
You Shall Not Pass: The Roma “Travel Ban,” Racial Profiling in Macedonia, and Remedy Under International Law

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ABSTRACT

The Roma people have faced centuries of discrimination and prejudice in Europe. Recent expansions of the European visa-free travel zone triggered yet another form of discrimination against Roma individuals. After Roma began making false asylum claims in the European Union, officials pressured the source nations to stem the tide of false asylum seekers. Macedonia, one of the primary source nations, responded to the pressure by developing a set of practices that arguably include racial profiling targeted primarily at Roma people.

This Comment discusses how Macedonia may be liable for claims of racial profiling under two adjudicatory bodies—the United Nations Human Rights Council and the Council of Europe’s European Court of Human Rights. In addition, this Comment compares both adjudicatory bodies by analyzing each entity’s precedent, procedure, standards of proof, and ability to provide a remedy. Then, this Comment evaluates the venues and possible outcome for a claim lodged by a Roma person against the Macedonian government. Finally, this Comment will recommend that a Roma individual pursuing a grievance against the Macedonian government for racial profiling bring their claim in the European Court of Human Rights.

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I. INTRODUCTION: ROMA AT THE BORDER

In April 2013, a van carrying a handful of men arrived at a border crossing, heading north from Macedonia¹ into Serbia.² The passengers were traditional musicians attending weekend wedding celebrations in Serbia.³ At the border checkpoint, guards asked to see each man's identity documents.⁴ The guards also asked the men to produce a letter of invitation proving their intent to enter Serbia, an itinerary showing their intent to return to Macedonia, and proof of their financial means.⁵

Aside from the identity card, none of the documents the guards demanded to see are legally required to exit Macedonia and enter

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1. Due to a name dispute with Greece, the United Nations and the European Union officially refer to Macedonia as "The Former Yugoslav Republic of Macedonia" or "FYROM". See *The Former Yugoslav Republic of Macedonia*, EUR. COMM'N, <http://ec.europa.eu/enlargement/countries/detailed-country-information/fyrom/> (last updated Oct. 10, 2012). This Comment will refer solely to the nation as "Macedonia."

2. Author's Notes from Roundtable Meeting Hosted by DAJA Women's Organization, in Kumanovo, Macedonia (July 1, 2013) (on file with the author) [hereinafter Author's Notes]. For other accounts of Roma prevented from traveling for weddings, seasonal and professional work, and trips to purchase car parts, see CHACHIPE, SELECTIVE FREEDOM: THE VISA LIBERALIZATION AND RESTRICTIONS ON RIGHT TO TRAVEL IN THE BALKANS 39 (2012).

3. Author's Notes, *supra* note 2.

4. *Id.*

5. *Id.*

Serbia.⁶ In fact, most Macedonians and Serbians are not asked for these documents.⁷ Why, then, were the men in the van asked for this documentation? The simple answer is: they are Roma.⁸

The Roma are a group of people who have faced centuries of discrimination, marginalization, and exclusion throughout Europe.⁹ The Roma are often stereotyped as dark skinned, mystically inclined communities of thieving “gypsies.”¹⁰ Beginning in the eighteenth century, Roma experienced “gypsy hunts” in Spain¹¹ and forced assimilation efforts in the Austro-Hungarian Empire.¹² Under the Nazi regime, Roma were forced into concentration camps.¹³

Although recent years have brought some positive changes to the plight of the Roma in Europe,¹⁴ discrimination against Roma people still

6. See Author’s Notes, *supra* note 2. Proof of intent to return to one’s home country and financial means to support oneself would generally indicate that an individual does not intend to claim asylum. See Part II.B.1 for a discussion of asylum and the benefits associated with making an asylum claim.

7. EUROPEAN ROMA RIGHTS CTR., MACEDONIA: EU ENLARGEMENT PROGRAMME 2012 ERRC REPORT 2–3 (2012), *available at* <http://www.errc.org/cms/upload/file/ecprogress-macedonia-2012.pdf> (describing instances where Roma individuals crossing the border by bus were the only passengers asked to show their documents or to submit to additional searches).

8. See Adrian Marsh, *Gypsies, Roma, Travellers: An Animated History*, OPEN SOC’Y FOUNDS., <http://www.opensocietyfoundations.org/voices/gypsies-roma-travellers-animated-history> (last visited Oct. 18, 2014) (describing Roma history from a Roma perspective).

9. *Id.*

10. *Factsheets on Roma, Western Europe*, COUNCIL EUR., <http://romafacts.uni-graz.at/index.php/history/early-european-history-first-discrimination/western-europe> (last visited Oct. 17, 2014).

