling for several hundreds of kilometers. The nationals on the 'white list' do not need to obtain visas for crossing the EU border. Nationals from both lists will however face the same border controls when they arrive to the territorial border of the Schengen area.⁴⁸

⁴³ Ibid, Title IV.

⁴⁴ "Liikkuminen EU/Schengen-alueella" [Movement in EU/Schengen area]. Ministry for Foreign Affairs of Finland, accessed October 14, 2012, <http://formin.finland.fi/public/default.aspx?nodeid=34670&contentlan=1&culture=fi-FI>.

⁴⁵ Meloni, *Visa Policy within the European Union Structure*, p. 55.

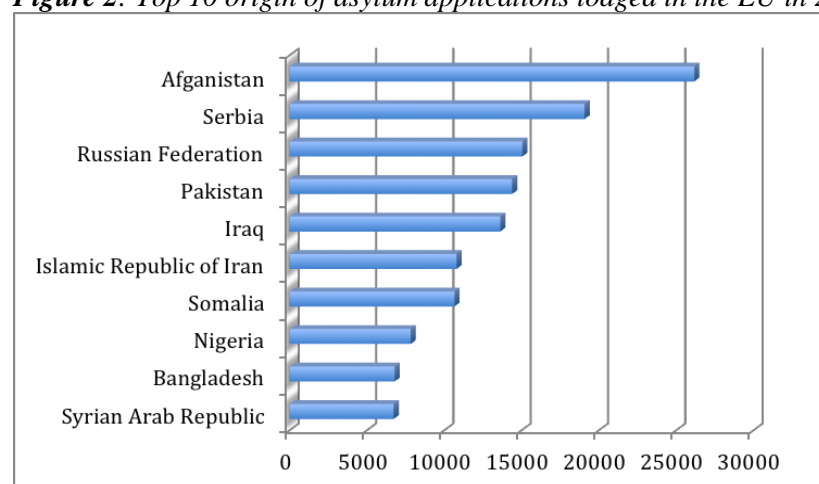
⁴⁶ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose national must be in possession of visas when crossing the external borders and those whose national are exempt from that requirement, 2001 O.J. (L 81/1), Annex I and Annex II.

⁴⁷ Kesby, "The Shifting and Multiple Border and International Law," p. 113.

⁴⁸ Art. 6, Convention Implementing the Schengen Agreement.

On top of these two lists, nationals of 12 countries (Afghanistan, Bangladesh, Congo, Eritrea, Ethiopia, Ghana, Iran, Iraq, Nigeria, Pakistan, Somalia, Sri Lanka) are required to have a visa even if they just pass the international transit area of an airport without entering the territory of that country.⁴⁹ These nationalities are required to have an airport transit visa. Based on the available statistics, major asylum seeker countries are on the ‘black list’ and also need airport transit visas. As can be seen from Figure 2 below, nine out of ten countries of the top ten origins of asylum applications lodged in the EU in 2011 are on the ‘black list’. Seven out of the top ten nationalities need an airport transit visa for even sitting at an airport. Serbia is the only country among the top ten whose nationals do not need a visa.⁵⁰ It is worth noting that also all African countries are on the ‘black list’.⁵¹

Figure 2: *Top 10 origin of asylum applications lodged in the EU in 2011.*



Source: UNHCR, “Asylum Levels and Trends in Industrialized Countries.”

When comparing the ‘black list’ countries and the statistics on the lodged asylum applications in the EU, it seems quite clear that asylum seekers are not welcome to access the territory of the EU. Those countries where asylum seekers most probably originate from are

⁴⁹ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, 2009 O.J. (L 243/1) [*hereinafter* Visa Code], Annex IV.

⁵⁰ Visa liberalization agreement concluded between Serbia and the EU will be discussed in the case study in Chapter 3.

⁵¹ The most recent list of ‘black list’ countries was obtained from “Visa requirement in the Schengen area and travel documents accepted by Finland (by country).” Ministry for Foreign Affairs of Finland, accessed on November 25, 2012, <http://formin.finland.fi/Public/default.aspx?nodeid=15720&contentlan=1&culture=fi-FI>.

also on the airport transit visa list mentioned above. The EU justifies airport transit visas as a means to fight against illegal immigration.⁵² According to European Council on Refugees and Exiles (ECRE), the purpose of airport transit visas is purely to prevent asylum applications at airports from those persons who will continue to another final destination.⁵³ The restrictiveness of visas on the movement of persons across borders becomes clear also from the data collection exercise completed by the Council of the European Union in 2009 with a contribution from all Member States. The number of entries to and exists from the Schengen area were examined in the exercise. In one week time the Member States recorded a total of 12 651 788 border crossings, of which only 11 percent were done by third country nationals who need a visa.⁵⁴ The results showed that 72 percent of the border crossers were Europeans themselves.⁵⁵ The collected data indicates that visa requirements are a major obstacle for movement across borders.

The second component of the common visa policy is uniform visa, which means the conditions an individual must fulfill in order to get a visa, which is then valid for the whole Schengen area. The conditions are defined in the Schengen Borders Code⁵⁶, the Common Consular Instructions on Visas⁵⁷ and the Community Code on Visas⁵⁸. Firstly, the common European visa system covers only short-term visas for stays no longer than “three months in any six-month period”.⁵⁹ The long-term visas are issued according to national legislations. For instance Finland does not issue long-term visas at all. A person who intends to stay in

⁵² Preamble (5), Visa Code.

⁵³ ECRE, “Defending Refugees’ Access to Protection in Europe,” p. 27.

⁵⁴ Council of the European Union, “Results of the data collection exercise,” 13267/1/09, October 1, 2009, p. 2, Brussels.

⁵⁵ Ibid.

⁵⁶ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, 2006 O.J. (L 105) [*hereinafter* Schengen Borders Code].

⁵⁷ Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts, 2005 O.J. (C 326/01) [*hereinafter* Common Consular Instructions on Visas].

⁵⁸ Visa Code.

⁵⁹ Art. 2.2(a), Visa Code, Art. 5(1), Schengen Borders Code and I.2.1.3, Common Consular Instructions on Visas.

Finland longer than three months must apply for a residence permit.⁶⁰ Secondly, Article 14(1) of the Visa Code lists the required proofs the visa applicant must present. These include indication of the purpose of the journey, evidence of sufficient means to finance the entire stay, accommodation and return as well as proof of the intention to leave the territory before the visa expires.⁶¹ The required proof of the intention to leave within three months is especially challenging for asylum seekers, who practically never fulfill that criteria.⁶² On top of these the Schengen Borders Code also states as conditions for *entry* that the person must not be listed and banned entry in the Schengen Information System (SIS) nor considered as “a threat to public policy, internal security, public health or international relations of any of the Member States”.⁶³ Visa is valid only together with a valid passport or other travel document required for crossing a border. It may be challenging for asylum seekers to obtain all the necessary documentation listed above. Asylum seekers may be afraid to approach the persecuting government authorities who issue some of those documents and who are the ones asylum seekers may need to be protected from. Applying for a visa in a foreign consulate may be risky in the country of origin, where a person has a fear of persecution.⁶⁴ Also the price of Schengen visa, which is currently 60 euros, may be too high for some asylum seekers to pay. The purpose of a uniform visa is to establish common conditions to avoid so-called visa shopping in a search for the easiest Member State to enter. Common conditions should help a Member State to trust other Member States that the unwanted persons are kept outside the external borders. That is relevant because once the person has entered the territory he or she can travel freely between countries that have lifted the internal border controls. In

⁶⁰ “Residence permit.” Finnish Immigration Service, accessed November 25, 2012, http://migri.fi/residence_permits.

⁶¹ Art. 14(1), Visa Code.

⁶² Elspeth Guild “The Legal Framework: Who is entitled to move?,” in *Controlling frontiers: free movement into and within Europe*, eds. Didier Bigo and Elspeth Guild (Aldershot: Ashgate Publishing Limited, 2005), p. 35.

⁶³ Art. 5(1)(d)-(e), Schengen Borders Code.

⁶⁴ Guild, “Moving the Borders of Europe,” p. 54.

practice though there are still differences in visa practices between Member States.⁶⁵ However, the scope of this thesis does not cover more detailed comparison on that issue.

Asylum seekers who have to flee their homes are subject to similar visa requirements as everyone else. Migration flows are not homogeneous, however states do not differentiate anyhow persons in genuine need of protection.⁶⁶ The influence of the EU's visa policy specifically on asylum seekers is obvious in several EU regulations. Firstly, in the Common Consular Instructions on Visas under the basic criteria for examining applications, the attention of authorities that issue visas is called towards "risk categories, unemployed persons, those with no regular income".⁶⁷ It can be assumed that many asylum seekers belong to this category.⁶⁸ It is stated under the same heading that for members of these categories additional supporting documentation can be required.⁶⁹ Typically asylum seekers are not able to obtain such documentation.

Secondly, Article 13(1) of the Schengen Borders Code states that third-country nationals who do not meet the requirements for entry must not be allowed to enter the territory of the EU.⁷⁰ However, it is further established in the same article that the right of asylum and right to international protection must be taken into consideration.⁷¹ The difficulty is that this provision means rejecting entry at the *border*. Due to visa obligation, it may be

⁶⁵ "Applying for a Schengen Visa and application form." Ministry for Foreign Affairs of Finland, accessed November 25, 2012, <http://www.formin.fi/public/default.aspx?nodeid=35334&contentlan=2&culture=en-US>. The instructions state: "Some Embassies or Consulates may require further documentation, and therefore the applicant should always check the requirements with the Embassy or Consulate in question."

⁶⁶ Brolan, "An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea from a Refugee Protection Perspective," pp. 561-596.

⁶⁷ Chapter V: Basic criteria for examining applications, Common Consular Instructions on Visas.

⁶⁸ Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, "The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU," *European Journal of Migration and Law* 10, no. 4 (2008): p. 449.

⁶⁹ Chapter V: Basic criteria for examining applications, Common Consular Instructions on Visas.

⁷⁰ Art. 13(1), Schengen Borders Code.

⁷¹ *Ibid.*

very difficult for an asylum seeker to reach that point. As has been mentioned earlier, visas may restrict the person to even leave his or her country of origin.

Thirdly, Article 4 of the Council Regulation listing the countries on the ‘black list’ states that the EU Member States may exempt a ‘black list’ national from visa requirement if he or she is a person for instance with diplomatic or service passport, emergency worker, sailor or civilian air crew.⁷² The provision does not mention persons with the right to seek asylum or right to international protection.

Based on the observations of this section on the visa legislation and asylum statistics, it is clear that one of the justifications for the EU’s visa policy is to control and even prevent the access of asylum seekers to the EU’s territory. The EU and its Member States are not eager to take the responsibility of processing the asylum application which is likely to be the next step after the visa has been issued and the asylum seeker has managed to reach the territory of the Union. The responsibility derives from the Dublin II Regulation, which states that the Member State who has issued a visa is responsible to process the asylum application unless there is a family unification reason that takes priority in the hierarchy of criteria.⁷³ The other justifications provided officially by the European Commission for determining the ‘black list’ countries that are subject to visa requirement will be discussed next.

⁷² Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose national must be in possession of visas when crossing the external borders and those whose national are exempt from that requirement, 2001 O.J. (L 81/1), Art. 4.

⁷³ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003 O.J. (L 50/1), Chapter III: Hierarchy of criteria.

1.2. *Objectives and justifications for visas*

It is correct that each state has a legitimate right to enforce controls at its own borders and decide who can enter its territory.⁷⁴ The usual justification for visas is controlling migration by preventing illegal arrival of some and on the other hand allowing legal entry of others.⁷⁵ However, visas are only one of the tools of border control and do not alone prevent a person from arriving to the territory of the Union. It must be acknowledged that visas can only reach the wanted objectives together with other tools, such as carrier sanctions and liaison officers. However, the scope of this study is narrowed down solely to examination of visa policy. Those non-EU countries, which are listed on the 'black list' and are subject to visa requirement, are determined on individual basis. The European Commission has given three possible reasons for including a country on the list; threat of illegal immigration, prevention of crime and international relations.⁷⁶ The Community Code on Visas also calls to pay attention to security and illegal immigration when examining visa applications.⁷⁷ Each of these three justifications is further discussed in this section.

1.2.1. **Illegal immigration**

The first justification for visas is prevention of illegal immigration. Illegal immigration is considered as evidence that a state has failed to enforce its border control efficiently.⁷⁸ In the explanatory memorandum for the Council Regulation listing the countries on the 'black' and 'white' lists the Commission gives the following criteria for assessing whether a certain country should be included or excluded from the 'black list'. The assessment can be based

⁷⁴ John Morrison and Beth Crosland, "The trafficking and smuggling of refugees: the end game in European asylum policy?," (Working Paper No. 39, UNHCR, April, 2001, p. 70).

⁷⁵ ECRE, "Defending Refugees' Access to Protection in Europe," p. 26.

⁷⁶ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose national must be in possession of visas when crossing the external borders and those whose national are exempt from that requirement, 2001 O.J. (L 81/1), preamble 5.

⁷⁷ Chapter V: Basic criteria for examining applications, Common Consular Instructions on Visas.

⁷⁸ Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times," *The Modern Law Review* 67, no. 4 (2004): p. 598.

firstly on the risk of illegal immigration by referring to data on “illegal residence, cases of refusal of admission to the territory, expulsion measures and clandestine immigration”; secondly on the reliability of travel documents and thirdly on the impact of readmission agreements with third countries.⁷⁹

Firstly, the criteria used for assessing the risk of illegal immigration are based on illegal acts of individual citizens, which are then generalized to the whole population of a certain third country. All citizens with the same nationality are in a way punished for the illegal acts of some individuals. The assumption of the EU’s visa policy is that nationals of certain countries are more prone to be illegal immigrants than others. Therefore, the assessment is not done based on individual characteristics but rather on nationality. Nagy has rightly called visas as “collective stigmas”.⁸⁰ The language of illegal immigration is problematic. In the EU’s language individuals may be considered as illegal immigrants although they are still physically in their own country of origin and not even close to the territory of the Union.⁸¹ Can an individual be illegal by only being a potential leaver from a third country? Furthermore, considering the specific context of this thesis asylum seekers are not illegal during the asylum procedure. Only if the decision is negative and the person does not leave the country, he or she may become illegally present immigrant.

Regarding the second criterion, reliability of travel documents, there is a difference whether an individual has forged his or her travel documents or whether he or she is not able to obtain sufficient travel documents from the authorities of his or her own country. In the latter case, the nationals of that country will be punished for the state’s failure or

⁷⁹ Commission Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM (2000) 27 final, Document 500PC0027.

⁸⁰ Nagy, “From the national border to the national eleven,” p. 189.

⁸¹ Elspeth Guild, “Criminalisation of Migration in Europe: Human Rights Implications,” (Issue Paper commissioned and published by the Council of Europe Commissioner for Human Rights, Strasbourg February 4, 2010, p. 9).

unwillingness to fulfill the requirements of valid travel document.⁸² The third criterion, effectiveness of readmission agreements is correctly criticized by Guild. She argues that the EU has not applied successfully the Dublin Regulation governing the responsibility among Member States to process asylum applications – the readmission agreement of the Member States – and the transfer rate of asylum seekers under the Dublin Regulation has remained only around one percent.⁸³ She then further states that inability of the Member States to solve readmission problems among themselves does not justify using effectiveness of less precise readmission agreements with third countries as a basis for a visa requirement.⁸⁴

Although visas have been used for decades to control immigration, so far it has not been proven that there is a correlation between maintaining a visa regime and reduction in illegal immigration.⁸⁵ This is what the European Commission has also stated, adding that “on the contrary it seems difficult to prove a link between the lifting of visa requirements and a subsequent increase of illegal immigration”.⁸⁶ What on the other hand has been found by several scholars is that there is a link between restrictive border policies and increase in illegal immigration and use of so called facilitators such as human smugglers. For instance, Spijkerboer has found that strengthening the EU’s external border controls has not decreased the number of illegal immigrants.⁸⁷ Instead of canceling their travel to Europe, migrants use more unsafe routes and expose themselves to bigger risks.⁸⁸ As Nadig and Brolan state, the tendency to close external borders of destination countries creates an illegal market for

⁸² Guild, “Moving the Borders of Europe,” p. 36.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ ECRE, “Defending Refugees’ Access to Protection in Europe,” p. 6.

⁸⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Study on the links between legal and illegal migration, COM (2004) 412 final (June 4, 2004), p. 13.

⁸⁷ Thomas Spijkerboer, “The Human Costs of Border Control,” *European Journal of Migration and Law* 9, no. 1 (2007): p. 131.

⁸⁸ Ibid.

human smugglers.⁸⁹ When entry to destination countries becomes more difficult, human smuggling becomes more sophisticated and smuggling services more expensive. In turn, the response of destination countries to an increase in illegal immigration and growing illegal market for smugglers is further tightening of their immigration controls. This is the trade-off between two difficulties that the EU has to face. A choice between two options that both arguably lead to illegal immigration: whether to loosen or strengthen border controls.

Annually worldwide smugglers help several hundred thousand people to cross borders.⁹⁰ What comes to asylum seekers, they are forced as well to turn to smugglers in order to have a possibility to reach a safe place to survive. Koser found out in his research in 2007 that at the European level the majority of asylum seekers arriving in Europe had been smuggled there.⁹¹ Since there has not been any loosening of border controls after 2007 for the major asylum seeker source countries, it can be assumed that this is still the case in 2012. Koser has noted that states face a difficult task in trying to have a control over asylum seekers, since their arrival is unpredictable and states do not have control over their amount, features nor methods of arrival.⁹² As was argued in the previous section, one of the clear objectives of the EU's visa policy is to try to control these factors as much as possible by screening the persons when they have not even left their country of origin.

Even though individuals are pre-screened, the use of smuggling services has further challenged the ability of states to control their own borders. Trying to control and prevent human smuggling is highly complex task. The details and extent of the smuggling process can be very different in different circumstances.⁹³ Furthermore, the smuggling business

⁸⁹ Aninia Nadig, "Human Smuggling, National Security and Refugee Protection," *Journal of Refugee Studies* 15, no. 1 (2002): pp. 1-25; Brolan, "An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea from a Refugee Protection Perspective," pp. 561-596.

⁹⁰ Khalid Koser, "Why Migrant Smuggling Pays," *International Migration* 46, no. 2 (2008): p. 4.

⁹¹ Koser, "Refugees, Transnationalism and the State," p. 235.

⁹² Ibid, p. 234.

⁹³ Koser, "Why Migrant Smuggling Pays," p. 19.

model can adapt very quickly to changing conditions. As Salt and Stein point out, smuggling is extremely difficult to control, as those who try to control it always seem to lack behind the fast changing business.⁹⁴ Smugglers demonstrate great flexibility, organization and are able to turn flaws in border control to their own benefit.⁹⁵ The EU is striving to maintain strict visa controls and at the same time to eliminate completely the alternative to use illegal smuggling services. The danger lies in the risk that the access of asylum seekers to the asylum system of the EU will be completely denied.

1.2.2. Crime

The second justification for visas given by the EU is prevention of crime. The EU intends to ensure national security through visa policy by keeping the “undesirable” out of the territory.⁹⁶ In the explanatory memorandum the Commission states that the particular characteristics of certain types of crimes are relevant.⁹⁷ According to the Commission, “the seriousness, regularity and territorial extent of the relevant forms of crimes” should be considered.⁹⁸ Just like in the above case of illegal immigration, the assessment ground based on crime discriminates as it relates to behavior of individuals and not to the activities of their state of nationality. For instance, UK introduced a visa requirement for Jamaicans in 2003 in order to reduce the crack cocaine smuggling.⁹⁹ As a consequence, traveling for regular visitors has become more difficult while the drug smugglers most likely can find a way around the visa system if they want to. It is important to acknowledge that organized

⁹⁴ John Salt and Jeremy Stein, “Migration as a Business: The Case of Trafficking,” *International Migration* 35, no. 4 (1997): p. 484.

⁹⁵ Ibid, pp. 467-494.

⁹⁶ Meloni, *Visa Policy within the European Union Structure*, p. 37.

⁹⁷ Commission Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2000) 27 final, Document 500PC0027.

⁹⁸ Commission Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2000) 27 final, Document 500PC0027.

⁹⁹ Meloni, *Visa Policy within the European Union Structure*, p. 38.

professional criminals do not recognize borders and they are not stopped by any visa requirements. Guild correctly points out the difficulty in finding a EU consensus on seriousness of certain crimes.¹⁰⁰ She uses an example of the legalization of personal use of marihuana in the Netherlands and Belgium and how different the approach would be in other EU Member States.¹⁰¹ In other words, it is a national decision of one Member State what is considered as a serious crime.