11. See *Factsheets on Roma, The Great “Gypsy” Round Up in Spain*, COUNCIL EUR., <http://romafacts.uni-graz.at/index.php/history/state-policies-integration-forced-assimilation-deportation/the-great-gypsy-round-up-in-spain> (last visited Oct. 18, 2014) (describing mass round ups and imprisonment in 18th century Spain).

12. See *Factsheets on Roma, Austro-Hungarian Empire*, COUNCIL EUR., <http://romafacts.uni-graz.at/index.php/history/state-policies-integration-forced-assimilation-deportation/austro-hungarian-empire> (last visited Oct. 18, 2014) (describing decrees of Empress Maria Theresa aimed at forcing gypsies to settle down and marry with non-gypsies).

13. See *Factsheets on Roma, Concentration Camps*, COUNCIL EUR., <http://romafacts.uni-graz.at/index.php/history/persecution-internment-genocide-holocaust/concentration-camps> (last visited Oct. 18, 2014) (placing estimates of Roma killed by Nazis between 25,000–250,000).

14. See *Decade in Brief*, DECADE ROMA INCLUSION, <http://www.romadecade.org/about-the-decade-decade-in-brief> (last visited Oct. 18, 2014) [hereinafter *Decade in Brief*]. The UN declared a special project lasting from 2005–2015, with the goal of integrating Roma priority areas of education, employment, health, housing, and housing. *Id.* The EU announced similar efforts. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 2, COM (2012) 226 final (May

exists, albeit in different forms.¹⁵ In particular, current discrimination against Roma stems from recent changes in visa policy, which have caused Roma individuals to make an increased number of false asylum claims¹⁶ in the European Union (“EU”).¹⁷ Frustrated and burdened by the rise in false claims, the EU began pressuring “source countries,”¹⁸ such as Macedonia, to stop the wave of false asylum seekers.¹⁹ The policies Macedonia adopted to stop false asylum seekers bear the hallmarks of racial discrimination.²⁰

This Comment will argue that the Macedonian government could be found liable for racial discrimination under two different international treaty bodies and their corresponding human rights protections. Part II of this Comment will describe how changes in EU visa policies, combined with the impoverished conditions of the Roma people, led to a wave of

21, 2012), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0226:FIN:EN:PDF> [hereinafter *Communication from the Commission*].

15. NATALIA BANULESCU-BOGDAN & TERRI GIVENS, MIGRATION POLICY INST., THE STATE OF ANTIDISCRIMINATION POLICIES IN EUROPE: TEN YEARS AFTER THE PASSAGE OF THE RACIAL EQUALITY DIRECTIVE 6 (2011), available at http://ec.europa.eu/ewsi/UDRW/images/items/docl_18120_227546760.pdf.

16. See *Asylum System Abuse*, ECONOMIST (Jan. 5, 2013), <http://www.economist.com/news/europe/21569064-will-eu-reimpose-visas-travellers-balkan-countries-asylum-system-abuse>. EU officials reported that asylum claims from the Western Balkans—Macedonia, Serbia, Albania, Bosnia, and Montenegro—tripled from 2009 into 2010–2012. *Id.* Officials estimated that Roma made 95% of those claims. *Id.*

17. The European Union is a quasi-governmental economic and political partnership between 28 European nations. See *How the EU Works*, EUR. UNION, http://europa.eu/about-eu/index_en.htm (last visited Nov. 21, 2014). Primary features include shared economic markets, ease of travel between member states, and shared commitment to human rights standards. See *id.* Macedonia is not yet an EU member state; it formally became a candidate nation in 2005 but Greece has continued to block its admission. *EU Enlargement: The Next Seven*, BBC NEWS EUROPE (Sept. 2, 2014), <http://www.bbc.com/news/world-europe-11283616>.

18. Source countries are the countries from which the asylum seekers originate. This Comment deals primarily with asylum seekers from Macedonia, but the Macedonian phenomenon was part of the trend of increased asylum seekers from all five Western Balkans countries—Macedonia, Serbia, Montenegro, Bosnia, and Albania. See EUROPEAN STABILITY INITIATIVE, SAVING VISA-FREE TRAVEL: VISA, ASYLUM AND THE EU ROADMAP POLICY 4-10(2013) [hereinafter ESI REPORT], available at http://www.esiweb.org/pdf/esi_document_id_132.pdf.

19. See *infra* Part III.B (describing the EU’s response to increased rates of asylum claims by false asylum seekers); see also *Asylum System Abuse*, *supra* note 16 (“The increasing abuse of the asylum system is not acceptable” . . . “The huge inflow of Serbian and Macedonian citizens must be stopped immediately.” (quoting Hans-Peter Friedrich, German Interior Minister)).