The criteria for crime in the explanatory memorandum continue by stating that in some cases crime can threaten national security in one or more Member States and it is appropriate from other Member States to show solidarity.¹⁰² The problem here again is how individual Member States interpret a threat to be serious enough to national security since the Commission does not define it anyhow. Other Member States accept the national definition of another Member State. As a consequence, the decisions on visa requirements are often collective decisions and individual states' right to decide does not have any meaning.¹⁰³

The connection between immigration and crime is a much discussed and controversial issue often brought up in media and political discussions. Especially after the 9/11 terrorist attacks, the threat of terrorism has increasingly been associated with immigrants. In some states immigrants and asylum seekers are increasingly targets of racism and acts of intolerance.¹⁰⁴ Scholars have found out that there is a significant relationship between immigration and crime in Europe.¹⁰⁵ The academicians have examined the reasons explaining

¹⁰⁰ Guild, "Moving the Borders of Europe," p. 36.

¹⁰¹ Ibid.

¹⁰² Commission Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2000) 27 final, Document 500PC0027.

¹⁰³ Nagy, "From the national border to the national eleven," p. 190.

¹⁰⁴ Brolan, "An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea from a Refugee Protection Perspective," pp. 561-596.

¹⁰⁵ Scholars such as Guiraudon, and Joppke, *Controlling a New Migration World*; César Alonso-Borrego, Nuno Garoupa, and Pablo Vazquez, "Does Immigration Cause Crime? Evidence from Spain," *American Law and Economics Review* 14, no. 1 (2012): pp. 165-191; Martin Killias, "Immigration and Crime: The European Experience," Research Report, EU-US Immigration Systems

the relationship and concluded that the characteristics rather than the number of immigrants are relevant. Killias provides two explanations: firstly, immigrants come from countries where crime is more accepted and secondly, immigrants experience more social disadvantages than the majority population.¹⁰⁶ Guiraudon and Joppke interestingly state that tightening the border controls have led to increase in crime rates among immigrants.¹⁰⁷ This argument counters the EU's justification of crime prevention. The rationale behind this is that those immigrants who dare to use illegal services in order to get to the destination countries are bigger risk-takers and more prone to violate the law.¹⁰⁸ I think this argument is not well justifiable in case of asylum seekers. Genuine asylum seekers come to the EU Member States to survive. Nobody wants to leave his or her home unless absolutely necessary. The life of many asylum seekers is so horrible in their own countries that they are willing to even risk their lives to find a better life. It is discriminatory to say that people in such a desperate situation are more prone to commit crimes. It may be possible though that strict border controls have an impact for instance on crimes of falsification of travel documents as it may be the only option for migrants to cross borders.

As stated in Article 6 of the Convention Implementing the Schengen Agreement, the same border controls apply when an individual arrives to the territorial boundary of the EU whether he or she is a national from the 'black list' or 'white list'.¹⁰⁹ The same checks must be completed at the border as during the visa application process: validation of travel documents, conditions for entry, accommodation, employment and return as well as identification of possible threats to national security of the Member States subject to the

No. 2011/19, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole: European University Institute, 2011.

¹⁰⁶ Killias, "Immigration and Crime: The European Experience," p. 7.

¹⁰⁷ Guiraudon, and Joppke, *Controlling a New Migration World*, p. 17.

¹⁰⁸ Ibid.

¹⁰⁹ Art. 6, Convention Implementing the Schengen Agreement.

agreement.¹¹⁰ It seems clear that the EU's objective is to reduce the burden on border controls at the territorial border and through visa requirement keep the potential criminals far from the territory of the Union. The Schengen Information System (SIS) enables EU authorities to verify suspected persons posing a threat to the security of a Member State both when the visa application is submitted and at the border crossing points. Individualized policies for assessing threat of crime are more appropriate considering that migration is not a homogenous phenomenon and based on the above reviewed studies individual characteristics have stronger impact on proneness to crime.

1.2.3. International relations

The third justification for visas is international relations. Visas have traditionally been foreign policy instruments.¹¹¹ Not requiring a visa from nationals of the 'white list' countries indicates political approval of those governments' policies and closeness of relations wanted with those countries.¹¹² Referring to the explanatory memorandum of the Commission, the relation with a group of countries and achievement of regional coherence is more important than consideration of individual countries.¹¹³ As in the case of crime, the Commission calls again for solidarity of other Member States.¹¹⁴ Guild criticizes heavily the element of regional coherence in Commission's criterion. Since the EU itself is a regional union with common policies, it treats also other regions with the same idea although in reality those states may not have any common regional interests.¹¹⁵ The solidarity requirement means that one Member State's enemy becomes as one for all other Member States as well. It is

¹¹⁰ Ibid, Art. 6(2)(a).

¹¹¹ Meloni, *Visa Policy within the European Union Structure*, p. 35.

¹¹² Ibid.

¹¹³ Commission Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2000) 27 final, Document 500PC0027.

¹¹⁴ Ibid.

¹¹⁵ Guild, "Moving the Borders of Europe," p. 37.

questionable to what extent it is justified to use visas as purely political tools when they in practice have a significant impact on the movement of nationals of third countries.

A key issue in the EU's international relations is a conditionality principle. According to the European Parliament "conditionality must also be a cornerstone of EU external policy on visas".¹¹⁶ Conditionality means that before a third country is granted visa facilitation or visa liberalization with the EU, it has to meet specific conditions defined by the EU. For instance, the Commission uses readmission agreements as precondition for visa facilitation, arguably to balance the undesirable side effects of the eastern enlargement.¹¹⁷ The aim of readmission agreements is to simplify the readmission of third country nationals, who stay in a Member State without authorization or have crossed its border illegally, back to their own countries of origin or countries they have transited through.¹¹⁸ The readmission agreements include the procedural principles of the readmission process. If a third country does not cooperate sufficiently, the closeness of relations with the EU may be obstructed.¹¹⁹ Therefore, third countries face certain trade-offs in the context of international relations with the EU. The conditionality principle also reflects the significance of visa policy as a political tool in international relations.

Scholars and human rights actors have criticized readmission agreements for not taking into consideration the needs of asylum seekers. For instance ECRE has claimed that the clear purpose of readmission agreements is to facilitate the return of asylum seekers from

¹¹⁶ Report of the European Parliament on the Proposal for a Council decision on the conclusion of the Agreement between the European Community and the Russian Federation on the facilitation of issuance of short-stay visas, COM(2006)0188 – C6-0169/2006 – 2006/0062(CNS) (February 5, 2007), p. 9.

¹¹⁷ Florian Trauner and Imke Kruse, "EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?," *European Journal of Migration and Law* 10 (2008): p. 412.

¹¹⁸ Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, 1996 O.J. (C 274), Art. 1 and Art. 2.

¹¹⁹ Council of the European Union, "Presidency Conclusions, Seville European Council, 21-22 June 2002," 22 June 2002, DOC/02/13, para 35.

the EU's territory and pass the responsibility to third countries.¹²⁰ Also Collinson argues that readmission agreements are primarily motivated by the facilitation of the return of asylum seekers, especially in the eastern European context.¹²¹ Both UNHCR and ECRE have expressed their concerns about missing safeguards in the readmission agreements to examine human rights situation in countries asylum seekers are returned to and to ensure effective access to an asylum procedure for people in genuine need of protection.¹²² Roig and Huddleston rightly point out that not ensuring the conditions in the countries people are returned to will probably lead to illegal re-entries as asylum seekers do not have other alternatives.¹²³ The difference is that they would most likely be forced to use even more dangerous and illegal channels to migrate.¹²⁴ Visa facilitation, liberalization and readmission agreements will be further discussed in Chapter 3 in the specific context of Western Balkan countries. The next section briefly summarizes Chapter 1.

1.3. Conclusions

Visa policy is one of the ways for the EU to externalize its border controls. Visas enable the EU Member States to check persons even prior to their arrival to the territorial border. Visa may be a pre-requisite for even exiting one's country of origin. In other words, although the visa policy externalizes the EU border, that border is still controlled with entry requirements set by the EU. The location of the EU's external border is experienced differently by different nationalities. The location depends whether the persons is a national of a country included on

¹²⁰ ECRE, "Broken Promises – Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection. Tampere 1999 - Brussels 2004," June 1, 2004, <http://www.ecre.org/topics/areas-of-work/access-to-europe/97-broken-promises-forgotten-principles-ecre-evaluation-of-the-development-of-eu-minimum-standards-for-refugee-protection.html>.

¹²¹ Sarah Collinson, "Visa Requirements, Carrier Sanctions, 'Safe Third Countries' and 'Readmission': The Development of an Asylum 'Buffer Zone' in Europe," *Transactions of the Institute of British Geographers* 21, no. 1 (1996): p. 85.

¹²² Annabelle Roig and Thomas Huddleston, "EC Readmission Agreements: A Re-evaluation of the Political Impasse," *European Journal of Migration and Law* 9 (2007): p. 382; ECRE, "Broken Promises – Forgotten Principles," p. 23.

¹²³ Roig and Huddleston, "EC Readmission Agreements," p. 382.

¹²⁴ Ibid.

the ‘black list’ and needs a visa or is a national of a country included on the ‘white list’ and does not need visa in order to enter the EU. Regardless of which list a certain national is included on, the same border controls apply to everyone at the territorial border including the same conditions as the visa application procedure. The role of the visa policy could be questioned as the same things are checked again at the border. However, it seems that the EU wants to reduce the burden at the territorial border and arguably wants to prevent the unwanted persons from even reaching that border.

This chapter answered the question *how the European Union justifies the necessity to maintain a visa policy*. Four objectives were presented. Firstly, based on the examination of the EU’s visa regulations it is evident that visa policy is a significant obstacle for asylum seekers to enter the territory of the EU. The largest asylum seeker source countries are included on the ‘black list’ as well as on the airport transit visa list. The conditions required to get a visa are very hard to fulfill for asylum seekers, such as obtaining all required documentation, proving the intention to leave within three months and managing the financial costs. The regulations on visas do not efficiently differentiate persons in genuine need of international protection and may apply only at the border of the EU, which asylum seekers may never reach due to visa requirements. The influence of the EU’s visa policy on asylum seekers is clear in several EU regulations. Since visas limit the possibilities of asylum seekers to access the territory of the EU, as a consequence they are not able to access an asylum procedure either. Based on these factors, this thesis argues that controlling the movement of asylum seekers is one of the objectives of the EU’s visa policy.

Secondly, the three other justifications can be considered the “official” justifications as the European Commission has openly stated them. Countries included on the ‘black list’ are determined individually based on threat of illegal immigration, prevention of crime and management of international relations. The first two assessment criteria, illegal immigration

and crime, are stigmatizing. The illegal actions of individuals of certain nationality are generalized to the entire population of that third country. Therefore, the assumption is that some nationalities are more prone to be illegal immigrants or criminals. The EU's visa system is based on every individual proving that he or she is not illegal or criminal although he or she belongs to the "high risk" nationality. High level of solidarity is required from other Member States since the collective decisions are based on one or more individual Member States' experiences and objectives. Debatable issues are for instance seriousness of crimes and level of illegal immigration and crime that can be considered as a threat to national security.

Illegal immigration is today's tragedy and it concerns nearly every country in the world. Response of states to the threats and challenges has been to strengthen their border controls. However, stricter policies do not affect the desire and need to seek asylum. It has been found that there is a link between restrictive border policies and increase in illegal immigration and use of smuggling services. The more difficult states make freedom of movement, the more smuggling services are relied on that may involve exploitation of migrants.

Visas are also purely political tools as illustrated by the last criteria of the Commission, that of international relations. The key principle is conditionality. In order to gain visa freedom third countries must fulfill specific conditions defined by the EU. If there is not enough cooperation from the side of the third country, the relations may be threatened. Conditionality is a good and necessary principle as long as the conditions required are fair. Politicizing visa policy too much is dangerous as human rights of individuals are involved. The right of the EU to control its border must be recognized but inside the framework of human rights law. The next chapter discusses the other part of the balancing dilemma, i.e. the rights of asylum seekers to seek asylum.

2. Rights of asylum seekers

As was concluded in the previous chapter, based on the interpretation of the EU's visa regulations one of the objectives of visa policy is to control the access of asylum seekers to the EU's territory. By screening people already in the refugee producing source countries, the EU Members States can control the movement of people before they have even exited their countries of origin. This thesis argues that the current visa policy violates the rights of asylum seekers in certain situations. The EU's asylum system functions only once the asylum seeker has reached the territory of the destination country. However, the right to access an asylum procedure does not have any meaning when the EU has posed a visa barrier for asylum seekers to even exit their country of origin. As was mentioned in the previous chapter, states have a right to control who can enter their territory. However, that right is not absolute. This current study argues that the EU's right to control its border must comply with the rights of asylum seekers.

This chapter aims at setting the human rights context for this study by reviewing the individual asylum seeker's right to seek asylum. This chapter focuses on the individuals' right part of the balancing dilemma examined in this thesis. As was mentioned in the Introduction chapter, this thesis focuses on right to *seek* asylum. In other words, asylum will be approached as a procedural right. Three separate rights will be discussed, all of which visa policies may restrict to a great extent in certain contexts. Comparison will be made between provisions of international and European human rights instruments as well as relevant case law. The first section of this chapter analyses the right to exit any country, which is obviously a necessary precondition for applying a refugee status in another country. The Refugee Convention does not cover someone who has not yet left his or her country of origin or

country of last residence.¹²⁵ Neither do the EU Member States have an obligation to look for and invite asylum seekers to apply for asylum on their territory. The second section reviews the legal framework for the right to *access* an asylum procedure. That means that asylum seekers have a right to submit their asylum applications in order to be examined “individually, objectively and impartially”.¹²⁶ The third section discusses the absolute prohibition of ill treatment and the principle of non-refoulement that can become relevant in certain situations. This chapter provides an answer to the question *how the European Union’s visa policy affects the rights of asylum seekers to seek asylum*.

2.1.Right to exit any country

Although states can legitimately regulate immigration, the right to exit any country is a human right recognized in both international and European law. Firstly, in the international law the right to exit any country is established in several different instruments. These include for instance Article 13(2) of the UDHR¹²⁷, Article 12(2) of the International Covenant on Civil and Political Rights¹²⁸ and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination¹²⁹. Secondly, the exactly same wording can be found also in European law in Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms¹³⁰. Provisions of all these four instruments apply

¹²⁵ Art. 1(A)(2), Refugee Convention.

¹²⁶ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005 O.J. (L 326/13), Art. 8(2)(a).

¹²⁷ Art. 13(2), UDHR.

¹²⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 [*hereinafter* ICCPR], Art. 12(2).

¹²⁹ International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (1969), Article 5.

¹³⁰ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 1963, E.T.S. 46 (1968) [*hereinafter* Protocol No. 4 to the ECHR], Art. 2.

to *everyone* and include the right to exit one's *own* country.¹³¹ Visa policy, enforced with carrier sanctions may significantly restrict the right to exit a country. Externalizing the EU's borders and exercising "remote control" makes it possible for the authorities of the destination country to control the person's journey before it has even started.¹³² Although carrier sanctions are not a topic in this thesis, a short explanation is given in this context.

Through carrier sanctions, which were also established in the 1990 Convention Implementing the Schengen Agreement, it has been possible to make visas a precondition for even exiting the country of origin.¹³³ Carriers that transport passengers are obliged under Article 26 of the Convention Implementing the Schengen Agreement to act as border guards and ensure that all passengers possess the required travel documents needed to enter the destination country.¹³⁴ Otherwise carriers are penalized for transporting passengers with inadequate documentation. Although Article 26 provides that Member States must fulfill the obligations of the Refugee Convention, it does not consider asylum seekers as an exceptional case. The risk is that carriers refuse to board asylum seekers who have not even had a chance yet to present their asylum application since they are still physically in their country of origin. Especially disturbing is the privatization of border control.¹³⁵ The carrier company, which is a non-state private actor is performing the function of a border guard and cannot be considered accountable for violating rights under international law, unless its action is attributable to the State.¹³⁶ Neither are private actors trained on international refugee law.

Right for an individual to exit any country is not an absolute right. It can be limited for severe reasons. Possible limitations are provided in Article 12(3) of the ICCPR and

¹³¹ Art. 13(2), UDHR; Art. 12(2), ICCPR; Art. 5, International Convention on the Elimination of All Forms of Racial Discrimination; Art. 2, Protocol No. 4 to the ECHR.

¹³² Sophie Scholten and Paul Minderhoud, "Regulating Immigration Control: Carrier Sanctions in the Netherlands," *European Journal of Migration Law* 10 (2008): p. 130.

¹³³ Gammeltoft-Hansen and Gammeltoft-Hansen, "The Right to Seek – Revisited," p. 450.

¹³⁴ Art. 26, Convention Implementing the Schengen Agreement.

¹³⁵ Scholten and Minderhoud, "Regulating Immigration Control," pp. 128-129.

¹³⁶ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 53 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), Art. 2.

Article 2(3) of Protocol No. 4 to the ECHR. Both provisions include the requirement of necessity to “protect national security, public order, public health or morals or the rights and freedoms of others”.¹³⁷ In addition, the Protocol adds also prevention of crime as one of the acceptable criteria for restricting the right to exit a country.¹³⁸ However, if the right is limited it is essential that those limitations must not change the original content of the right.¹³⁹ Both ICCPR and Protocol No. 4 to the ECHR also state that possible interferences must be provided by law and be necessary in a democratic society.¹⁴⁰ These two conventions do not establish that the right to exit can be limited because a person does not have sufficient funds to cover his or her stay and accommodation, cannot justify the purpose or conditions of his or her stay or because he or she wants to apply for asylum.

When it comes to the right to exit any country, there is no corresponding right to enter another country. That would naturally be the goal of asylum seekers after they have left their country of origin. The European Court of Human Rights has established in its case law that the right to leave means “a right to leave for such country of the person’s choice to which he may be admitted”.¹⁴¹ Although no right of free entry exists, according to Lax it does not justify the ignorance of the recognized right to leave.¹⁴² Based on the above legal interpretations, visa policy must also fulfill the criteria of lawfulness and necessity in democratic society.

It is questionable what is actually the value of leaving one’s country if there is not necessarily a possibility to enter another. The right to freedom of movement, which is

¹³⁷ Art. 12(3), ICCPR.

¹³⁸ Art. 2(3), Protocol No. 4 to the ECHR.

¹³⁹ Human Rights Committee, General Comment No. 27 on freedom of movement (Art. 12) U.N.Doc. CCPR/C/21/Rev.1/Add.9 (1999), para 13.

¹⁴⁰ Art. 12(3), ICCPR and Art. 2(3), Protocol No. 4 to the ECHR.

¹⁴¹ *Napijalo v. Croatia*, Application no. 66485/01, Eur. Ct. H.R. Judgment of 13 November 2003, para 68.

¹⁴² Lax, “Must EU Borders have Doors for Refugees?,” p. 354.

recognized in both international and European law¹⁴³, then actually means only movement inside the borders of one's own country or exit from and return to one's own country. But if we consider the *right to exit to seek asylum*, as Lax suggests, the proportionality test is much stricter than in the case of right to exit alone.¹⁴⁴ She poses a question in her article whether it is proportionate to impose visa requirements on asylum seekers, which as a consequence may force them to use illegal smuggling services.¹⁴⁵ Only asylum seekers who are willing to take that risk and break the law may reach the destination country and apply for asylum. Legally that is not justified. The proportionality test should take into account the individual motives to exit one's own country.

The right to exit to seek asylum has been analyzed also in courts. The case *R v. Immigration Officer at Prague Airport* is a well-known example of externalization of borders and the rights of asylum seekers.¹⁴⁶ The judgment illustrates that international protection is decided based on the persons location regarding the borders and not based on the seriousness of the person's need for protection.¹⁴⁷ The case concerned pre-entry procedures at Prague Airport by British immigration authorities. The UK and the Czech Republic had agreed that British authorities could deny passengers from leaving to enter the UK before they even embark on a plane. The aim was to control the amount of asylum seekers traveling to the UK, mainly of Roma origin.¹⁴⁸ The passengers experienced the UK border although they were still physically in Czech Republic.¹⁴⁹ The British House of Lords concluded that intention to

¹⁴³ For instance Art. 2(1), Protocol No. 4 to the ECHR, Art. 12, ICCPR and Art. 13, UDHR.

¹⁴⁴ Lax, "Must EU Borders have Doors for Refugees?," p. 356.

¹⁴⁵ Ibid.

¹⁴⁶ *R. v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55 (appeal taken from [2003] EWCA Civ 666).

¹⁴⁷ Kesby, "The Shifting and Multiple Border and International Law," p. 117.

¹⁴⁸ Ibid, p. 103.

¹⁴⁹ Ibid, p. 115.

apply for asylum could not be a purpose for granting “leave to enter”.¹⁵⁰ On the other hand, the Human Rights Committee has emphasized in its General Comment 27 that administrative authorities must also acknowledge the principle of proportionality when they apply the law.¹⁵¹ This requirement could be interpreted as applying on authorities granting visas as well.

If the asylum seeker has managed to exit his or her country of origin, the next steps are to reach the territory of the EU, have access to an asylum procedure and submit an asylum application. Practically the first possible place to submit an application is at the border of the destination EU country. The next section discusses asylum seekers’ right to access an asylum procedure.

2.2.Right to access an asylum procedure

In international law the only *procedural* right to seek asylum is stated in Article 14(1) of the UDHR, which establishes the right to *seek* asylum from persecution in other countries.¹⁵² From the wording of the provision it is obvious that it refers specifically to the procedural right. As it is widely known, the UDHR is not a binding convention. However, it is recognized as a declaration providing the basic values and violation of Article 14 is a severe “moral and legal political issue”.¹⁵³ Therefore, the EU should respect the provisions of the UDHR also when it tries to control with visa requirements the physical access of asylum seekers to its territory.

While states are not under an obligation to *grant* asylum, those states that are parties to the Refugee Convention are legally bound to grant refugee status to those asylum seekers

¹⁵⁰ R. v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), [2004] UKHL 55 (appeal taken from [2003] EWCA Civ 666), para 53.

¹⁵¹ Human Rights Committee, General Comment No. 27, para 15.

¹⁵² Art. 14(1), UDHR.

¹⁵³ Gammeltoft-Hansen and Gammeltoft-Hansen, “The Right to Seek – Revisited,” p. 442.

who manage to submit their asylum application and who fulfill the criteria set in Article 1(A)(2) of the Refugee Convention.¹⁵⁴ As has already been mentioned, the Refugee Convention applies to only those persons who are “outside the country of his nationality”.¹⁵⁵ Therefore, the responsibility under Article 1(A)(2) of the Refugee Convention for asylum seekers begins only when they have crossed borders. The EU’s externalized borders that asylum seekers may experience in their own country of nationality are not acknowledged in the Convention. The Refugee Convention does not impose an obligation for the parties to issue visas for asylum seekers so that they have a possibility to exit their own country and access an asylum procedure in another. As Guild points out, the states have an interest in externalizing their borders in order to avoid taking responsibility for processing asylum claims.¹⁵⁶ Nessel urges to look at the original intentions of the drafters of the Refugee Convention.¹⁵⁷ The author rightly argues that the drafters could not have foreseen in 1951 the substantial efforts of the western states to prevent potential refugees-to-be from even exiting their countries of origin.¹⁵⁸ Consequently, interpreting the provisions of the Refugee Convention must be done in the wider international human rights framework.¹⁵⁹ The EU Member States must ensure that asylum seekers in genuine need of international protection are able to access an asylum procedure.

After reviewing the international law, the relevant European law is discussed. In the European law “the absolute respect for the right to *seek* asylum” was specifically established in the Tampere programme in 1999.¹⁶⁰ Article 18 of the EU Charter refers to the rules stated in the Refugee Convention and its Protocol, according to which the right to asylum must be

¹⁵⁴ Art. 1(A)(2), Refugee Convention.

¹⁵⁵ Ibid.

¹⁵⁶ Guild, “Moving the Borders of Europe,” p. 6.

¹⁵⁷ Lori A. Nessel, “Externalized Borders and the Invisible Refugee,” *Columbia Human Rights Law Review* 40, no. 3 (2009): pp. 625-699.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Council of the European Union, “Presidency Conclusions, Tampere European Council, 15-16 October 1999,” 16 October 1999, para 13.

guaranteed (the wording does not refer to a procedural right as discussed above).¹⁶¹ The Charter was given binding effect when the Lisbon Treaty came into force on 1 December 2009. Interestingly, the ECHR does not include any reference to right to seek asylum. However, according to Article 3(1) of the Dublin II Regulation Member States have an obligation to “examine the application of any third country national who applies at the border or in their territory to any one of them for asylum”.¹⁶² Firstly, the applicability of the provision requires that a person has managed to exit a third country and has reached the border or territory of an EU Member State. Secondly, Article 3 can be interpreted that Member States are obliged to *process* the applications but are not bound to grant a refugee status to a person who applies for asylum. According to the Commission, the initial goal of the Dublin II Regulation was to ensure that every asylum seeker has an access to an asylum procedure.¹⁶³ Another objective of the Dublin II Regulation is to ensure that each case is examined only by one Member State.¹⁶⁴ This is to avoid so called “asylum shopping” when one person submits several applications in different Member States. In practice, however, unfortunately harmonization efforts have not been very successful and asylum seekers still have unequal chance of being granted refugee status in different Member States. The EU’s objective to harmonize the asylum and immigration policy has seemed more like an attempt to stop asylum seekers from physically entering the territory of the Member States and to eliminate their access to asylum procedures.¹⁶⁵

¹⁶¹ Art. 18, EU Charter.

¹⁶² Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003 O.J. (L 50/1), Art. 3(1).

¹⁶³ Commission Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, COM (2001) 447 final (July 26, 2001), p. 3.

¹⁶⁴ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003 O.J. (L50/1), Art. 3.

¹⁶⁵ Gammeltoft-Hansen and Gammeltoft-Hansen, “The Right to Seek – Revisited,” p. 448.

The Dublin II Regulation means also that internal borders still exist for asylum seekers between different Member States. Others who have been granted a Schengen visa can freely move between countries that have lifted the internal border controls. Asylum seekers are required to respect internal borders while Member States are agreeing on their responsibilities to process asylum applications. The Member State who has granted the visa to the asylum seeker should be responsible for examining the application, unless it is a family unification case which takes priority in the hierarchy of criteria.¹⁶⁶

The case *M.S.S v. Belgium and Greece* is an example of Member States determining their responsibilities and an illustration how people can end up in horrible situations during that process.¹⁶⁷ In the case the applicant was returned to Greece, which was obliged to take charge based on the Dublin II Regulation. In Greece the applicant was held in detention under harsh conditions and the examination of his asylum request by the Greek authorities was insufficient. The European Court of Human Rights concluded that there had been a violation of Article 3 of the ECHR.¹⁶⁸ Before returning the applicant to Greece, the Belgian authorities should have verified how the Greek asylum legislation is applied in practice.¹⁶⁹

The *M.S.S* case is an example of a situation when the level of national protection in a Member State is not in conformity with the community legislation. There is a risk that the Dublin system may result in Member States sending asylum seekers back and forth while denying their own responsibility to process the applications. Visa policy is a way for the Member States to control the flow of asylum seekers to their own territory. If one EU

¹⁶⁶ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2003 O.J. (L 50/1), Art. 9(2) and Chapter III: Hierarchy of criteria.

¹⁶⁷ *M.S.S v. Belgium and Greece*, Application no. 30696/09, Eur. Ct. H.R. Judgment of 21 January 2011.

¹⁶⁸ *Ibid*, para 234.

¹⁶⁹ *Ibid*, para 359.

Member State issues a visa for the asylum seeker, in principle he or she cannot apply asylum in another Member State (see reference to priority of family unification criteria above).

The right to seek asylum has been noticed in the courts. In the well-known case *R v. Immigration Officer at Prague Airport*, which was already referred to in the previous section, the appellants claimed that the pre-entry procedures violated their right to seek asylum and were racially discriminatory against Roma.¹⁷⁰ According to the judgment of the House of Lords, the international obligations defined by the Refugee Convention and customary law did not apply in the case, as the applicants were not outside their country of origin.¹⁷¹ The Court further argued that even if the obligations were valid, the Roma could seek asylum in any other country.¹⁷² However, controversially, the House of Lords ruled that the pre-entry procedures were discriminatory against Roma.¹⁷³

The case illustrates a lack of solidarity, which exists in the EU. The burden sharing efforts have not been successful since every Member State primarily attempts to prevent asylum seekers from entering its own territory. The consequences are ignored of what a situation that could lead to, if every Member State is thinking in a similar way, i.e. focusing only on preventing access to its own territory. Asylum seekers would end up “locked” in their own countries of origin. Currently, no Member State seems to be eager to accept larger flows of Roma asylum seekers. This is reflected in the visa practices. The British action in the *R v. Immigration Officer at Prague Airport* case undermined the right to access an asylum procedure as well as the right to exit one’s country. The objective of the EU’s visa policy to keep asylum seekers outside the EU territory hinders their possibilities to access an asylum

¹⁷⁰ *R. v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55 (appeal taken from [2003] EWCA Civ 666).

¹⁷¹ *Ibid.*, paras 26 and 43.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, para 97.

procedure. Next the third obligation, absolute prohibition of ill treatment, is discussed and its applicability in the context of visa policy is analyzed.

2.3. Absolute prohibition of ill treatment

The comparison of the non-refoulement principle and prohibition of ill treatment in other international and European human rights instruments gives an interesting insight to the applicability of these rights and how refusal of visas may affect them. Firstly, the principle of non-refoulement in Article 33 of the Refugee Convention is analyzed.¹⁷⁴ Protection from refoulement is established also in European law in the Qualification Directive in Article 21.¹⁷⁵ Non-refoulement means the prohibition to “expel or return 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”.¹⁷⁶ Externalization of borders has raised new questions on where and when principle of non-refoulement is actually in effect.¹⁷⁷ The Refugee Convention includes a geographical limitation in Article 1(A)(2) as it applies to persons “outside the country of his nationality” or “outside the country of his former habitual residence”.¹⁷⁸ The drafters of the Refugee Convention over 60 years ago were probably not prepared for today’s highly externalized border policies and the fact that potential refugees-to-be are controlled far away from the territorial borders of the states. Nevertheless, according to Goodwin-Gill’s interpretation the Contracting Parties were not willing at the time of drafting to include any provisions to the

¹⁷⁴ Art. 33, Refugee Convention.

¹⁷⁵ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, 2004 O.J. (L 304/12), Art. 21.

¹⁷⁶ Art. 33(1), Refugee Convention.

¹⁷⁷ Lax, “Must EU Borders have Doors for Refugees?,” p. 333.

¹⁷⁸ Art. 1(A)(2), Refugee Convention.

Convention, which would have even slightly referred to an obligation to *grant* asylum.¹⁷⁹ Therefore, non-refoulement was not meant to refer to any kind of duty to grant entry. As has been mentioned already, it is absolutely true that states do not have any legal obligation to grant asylum nor receive refugees.

The question in relation to visa policy is whether refusing to grant a visa in the territory of the country of origin to a person who intends to apply for asylum in a EU Member State amounts to refoulement to the place of persecution. According to the judgment of the House of Lords in the *R v. Immigration Officer at Prague Airport*, the drafters of the Refugee Convention did not mean Article 33 to have extraterritorial validity.¹⁸⁰ The Court concluded that there was no violation of Article 33 in the case concerning non-refoulement since the applicants never left their state of nationality.¹⁸¹ Goodwin-Gill, however, has said that non-refoulement principle is customary international law and the principle should regulate states' actions wherever they take place; inside the territory, at the border or outside territorial jurisdiction by their state agents.¹⁸²

In case of visas it is possible that the person needs to travel to a neighboring country in order to find the nearest consulate or embassy where he or she can apply for a visa. Goodwin-Gill has argued that refusing to grant a visa to a person with a well-founded fear of persecution does not amount to refoulement.¹⁸³ It is definitely a barrier to reach safety and restricts the right to seek asylum but states are not obliged to modify their immigration policies.¹⁸⁴ When visa requirement applies, states have "complete authority and control to

¹⁷⁹ Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon Press, 1996), p. 122.

¹⁸⁰ *R. v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55 (appeal taken from [2003] EWCA Civ 666), para 68.

¹⁸¹ *Ibid*, para 43.

¹⁸² Goodwin-Gill, *The Refugee in International Law*, p. 143.

¹⁸³ *Ibid*, p. 252.

¹⁸⁴ *Ibid*, p.252.

interfere” with an access to their territories.¹⁸⁵ I argue that although denying a visa may not be considered as a violation of Article 33, in some asylum situations it may be against the purpose and the spirit of the Refugee Convention. In the context of visas a relevant issue is whether refusing a visa and returning an asylum seeker, who is already outside his or her country of nationality and applying for a visa in a neighboring country where he or she may face persecution on the grounds defined in the Refugee Convention, could be considered as refoulement under Article 33. Lax argues that it definitely could.¹⁸⁶

Secondly, the applicability of prohibition of ill treatment is analyzed. That prohibition is widely recognized as an absolute non-derogable right. Prohibition is established in Article 3 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹⁸⁷, Article 5 of the UDHR¹⁸⁸, Article 7 of the ICCPR¹⁸⁹, Article 3 of the ECHR¹⁹⁰ and Articles 4 and 19 of the EU Charter¹⁹¹. These provisions establish that states shall not send persons to countries where they may face torture or degrading or inhuman treatment. These provisions do not include any geographical limitations, contrary to the Refugee Convention. Furthermore, these provisions cover *everyone* and do not list any specific grounds of persecution as Article 33(1) of the Refugee Convention.¹⁹² Therefore, the articles on prohibition of ill treatment offer broader protection than non-refoulement in Article 33 of the Refugee Convention.

¹⁸⁵ Lax, “Must EU Borders have Doors for Refugees?,” p. 337.

¹⁸⁶ Ibid, p. 362.

¹⁸⁷ Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984); 1465 U.N.T.S. 85 (1987), Art. 3.

¹⁸⁸ Art. 5, UDHR.

¹⁸⁹ Art. 7, ICCPR.

¹⁹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, E.T.S. 5; 213 U.N.T.S. 221 (1953), Art. 3.

¹⁹¹ Art. 4 and Art. 19, EU Charter.

¹⁹² Art. 33(1), Refugee Convention: ”—on account of his race, religion, nationality, membership of a particular social group or political opinion”.

The absolute nature of the prohibition of ill treatment is confirmed in several cases of the European Court of Human Rights. For instance in case *Soering v. the United Kingdom* concerning extradition the Court considered that the prohibition of torture and inhuman treatment under Article 3 of ECHR is absolute regardless of the person's behavior.¹⁹³ Also in case *Chahal v. the United Kingdom*, which involved a deportation order of a Sikh separatist back to India, the Court confirmed that Article 3 of the ECHR is absolute and no exceptions are allowed.¹⁹⁴ In the case *Saadi v. Italy* the applicant was a suspected terrorist.¹⁹⁵ Italy wanted to deport the applicant back to Tunisia in a fear of him being a threat to national security. However, the Court concluded that even a suspected terrorist cannot be deported to a country where there is a risk that he or she will be treated contrary to Article 3 of the ECHR.¹⁹⁶ Besides covering everyone and being absolute, the prohibition of ill treatment applies also extraterritorially if the actions are committed within states' jurisdiction.

The extraterritorial applicability of human rights obligations has been established in both international and European case law. For instance in the case *De Lopez v. Uruguay* the Human Rights Committee confirmed that under Article 2(1) of the ICCPR states' obligations arise "within its territory and subject to its jurisdiction".¹⁹⁷ The Committee further concluded that state might be accountable for violations committed by its agents also in the territory of another state.¹⁹⁸ The Human Rights Committee has interpreted the scope even more broadly

¹⁹³ *Soering v. the United Kingdom*, Application no. 14038/88, Eur. Ct. H.R. Judgment of 07 July 1989, para 88.

¹⁹⁴ *Chahal v. the United Kingdom*, Application no. 22414/93, Eur. Ct. H.R. Judgment of 15 November 1996, para 79.

¹⁹⁵ *Saadi v. Italy*, Application no. 37201/06, Eur. Ct. H.R. Judgment of 28 February 2008.

¹⁹⁶ *Ibid*, para 137.

¹⁹⁷ Human Rights Committee, *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984), para 12.3.

¹⁹⁸ *Ibid*.

in its General Comment 31. States' obligations under the ICCPR are applicable towards a person who is "within the power or effective control" of the state.¹⁹⁹

In the European case law the jurisdiction debate on the extraterritorial effect of human rights obligations has taken place for instance in case *Issa and Others v. Turkey*, in which the European Court of Human Rights concluded that states may be accountable for human rights violations if the person in question is under the state's authority and control in the territory of another state.²⁰⁰ According to the Court, the ECHR must be interpreted in a way that actions prohibited on a state's own territory cannot be allowed on another state's territory.²⁰¹ Another example case is *Al-Skeini and Others v. the United Kingdom*, which concerned the death of six Iraqis at the time when the United Kingdom was an Occupying Power in Iraq and British soldiers had been involved in the incidents.²⁰² The British government claimed that the Court lacked jurisdiction, as the victims were not within the United Kingdom jurisdiction, except the sixth victim.²⁰³ The European Court of Human Rights concluded that the United Kingdom had exercised authority and control over the victims, which established a jurisdiction link in the case.²⁰⁴

The European case law includes also examples of extraterritorial applicability in the specific context of Article 3 of the ECHR. In the case *Soering v. the United Kingdom* the European Court of Human Rights confirmed that Article 3 of the ECHR is applicable when

¹⁹⁹ Human Rights Committee, General Comment No. 31 on nature of the general legal obligation imposed on states parties to the Covenant, U.N.Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 10.

²⁰⁰ *Issa and others v. Turkey*, Application no. 31821/96, Eur. Ct. H.R. Judgment of 16 November 2004, para 69.

²⁰¹ *Ibid*, para 71.

²⁰² *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, Eur. Ct. H.R. Judgement of 07 July 2011.

²⁰³ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, Eur. Ct. H.R. Judgement of 07 July 2011, para 109-119. See also *Loizidou v. Turkey*, Application no. 15318/89, Eur. Ct. H.R. Judgment of 23 March 1995, para 62 in which the Court concluded that jurisdiction does not refer only to the national territory of the state but also state exercising effective control outside its national territory raises responsibility.

²⁰⁴ *Al-Skeini and Others v. the United Kingdom*, Application no. 55721/07, Eur. Ct. H.R. Judgement of 07 July 2011, para 149.

extradition leads to possible ill treatment in another country of the person in question.²⁰⁵ A more recent judgment of the European Court of Human Rights is *Hirsi Jamaa and others v. Italy*. The case concerned Somali and Eritrean nationals who boarded vessels in Libya and aimed at reaching Italian coast. They were intercepted on the high seas by the Italian police and were handed over to Libyan authorities.²⁰⁶ What comes to the question of jurisdiction, the Court concluded that the applicants were continuously under control of Italian authorities and therefore within Italian jurisdiction.²⁰⁷ The Court confirmed the absolute nature of Article 3 of the ECHR in case when a person is removed to another country where he or she faces a real risk of treatment in violation of Article 3.²⁰⁸ If the other country is just an intermediate, the returning state must ensure “sufficient guarantees” against refoulement.²⁰⁹

Finally, there is one more concept introduced by the EU that may breach the prohibition of ill treatment and undermine access to an asylum procedure. It is the safe third country concept. The safe third country concept means that in case the applicant has travelled through a country that is considered safe and where he or she could have applied for asylum, Member States may refuse to process his or her application.²¹⁰ According to ECRE, the purpose of the safe third country rule is to shift the responsibility for handling asylum applications and facilitate the return of persons to third countries outside the EU.²¹¹ An example case from Hungary illustrates the risks related to right to seek asylum. Serbia is considered as a safe third country by Hungarian authorities and applications of asylum seekers who have travelled through Serbia are routinely rejected without being referred to an

²⁰⁵ *Soering v. the United Kingdom*, Application no. 14038/88, Eur. Ct. H.R. Judgment of 07 July 1989, para 86.

²⁰⁶ *Hirsi Jamaa and others v. Italy*, Application no. 27765/09, Eur. Ct. H.R. Judgment of 23 February 2012.

²⁰⁷ *Ibid*, paras 81-82.

²⁰⁸ *Ibid*, para 123.

²⁰⁹ *Ibid*, para 147.

²¹⁰ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, 2005 O.J. (L 326/13), Art. 27.

²¹¹ ECRE, “Broken Promises – Forgotten Principles”.

in-merit procedure. According to the Hungarian Helsinki Committee's study published in June 2012, Serbia has not recognized a single person as a refugee yet.²¹² Serious concerns have been raised about the limited access to an asylum procedure in Serbia. According to Hungarian Helsinki Committee's research, 85 percent of the people who have an intention to seek asylum do not have their application registered.²¹³ Furthermore, safe third country practice may expose asylum seekers to ill treatment when returned or to "chain refoulement" if the third transit country considered safe further returns asylum seekers for instance to neighboring countries considered safe.²¹⁴ Hungarian authorities are urged to stop returning asylum seekers to Serbia. The attempts in the EU to control the burden of asylum seekers has unfortunately often seemed to cost the rights of the people in genuine need of protection.