20. See *infra* Part III.C (describing the policies Macedonia has adopted to prevent false asylum seekers).

false asylum seekers in the EU.²¹ Part II will also describe the discriminatory policies implemented by the Macedonian government as a response to EU pressure to stop the false asylum seekers.²² Part III will examine two different venues for remedy: the United Nations' Human Rights Council ("UNHRC") and the Council of Europe's European Court of Human Rights ("ECHR").²³ Finally, Part IV will conclude with an evaluation of which of the two venues would be preferable for a Roma person seeking a remedy for racial discrimination.²⁴

II. THE ROMA PEOPLE AND FALSE ASYLUM CLAIMS

A. *The Flood of False Asylum Seekers*

In 2009, Macedonia entered the European visa-free travel zone, which allows people with Macedonian passports to enter the European Union without a visa for short-term trips.²⁵ Lifting the visa requirement also removed the screening function played by visas, thereby encouraging travel of impoverished individuals who would normally avoid such action due to the expense and administrative burden of obtaining a visa.²⁶

The Roma people, particularly in Macedonia, are one such group of impoverished individuals.²⁷ While Roma communities have their differences, they typically share distinctive characteristics, including

21. See *infra* Part II.

22. See *infra* Part II.

23. See *infra* Part III.

24. See *infra* Part IV.

25. The visa-free travel zone, also dubbed "visa liberalization," applies to individuals with a new biometric-style passport who are traveling for less than 90 days within a six-month period. See *Schengen Area*, EUR. COMM'N, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm (last updated Apr. 29, 2014). Technically, Macedonia entered the Schengen Visa Area, which has slightly different membership than the European Union, but the Schengen Area is largely identified as a product of the EU. *Id.* Biometric passports include fingerprint scans in addition to a photo. See *Visa Information System (VIS)*, EUR. COMM'N, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index_en.htm (last updated Aug. 11, 2014).

26. See Sinisa Jakov Marusic, *Poverty Prevents Macedonians from Travelling*, BALKANINSIGHT (May 11, 2011), <http://www.balkaninsight.com/en/article/poverty-prevents-macedonians-from-traveling>.

27. See DECADE OF ROMA INCLUSION 2005–2015 PROGRESS REPORT 2011 MACEDONIA 1(2011) [hereinafter MACEDONIA PROGRESS REPORT], available at http://www.romadecade.org/cms/upload/file/9300_file7_macedonia_decade-progress-report-f.pdf. In 2011, the estimated Roma poverty rate was 88% compared to a national average of 30%. *Id.* Similarly, Roma unemployment was estimated at 73% compared to a national average of 31%. *Id.*

similar physical features such as dark skin, a common root language, and a history of discrimination.²⁸ The Roma also suffer from high rates of unemployment, illiteracy, poor health, and inadequate housing.²⁹ Thus, when the visa-free travel regime took effect, waves of Roma took advantage of the opportunity to leave Macedonia in search of better living conditions.³⁰ This became an issue for destination countries in the EU when Roma travelers arriving at immigration checkpoints began requesting asylum in droves.³¹

The wave of asylum seekers presented a problem for the destination countries because of the generous protections afforded under EU law to individuals who make an asylum claim.³² While the asylum claim is evaluated, the destination country's government bears the financial and administrative burden of providing applicants with a number of benefits.³³ These benefits include food, housing, healthcare, education for children, and a cash stipend.³⁴ Some countries take a number of months to evaluate asylum claims, so applicants may receive benefits for some time.³⁵ Therefore, making an asylum claim, even one that is

28. See Adrian Marsh, *Gypsies, Roma, Travellers: An Animated History*, *supra* note 8; see also Charlotte Alter, *Mystery Blonde Girl Is Roma After All*, TIME (Oct. 25, 2013), <http://world.time.com/2013/10/25/mystery-blond-girl-is-roma-after-all/> (describing a report that DNA testing was used to confirm that a blond-haired child is in fact Roma).

29. See *Decade in Brief*, *supra* note 14. The UN declared a special project lasting from 2005–2015, with an emphasis on integrating Roma in the “priority areas” of education, employment, health, and housing. *Id.* The EU announced similar efforts. See also *Communication from the Commission*, *supra* note 14, at 1–11; David Simpson, *The Roma: A Thousand Years of Discrimination Continues in Europe*, *Advocates Say*, CNN WORLD (Oct. 25, 2013), <http://www.cnn.com/2013/10/21/world/europe/roma-discrimination/>.

30. See *Asylum System Abuse*, *supra* note 16.

31. *Id.* For an overview of the asylum process, see *Common European Asylum System (CEAS)*, EUR. COMM’N, http://ec.europa.eu/dgs/home-affairs/e-library/docs/infographics/ceas/ceas_infographics_a4_en.pdf (last visited Nov. 21, 2014).