It is accepted that states have "the right -- to control the entry, residence and expulsion of aliens".²¹⁵ However, not allowing asylum seekers to exit or returning them to places where they face persecution without giving an opportunity to seek asylum violates human rights law. The EU's current visa policy does not take into consideration the consequences of asylum seekers possibly being trapped in their own countries. Not only does the visa policy undermine the right to exit one's own country to seek asylum, also refusing visas may prevent an asylum seeker to flee from persecution. In these cases the absolute protection against ill treatment may become relevant. All three rights presented in this chapter should be considered together, interpreted as a part of broader international human rights law and also consider the original purpose and spirit of various international and

²¹² Anikó Bakonyi et al., "Serbia as a Safe Third Country: Revisited. An update on the Hungarian Helsinki Committee's 2011 report based on a field mission to Serbia (2-4 April 2012)," Hungarian Helsinki Committee, June 2012, p. 16, <http://helsinki.hu/en/serbia-not-a-safe-country-of-asylum>.

²¹³ Ibid, p. 2.

²¹⁴ Ibid, p. 2.

²¹⁵ For instance *Chahal v. the United Kingdom*, Application no. 22414/93, Eur. Ct. H.R. Judgment of 15 November 1996, para 73; *TI v. the United Kingdom*, Application no 43844/98, Eur. Ct. H.R. Judgment of 7 February 2000.

European human rights instruments. The existing case law gives important guidance in interpreting the three rights. The next section briefly summarizes Chapter 2.

2.4. Conclusions

This chapter answered the question *how the European Union's visa policy affects the rights of asylum seekers to seek asylum*. The focus of this study is on the procedural right to seek asylum. Both international and European human rights instruments were examined as well as related case law. Three rights were discussed: right to exit any country, right to access an asylum procedure and absolute prohibition of ill treatment.

Firstly, the EU's asylum system starts to function only once the asylum seekers has reached the territory of the EU. Obviously, exiting another country is a precondition. Visa may be a pre-requisite to exit a country and a plan to seek asylum is not a reason for granting a visa. If a person cannot exit his or her country of origin, right to access an asylum procedure does not have meaning. Therefore, right to exit should be approached as a *right to exit to seek asylum*, for which the proportionality test is stricter. States must respect the right of an individual to leave his or her country in order to apply for international protection.

Secondly, as was mentioned right to exit any country and right to access an asylum procedure are closely linked. States do not have an obligation to grant asylum or invite potential refugees to seek asylum in their territory. However, the EU's visa policy clearly influences the possibilities of asylum seekers to access an asylum procedure. When interpreting the rights to seek asylum and to access an asylum procedure, the original intentions of the refugee protection framework and wider international human rights law must be considered.

Thirdly, prohibition of ill treatment and principle of non-refoulement were reviewed. Although refusal of a visa in a country of origin to a person who wants to apply for asylum in the EU does not amount to violation of non-refoulement, it can be considered to be against

the purpose of the Refugee Convention. Non-refoulement is considered to be customary international law that may apply also outside the territorial jurisdiction of a state. Prohibition of ill treatment provides broader protection than non-refoulement principle. The absolute nature of the prohibition is confirmed in substantial case law as well as the extraterritorial applicability if actions are committed within states' jurisdiction. When refusing a visa prevents an asylum seeker to flee from persecution and have an opportunity to access an asylum procedure, absolute protection against ill treatment may be applicable.

The EU's objectives to control access of asylum seekers, fight against illegal immigration, prevent crime and manage international relations seem to have taken the priority and rights of asylum seekers have been disregarded. The current mechanically applied EU's visa policy does not consider the consequences of asylum seekers not being able to exit countries where they face persecution. Right to exit any country, right to seek asylum and absolute prohibition of ill treatment and refoulement together should be interpreted as a duty for EU Member States to ensure that those asylum seekers who are in genuine need of international protection are able to access an asylum procedure.

The framework of the study is presented in Figure 3 below and will guide the analysis in the comparative case study. The two upmost boxes summarize the issues discussed so far: objectives of the EU's visa policy and rights of asylum seekers. Also the issue of illegal smuggling was discussed in Chapter 1 and is pictured on the left hand side in Figure 3. The empirical part in Chapter 3 will focus on regulatory efficiency, which is illustrated on the right hand side in Figure 3. It means that the outcome will be compared to the original objectives of the EU's visa policy before and after visa liberalization was granted in the five Western Balkan countries. The lowest box in Figure 3 circled with dashed line illustrates the other possible determinants affecting the outcome. However, those determinants are outside the scope of this thesis, which focuses only on implications of visa policy.

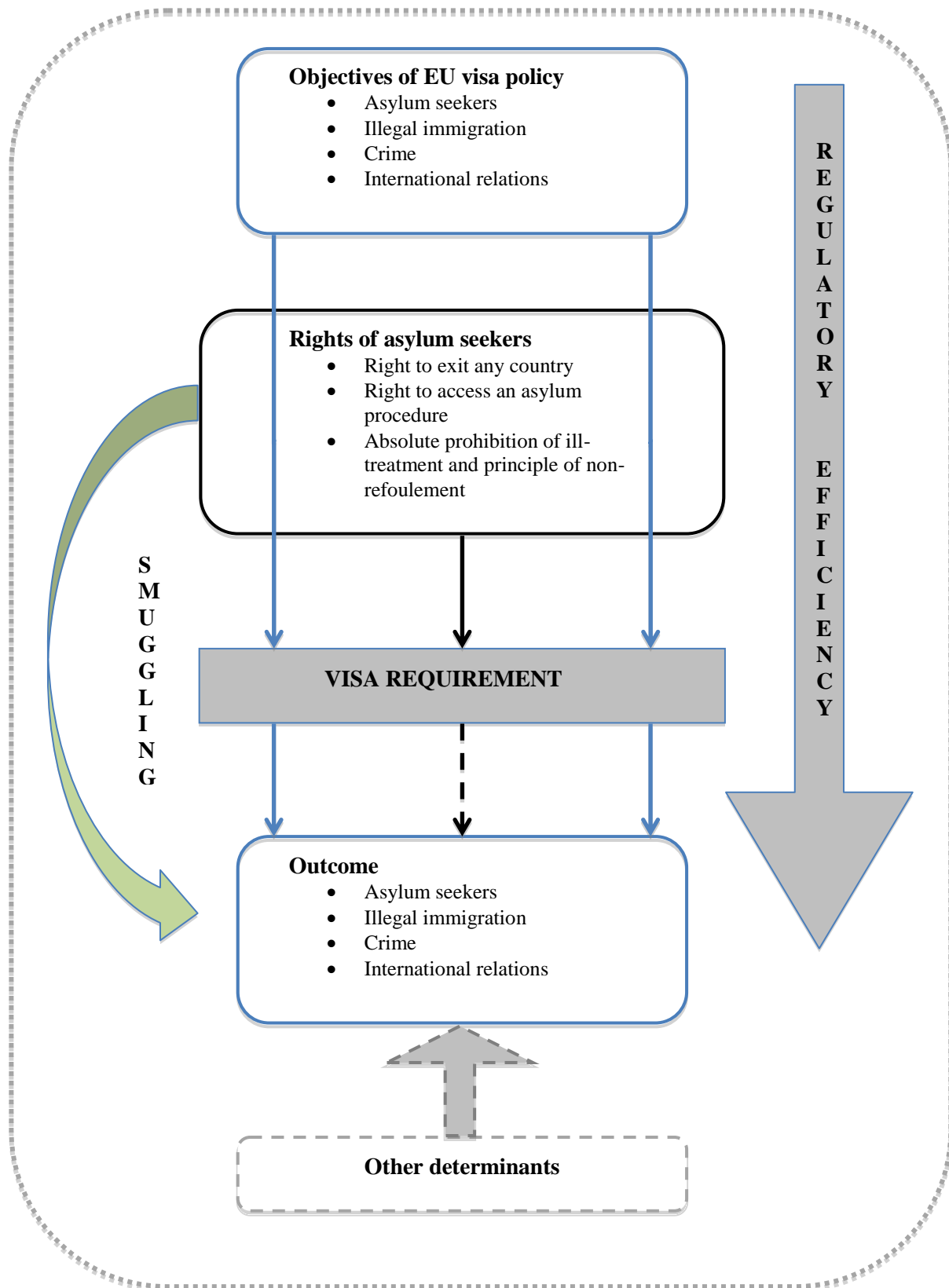


Figure 3: Framework of the study.

3. Comparative case study: Consequences of visa liberalization in Western Balkans

In order to answer the main research question of this study, which is *how to balance the objectives of the European Union's visa policy and rights of asylum seekers when designing visa policies*, it is essential to analyze the regulatory efficiency of the EU's visa policy. It is necessary to examine through a practical example whether the EU's objectives are justifiable and what has happened in reality when visa requirements have been removed. This issue is approached through a comparative case study on the consequences of visa liberalization in five Western Balkan countries. This chapter provides an answer to the question: *Has the European Union's visa policy met the objectives it was introduced for in the Western Balkan countries?*

The aim of this chapter is to analyze the measurable implications of visa liberalization in five Western Balkan countries: Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia. This chapter consists of four sections. Firstly, the choice of the five Western Balkan countries as source countries and Finland as a migration target country is justified. Secondly, the research methodology used in the case study is outlined and limitations are analyzed. Thirdly, the road to visa liberalization and the bargaining process with the EU is discussed. Fourthly, the statistical data is examined before and after the visa requirement was removed. The measurable consequences of visa liberalization are analyzed based on the objectives for maintaining the visa policy discussed in Chapter 1. Those objectives include controlling the access of asylum seekers, reducing illegal immigration, preventing crime and managing international relations. Also political and legal reactions to visa liberalization are discussed in this chapter.

Next, a brief justification for the choice of the source and target case countries is provided.

3.1.Choice of the case countries

The five migration source countries examined in this case study are Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia. The following three reasons led to this choice. Firstly, all five countries have been granted visa liberalization with the EU. The agreement with Macedonia, Montenegro and Serbia entered into force in 2009 and with Albania and Bosnia and Herzegovina in 2010.²¹⁶ Several source countries were chosen so that national comparison between them is also possible. Visa liberalization in each country enables comparison of measurable impacts before and after visa the requirement was removed.

Secondly, due to the geographical location of Western Balkan countries close to the EU the negative effects of the visa requirements on Western Balkan citizens to move freely in the region were clear.²¹⁷ Not only for asylum seekers but visa requirement was a major barrier for other travellers as well such as tourists, business travellers and students. Visa liberalization agreements are an important political tool for the EU's eastern enlargement strategy and initiative for third countries towards the EU membership. The EU has pressured and motivated the Western Balkan countries to fulfill specific conditions to gain visa free travel by offering them a possibility of EU accession. The Western Balkan nationals

²¹⁶ Council Regulation (EC) No 1244/2009 of November 2009 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, 2009 O.J. (L 336/1); Regulation (EU) No 1091/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, 2010 O.J. (L 329/1).

²¹⁷ Trauner and Kruse, "EC Visa Facilitation and Readmission Agreements", pp. 416-417.

themselves felt that the EU's restricting visa policy was isolating and exclusive.²¹⁸ Thus, due to these factors this case study illustrates the political importance of visas in the EU's foreign policy as well.

Thirdly, migration flows from and through Western Balkan countries to the EU are relatively significant. This is true also in cases of asylum seekers and illegal immigration. For instance, in 2011 the five countries of this case study submitted 95 percent of all asylum applications by visa-exempted countries in the EU.²¹⁹ What comes to illegal immigration, Western Balkan countries experience growing pressure as significant amount of migrants use the Western Balkan route to access their final destination in the EU.²²⁰

The target migration country in this case study is Finland, which is a both transit and target migration country. Finland was chosen for the following two reasons. Firstly, visa policy has not been much discussed in Finland other than in the context of Russia. Already in 2005 visa liberalization was set as a long-term goal between Russia and the EU.²²¹ However, the visa regime is still maintained. Although Finland is supportive towards visa liberalization agreement with Russia, certain concerns still exist. This study analyzes the consequences of visa liberalization granted for Western Balkans specifically in Finland and therefore may provide useful information and insight for the negotiations in the case of Russia. The findings of this thesis will be provided to the Ministry for Foreign Affairs of Finland, which is the main authority in Finland dealing with visa issues, if interested. Therefore, this study has an important practical purpose.

Secondly, more emphasis and discussion must be directed towards the efficiency of visas as a tool to control migration. Especially the lack of academic research is evident.

²¹⁸ Ibid, p. 417.

²¹⁹ Frontex, "Western Balkans Annual Risk Analysis 2012," p. 30.

²²⁰ Ibid, p. 6.

²²¹ European Union, "Common Spaces Roadmap: Roadmap for the Common Space of Freedom, Security and Justice," 2005, p. 21, http://eeas.europa.eu/russia/common_spaces/index_en.htm.

Finland has been part of the Schengen community since 1996 and issues a growing number of visas every year. In 2011, for instance 1 259 643 short-term Schengen visas were applied to Finland which is 23 percent more than in 2010 and 58 percent more than in 2009.²²² The significant increase in the total number of applications is explained by the increase of applications in Russia. In 2011, around 95 percent of all visas were applied for in Russia.²²³ The rate of rejected short-term visas is very low. In 2011 and 2010 it was around one percent whereas in 2009 the rate was around two percent.²²⁴ Considering the huge workload required for processing that amount of visa applications annually, topic of regulatory efficiency is very actual. On top of that, the human rights aspect of visas must be brought into the discussion in Finland. The government of Finland has established promoting human rights as its priority in the first National action plan on fundamental and human rights 2012-2013 as well as in the current Government Program of Finland.²²⁵ Rights of asylum seekers must not be forgotten for the sake of the objectives of the EU's visa regulations.

Although this case study focuses specifically on Finland as a target country, comparisons will be drawn also from other EU countries and from the EU as a whole. The next section outlines the methodology and limitations of this case study.

3.2. Methodology and limitations

The data for this case study was collected from statistics, national legislations of the Western Balkan countries and secondary data. Statistical data was requested and obtained from the Ministry for Foreign Affairs of Finland, Statistics Finland, Finnish Immigration Service,

²²² Ministry for Foreign Affairs of Finland, "Statistics on Schengen visas 2008-2011," provided upon request October 29, 2012.

²²³ Ibid. In 2011, total of 1 191 460 short-term visas were applied in Russia.

²²⁴ Ibid.

²²⁵ Finnish Government, "Programme of Prime Minister Jyrki Katainen's Government," June 22, 2011, <http://valtioneuvosto.fi/hallitus/hallitusohjelma/pdf/en334743.pdf>; Ministry of Justice of Finland, "National action plan on fundamental and human rights 2012-2012," January 31, 2012, <http://www.om.fi/Etusivu/Julkaisut/Selvityksiajaohjeita/Selvitystenjaohjeidenarkisto/Selvityksiajaohjeita2012/1330603574634>.

Police and National Bureau of Investigation. Statistics on EU level were found in the Eurostat database and Frontex publications. Most of the national legislations were found in English online. Some reports and other documents of NGOs had to be relied on in case of those national legislations, which were available only in their original language. Secondary data sources were also used. These include Internet pages and reports of the key actors and reports of relevant NGOs and institutions. Secondary data was used mainly to support and extend evidence from the statistical sources.

There are three limitations in this case study that need to be acknowledged. Firstly, the scope of this study is narrowed to analyzing consequences of removing visa requirements. There are also other determinants on which for instance asylum seekers base their decision to seek asylum in a certain country (as was presented in Figure 3). Strict visa policy may be just one of those determining factors. Also what comes to illegal immigration and criminality, other factors may influence the reduction or increase of the two phenomena. However, this study focuses only on whether there is available evidence that in reality removing visa requirements has led to those phenomena that the EU is using as justifications for maintaining a visa policy. In other words, the focus is on regulatory efficiency of *visas*.

The second limitation is that visa liberalization in Western Balkans is a new thing. As has been mentioned visa requirements were removed from Macedonia, Montenegro and Serbia in the end of 2009 and from Albania and Bosnia and Herzegovina in the end of 2010. Therefore, it is not possible yet to analyze what are the long-term consequences and implications of visa liberalization in these specific countries. Instead, this study focuses on the short-term impacts.

Thirdly, this case study is limited to only one target country, Finland. As this is a limited case study of certain source and target countries, it could be argued that the results are not generalizable beyond this specific case study. However, some direction could still be seen

in the findings and some conclusions were possible to be drawn. Furthermore, the purpose of this case study is to understand the issue particularly Finland and the EU as a whole as target destinations and Western Balkans as source countries. When the data is analyzed in section 3.4, examples are drawn also from other EU countries and from the EU in total. That will give a better idea how far the findings of the case study can be generalized.

Next, the steps that were needed to reach visa liberalization agreements in Western Balkans and the conditionality requirement introduced by the EU in the bargaining process are reviewed.

3.3.Road to visa liberalization

The EU indicated the importance of granting visa liberalization for the Western Balkan countries already in 2003 in the Thessaloniki summit.²²⁶ The purpose of lifting visa requirements is to enable contacts between people, to promote business and cultural relations as well as to allow citizens of Western Balkan countries to learn more about the EU.²²⁷ However, only four and half years after the summit on 1 January 2008 the first concrete step was taken towards visa liberalization when the visa facilitation agreements entered into force in all five countries.²²⁸ Readmission agreements had been signed between the European Community and the five Western Balkan countries already prior to visa facilitation.²²⁹ Visa

²²⁶ General Affairs and External Relations Council (GAERC), “The Thessaloniki agenda for the Western Balkans: Moving towards European Integration,” Council Conclusions - Western Balkans, June 16, 2003.

²²⁷ Frontex “Western Balkans Annual Risk Analysis 2012,” p. 38.

²²⁸ Agreement between the European Community and Bosnia and Herzegovina on the facilitation of the issuance of visas, December 19, 2007, 2007 O.J. (L 334/97); Agreement between the European Community and the Former Yugoslav Republic of Macedonia on the facilitation of the issuance of visas, December 19, 2007, 2007 O.J. (L 334/125); Agreement between the European Community and the Republic of Albania on the facilitation of the issuance of visas, December 19, 2007, 2007 O.J. (L 334/85); Agreement between the European Community and the Republic of Montenegro on the facilitation of the issuance of visas, December 19, 2007, 2007 O.J. (L 334/109); Agreement between the European Community and the Republic of Serbia on the facilitation of the issuance of visas, December 19, 2007, 2007 O.J. (L 334/137).

²²⁹ Council Decision 2005/809/EC of 7 November 2005 concerning the conclusion of the Agreement between the European Community and the Republic of Albania on the readmission of persons

facilitation agreements and related readmission agreements were already shortly mentioned in section 1.2.3. of this thesis when the principle of conditionality was discussed. The content of the visa facilitation agreements for all five Western Balkan countries is the same. The visa facilitation agreements specify the groups of persons who can benefit from the simplified procedure and indicate what documentation is required to prove the purpose of the travel. The agreements in all five countries include categories of persons such as business people, official delegations, journalists, scientists, students, close relatives, athletes participating in sport events and tourists with a certificate from a travel agency.²³⁰ Persons belonging to these groups, except tourists, can apply for a multiple entry-visa.²³¹ Visa facilitation agreements also establish lower 35-euro visa fee and shorter ten-day decision-making time regarding visa applications.²³² Therefore, the main purpose of visa facilitation agreements is to simplify and fasten the visa procedures for short-term visas. The downside of these agreements is that they clearly divide the citizens into two groups, those who benefit from visa facilitation and those who do not. Still majority of citizens belong to the group that cannot enjoy the benefits.

All five agreements made with Western Balkan countries recognize visa facilitation as the “first concrete step towards the visa free travel regime”.²³³ The bargaining process for visa liberalization in all five countries Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia happened between 2008 and 2010. Visa facilitation agreements advanced the political discussion and for the EU they were a means of convincing and motivating Western Balkans countries to commit reforms in several areas. The Commission

residing without authorisation, 2005 O.J. (L 304/14); Council Decisions 2007/817/EC, 2007/818/EC, 2007/819/EC and 2007/820/EC of 8 November 2007 on the conclusion of Agreements between the European Community and the Former Yugoslav Republic of Macedonia, the Republic of Montenegro, the Republic of Serbia and Bosnia and Herzegovina on the readmission of persons residing without authorisation, 2007 O.J. (L 334/1), (L 334/25), (L 334/45) and (L 334/65).