32. A trio of “Directives” guides EU asylum policy: the Asylum Procedures Directive, the Asylum Qualification Directive, and the Asylum Reception Conditions Directive. See Council Directive 2005/85, 2005 O.J. (L 326) 13, 14 (EC) [hereinafter Asylum Procedures Directive]; Council Directive 2011/95, 2011 O.J. (L 337) 14 (EU) [hereinafter Asylum Qualifications Directive]; Council Directive 2003/9, 2003 O.J. (L 31) 18 (EC) [hereinafter Asylum Reception Conditions Directive].

33. ESI REPORT, note 18, at 8.

34. Asylum Reception Conditions Directive, *supra* note 32. The national assembly of each EU member state sets the rate for the stipend and other non-cash benefits. Such independence has resulted in significant disparity in the rate offered by various nations. KRIS POLLET ET AL., EUROPEAN COUNCIL ON REFUGEES & EXILES, NOT THERE YET: AN NGO PERSPECTIVE ON CHALLENGES TO A FAIR AND EFFECTIVE COMMON EUROPEAN ASYLUM SYSTEM 28 (2013), available at http://www.asylumineurope.org/files/shadow-reports/not_there_yet_02102013.pdf.

35. ESI REPORT, *supra* note 18, at 13–14. Germany, Sweden, Belgium and Luxembourg, for example, may take four to eight months to process an initial asylum

eventually denied, can be fairly attractive to an impoverished person like a Roma.³⁶

Asylum, however, is only granted to a relatively narrow subset of people, who can prove that they have a fear of persecution in their home country because of their membership in one of five protected groups.³⁷ Although many Roma suffer discrimination and hardship, most cannot prove the persecution necessary to gain asylum.³⁸ Rather, many Roma travel to the EU to take advantage of the benefits offered to asylum seekers knowing that their asylum claim will not be granted.³⁹ As floods of false asylum seekers began to overwhelm EU nations' immigration

claim, while the Netherlands, France, and Austria usually take one to four weeks. *Id.* These figures do not include the added processing time that would accompany a possible appeal.

36. See FRONTEX, WESTERN BALKANS ANNUAL RISK ANALYSIS 2012 29 (2012) [hereinafter FRONTEX 2012], available at http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/WB_ARA_2013.pdf (“[C]laiming asylum in the EU [has become] part of [an] overall seasonal strategy for [Roma] livelihood.”). In 2012, the German parliament increased the living stipend for a family of four to 420 euro per month, while the average employed Macedonian only earned 330 euro per month in 2013. See ESI REPORT, *supra* note 18, at 6–7 (noting the stipend for a family of four was increased from 120 euro per month to 420 euro per month in July 2012); *Asylum System Abuse*, *supra* note 16 (noting Macedonian average monthly wage was lower than the stipend provided by Germany).

37. Asylum Procedures Directive, *supra* note 32, at pmb., art. 3. The Asylum Procedures Directive stipulates that asylum should be granted to migrants who do not wish to return to their home country due to a “well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or social group.” *Id.*; Asylum Qualifications Directive, *supra* note 32, at art. 2. The landmark UN Convention on Refugees established this standard in 1951. See Convention Relating to the Status of Refugees, G.A. Res. 429 (V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775, at 48 (Dec. 14, 1950).

38. See Sinisa Jakov Marusic, *More Macedonians Seek Asylum in Germany*, BALKANINSIGHT (Sept. 11, 2014) <http://www.balkaninsight.com/en/article/more-macedonians-seek-asylum-in-germany> (noting that while about 4600 Macedonian nationals sought asylum in the first half of 2014, only 0.3% of claims were granted); ESI REPORT, *supra* note 18, at 10; ANTHONY ALBERTINELLI, EUROSTAT, ASYLUM APPLICANTS AND FIRST INSTANCE DECISIONS ON ASYLUM APPLICATIONS IN THIRD QUARTER 2010, at 11 (2011) (noting that Germany granted only 0.2% of claims by mostly Roma Serbs in one quarter of 2010).