²³⁰ See for instance Agreement between the European Community and Bosnia and Herzegovina on the facilitation of the issuance of visas, December 19, 2007, 2007 O.J. (L 334/97), Art. 4.

²³¹ Ibid, Art. 5.

²³² Ibid, Art. 6 and Art. 7.

²³³ Ibid, preamble.

underlined that achieving visa free travel requires “substantial efforts” from the Western Balkans themselves.²³⁴

In practice visa liberalization means that the five Western Balkan countries were removed from the ‘black list’. However, it does not mean unrestricted travelling opportunities for the citizens of Western Balkans. Visa free travelling applies only to citizens who have a new biometric passport and they can stay no longer than three months within a six-month period. Visa facilitation agreements apply still on those citizens who do not have a biometric passport and they must still apply for a visa according to the regular or facilitated procedures. Furthermore, Western Balkan citizens who do not need a visa anymore to travel to the EU are obliged to fulfill the entry conditions and can be rejected at the border if they do not meet those conditions. The entry conditions, established in Article 5(1) of the Schengen Borders Code include: valid travel document, sufficient financial resources for the entire stay and return back to country of origin, justification for the purpose of the stay and absence of alert in the SIS or public threat.²³⁵ From the listed entry conditions in the Schengen Borders Code only visa requirement does not apply. When compared to the requirements listed in the Visa Code (also discussed in section 1.1), visa liberalization means that the pre-screening previously done in the embassies and consulates is instead done at the border.

As was explained in Chapter 1 of this study, countries entitled to visa exempt are assessed on individual basis according to criteria of illegal immigration, crime and international relations. In 2008, the Commission gave roadmaps to each of the five Western Balkan countries, which contained the criteria that needed to be fulfilled as a condition for visa liberalization.²³⁶ The Commission monitored the implementation of the roadmaps. The

²³⁴ Commission Communication of 27 January 2006: The Western Balkans on the road to the EU: consolidating stability and raising prosperity, COM (2006) 27 final (January 27, 2006), p. 8.

²³⁵ Art. 5(1), Schengen Borders Code.

²³⁶ Visa liberalization roadmap for each Western Balkan country can be found at “The visa roadmaps.” European Stability Initiative, accessed November 25, 2012, <http://www.esiweb.org/index.php?lang=en&id=352>.

roadmaps were almost the same for all countries containing over 40 conditions. However, already existing legislation and good practice was taken into consideration and that led to small differences in the roadmaps between the five countries. All of the roadmaps have two parts. The first part consists of requirements for correct fulfillment of visa facilitation and readmission agreements while the second part consists of four blocks of requirements: (1) document security, (2) illegal migration, (3) public order and security and (4) external relations and fundamental rights.²³⁷ The nature of the requirements varies a lot from technical issues to implementation of laws and national strategies. The main idea is to have the national policies of the Western Balkan countries in compliance with the EU standards. Therefore, persons coming from or transiting through the Western Balkans countries to the EU's territory would meet the entry criteria defined in the Schengen Borders Code.

Many people from Western Balkan countries have benefited from the visa facilitation agreements and later from the complete removal of visa requirements. They have been able to save time and money when travelling to the EU. In the next section comparative analysis will be conducted on how the visa liberalization, i.e. removal of visa requirements has influenced the original objectives of the EU for maintaining a visa policy and what have been the political and legal reactions to the consequences, especially in the context of asylum seekers.

3.4. Comparative analysis

This section examines the measurable implications before and after the visa requirement was removed in Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia. Comparative analysis is made mainly based on statistical data on asylum seekers, illegal immigration and crime in Finland. However, comparisons are drawn also from other countries and from the EU as a whole. Instead of statistical analysis, the last section on the

²³⁷ Ibid.

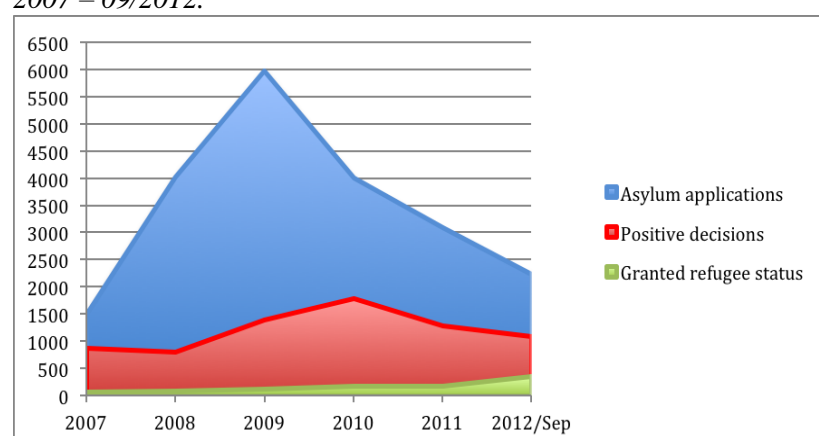
international relations focuses on analyzing the political and legal reactions to visa liberalization on national and EU level. First, the data on asylum seekers is examined.

3.4.1. Asylum seekers

Although it is not included in the Commission's list of official justifications for maintaining a visa regime, as was argued in the earlier chapters of this thesis the EU's visa policy represents a major barrier for asylum seekers to reach the territory of the EU and access an asylum procedure. It was concluded that one of the objectives of the EU's visa policy is to control the access of asylum seekers. Visa liberalization has opened the possibility for persons to travel to the EU and apply for asylum there, which is something they may have wanted to do already for a longer time and now have the possibility to use legal channels. This section analyzes the implications of visa liberalization on the flows of asylum seekers from the five Western Balkan countries mainly to Finland. Asylum statistics for the analysis have been obtained from Finnish Immigration Service and Eurostat. At the time of writing, the latest available asylum statistics are from September 2012.

Figure 4 below illustrates the total number of asylum applications submitted, positive decisions made and refugee status granted in Finland in 2007 - September 2012. Positive decisions in total include granted refugee status, secondary protection, humanitarian protection and other reasons for a positive decision.

Figure 4: Total number of asylum applications submitted and positive decisions made in Finland 2007 – 09/2012.



Source: Finnish Immigration Service, “Asylum applicants and decisions on asylum, total figures by nationality,” http://www.migri.fi/tietoa_virastosta/tilastot/turvapaikka-ja_pakolaistilastot.

After 2009 the total amount of submitted asylum applications has steadily decreased. In 2011, the percentage of positive decisions was 41 percent while in the peak year 2009 it was only 23 percent. The percentage of granted refugee status has been relatively low but it has increased slightly since 2007. Percentage of decisions to grant refugee status of all positive decisions was 34 percent in 2012 (until September). Significant growth is noticeable compared to previous years. In 2011 refugee status was granted in 13 percent of positive decisions and in 2010 the same figure was 10 percent. According to the Finnish Immigration Service this can at least partly be explained by the increase of applications submitted by Syrians who often are granted refugee status.²³⁸

After presenting the general asylum situation in Finland, the focus of the analysis is moved specifically on the five Western Balkan countries. Based on the statistics, Serbia is the largest asylum seeker source country to Finland from the five countries studied in this case study. Serbia has been on the Finnish Immigration Service’s list of top ten source countries in 2010 and 2012, in both years on the sixth place of the list.²³⁹ Table 1 below illustrates the

²³⁸ Finnish Immigration Service, “Turvapaikkayksikön tilastokatsaus tammi-elokuu 2012” [Analysis of statistics on asylum January-August 2012], September 18, 2012, p. 6, http://www.migri.fi/download/36547_tupa_tilastokatsaus_tammi-elo_2012.pdf.

²³⁹ Ibid, p.2.

asylum applications submitted based on nationality in Finland between 2007 and September 2012. The shading in the table illustrates the year when visa liberalization entered into force. For Albania and Bosnia and Herzegovina visa liberalization entered into force in the end of 2010 and for Macedonia, Montenegro and Serbia in the end of 2009. Serbia and Montenegro is still included in the statistics as a separate country in addition to both countries presented also separately.

Table 1: *Asylum applications submitted based on nationality in Finland 2007 – 09/2012.*

	2007	2008	2009	2010	2011	09/2012
Albania	13	16	9	12	11	7
Bosnia and Herzegovina	22	11	13	9	17	69
Macedonia	3	5	9	20	16	24
Montenegro	1	0	1	0	6	12
Serbia	139	94	43	173	72	72
Serbia and Montenegro	10	9	7	2	0	3

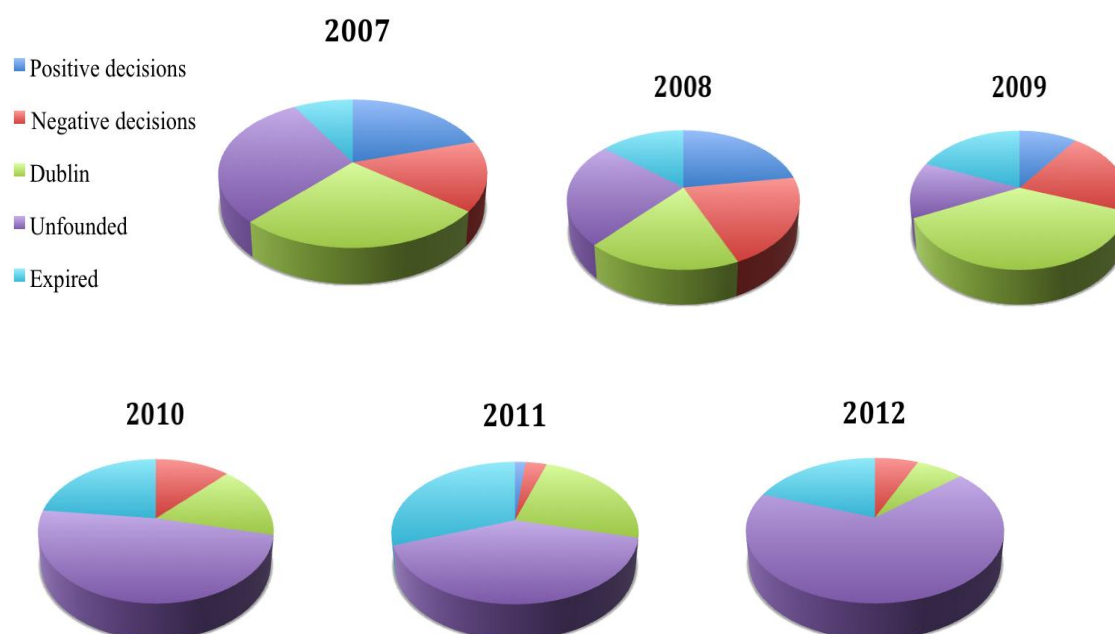
Source: Finnish Immigration Service, "Asylum applicants, total figures by nationality," http://www.migri.fi/tietoa_virastosta/tilastot/turvapaikka-_ja_pakolaistilastot.

The biggest increase in the submitted asylum applications immediately after the visa liberalization happened in the case of Serbia. In 2010, 400 percent more applications were submitted than in 2009 as can be seen in Table 1. However, the number of applications submitted has again dropped in 2011. Also, compared to year 2011 the number of Serbian asylum applicants has been higher prior to the visa liberalization especially in 2007. Another significant increase happened in the number of Bosnian applications, which grew from 17 in 2011 to 69 in 2012 until September. The number of applications from other Western Balkan countries presented in Table 1 above has remained relatively stable since 2007. As has been acknowledged earlier in this thesis, several other determinants besides visa policy may affect the choice of migration destination country but are outside the scope of the current study.

When looking at the decision on the asylum applications submitted by nationals from the five Western Balkan countries, most of the applications have turned out to result in negative decisions, to be unfounded or applicants have been returned according to the Dublin

Regulation. Figure 5 below illustrates the decisions made in 2007 - September 2012. The decisions concerning all five countries are combined in the same figures.

Figure 5: *Decision on asylum applications submitted by Western Balkan nationals 2007 – 09/2012 in Finland.*



Source: Finnish Immigration Service, “Decisions on asylum, total figures by nationality,” http://www.migri.fi/tietoa_virastosta/tilastot/turvapaikka-_ja_pakolaistilastot.

What is not visible in Figure 5 is that one Macedonian application was rejected due to safe country of origin criteria in 2010.²⁴⁰ It is clear from Figure 5 that after the first visa liberalization agreements entered into force in 2009 the amount of unfounded applications has increased. That has been the case especially with Serbian and Bosnian applications that have increased after visa liberalization.²⁴¹ This finding is supported by Frontex, which stated in its risk analysis report that increase of unfounded applications has been the most observable result of visa liberalization in the Western Balkans.²⁴² Also, interestingly in 2010 and 2012 until September there was not a single positive decision made in Finland, as can be

²⁴⁰ Finnish Immigration Service, “Decisions on asylum, total figures by nationality,” http://www.migri.fi/tietoa_virastosta/tilastot/turvapaikka-_ja_pakolaistilastot.

²⁴¹ Ibid.

²⁴² Frontex, “Western Balkans Annual Risk Analysis 2012,” p. 18.

seen in Figure 5. The recognition rate in general is low. According to the Finnish Immigration Service, applications submitted by Bosnian and Serbian nationals are processed in accelerated procedures.²⁴³ Chachipe has noted that the use of accelerated procedures tend to result in negative decisions.²⁴⁴ All in all, in Finland the number of asylum applications has not increased drastically after visa liberalization in Western Balkans. Serbia and Bosnia and Herzegovina are currently the largest source countries. However, the proportion of applications found unfounded has increased since 2009.

The changes in the numbers of submitted asylum applications have been more significant in other EU countries after the visa liberalization. Firstly, in all EU Member States in total the number of asylum applications submitted by nationals from the five Western Balkan countries peaked in 2010 to around 29000 applications from 10000 in 2009.²⁴⁵ In 2011 and 2012 until September the total number of applications has remained around 25000.²⁴⁶ As can be seen from Figure 6 below, most of the asylum applications have been submitted by Serbian nationals. Macedonia is the second largest asylum source country but still significantly smaller than Serbia. In both cases of Serbia and Macedonia, seeking asylum in the EU Member States has clearly peaked in the consecutive year of visa liberalization, in 2010. As presented in Figure 6, also Albanians, Bosnians and Montenegrins have sought more often asylum in the EU after visa free travel was granted. However, the increase of applications is not as significant as in the case of Serbia.

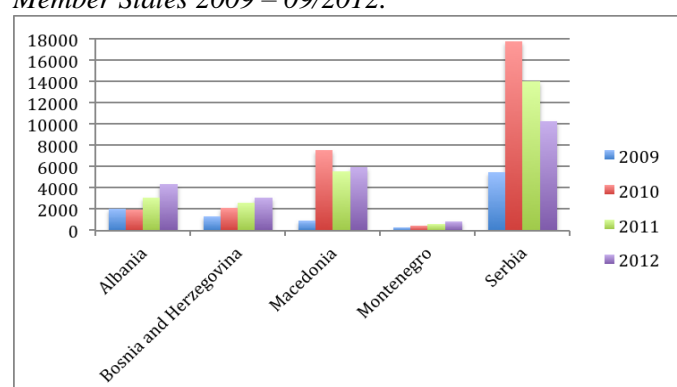
²⁴³ Finnish Immigration Service, "Turvapaikkayksikön tilastokatsaus tammi-elokuu 2012" [Analysis of statistics on asylum January-August 2012], p. 12.

²⁴⁴ Letter from Chachipe to Mrs. Maria Åsenius, the Head of Cabinet of Commissioner Cecilia Malmström regarding "Ongoing human rights concerns in relation with the European Commission's requests to the countries of the Western Balkans to stop the influx of asylum seekers in the EU," 25 January 2012, accessed November 25, 2012, <http://romarights.wordpress.com/visa-liberalisation-vs-asylum>.

²⁴⁵ Eurostat, "Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded)," migr_asyappctza.

²⁴⁶ Eurostat, "Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded)," migr_asyappctza; "Asylum and new asylum applicants by citizenship, age and sex Monthly data (rounded)," migr_asyappctzm.

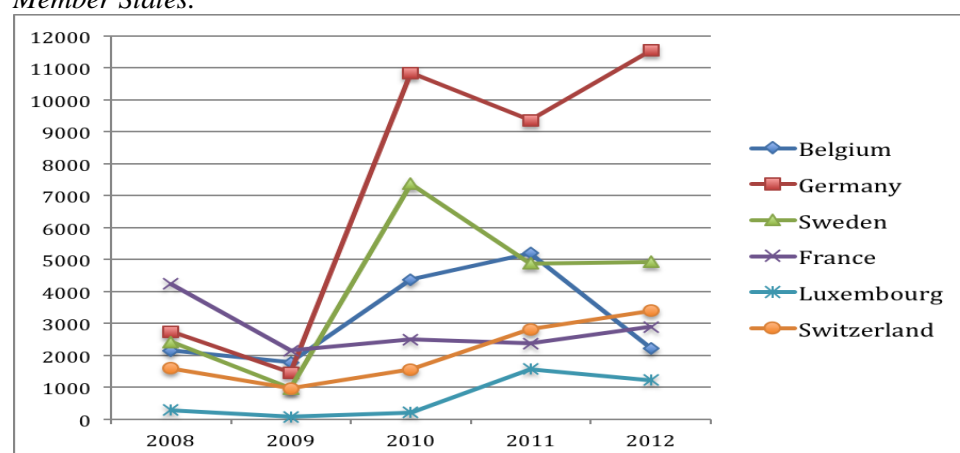
Figure 6: Total number of asylum applications submitted by Western Balkan nationals to all EU Member States 2009 – 09/2012.



Source: Eurostat, “Asylum and new asylum applicants by citizenship, age and sex Annual aggregated date (rounded),” *migr_asyappctza*; “Asylum and new asylum applicants by citizenship, age and sex Monthly data (rounded),” *migr_asyappctzm*.

The relevant question is, in which Member States do Western Balkan nationals most often seek asylum and why? By observing the statistics of Eurostat, it becomes clear that the top three EU Member States to seek asylum in are Belgium, Germany and Sweden. The numbers of asylum applications in the top EU Member States submitted by Western Balkan nationals are illustrated in Figure 7 below. Switzerland is not an EU member but in 2011 and 2012 the country has experienced a significant increase in submitted asylum applications, mainly from Serbian nationals. When interpreting the statistics, it needs to be acknowledged that the statistics for 2012 include data only until September.

Figure 7: Total number of asylum applications submitted by Western Balkan nationals in top EU Member States.



Source: Eurostat, “Asylum and new asylum applicants by citizenship, age and sex Annual aggregated date (rounded),” *migr_asyappctza*; “Asylum and new asylum applicants by citizenship, age and sex Monthly data (rounded),” *migr_asyappctzm*.

As can be seen from Figure 7, asylum applications in Belgium, Germany and Sweden increased considerably after 2009 when visa requirement was lifted in Macedonia, Montenegro and Serbia. On the other hand, the number of asylum applications submitted in France decreased compared to the year 2008 and has remained relatively stable but high after the visa liberalization. France has remained the fourth largest receiver of asylum seekers from the Western Balkans during the research period. Germany has received by far the most asylum applications since 2009, as becomes evident from Figure 7. Serbian nationals have submitted around 65 percent of those applications.²⁴⁷ The second biggest group of nationals seeking asylum in Germany has been Macedonians, who have submitted around 27 percent of all applications in Germany since 2009.²⁴⁸ Most of the Albanians have sought asylum in France whereas Bosnians have preferred Sweden.²⁴⁹ It is important to note that the number of asylum seekers has increased significantly also in Luxembourg in 2011 and 2012, although the total number of submitted applications during the research period is not high compared to the other five countries pictured in Figure 7 above. Most of the applications in Luxembourg have been also submitted by Serbian nationals.²⁵⁰

Since they are the two largest source countries, Serbia and Macedonia are used here as examples when examining the recognition rates in the top four receiving Member States as well as in the EU in total. Recognition rates in each country are presented in Table 2 below.

²⁴⁷ Eurostat, "Asylum and new asylum applicants by citizenship, age and sex Annual aggregated data (rounded)," migr_asyappctza; "Asylum and new asylum applicants by citizenship, age and sex Monthly data (rounded)," migr_asyappctzm.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

Table 2: Recognition rates for Serbian and Macedonian asylum seekers in top four EU Member States and EU in total.

	Serbian asylum seekers	Macedonian asylum seekers
Belgium	13,5 %	2,8 %
Germany	0,7 %	0,3 %
Sweden	3,0 %	0,3 %
France	6,3 %	2,6 %
EU in total	2,6 %	1,3 %

Source: Eurostat, "First instance decisions on applications by citizenship, age and sex Annual aggregated data (rounded)," *migr_asydcfst*a. Own calculations based on Eurostat data.

Recognition rates are calculated as a percentage of positive decisions out of all decisions made. As can be seen in Table 2, only very few asylum seekers actually receive protection status. This is especially the case in Germany where the recognition rate is under one percent. The recognition rate in the EU in total for Serbians and Macedonians is around two percent, which is extremely low. Many of the asylum seekers are aware themselves that chances to be granted asylum are low but they want to try anyway.²⁵¹ Furthermore, most of the migrants leave their homes for economic reasons as will be discussed in the next paragraph. These low recognition rates indicate the large share of unfounded applications from the total decisions made, as was illustrated in Figure 5 above. The European Commission has noted that most of the asylum seekers from the Western Balkan countries are Roma.²⁵² The fact that almost none of their applications have been successfully recognized in the EU has added the issue of discrimination to the debate. Discrimination will be further discussed in section 3.4.4. when the political and legal consequences are reviewed.

Why do asylum seekers prefer Belgium, Germany and Sweden as destination countries? At least the Commission and European Stability Initiative have reached the same answer to that question. As a consequence of the poor situation of Roma, economic reasons

²⁵¹ Report from the Commission to the European Parliament and the Council, Third report on the post-visa liberalisation monitoring, p. 11.

²⁵² Ibid, p. 12.

remain the main push factor to leave in a search for better life in the EU.²⁵³ By definition economic migrants flee from hopeless poverty and absolute lack of opportunities, and not from fear of persecution.²⁵⁴ Those are not sufficient reasons for asylum, although it is important to notice that in reality reasons to flee can also often overlap. Due to the economic nature of the flight, the length of the asylum procedures and financial support paid for the duration of the asylum procedure in Belgium, Germany and Sweden seem to be one of the determinants for asylum seekers' choice of destination country.²⁵⁵ According to the research of European Stability Initiative in 2011, the average length of the asylum procedure was 9,9 months in Belgium, 6,8 months in Germany and 4,3 months in Sweden.²⁵⁶ For some Roma it is attractive that during the asylum procedure applicants get support for accommodation, food, clothes, medical care and schooling.²⁵⁷ On the other hand, European Stability Initiative's research showed that in France the asylum procedure is on average only 15 days.²⁵⁸ As the Eurostat's statistics illustrated above in Figure 7, France has remained the fourth largest asylum seeker destination country among the Western Balkan citizens. Also, in Finland the average length of the procedure is 8 months, which is longer than for instance in Germany and Sweden.²⁵⁹ However, there has not been as significant increase in the number of asylum seekers in Finland as in some other EU Member States. Based on the examples of France and Finland it seems that other determinants also play a key role in the choice of

²⁵³ Ibid, p. 14.

²⁵⁴ Brolan, "An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea from a Refugee Protection Perspective," pp. 561-596.

²⁵⁵ "Visa-free travel and asylum." European Stability Initiative, accessed November 25, 2012, <http://www.esiweb.org/index.php?lang=en&id=532> and <http://euobserver.com/opinion/113807>; Report from the Commission to the European Parliament and the Council, Third report on the post-visa liberalisation monitoring, p. 14.

²⁵⁶ European Stability Initiative, "Freedom of movement in a populist age: Why Balkan visa liberalisation is (still) as success" (presentation, Brussels, June 30, 2011), <http://www.esiweb.org/index.php?lang=en&id=532>.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Finnish Immigration Service, "Turvapaikkayksikön tilastokatsaus tammi-elokuu 2012" [Analysis of statistics on asylum January-August 2012], p. 12.

destination countries and should not be ignored. The current study's scope, however, does not cover analyzing all other possible determinants.

All in all, the number of asylum seekers increased both in Finland and in other EU Member States after visa liberalization. The trend in the number of asylum seekers is not equally spread among the five Western Balkan source countries and the EU target countries. Increase in the number of asylum seekers is not an issue for all EU Member States, only for some. What is common is that majority of asylum seekers are Roma that makes the issue even more sensitive. Major concerns rose in the EU immediately after the visa liberalization. The reactions and requirements of the EU will be analyzed in more details later in section 3.4.4. Next, statistics on illegal immigration are examined.

3.4.2. Illegal immigration

The Commission's criteria for assessing the risk of illegal immigration were discussed in section 1.2.1. and they include illegal residence, refusals of admission, expulsion measures, clandestine immigration, reliability of travel documents and impact of readmission agreements with third countries.²⁶⁰ These criteria will be analyzed in this section in specific context of illegal immigration from the five Western Balkan countries.

During the data collection, it turned out that it is very difficult to obtain data about illegal immigration in Finland. Statistical data was requested from the Ministry for Foreign Affairs of Finland, Finnish Immigration Service, Finnish Police and National Bureau of Investigation that are the main actors in the field of illegal immigration in Finland. Often the reply was that statistics are not public and meant only for the use of authorities. The other problem is that the statistics that were finally obtained are not nationality specific but rather general. Some statistics on the top ten countries regarding certain measures are available but

²⁶⁰ Commission Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2000) 27 final, Document 500PC0027.

the five Western Balkan countries are not included in those top ten countries. However, some nationality specific data is available in Eurostat and was utilized in this case study. Statistics on European level were obtained from Eurostat databases and Frontex reports. The latest report is from February 2012 and the latest statistics available at the time of writing are from 2011.

Another issue related to data on illegal immigration is that the figures are dependent on numerous factors. For instance, the number of refusals of admission and detections of illegally residing immigrants depend on the efforts put into the surveillance activities. An increase in the statistics may be explained by an actual increase in cases of illegal immigration or may be a result of more resources directed to surveillance to detect those cases more efficiently. Increased detection efforts may therefore hide the actual decreasing trend in the cases of illegal immigration.

The first criterion to be analyzed is cases of illegal residence. In 2011 in total 3305 illegally residing foreigners came to the knowledge of authorities in Finland.²⁶¹ The number of detected cases has decreased since 2009. In 2009 total 6660 foreigners were found to be illegally present in Finland whereas in 2010 the number was 3755.²⁶² However, when looking at a longer period of time the past four years have been statistically the years of the highest amount of illegally present foreigners in Finland.²⁶³ The most common illegally present nationalities have been already for four year Iraqis, Russians and Somalis.²⁶⁴ When looking at the specific case of the five Western Balkan countries presented in Table 3 below, excluding

²⁶¹ Eurostat, "Third country nationals found to be illegally present – annual data (rounded)," migr_eipre.

²⁶² Ibid.

²⁶³ Laittoman maahantulon torjunnan virkamiestyöryhmä [Working group for prevention of illegal immigration], "Laittoman maahantulon arviointiraportti vuosi 2011 ja laittoman maahantulon vastaisen toimintaohjelman 2010-2011 loppuraportti" [Evaluation report of illegal immigration in 2011 and end report of the action plan for preventing illegal immigration 2010-2011], February 16, 2012, p. 5, provided upon request.

²⁶⁴ Ibid, p. 6.

Serbians only few illegally residing nationals have been detected. The shading in the table illustrates when the visa liberalization entered into force.

Table 3: *Nationals of five Western Balkan countries found to be illegally present in Finland 2008-2011.*

	2008	2009	2010	2011
Albania	20	5	10	0
Bosnia and Herzegovina	15	10	5	0
Macedonia	0	10	10	5
Montenegro	0	5	0	0
Serbia	140	35	230	105

Source: Eurostat, “Third country nationals found to be illegally present – annual data (rounded),” *migr_eipre*.

In case of Albania, Bosnia and Herzegovina, Macedonia and Montenegro the number of detected illegally present nationals has decreased after the visa liberalization was granted. However, as was already mentioned as one limitation of this study, the comparison for Albanians and Bosnians can be made only with year 2011 since the data of 2012 is not yet available at the time of writing. As Table 3 illustrates, 195 more cases involving Serbian nationals were detected in 2010 following the visa liberalization. However, in 2011 the number of Serbians again decreased to 105 cases. Also in 2008 when the visa requirement was still in place the number of illegally residing Serbians was higher than in 2011.

To have a comparison with the other EU Member States as a whole, Table 4 below presents the same statistics in all EU Member States. The shading in the table illustrates when the visa liberalization entered into force. In general the number of illegally present Western Balkan nationals in the EU has significantly decreased in 2011. Mainly the decrease can be explained by the drastic fall in the number of illegally residing Albanians after the visa liberalization in 2010. The number of Albanians dropped by around 300%, as illustrated in Table 4 below.

Table 4: Nationals of five Western Balkan countries found to be illegally present in EU Member States 2008-2011.

	2008	2009	2010	2011
Albania	72660	68985	52375	17210
Bosnia and Herzegovina	2525	2095	2255	2685
Macedonia	2780	1915	3160	3230
Montenegro	350	310	365	385
Serbia	13315	8335	12050	9310
EU in total	91630	81640	70205	32820

Source: Eurostat, “Third country nationals found to be illegally present – annual data (rounded),” *migr_eipre*.

When exploring the statistics in more details, the significant decrease of illegally present Albanians has happened in Greece.²⁶⁵ In case of other nationalities, after the visa liberalization the number of illegally present persons in the EU Member States has grown. This suggests that EU’s justification for maintaining visa policy in order to fight against illegal immigration could be reasonable. On the other hand, it also seems to be very country specific. For instance, in 2008 when visa requirements still applied in Serbia the number of illegally present persons in the EU was highest during the entire four-year research period, as can be seen in Table 4. Actually, in 2011 over half of the illegally residing immigrants in the territory of the EU had entered the territory legally but overstayed the time their visa or residence permit allowed.²⁶⁶ Also, another explanation may be that the reason for illegal entry and stay may have changed. Before visa liberalization those who crossed the border illegally did it due to the visa policy. After the visa liberalization Western Balkan countries have strengthened exit controls in their national legislations, as will be discussed later in section 3.4.4. Due to the current stricter exit controls immigrants may need to find an alternative illegal way to reach the destination countries. The phenomenon is definitely challenging. Since a significant number of illegally residing immigrants have crossed the border legally,

²⁶⁵ Eurostat, “Third country nationals found to be illegally present – annual data (rounded),” *migr_eipre*.

²⁶⁶ Finnish Police, “Laittoman maahantulon vastainen toimintaohjelma 2010-2011” [Action plan for preventing illegal immigration 2010-2011], May, 2009, p. 2, [http://www.poliisi.fi/intermin/biblio.nsf/F2AEA0220E3B72A3C225767A002FAAA3/\\$file/5-2009.pdf](http://www.poliisi.fi/intermin/biblio.nsf/F2AEA0220E3B72A3C225767A002FAAA3/$file/5-2009.pdf). At the time of writing the action plan 2012-2015 was not published yet.

the internal surveillance inside the countries must be made more efficient in order to detect the “over stayers”.

The second Commission’s criterion to be analyzed is refusals of admission. That means persons refused entry at the external borders of Finland. In general including all nationalities refusals at the borders of Finland have decreased with few hundreds every year since 2008.²⁶⁷ However, in 2011 the number of refusals increased from the previous year 20 percent to 1420 cases.²⁶⁸ The two main reasons for refused entry in 2008-2011 has been lack of sufficient means of subsistence and lack of valid visa or residence permit.²⁶⁹ When examining the cases of refusals specifically for Western Balkan nationals, the statistics do not provide any basis for comparison. According to Eurostat database, there have been only 10 incidents in total in 2008-2011 regarding all five nationalities.²⁷⁰ In 2008 five Albanians were refused to enter due to lack of visa or residence permit whereas in 2011 five Serbians were refused due to lack of sufficient means of subsistence.²⁷¹ Based on this data, refusals of entry for Western Balkan nationals is not a major issue in Finland and the statistics do not provide any basis for further conclusions.

For this reason, analyzing the data on the EU as a whole makes more sense. The statistics on refused entries are presented in Table 5 below. The shading in the table illustrates when the visa liberalization entered into force.

²⁶⁷ Eurostat, “Third country nationals refused entry at the external borders – annual data (rounded),” *migr_eirfs*.

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

Table 5: Nationals of five Western Balkan countries refused entry at the external borders of the EU 2008-2011.

	2008	2009	2010	2011
Albania	1410	1975	2365	16740
Bosnia and Herzegovina	1640	1320	895	1715
Macedonia	2125	2280	4010	3220
Montenegro	75	135	295	285
Serbia	5745	3620	6380	6575
EU in total	10995	9330	13945	28535

Source: Eurostat, "Third country nationals refused entry at the external borders – annual data (rounded)," *migr_eirfs*.

It is not surprising that once the visa requirement was removed, refusals at the borders have increased. This has been the case for all nationalities, as can be seen in Table 5. By far the most significant increase in the refusals have happened in the case of Albanian nationals in 2011 when there were around 700 percent more refused entries than in 2010. As was just found above, the biggest decrease in illegally present persons happened in case of Albanians. This demonstrates a linkage between decrease in illegal residence and refused entries at the border. The checks, which used to be done when applying for a visa, are now done at the border. As has been stated earlier in this thesis, by externalizing its borders the EU specifically wants to lower the burden at its territorial borders. According to Eurostat data, most of the refusals happen in the countries around the same region: Greece, Hungary, Slovenia, Bulgaria and Italy.²⁷² This is probably explained by land routes, which cross the EU's external border in these countries.

The third Commission's criterion to be examined is expulsion measures. Table 6 below illustrates the statistics on nationals of the five Western Balkan countries who have been ordered to leave. On the left hand side are statistics of Finland and on the right hand side figures of the EU Member States in total. The shading shows the year when visa liberalization entered into force.

²⁷² Ibid.

Table 6: Nationals of five Western Balkan countries ordered to leave from Finland and from EU Member States 2008-2011.

	Finland				EU Member States			
	2008	2009	2010	2011	2008	2009	2010	2011
Albania	15	15	15	15	78925	69200	55370	16760
Bosnia and Herzegovina	5	10	10	15	2285	2035	2355	2325
Macedonia	0	0	20	30	2030	1805	4390	5060
Montenegro	0	0	0	0	325	350	375	410
Serbia	75	35	60	75	12920	9395	13030	12015
Total	95	60	105	135	96485	82785	75520	36570

Source: Eurostat, "Third country nationals ordered to leave – annual data (rounded)," migr_eiord.

As can be seen from Table 6, in Finland the numbers have remained approximately the same before and after visa liberalization. However, the total number has slightly increased after the visa liberalization. The biggest increases can be seen in cases of Macedonia and Serbia. The same is true when comparing the ordered leaves in the EU Member States in total. These trends correlate with the increase of illegally present Macedonians and Serbians, as was found above. Also in the previous section it was found that asylum applications from these two countries have increased in the EU and most of the applications are affirmed unfounded or asylum seekers are sent back according to the Dublin II Regulation. On the other hand the significant decrease in the number of Albanians ordered to leave correlates with finding that after the visa liberalization Albanians found illegally present in EU Member States dropped drastically.

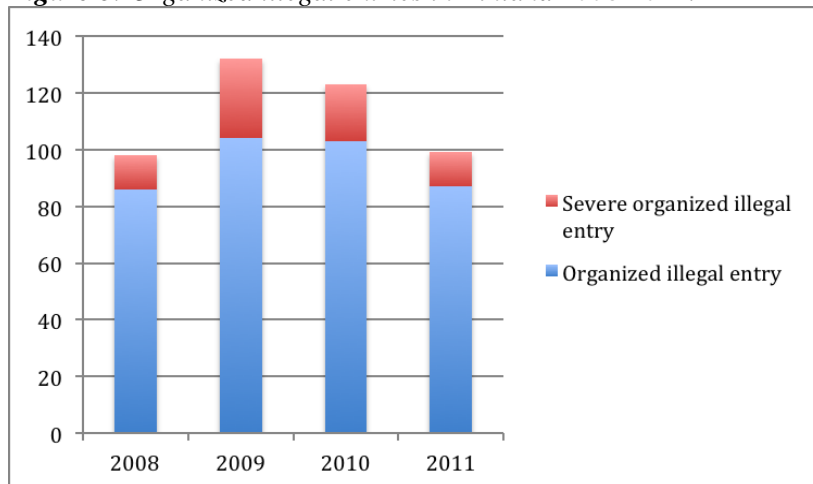
The fourth criterion to be analyzed is clandestine immigration. In this study, this is considered as smuggling or as Frontex calls it the use of "facilitators".²⁷³ There are no accurate statistics on smuggling in Finland, which poses a challenge for the research. Especially specific statistics on Western Balkan nationals are not available. According to the Evaluation Report of Illegal Immigration in 2011, most of the illegal entries to Finland are done across the internal borders and only marginal amount through the external borders.²⁷⁴

²⁷³ Frontex, "Western Balkans Annual Risk Analysis 2012," p. 10.

²⁷⁴ Laittoman maahantulon torjunnan virkamiestyöryhmä [Working group for prevention of illegal immigration], "Laittoman maahantulon arviointiraportti vuosi 2011 ja laittoman maahantulon vastaisen toimintaohjelman 2010-2011 loppuraportti" [Evaluation report of illegal immigration in

Therefore, the actual smuggling may have taken place at the EU's external border in another country and the person once being able to cross the border has travelled to Finland across internal borders without having to stop at any border control. The Finnish Police collects statistics on those cases of organized illegal entries that it is aware of. Figure 8 below presents the data on organized illegal entries and severe organized illegal entries.

Figure 8: *Organized illegal entries in Finland 2008-2011.*



Source: PolStat, "Crimes related to illegal immigration," provided upon request.

It must be acknowledged that these statistics include all nationalities and therefore although the trend has been decreasing since 2009, it cannot be explained solely on the visa liberalization in the Western Balkans. Furthermore, the decrease is not significant but only couple of tens of cases. More reliable data can be found in the Frontex 2012 Risk Analysis report on Western Balkans. According to the report, the demand for smuggling services or facilitators when traveling to the EU has reduced considerably in 2010 and 2011.²⁷⁵ The decreasing trend is illustrated also in the statistics provided by Frontex. Detections of facilitators reported by the Western Balkan risk analysis network members have decreased from 1015 in 2009 to 796 in 2011.²⁷⁶ These statistical findings support the arguments made earlier in section 1.2.1. and findings of for instance Nadig and Brolan who have stated that

2011 and end report of the action plan for preventing illegal immigration 2010-2011], February 16, 2012, p. 17, provided upon request. There were in 2008 67, in 2009 139, in 2010 60 and in 2011 80 illegal entries through external borders.

²⁷⁵ Frontex, "Western Balkans Annual Risk Analysis 2012," p. 16.

²⁷⁶ Frontex, "Western Balkans Annual Risk Analysis 2012," p. 10.

stricter border controls are linked to increased use of illegal smuggling services.²⁷⁷

The fifth Commission's criterion to be examined is reliability of travel documents. It was not possible to obtain statistics on false travel documents from the Finnish authorities. According to Eurostat data, there have been no detections of Western Balkan nationals using false travel documents in Finland in 2008-2011.²⁷⁸ Based on the statistics on all EU Member States presented in Table 7 below, refusing person to enter due to false travel document is not a common reason. Table 7 presents the use of false travel documents by Western Balkan nationals detected by the EU Member States in 2008-2011. Shading illustrates the year of the visa liberalization.

Table 7: *Use of false travel documents by Western Balkan nationals detected by EU Member States 2008-2011.*

	2008	2009	2010	2011
Albania	45	135	60	35
Bosnia and Herzegovina	10	0	5	0
Macedonia	10	55	0	5
Montenegro	0	5	0	0
Serbia	70	40	25	20
EU in total	135	235	90	60

Source: Eurostat, "Third country nationals refused entry at the external borders – annual data (rounded)," migr_eirfs.

It is not surprising that significantly less false travel documents are detected after the visa requirements have been removed in the five Western Balkan countries. As was mentioned earlier, visa liberalization applies only to those persons who have a new biometric passport. Instead of falsifying visas, there may be still demand for fake passports or other required travel documents. Also it should not be forgotten that persons with older passports still need a visa unless they belong to one of the groups stated in the visa facilitation agreements.

The last criterion listed by the Commission is the impact of readmission agreements with third countries. The Joint Readmission Committee monitors the implementation of the

²⁷⁷ Nadig, "Human Smuggling, National Security and Refugee Protection," pp. 1-25; Brolan, "An Analysis of the Human Smuggling Trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea from a Refugee Protection Perspective," pp. 561-596.