39. See FRONTEX 2012, *supra* note 36, at 29. Many observers have noted that information regarding asylum benefits is widely distributed in Roma communities, even citing reports of “asylum tours” organized by travel companies. Ljubica Grozdanovska Dimishkovska, *Racial Profiling on Macedonia's Borders?*, TRANSITIONS ONLINE (June 27, 2012), <http://www.tol.org/client/article/23232-macedonia-roma-profiling-eu.html>. In addition, statistics of asylum claims in Germany provide additional support for the notion that Roma seek asylum to reap the benefits provided while their claims are pending. ESI REPORT, *supra* note 18, at 6–7. After Germany more than doubled the cash stipend it awards to asylum seekers in 2012, the country recorded more asylum claims in two months than it had received in the entire previous year. *Id.*

systems and strain national budgets, the EU countries turned to the source countries to stem the tide.⁴⁰

Macedonia, a source country eager to gain EU membership, was quick to comply with EU requests to stop the influx of false asylum seekers in order to prove its potential worth as an EU member.⁴¹ Macedonian government officials instituted policies and practices aimed at ending the claims of false asylum seekers.⁴² The policies implemented by the Macedonian government amount to racial profiling, resulting in discrimination against Roma individuals.⁴³

B. The “Travel Ban”: Macedonian Response to EU Pressure to Stop False Asylum Seekers

In May 2011, Macedonian officials announced a series of measures aimed at “suppressing the ongoing trend of asylum seeking,”⁴⁴ effectively amounting to a “travel ban” on Roma persons.⁴⁵ The government’s measures included enacting a new law making it a crime to seek asylum without “solid proof of cause.”⁴⁶ In addition, government officials amended the Law on Travel Documents,⁴⁷ preventing anyone who had been forcibly returned to the country from using his or her passport for one year.⁴⁸

40. See CHACHIPE, *supra* note 2, at 6–12, 32–35 for a detailed account of numerous visits between and public statements by EU and source country officials.

41. See *id.* at 32–35.

42. *Id.* at 35–46.

43. See CHACHIPE, *supra* note 2, at 37–38; *Asylum System Abuse*, *supra* note 16; FREEDOM HOUSE, NATIONS IN TRANSIT 2013: DEMOCRATIZATION FROM CENTRAL EUROPE TO EURASIA 376 (2014); Dimishkovska, *supra* note 39; DAJA, REPORT ON FIELD RESEARCH IN KUMANOVO REGARDING TRAVEL BAN 1–2(2013) [hereinafter DAJA REPORT].

44. CHACHIPE, *supra* note 2, at 34.

45. DAJA REPORT, *supra* note 43.

46. CHACHIPE, *supra* note 2, at 34.

47. SLUŽBEN VESNIK NA REPUBLIKA MAKEDONIJA BROJ 135 [OFFICIAL GAZETTE OF THE REPUBLIC OF MACEDONIA NO. 135], ZA IZMENUVANJE I DOPOLNUVANJE NA ZAKONOT ZA PATNITE ISPRAVI NA DRŽAVJANITE NA REPUBLIKA MAKEDONIJA [Law Amending and Supplementing the Law on Travel Documents of Nationals of the Republic of Macedonia] 6 (2011).

48. *Id.* The amendment was overturned by the Constitutional Court in June 2014 after Roma rights groups brought suit; while Roma may now retain their passports, it is unclear what, if any effect this will have on discrimination at the border. See *Highest Court in Macedonia Upholds Freedom of Movement for All Macedonians, Including Roma*, EUR. ROMA RTS. CTR. (July 15, 2014), <http://www.errc.org/article/highest-court-in-macedonia-upholds-freedom-of-movement-for-all-macedonians-including-roma/4301>; see also *ERRC Challenges Discrimination at the Border Before the Constitutional Court in Macedonia*, EUR. ROMA RTS. CTR. (Feb. 26, 2014), <http://www.errc.org/article/errc->

Furthermore, the Macedonian Ministry of the Interior announced a program to mark the passports of people who were thought to be leaving the country in a false attempt to seek asylum.⁴⁹ If border officials suspected a Roma was leaving Macedonia to falsely seek asylum, the officials would mark the passport with two parallel slash lines and the letters “AZ” for “azil,” the Macedonian word for asylum.⁵⁰ The marking barred the Roma individual from subsequent attempts to exit the country.⁵¹ The use of “AZ” eventually stopped after local groups and the international community complained of discrimination.⁵² The markings continued, however, with the use of two small, less conspicuous lines.⁵³

Additionally, Roma continued to be subjected to further discriminatory restraints on efforts to move among European nations.⁵⁴ Border officials persisted in asking Roma individuals for letters of invitation and proof of means of subsistence when attempting to cross a nation’s border, something not required by any national laws.⁵⁵ Though it has not divulged specific criteria used, the Macedonian government has also stated that it employs a “profile” to aid in screening potential false asylum seekers.⁵⁶ Major media outlets and commentators have discussed the possibly racist nature of the tactics used by Macedonia to suppress false asylum seekers.⁵⁷ Because of the targeted nature of these tactics, many Roma have complained of racial profiling.⁵⁸ In order to

challenges-discrimination-of-roma-at-the-border-before-the-constitutional-court-of-macedonia/4248.

49. CHACHIPE, *supra* note 2, at 36.

50. Dimishkovska, *supra* note 39.

51. *Id.*

52. DAJA REPORT, *supra* note 43.

53. *Id.*

54. *Id.*; CHACHIPE, *supra* note 2, at 37; *see also* EUROPEAN ROMA RIGHTS CTR., *supra* note 7, at 2–3.

55. CHACHIPE, *supra* note 2, at 37; *see also* EUROPEAN ROMA RIGHTS CTR., *supra* note 7, at 203. According to at least two accounts, border guards explicitly told Roma individuals that they were being denied exit based on instructions from a higher authority. CHACHIPE, *supra* note 2, at 41.

56. CHACHIPE, *supra* note 2, at 36–37.

57. *Asylum System Abuse*, *supra* note 16.

58. CHACHIPE, *supra* note 2, at 20–22, 39–40; ESI REPORT, *supra* note 18. The United Nations has defined racial profiling as “the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.” World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31–Sept. 8, 2001, *Durban Declaration*, U.N. Doc. A/CONF.189/12 (Sept. 8, 2001). In addition, reports from the European Commission, U.S. Department of State, and the European Roma and Travellers Forum have discussed racial profiling in Macedonia. *See* FREEDOM HOUSE, *supra* note 43; CHACHIPE, *supra* note 2, at 38.

address the grievances of Roma individuals, the Macedonian government should be held liable for its prejudicial policies.

III. MACEDONIAN CULPABILITY FOR RACIAL PROFILING

The discriminatory practices singling out Roma people as false asylum seekers could give rise to claims of racial profiling against the Macedonian government. There are two different avenues through which a Roma individual may bring a racial profiling claim: (1) The UNHRC or (2) the ECHR⁵⁹

A. *The United Nations Human Rights Council*

The United Nations hears claims for racial discrimination through the UNHRC.⁶⁰ The UNHRC's authorizing document is the International Covenant on Civil and Political Rights ("ICCPR"),⁶¹ which Macedonia adopted in 1994.⁶² Article 26 of the ICCPR prohibits discrimination and states that all persons are equal under the law.⁶³ Individuals may bring

59. Consideration of other concerns such as filing deadlines and financial resources are important, but lie outside the scope of this Comment. For a more comprehensive description of strategic litigation techniques see EUROPEAN ROMA RIGHTS CTR., INTERRIGHTS, AND MIGRATION POLICY INSTITUTE, STRATEGIC LITIGATION OF RACE DISCRIMINATION IN EUROPE: FROM PRINCIPLES TO PRACTICE 22 (2004), *available at* http://www.migpolgroup.com/public/docs/57.StrategicLitigationofRaceDiscriminationinEurope-fromPrinciplestoPractice_2004.pdf [hereinafter STRATEGIC LITIGATION]. Because Macedonia is not an EU member, I will not analyze its liability under European Court of Justice or European Convention for the Protection of Human Rights and Fundamental Freedoms. However, note the irony that, under implicit sanction from the EU, the Macedonian government has taken actions that could expose it to liability under EU law, possibly for racial discrimination and interfering with freedom of movement. See CHACHIPE, *supra* note 2, at 61–65; ESI report, *supra* note 18, at 10–12.

60. See OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS, CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMMITTEE, FACT SHEET NO. 15, at 7 (2005) [hereinafter FACT SHEET NO. 15], *available at* <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>. The UNHRC is responsible for "strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them." *Welcome to the Human Rights Council*, UNITED NATIONS HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Oct. 18, 2014). It is made up of 47 Member States, which are elected by the UN General Assembly, and sits in Geneva. *Id.*

61. International Convention on the Elimination of All Forms of Racial Discrimination arts. 28–45, *adopted* Dec. 21 1965, 660 U.N.T.S. 195 [hereinafter ICCPR]; Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 19 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol].

62. ICCPR, *supra* note 61.

63. *Id.* at art. 26. Article 26 provides:

complaints to the UNHRC only after all available domestic remedies have been exhausted, which usually means that the highest court of the nation where the complaint originated heard the claim and denied relief to the complainant.⁶⁴

The burden of proof before the UNHRC is flexible.⁶⁵ The UNHRC evaluates the evidence presented by both parties and the specificity of both parties' allegations and denials and adjusts the burden accordingly.⁶⁶ In some situations, the UNHRC recognizes that it is impossible for the complainant to provide documentary evidence, and in those cases, the state has a higher burden to refute the claims.⁶⁷

As a remedial body, the UNHRC is limited to holding hearings, soliciting reports from other organizations or governments, and producing "views," which are reports that describe its opinion on the matters brought before it.⁶⁸ The views may recommend that the offending state take specific actions, such as amending or enacting legislation to address complained-of problems, providing compensation to injured parties, or releasing detained individuals.⁶⁹ The UNHRC's views, however, are non-binding; they are essentially recommendations.⁷⁰ Furthermore, the UNHRC's ability to provide a remedy is undermined by its very slow processing time.⁷¹ Typically it takes several years for a complaint to result in a view,⁷² and there are no

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id.