²⁷⁸ Eurostat, "Third country nationals refused entry at the external borders – annual data (rounded)," migr_eirfs.

readmission agreements. According to the most recent assessment, the implementation has been positive in all five Western Balkan countries.²⁷⁹ Excluding Macedonia, all other four countries have adopted a strategy for reintegration of returnees under readmission agreements.²⁸⁰ As was already mentioned in Chapter 1, many human rights actors including ECRE have expressed their concerns that readmission agreements are just another barrier for asylum seekers to access an asylum procedure.²⁸¹ Readmission agreements are arguably implemented in a non-transparent way and without giving a possibility for asylum seekers to express their protection needs.²⁸²

All in all, the number of illegally residing Western Balkan nationals has decreased in general both in Finland and in the EU as a whole. On the other hand refusal of admission and expulsion measures have increased. What comes to illegal smuggling services, the use of facilitators when traveling to the EU from the Western Balkans has decreased considerably in 2010 and 2011. Next, crime statistics are analyzed.

3.4.3. Crime

The Commission's criteria for assessing crime were discussed in section 1.2.2. and include regularity, seriousness and territorial extent of forms of crime as well as possible national

²⁷⁹ Report from the Commission to the European Parliament and the Council, Third report on the post-visa liberalisation monitoring, p. 14.

²⁸⁰ Strategy of Returnees' Reintegration based on the Readmission Agreement, Official Gazette of the Republic of Serbia, No. 15/09 of 2009, http://www.kirs.gov.rs/docs/Readmission_strategy.pdf; Chachipe, "Selective Freedom: The visa liberalization and restrictions on the right to travel in the Balkans," June, 2012; Republic of Albania, "Strategy on Reintegration of Returned Albanian citizens 2010-2015," June, 2010, http://www.esiweb.org/pdf/schengen_whitelist_project_Strategy%20on%20Reintegration%20of%20Returned%20Albanian%20Citizens%202010-2015.pdf; Bosnia and Herzegovina Council of Ministers "Second readiness report on the implementation of the roadmap for visa liberalization," Annex 2: Returnee Reintegration Strategy Under the Community Readmission Agreement, October 1, 2009, pp. 151-187, http://www.esiweb.org/pdf/schengen_white_list_project_UPDATED%202nd%20READINESS%20REPORT%20FOR%20VIZA%20LIBERALIZATION.pdf.

²⁸¹ ECRE, "Defending Refugees' Access to Protection in Europe."

²⁸² Ibid, p. 57.

security threat.²⁸³ Those elements are analyzed in this section. Crime statistics for this case study were requested from Statistics Finland. Statistics based on whether the crime was committed by a Finnish citizen or a foreigner in general are available 2007-2011 whereas statistics based on specific nationalities are available 2009-2011. The most recent data of 2012 will be published only in March-April in 2013. The numbers in the statistics reflect only those crimes of which a police report has been submitted. Those crimes that have not come to the knowledge of the police are not included in the data. It is important to acknowledge that the statistics on crime are influenced by for instance changes in surveillance practice, legislation and also by the willingness of citizens to report crimes to the police.

Firstly, what comes to regularity, in 2011 about 458251 crimes committed by Finnish nationals and foreigners in total were reported to the police in Finland, which is 6 percent more than in 2010 as can be seen in Table 8 below. However, in 2010 the number of crimes reported to the police was relatively lower considering the five-year period as a whole. During 2007-2011 on average around 441000 crimes came to the knowledge of the police every year. The percentage of solved crimes was 59 percent in 2011, which was 3 percent lower than in year 2010 as illustrated in Table 8. During 2007-2011 on average around 60 percent of crimes that came to the knowledge of the police was solved annually.

Table 8: *Crimes reported to the police and solved by the police in Finland 2007-2011.*

Year	Crimes reported to the police	Crimes solved by the police
2007	435 824	261 602
2008	440 711	271 200
2009	441 416	265 160
2010	431 623	267 798
2011	458 251	270 534

Source: Statistics Finland, "Crimes committed and solved since 1980," http://193.166.171.75/database/statfin/oik/polrik/polrik_fi.asp.

²⁸³ Commission Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2000) 27 final, Document 500PC0027.

When examining the statistics on the suspects of crimes based on nationality presented in Table 9, in general crimes committed by foreign nationals in Finland have risen since 2007. One person is presented in the statistics as many times as he or she is suspected of committing a crime. For the present case study it is relevant to find out how many nationals of Western Balkans are included in the number of foreign suspects and whether

Table 9: *Suspects of crimes based on nationality in Finland 2007-2011.*

Year	All	Finnish nationals	Foreign nationals
2007	308 150	286 915	21 235
2008	308 195	284 508	23 687
2009	298 527	268 578	29 949
2010	302 053	268 422	33 631
2011	302 762	268 247	34 515

Source: Statistics Finland, "Suspects of crimes based on nationality 2007-2011," http://www.stat.fi/til/polrik/2011/polrik_2011_2012-04-02_tau_004_fi.html.

their share has changed after the visa liberalization. Table 10 below presents the number of Western Balkan nationals suspected of crime in Finland in 2009-2011. The shading in the table illustrates when visa liberalization entered into force. Since the statistics based on specific nationalities are available only from 2009 onwards, it is not possible to make a comparison for the last three countries before 2009.

Table 10: *Western Balkan nationals suspected of crime in Finland 2009-2011.*

	2009	2010	2011
Albania	33	14	27
Bosnia and Herzegovina	127	154	152
Macedonia	30	38	41
Montenegro	14	17	17
Serbia	100	117	79

Source: Statistics Finland, "Persons suspected of solved crimes based on nationality 2009-2011," http://193.166.171.75/database/statfin/oik/polrik/polrik_fi.asp.

The available statistics in the Table 10 above illustrate the relative stableness of number of suspected criminals. After the year when visa liberalization entered into force, the number of suspects has increased in case of each country. Nevertheless, those have been relatively slight increases. As was mentioned, one person may be presented several times in the statistics if he or she has been suspected of several crimes. Therefore, smaller differences in the numbers may even be explained by certain individual's recurring criminal behavior. Based on the

statistics above, the regularity of crimes does not seem to be solely explained by visa policy. The biggest changes in the number of suspects have been the increase of 27 Bosnian suspects in 2010, as presented in Table 10. However, visa liberalization entered into force only in December 2010. The other nationality with biggest changes is Serbia. Serbians represented 17 more suspects in 2010 following the visa liberalization in December 2009. However, in 2011 the number of Serbian suspects dropped from 117 down to 79. Therefore, no clear correlation is visible in the statistics.

Secondly, to analyze the other criteria listed by the Commission, those of seriousness, territorial extent and national security, it is essential to examine the types of the suspected crimes. Most of the nationals from the five Western Balkan countries have been suspected in Finland of property crimes, mostly theft and shoplift.²⁸⁴ The available statistics include falsification as a crime type. The division is made between falsification and severe falsification. However, the statistics do not indicate whether it has been related to falsifying documents for migration purposes. In any case, Albanians and Bosnians have been suspected of falsification only before the visa liberalization (13 incidents).²⁸⁵ After the visa liberalization, allegedly Macedonian and Serbian nationals have committed only three falsification crimes.²⁸⁶ It may be possible that stricter visa policy leads to increased falsification criminality specifically related to travel documents. This is supported by the finding in the previous section concerning decrease in detections of false travel documents.

The second most common type of crime Western Balkan nationals have been suspected of in Finland is crime threatening life and health.²⁸⁷ Those crimes include mainly mugging and light mugging. Only one case of manslaughter has been reported in 2011.²⁸⁸

²⁸⁴ Statistics Finland, "Persons suspected of solved crimes based on nationality 2009-2011," http://193.166.171.75/database/statfin/oik/polrik/polrik_fi.asp.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

There have not been seriously life-threatening crimes committed by the five Western Balkan nationals. Regarding the most common types of crimes, there is no logical correlation between the number of Western Balkan suspects and the timing of the visa liberalization. As was discussed in section 1.2.2., the difficulty is that there is not really an EU wide consensus on what is considered as a serious crime and what constitutes a serious threat to national security. When considering the Commission's assessment criteria of threat to national security and territorial extent together, terrorism and organized crime could be considered as example cases of more serious type of crime. Firstly, threat of terrorism in Finland is believed to be low.²⁸⁹ The police introduced first terrorism charges in Finland in 2011 and the case involves Somali-born citizen.²⁹⁰ The case has not been solved yet. Secondly, the territorial extent of organized crime can be very wide. Those activities can be for instance related to smuggling or drugs. Issue of smuggling was already discussed in the previous section and based on Frontex statistics it was concluded that the use of smuggling services seems to have decreased since the visa liberalization in Western Balkans. Suspects of drug crimes are categorized based on nationality by Statistics Finland. According to the statistics, three Western Balkan nationals were suspected in 2009, four in 2010 and six in 2011.²⁹¹ The statistics do not tell what was the role of the suspects in those crimes or what was the territorial extent. Also it must be acknowledged that the statistics include only those crimes that have come to the knowledge of the police. It is highly likely that the police is not aware of all drugs crimes, especially those with organized crime characteristics. Although there has been a slight increase in the numbers, no reliable conclusions can be drawn from these statistics.

²⁸⁹ OSAC, "Finland 2012 Crime and Safety Report," February 21, 2012, <https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=12031>.

²⁹⁰ Ibid.

²⁹¹ Statistics Finland, "Persons suspected of solved crimes based on nationality 2009-2011."

On top of the types of crimes discussed so far, Statistics Finland separates offences in traffic and risking safety in traffic. Those are by far the most common suspected offences considered as one category for all five Western Balkan countries as illustrated in Table 11.

Table 11: Western Balkan nationals suspected of offences in traffic and risking safety in traffic in Finland 2009-2011.

	2009	2010	2011
Albania	44	44	27
Bosnia and Herzegovina	155	154	171
Macedonia	44	37	36
Montenegro	3	8	9
Serbia	92	116	101

Source: Statistics Finland, "Persons suspected of solved crimes based on nationality 2009-2011," http://193.166.171.75/database/statfin/oik/polrik/polrik_fi.asp.

The number of suspects amounts to almost same numbers as suspects for all other crimes presented in Table 10 or even above those numbers. Montenegro is the only clear exception from that. The seriousness of offences in traffic is difficult to assess since they can risk also the safety and lives of others in traffic. However, the statistics above include all kinds of crimes in traffic including for instance crimes related to vehicles, escape in traffic and violations of speeding limits in case they have been registered as risking safety in traffic.

All in all, the number of Western Balkan nationals suspected of crime in Finland has remained stable after the visa liberalization agreements entered into force. Most of the crimes have been theft, shoplift, mugging and offences in traffic. Therefore, it is argued that regularity, level of seriousness, territorial extent and threat to national security are all low.

3.4.4. International relations

The Commission's principles on international relations were discussed in section 1.2.3. The Commission emphasizes the importance of relations with group of countries rather than with individual countries as well as solidarity between all EU Member States.²⁹² Also the EU's principle of conditionality was discussed. This section aims at analyzing the political and

²⁹² Commission Proposal for a Council Regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2000) 27 final, Document 500PC0027.

legal reactions to the consequences of visa liberalization and what kind of implications those reactions may have on international relations. Instead of statistical data, reports of the EU's institutions and relevant NGOs as well as national legislations of the Western Balkan countries are used as a source of information.

The EU clearly considers Western Balkans as a group of countries. Already the rhetoric used by the EU suggests it since the term "Western Balkans" is used as a reference to the region of the five countries that are the subjects of this case study: Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia. Although visa liberalization was not granted for all countries at the same time, the requirements in the Commission's roadmaps were identical (existing national legislation was taken into consideration as was mentioned in section 3.3). Western Balkans as a region is strategically important for the EU and the promise of visa liberalization and the possibility for EU membership in the future work as incentives to complete the reforms required by the EU. As the findings of the above sections confirm, the most significant consequence of visa liberalization that has raised substantial concern is the increased number of asylum seekers in some EU Member States.

The first concerns rose in the EU in 2010 immediately after the number of asylum applications rapidly increased in some EU Member States, mainly applications from Macedonia and Serbia submitted in Germany, Belgium and Sweden as was found in section 3.4.1. The fact that the majority of the asylum seekers were Roma makes the case even more sensitive.²⁹³ These new flows of asylum seekers were widely reported in the media and already in October 2010 the possibility of reversing the visa liberalization was mentioned for the first time.²⁹⁴ Around the same time EU home affairs commissioner Cecilia Malmström

²⁹³ Report from the Commission to the European Parliament and the Council, Third report on the post-visa liberalisation monitoring, p. 12.

²⁹⁴ "Europe hit by scores of Western Balkan asylum seekers." EurActiv.com, published October 21, 2010, updated October 25, 2010, accessed November 12, 2012, <http://www.euractiv.com/enlargement/europe-hit-scores-western-balkan-news-498992>.

warned the Macedonian and Serbian governments that the alarming increase of asylum seekers may risk the entire visa liberalization in Western Balkans.²⁹⁵ The governments of the Western Balkan countries were alleged for not being committed to the reforms required in the roadmaps and the EU demanded more actions from them. For instance the Belgian Migration Minister Melchior Wathelet argued that the conditions required by the EU in the visa roadmaps in 2009 are not fulfilled any more.²⁹⁶ Some of the EU Member States felt that the principle of conditionality was not properly fulfilled.

The Commission's statement on 8 November 2010 confirmed visa liberalization for Albania and Bosnia and Herzegovina. At the same time the Commission made a proposal for a post-visa liberalization follow-up mechanism.²⁹⁷ The first monitoring report was published on 30 May 2011. The monitoring reports contain separate assessments for each of the five countries following a similar structure as in the visa liberalization roadmaps. The post-visa liberalization monitoring has two purposes. Firstly, the Commission assesses that the Western Balkan countries continue to implement the reforms stated in the visa roadmaps and secondly, the Commission aims at preventing the abuse of visa liberalization.²⁹⁸ The Commission has requested reports from the Western Balkan countries and made evaluation missions to the countries.²⁹⁹ At the time of the writing the Commission has published two

²⁹⁵ "Asylum rise puts Balkan visa-free scheme in danger." EUobserver.com, October 21, 2010, accessed November 12, 2012, <http://euobserver.com/news/31092>.

²⁹⁶ "Serbia, Macedonia's EU visa freedom under threat." Deutsche Presse-Agentur DPA, June 10, 2011, accessed November 25, 2012, http://news.monstersandcritics.com/europe/news/article_1644751.php/Serbia-Macedonia-s-EU-visa-freedom-under-threat.

²⁹⁷ Proposal for a Regulation of the European Parliament and of the Council of the European Union amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders of Member States and those whose nationals are exempt from that requirement (first reading) – Commission statement, Interinstitutional File: 2010/0137 (COD), 15926/1/10 (November 8, 2010).

²⁹⁸ Commission Staff Working Paper on the post-visa liberalisation monitoring, p. 2.

²⁹⁹ Ibid, p. 3.

more monitoring reports, one in December 2011 and one in August 2012.³⁰⁰ Each of the reports also provides the Commission's view on the necessary actions to be taken. As was found in the previous sections, the implications for the target EU countries are not similar in case of the five different source countries. However, the recommendations suggested by the Commission are the same for all Western Balkan countries.

As was said, reversing the visa liberalization was brought into discussion already in 2010 immediately after the first waves of asylum seekers to the EU Member States. A week before publishing its first post-visa liberalization monitoring report, the Commission submitted a proposal for introducing a visa safeguard clause.³⁰¹ According to the proposal a temporary suspension of visa free travel could be introduced in case of one or more Member States experience a sudden increase of third country nationals staying illegally in a Member State or applying asylum or if the number of rejected readmission applications suddenly increases.³⁰² The Member State affected should inform the Commission, which assesses the situation and might temporarily re-introduce the visa obligation.³⁰³ From the perspective of international relations, reversing the visa liberalization would mean taking considerable steps back in the integration process of the region. According to the European Stability Initiative, the EU's credibility would also suffer and the reversion would be unfair.³⁰⁴ Also putting all the blame on the Western Balkan countries will probably not bring the relations with the EU Member States any closer. Furthermore, the EU would lose credibility concerning other ongoing visa liberalization negotiations, for instance with Russia.

³⁰⁰ Commission Staff Working Paper, Second report on the post-visa liberalisation monitoring; Report from the Commission to the European Parliament and the Council, Third report on the post-visa liberalisation monitoring.

³⁰¹ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 539/2001 listing the third countries whose national must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM (2011) 290 final (May 24, 2011).

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ "Balkan asylum seekers and the spectre of European hypocrisy." EUobserver.com, October 4, 2011, accessed November 25, 2012, <http://euobserver.com/opinion/113807>.

The issue of solidarity between all EU Member States is also reflected in the post-visa liberalization reactions. As was found in the statistical analysis, the drastic increase of asylum seekers concerns only few Member States. Instead of focusing on the pull factors in those Member States, the Commission has proposed enhancing exit controls in the Western Balkan countries.³⁰⁵ Problems in some Member States have led to requirements in the common name of the EU to implement measures in the Western Balkan countries. The idea that one Member State's enemy becomes every Member State's enemy is reflected. This issue might cause difficulties for individual Member States in building bilateral relations between the five Western Balkan countries.

The Commission's roadmaps for each country included requirements to implement national legislation in compliance with international and European legal standards. International and European instruments have been widely ratified by the five countries. For instance, all five Western Balkan countries are signatories to the Refugee Convention, Serbia and Montenegro being the latest ones to ratify it in 2001 and 2006.³⁰⁶ All five countries have also ratified the ICCPR, ECHR and Protocol No. 4 to the ECHR, Montenegro being the most recent country where the two Conventions entered into force in 2006.³⁰⁷ The concerning issue is that some newly implemented national legislations in the Western Balkan countries arguably breach these international human rights instruments. At least Serbia and Macedonia have tightened their border controls arguably to avoid persons, who might possibly apply asylum in the EU, from even exiting the countries of origin. As the statistical analysis

³⁰⁵ Report from the Commission to the European Parliament and the Council, Third report on the post-visa liberalisation monitoring, p. 15.

³⁰⁶ "Reservations and Declarations to the 1951 Refugee Convention." UNHCR as of 1 April 2011, accessed November 7, 2012, <http://www.unhcr.org/3d9abe177.html>.

³⁰⁷ "International Covenant on Civil and Political Rights." United Nations Treaty Collection as of 27 November 2012, accessed November 27, 2012, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en; "Chart of signatures and ratifications to the Convention for the Protection of Human Rights and Fundamental Freedoms." Council of Europe as of 7 November 2012, accessed November 7, 2012, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>.

showed, Serbia and Macedonia are currently the largest source countries of asylum seekers both in Finland and in EU Member States in total. Therefore, the national laws of Serbia and Macedonia related to the right to exit are shortly reviewed and compared next.

Serbian Law on State Border Protection grants authority for the border officers to perform entry and exit checks as regards travel documents and purpose of the journey.³⁰⁸ Serbian Law on Foreigners states that exit of a person can be denied if he or she does not have a visa required to enter another country.³⁰⁹ Not yet in effect but it has been planned that the border police will get more authority to examine more detailed those persons who are suspected of seeking false asylum in the EU Member States.³¹⁰ The Serbian Interior Minister Ivica Dačić has stated, referring specifically to Roma, that “no one from those communities will be able to leave the country if they do not have a return ticket, means to support their stay and cannot state the reason for the journey”.³¹¹ The Interior Minister also said that passports of false asylum seekers may be temporarily confiscated and they may be forbidden to exit the country.³¹²

Macedonian Law on Foreigners does not include any similar provision on restricting a person to exit because he or she does not fulfill the entry requirements of another country.³¹³ However, control of so-called false asylum seekers in Macedonia has been taken a step further than in Serbia. Law on Travel Documents was amended in 2011 and the law allows

³⁰⁸ Law on State Border Protection, Official Gazette of the Republic of Serbia, No. 97/08 of October 27, 2008, Art. 6, <http://www.unhcr.org/refworld/docid/4b5d92582.html>.

³⁰⁹ Law on Foreigners, Official Gazette of the Republic of Serbia, No. 97/08 of October 27, 2008, Art. 13, <http://www.unhcr.org/refworld/docid/4b5d715a2.html>.

³¹⁰ “Asylum seekers may cost Serbia EU visa liberalization.” ISA Intel, May 10, 2011, accessed November 25, 2012, <http://www.isaintel.com/2011/05/10/asylum-seekers-may-cost-serbia-eu-visa-liberalization>.

³¹¹ “Interior minister announces stricter border control.” Tanjug, May 8, 2011, accessed November 25, 2012, http://www.b92.net/eng/news/politics-article.php?yyyy=2011&mm=05&dd=08&nav_id=74223.

³¹² “Asylum seekers may cost Serbia EU visa liberalization.”