64. *Id.* at arts. 1–3. The complaint must claim that a right enumerated in the ICCPR has been violated. *Id.* at art. 2. Additionally, the same claim cannot currently be pending before any other international body for "investigation or settlement." *Id.* at art. 5.1(a). However, there is an exception to this requirement if the application of such remedies has been unreasonably prolonged. *Id.* at art. 5.2(b).

65. FACT SHEET NO. 15, *supra* note 60, at 26.

66. *Id.*

67. *Id.*

68. *See id.* The UNHRC is granted authority to issue "views" by the Optional Protocol. Optional Protocol, *supra* note 61, at art. 5.4.

69. *See* FACT SHEET NO. 15, *supra* note 60, at 27.

70. *See* RUTH MACKENZIE ET AL., THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 416 (2d ed. 2009) for an overview of UNHRC procedures.

71. *See* FACT SHEET NO. 15, *supra* note 60, at 25.

72. *Id.* In some limited circumstances an expedited process may be used. *Id.* The *Lecraft* case, however, discussed *infra*, Part IV.A.1, was filed in Spanish courts in 1992, and the UN did not issue a view until 2009. *See* OPEN SOC'Y JUSTICE INITIATIVE, SUMMARY OF THE CASE OF ROSALIND WILLIAMS *LECRAFT V. SPAIN* 1–2 (2010) [hereinafter

provisions for interim measures of protection.⁷³ Of course, in addition to these substantive concerns, it is essential to consider UNHRC precedent on racial discrimination and how it might apply to a Roma racial profiling claim.

1. Racial Profiling Precedent Under the UNHRC

The most direct precedent for a racial profiling claim brought under the ICCPR is the case of *Lecraft v. Spain*.⁷⁴ Plaintiff Rosalind Williams Lecraft, a black woman born in the United States who had been a naturalized Spanish citizen for over 20 years, was the only person on a train platform stopped by Spanish police and asked for identity documents.⁷⁵ When she asked the police officer requesting her documents the reason for the stop, the officer responded that the Ministry of the Interior⁷⁶ had specifically directed police to check the identity of “colored persons.”⁷⁷ The Spanish Constitutional Court found that contemporary Spanish law permitted law enforcement to rely on race as a factor indicative of nationality and include such consideration in random identity checks.⁷⁸

The UNHRC, however, disagreed with the Spanish Constitutional Court.⁷⁹ Rather, the UNHRC stated that while it is acceptable for public officials to make general identity checks for the purposes of controlling illegal immigration, “mere physical or ethnic features . . . should not be taken as indicative [of possible illegal status].”⁸⁰ The UNHRC also asserted that the state, Spain in this case, could be held liable for acts or omissions by any branch of government, including those of the police

OPEN SOCIETY SUMMARY], *available at*
http://www.humanrights.ch/upload/pdf/120530_OSJI_Williams-Lecraft.pdf.

73. WORKING WITH THE UNITED NATIONS HUMAN RIGHTS PROGRAMME: A HANDBOOK FOR CIVIL SOCIETY 159 (2008), *available at*
http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf.

74. *Lecraft v. Spain*, United Nations Human Rights Committee, Communication No. 1493/2006, U.N. Doc. CCPR/C/96/D/1493/2006, at paras. 7.2–7.3 (2009) (finding the Spanish government liable for a violation of the ICCPR due to racial profiling carried out by a Spanish police officer).

75. *See id.* at para. 2.1; Indira Goris, *Ethnic Profiling in Spain Persists, Despite Landmark Ruling*, OPEN SOC’Y FOUND. (July 27, 2010), <http://www.opensocietyfoundations.org/voices/ethnic-profiling-spain-persists-despite-landmark-ruling>.

76. At the time, the Ministry of the Interior was tasked with overseeing Spain’s law enforcement. *See* Communication No. 1493/2006, at para. 2.1.

77. *Id.*

78. *Id.* at para. 2.6.

79. *Id.* at para. 7.2.