³¹³ Law on Foreigners, Official Gazette of the Republic of Macedonia, No. 35/06 of March 14, 2006, Art. 26, <http://www.unhcr.org/refworld/docid/44b2668a4.html>.

taking away the passport of rejected asylum seekers for a year.³¹⁴ Already before the law was amended, passports of Macedonians were stamped if they were suspected of seeking asylum in the EU.³¹⁵ Article 15 of the Law on Border Surveillance, which establishes the minimum border checks has been used as a legal justification for that activity.³¹⁶ Paragraph 4 of the article grants authorization to the border officers to conduct “on a non systematic basis” checks whether a person poses a threat to “people, national security, public policy, international relations or a threat to public health”.³¹⁷ The measures planned by Serbian authorities and already implemented by Macedonian authorities clearly amount to punishing so-called false asylum seekers.

On top of these, actions have been taken in both countries against travel agencies who allegedly transport false asylum seekers to the EU’s territory. For instance, Serbian authorities have closed down most of the travel agencies that were used by the claimed false asylum seekers to travel to the EU.³¹⁸ In 2011, Macedonia amended its criminal code which now includes Article 418e stating that anyone who transports or organizes persons to the EU in order to “exercise social, economic or other rights, contrary to the law of the European Union, to the regulations of the member states of the European Union and of the Schengen Agreement and to the international law” can be sentenced to prison for four years or more.³¹⁹ Punishing travel agencies and tour operators discourage them to transport any persons who

³¹⁴ “Right to stop travel.” Chachipe, July 20, 2012, accessed November 25, 2012, <http://romarights.wordpress.com/2012/07/20/right-to-stop-travel>.

³¹⁵ Ibid.

³¹⁶ Letter from Chachipe to six Macedonian Ministers regarding “Human rights concerns in relation with the recent measures taken by your government aimed to restrict the alleged abuse of the visa-free regime,” 3 August 2011, accessed November 25, 2012, <http://romarights.wordpress.com/visa-liberalisation-vs-asylum>.

³¹⁷ Law on Border Surveillance, Official Gazette of the Republic of Macedonia, No. 171/10 of December 30, 2010, Art. 15 (4). Obtained from Letter from Chachipe to six Macedonian Ministers regarding “Human rights concerns in relation with the recent measures taken by your government aimed to restrict the alleged abuse of the visa-free regime,” 3 August 2011, accessed November 25, 2012, <http://romarights.wordpress.com/visa-liberalisation-vs-asylum>.

³¹⁸ “Asylum seekers may cost Serbia EU visa liberalization.”

³¹⁹ Letter from Chachipe to six Macedonian Ministers.

may apply for asylum in the EU. Making no difference between economic migrants and would-be-refugees obviously violates the rights of genuine asylum seekers.

Another concern is that exit controls are performed based on clear profiling in both Serbia and Macedonia. As was mentioned earlier, most of the asylum seekers from Western Balkans countries are Roma. The former Council of Europe Commissioner for Human Rights Thomas Hammarberg has said that the fact that not everyone can be checked on exit has resulted in profiling and discrimination against Roma minority.³²⁰ (See also statement regarding Roma communities by the Serbian Interior Minister referred earlier). Discrimination is prohibited in the constitutions of all five Western Balkan countries.³²¹ Profiling based on ethnic origin has been found to be discriminatory also in the case law. In the case *R v. Immigration Officer at Prague Airport*, which was referred to in Chapter 2 the House of Lords ruled that the pre-entry procedures performed by the British immigration authorities at the Prague Airport were discriminatory against Roma.³²²

The European Stability Initiative has claimed that the Commission and the EU Member States have asked Serbian and Macedonian border officers to do things that would actually be the tasks of the EU's border guards.³²³ The obligation of the EU's border guards is to reject entry if the person cannot justify the purpose of the stay or lacks sufficient finance for the stay. These tasks have now been transferred to Serbian and Macedonian border

³²⁰ "The right to leave one's country should be applied without discrimination." Council of Europe Commissioner's human rights comment, posted November 22, 2011, accessed November 25, 2012, http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=193.

³²¹ See Art. 18 of the Constitution of the Republic of Albania (1998); Art. 2(4) of the Constitution of Bosnia and Herzegovina (1995); Art. 9 of the Constitution of the Republic of Macedonia (2001); Art. 8 of the Constitution of the Republic of Montenegro (2007) and Art. 21 of the Constitution of the Republic of Serbia (2006).

³²² *R. v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55 (appeal taken from [2003] EWCA Civ 666), para 97.

³²³ European Stability Initiative, "Advancing Freedom of Movement in a Populist Age: How the Western Balkans asylum seekers' affair can be resolved," July 9, 2011, p. 28, Brussels.

guards.³²⁴ The EU arguably wants to outsource tasks it does not want to do, such as treating Romas in a discriminatory manner. However, requirements are entry conditions listed in the Schengen Borders Code and should not be needed to check upon exit.

The Commission claims it has nothing to do with the measures introduced by the Western Balkan countries.³²⁵ This thesis argues that EU has *influenced* the introduction of exit controls if not directly required. Firstly, the similarity of the measures indicates that the Commission may have suggested their implementation. Secondly, the Commissions own reports suggest that the EU's entry conditions are exit conditions in the Western Balkan countries. For instance, the first post-visa liberalization report of the Commission states that Montenegrin nationals have been prevented from exiting Montenegro because they did not meet the entry conditions of the EU.³²⁶ The same reports states in case of Serbia that exit control at the border crossings has been strengthened to avoid the abuse of the visa freedom.³²⁷ This thesis argues that exit controls violate international and European human rights provisions. In the visa liberalization roadmaps the Commission required Western Balkan countries to adopt international and European human rights standards. However, when NGOs have pressured the Commission about human rights issues related to the consequences of the visa liberalization the Commission has stated that it does not have competence to evaluate national legislations against international human rights standards.³²⁸

³²⁴ Ibid.

³²⁵ "European Parliament: Parliamentary questions. Answer given by Ms Malmström on behalf of the Commission," February 9, 2012, accessed November 25, 2012, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-012329&language=EN>; "European Parliament: Parliamentary questions. Question for written answer to the Commission, Rule 117, Barbara Lochbihler, Subject: Visa-free regime with countries from the Western Balkans – recent developments," January 5, 2012, accessed November 25, 2012, <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2011-012329&language=EN>.

³²⁶ Commission Staff Working Paper on the post-visa liberalisation monitoring, p. 10.

³²⁷ Ibid, p. 13.

³²⁸ Letter as a reply from Stefano Manservigi on behalf of the European Commission to Ms Karin Waringo at Chachipe, 4 May 2012, accessed November 25, 2012, <http://romarights.wordpress.com/visa-liberalisation-vs-asylum>.

All in all, visa liberalization in the five Western Balkan countries was an important decision for integration and inclusion of the strategically important region for the EU. However, the political and legal reactions to the consequences of the visa liberalization, i.e. increase in the number of asylum seekers, are dangerous for international relations as well as for human rights of asylum seekers. This thesis argues that although visa requirements have been removed, the EU still tries to externalize its borders in different ways such as requiring readmission agreements and influencing the introduction of exit controls in the Western Balkan countries. The next section briefly summarizes the main findings in Chapter 3.

3.5. Conclusions

The purpose of this chapter was to answer the question whether *the European Union's visa policy has met the objectives it was introduced for in the Western Balkan countries* by comparing the realization of the EU's objectives before and after the visa liberalization mainly in Finland and in the EU as a whole. Statistical data on asylum seekers, illegal immigration and crime as well as national legislations and secondary data were used as a basis for the analysis in the case study.

Firstly, visa policy did meet the objective of controlling the access of asylum seekers in *some* EU Member States. The number of asylum seekers increased both in Finland and in other EU Member States after visa liberalization. However, this can be considered as a natural and expected immediate consequence of lifting visa requirement. A drastic increase was experienced only in case of Serbian and Macedonian nationals. Also just three EU Member States, Belgium, Germany and Sweden, experienced significant increase and have been the major destination countries of most of the asylum seekers. Therefore, it cannot be claimed that the issue is concerning the entire EU. Most of the asylum seekers are Roma fleeing for economic reasons. The recognition rates are very low which indicate that majority of the applications are unfounded. This adds a discriminatory element to the discussion.

Secondly, the EU's visa policy has not been efficient in combating illegal immigration. The EU's objective to keep the burden at the borders low was successful since refusals of entry have increased after the visa liberalization. However, in general both in Finland and in the EU in total the number of illegally residing Western Balkan nationals has decreased. When looking at specific nationalities, in Finland the number of illegally residing Serbians has increased whereas in the EU in total the number of all other nationalities has increased except Albanians. Nevertheless, a considerable amount of illegally residing immigrants have entered the EU territory legally but the reason they have illegal status is that they have overstayed the period granted by their visa or residence permit. The expulsion measures have increased in both Finland and in the EU and after the visa liberalization mainly Serbians and Macedonians have been ordered to leave. This indicates a correlative link with the increase of asylum applications and that great majority of them have been found unfounded. The use of services of facilitators has decreased considerably, which supports the argument that there is a link between strict border policies and the use of illegal smuggling services.

Thirdly, the visa liberalization has not changed significantly the number of Western Balkan nationals suspected of crime in Finland. The most typical crimes have been arguably less serious and with a limited territorial extent. No change in the type of crimes can be detected before and after the visa liberalization. The EU's visa policy may not be the most efficient tool for preventing crime and protecting national security since the committers of more serious crimes with wider territorial extent, such as terrorism and organized crime, have more sophisticated tools at their use to go around visa requirements. As said, at least in case of Finland there is no indication that even petty crimes would have increased substantially.

Fourthly, maintaining or lifting visa obligations may have significant implications on international relations. Visa liberalization was very positive decision from the EU. It has

removed restrictions from travellers and promoted legal migration between the EU and Western Balkan countries. However, measures taken as a political and legal response to the consequences of the visa liberalization raise serious concerns. The Commission and politicians from those EU Member States that have been mostly affected have blamed the Western Balkan governments for not being committed to the principle of conditionality. Even a possibility of temporary suspension of visa freedom has been proposed, which could be extremely negative for the integration and credibility of visa liberalization. This thesis argues that the EU has influenced the introduction of exit controls in the national legislations that arguably breach international and European human rights law. The comparison of national legislations and measures recommended by the Commission show the similarity between Western Balkan countries although the actual consequences of visa liberalization have been very country-specific. It seems like other replacing tools and measures have been introduced in the place of visa policy.

The findings in the comparative case study support the argument that EU's visa policy may not be the most efficient tool to reach the desired objectives and control the unwanted phenomena. The statistical evidence and review on political and legal reactions showed that the EU's objectives tend to take a priority without considering human rights of asylum seekers. After the visa liberalization the respect for rights of asylum seekers has not improved. The next concluding chapter provides suggestions for the main research question.

Conclusions

This chapter addresses the main research problem and proposes suggestions for the main research question. The aim of this study was to examine the balancing dilemma between the objectives of the EU's visa policy and rights of asylum seekers. This issue was considered important because visas pose a major barrier for asylum seekers to access the territory of the EU and as a consequence to access an asylum procedure. However, previous academic work has failed to investigate the efficiency of the EU's visa policy from a specific human rights perspective of asylum seekers. The sub-questions of this thesis were answered in the previous three main chapters. The sub-questions were: *How does the European Union justify the necessity to maintain a visa policy? How does the European Union's visa policy affect the rights of asylum seekers to seek asylum? Has the European Union's visa policy met the objectives it was introduced for in the Western Balkan countries?*

The main research question of this study was asking *how to balance the objectives of the European Union's visa policy and rights of asylum seekers when designing visa policies*. As was already mentioned, answering the research question required analysis of regulatory efficiency of the EU's visa policy and evaluation whether the EU's objectives are justifiable and have been fulfilled by visa policy. It must be acknowledged that the comparative case study was limited only to certain countries. Therefore, broad generalizations are not reliable. The comparative aspect of the case study helped to detect the differences between both source and target countries. What seems consistent is that some of the consequences correlate with the number of asylum seekers. This was evident in the case of illegal immigration. Crime statistics have not changed according to asylum situation, at least in Finland. In the specific context of the case study, it was concluded that although visas are useful tool for controlling the movement of people across borders, the EU's visa policy may not be the most

efficient tool to achieve the objectives of preventing unwanted phenomena. Furthermore, visa policy significantly restricts the movement of *bona fide* travellers. The next suggestions propose ideas how the balance between the objectives of the EU and rights of asylum seekers may be improved.

Firstly, the least to do to improve the balance between the objectives of visa policy and rights of asylum seekers is to amend the EU's existing visa regulations. As was found, the largest refugee-producing countries are on the 'black list' and nationals must obtain a visa in order to travel to the EU. The visa regulations should make more clearly a difference between persons in genuine need of international protection and persons migrating for other reasons. The conditions required for being granted a visa should be amended so that also asylum seekers have a possibility to fulfill them in reality. The right to access an asylum procedure has no meaning when the visa barrier prevents asylum seekers from even exiting their own countries. Right to exit should be approached rather as a right to exit to seek asylum. Removing a country temporarily from the 'black list' for instance in case of a humanitarian crisis could be one suggestion. The EU's visa regulations must be in compliance with human rights law, which should be interpreted in a broader way considering the original purpose and spirit of those instruments. The comparison of international and European human rights instruments illustrated the room left for interpretation. For instance, absolute prohibition of ill treatment grants broader protection than non-refoulement principle in Article 33 of the Refugee Convention.³²⁹ Also, the legal instruments drafted decades ago should be applied in a way that takes into consideration the changed practices of the present day, for instance the tendency to externalize borders. Case law provides important guidance in interpreting the existing legal framework.

³²⁹ Art. 33, Refugee Convention.

The EU's visa policy is discriminatory not only for asylum seekers but also for other travellers who happen to be nationals listed on the 'black list'. The basis of the visa policy is that an individual must prove that he or she is not a 'high risk' person but different from what he or she is assumed to be based on his or her nationality. It is well known and must be acknowledged that migration is a heterogeneous phenomenon. Therefore, the policy should work the other way around, which admittedly is challenging to achieve in practice. This study argues that most individuals from the 'black list' countries should be instead considered similarly to the category of EU citizens and not as threats to illegal immigration and criminality. For these people a visa could be granted for a longer period of time, for instance for the entire validity period of the passport. As Cholewinski has rightly pointed out, free movement of EU citizens is promoted and considered as a European success story while movement of third country nationals is seen as a negative issue.³³⁰ The benefits of migration on a global level should be promoted as well.

Secondly, visa facilitation agreements with third countries should be promoted and considered as the first concrete steps towards total visa liberalization. More comprehensive research is needed to compare all the benefits and harms of lifting visa requirements, for instance economic implications. The current practice of assessing countries individually is justified and a fair principle of conditionality could be applied. Both visa facilitation and liberalization tend to raise concerns and fears in the minds of decision-makers as well as citizens. This is a current topic for instance in Finland related to visa liberalization agreement with Russia. However, it must not be forgotten that facilitating and removing visa requirements do not mean travelling possibilities without any restrictions. Visa facilitation agreements apply only to certain categories of people while completely visa free travelling is

³³⁰ Ryszard Cholewinski, "The criminalization of migration in EU law and policy," in *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, eds. Anneliese Baldaccini, Elspeth Guild, and Helen Toner (Oxford and Portland: Hart Publishing, 2007), p. 301.

possible only for persons with biometric passports. However, as stated in Article 6 of the Convention Implementing the Schengen Agreement, same border controls apply for all third-country nationals when they arrive to the territorial border of the EU.³³¹

After examining the conditions that the Commission required from the Western Balkan countries and comparing the amendments made to national legislations as well as other adopted national measures, this study argues that the EU has influenced the introduction of exit controls in the Western Balkans. Visa liberalization must not mean that the EU externalizes its borders through other measures and continues to control the exit at the borders of third countries with its own entry requirements. That approach would not affect positively the rights of asylum seekers and would transfer the accountability of breaching international and European human rights standards to third countries.

Thirdly, different types of measures than visas are needed to meet the objectives of the EU. As has been concluded by scholars and also found in this study, stricter border controls are linked to illegal immigration as migrants are forced to use illegal services of smugglers in order to reach their destination countries. Combating illegal immigration must be taken seriously as it has negative implications on individuals as well as on destination countries. As was mentioned, significant number of illegally residing immigrants in the EU have crossed the borders legally but have then overstayed the time period of their visas or residence permits. Therefore, more emphasis should be put on internal surveillance in order to detect more efficiently illegally present persons. Also, organized crime and illegal immigration are related to each other in a form of human smuggling. To combat transnational organized crime much more sophisticated measures are needed to prevent the highly complex phenomenon. Amending border controls to more relaxed direction would be the first step towards influencing the demand for such illegal services. On the other hand, if the EU

³³¹ Art. 6, Convention Implementing the Schengen Agreement.

maintains strict border controls but also manages to prevent illegal immigration, there is a risk that asylum seekers will not have any possible way to access an asylum procedure.

Fourthly, a way to differentiate genuine asylum seekers and migrants moving for other purposes should be invented and implemented. Efforts must be put also for making this same difference in public perception as it greatly influences the current public attitudes towards migrants and asylum seekers. In the comparative case study it was found that majority of asylum seekers from the five Western Balkan countries are Roma who are searching for economic improvements. The findings of the case study showed an example that instead of blaming the source country, the asylum policies in the destination country should be examined since they can be the reason for increased flows of asylum seekers. In the particular case of this study, for instance accelerating the asylum procedures in the destination countries could result in decreased number of economic migrants trying to apply for asylum. Lack of resources at the border controls or complaints of too much effort needed to return migrants should not be accepted as justifications for violating human rights. Rights may be violated for instance in a form of profiling at the border and not giving a chance to even apply for international protection. The need to seek asylum will not disappear no matter how strict border controls are applied.

As regards the common asylum system in the EU, it is not true that all Member States have the same standards. Asylum seekers have unequal chances of being granted refugee status in different Member States. The five Western Balkan countries examined in this case study are relatively small. In case of granting visa freedom to bigger countries, the consequences may be different. Therefore, it is crucial that the internal asylum system of the EU is working properly and is ready to respond effectively to possible consequences of future visa liberalization agreements. Burden sharing efforts between Member States should be enforced but only within the limits of human rights law. Even though the asylum system in

the EU is not working, Member States have a duty to make sure that all individuals who are in genuine need of international protection have an opportunity to apply for it. All three rights discussed in this thesis, right to exit any country, right to access an asylum procedure and absolute prohibition of ill treatment must be interpreted together.

Fifthly, prevention should be the key focus. As was noticed in the very beginning of this thesis, people migrating in a search for safe and better life has and will always exist in the world. Visa, readmission, asylum and other migration policies are not the right way to try to control the phenomenon. No one wants to leave their home unless they are in such a desperate situation that they have no other alternatives. Better investment from the EU would be to help the source countries to develop themselves so that safety and justice would not have to be searched from other countries and people could stay safely at home. For instance, in the specific case study of this thesis the overrepresentation of Roma among asylum seekers from the five Western Balkan countries should be approached as a sign of a real existing situation. It reflects that the EU's efforts have not been successful in tackling marginalization and discrimination of Roma. Obviously, preventive actions must be considered as longer-term objectives, which will not change anything over night.

Finally, the celebration of travelling in the global world without borders is a rare advantage for minority of the world's population. It is a priority only for some selected categories of people, excluding for instance those who would most desperately need that opportunity. Asylum seekers should not be seen as a burden. Migration phenomena are often illustrated in statistics, as was done also in this thesis. What is needed is to look behind those numbers and see the individual stories and contributions that can be made for the host countries. The EU was awarded with the Nobel Peace Prize for 2012 and one of the justifications by the Norwegian Nobel Committee was EU's longitudinal advancement of

human rights.³³² The EU must ensure it practices what it preaches also in case of protecting the rights of asylum seekers in a genuine need for international protection. The EU's right to control its borders must be recognized but within the limitations of international human rights law.

Suggestions for further research

Several interesting issues for further research emerged from this study. Firstly, since this study focused only on the implications of lifting visa requirements, it would be interesting to conduct a deeper and more comprehensive study analyzing also other determinants affecting the phenomena of asylum, illegal immigration and crime. It could be possible that other factors have much more significant role and the implications of visas are overemphasized. The level of complexity of that kind of study did not fit the limits of this thesis. Secondly, currently it is possible to examine only the short-term implications since the visa liberalization in the Western Balkans is relatively new. It would be interesting to complete a similar study after five or ten years when also long-term implications could be seen. Thirdly, involving more source and target countries in a future study would make broader generalizations and theory-generating conclusions possible.

³³² "The Nobel Peace Prize for 2012 - Press Release." Nobelprize.org, October 12, 2012, accessed November 25, 2012, http://www.nobelprize.org/nobel_prizes/peace/laureates/2012/press.html.

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