80. *Id.*

who seemed to be acting on an implicit policy of racial profiling.⁸¹ Moreover, the UNHRC proclaimed that any policies, whether implicit or explicit, supporting racial profiling impact not just the individuals affected but also support xenophobic attitudes in society and undermine anti-racial discrimination policies.⁸²

In determining a remedy, the UNHRC noted Spain's obligation to take "all necessary measures to prevent its officials from carrying out acts such as those in the present case."⁸³ The UNHRC also asserted that a public apology was an appropriate remedy, even though Williams had already received a private apology from Spanish officials in a private meeting.⁸⁴ These remedies, however, were mere suggestions because the UNHRC has no enforcement authority.

2. Application of the *LeCraft* Precedent to Incidents of Racial Profiling in Macedonia

Based on the *Lecraft* precedent, it is likely that the UNHRC would find the Macedonian government liable for the behavior of border patrol officers if Roma individuals brought claims of racial profiling to this body. As many Roma assert, Roma are often singled out for extra border checks due to their physical characteristics.⁸⁵ Furthermore, in Macedonia, border guards seem to utilize a profile that singles out Roma people implicitly and, in some cases, explicitly.⁸⁶ As the UNHRC stated in *Lecraft*, governments are liable even for implicitly discriminatory policies, and thus, Macedonia would likely be liable for its policies targeting Roma.⁸⁷ Additionally, as in the *Lecraft* case, the UNHRC would likely find that racial profiling in Macedonia would encourage

81. Communication No. 1493/2006, at para. 7.2.

82. *Id.* (reasoning that racial profiling policies "not only adversely affect the dignity of the persons affected, but would also contribute to spreading xenophobic attitudes among the population at large and would be inconsistent with an effective racial discrimination policy").

83. *Id.* at para. 9.

84. OPEN SOCIETY SUMMARY, *supra* note 72, at 3.

85. *See supra* Part II.B (describing the practices used by border agents).

86. *See supra* Part II.B.

87. *See* Communication No. 1493/2006, at para. 7.2. Furthermore, Article 50 of the Covenant states that the Covenant's provisions extend to all parts of a federal state, upholding a general principle of international law that State laws do not excuse breaches of treaty obligations at any level of government. FACT SHEET NO. 15, *supra* note 60, at 9. Accordingly, the Macedonian government could not claim exemption from the consequences of violating the ICCPR simply because state laws allowed border guards to conduct racial profiling.

further discrimination and be “inconsistent with an effective racial discrimination prevention policy.”⁸⁸

There are barriers, however, to seeking a possible remedy from the UNHRC. First, unless domestic entities have “unreasonably prolonged” resolution of the claim, the UNHRC may only hear issues after the complainant has exhausted all domestic remedies.⁸⁹ Therefore, before bringing a claim to the UNHRC, a Roma would first need to exhaust all avenues of relief in the Macedonian judicial system or argue that the Macedonian judicial system has unreasonably delayed resolution of his or her claim.⁹⁰ It would be difficult for a Roma to succeed in this context. The Macedonian judicial system is often cited for weak judicial independence and a high rate of corruption,⁹¹ thus making it unlikely that a politically sensitive racial profiling case would survive long enough to exhaust available domestic judicial avenues.

A second barrier to a favorable outcome under the ICCPR is the UNHRC’s limited power to provide a binding remedy.⁹² In the *Lecraft* case, the UNHRC could only recommend that the government make a public apology or provide compensation to the harmed individual.⁹³ It could not, however, mandate specific policy changes or monetary damages.⁹⁴ In a case brought to the UNHRC by a Roma, the UNHRC can recommend remedial action for Macedonia to take, but in the end, the responsibility is on Macedonia to initiate change independently.⁹⁵ In

88. Communication No. 1493/2006 at para. 7.2.

89. ICCPR, *supra* note 61, at art. 41(c).

90. *See id.*

91. *See, e.g.*, FREEDOM HOUSE, *supra* note 43, at 371–88 (assigning Macedonia relatively low scores for strength of judicial independence and overall levels of corruption); *Corruption Perceptions Index 2013*, TRANSPARENCY INT’L MACEDONIA, http://www.transparency.mk/en/index.php?option=com_content&task=view&id=513&Itemid=30 (last visited Nov. 22, 2014) (noting lack of accountability in government and widespread distrust of government independence and effectiveness); *see generally* UNITED NATIONS OFFICE ON DRUGS & CRIME, CORRUPTION IN THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA: BRIBERY AS EXPERIENCED BY THE POPULATION (2011), *available at* http://www.unodc.org/documents/data-and-analysis/statistics/corruption/Corruption_report_fYR_Macedonia_FINAL_web.pdf (describing the prevalence of bribery in interactions with public officials).

92. *See* FACT SHEET NO. 15, *supra* note 60, at 27.

93. *Id.*

94. STRATEGIC LITIGATION, *supra* note 59, at 27.

95. A robust critique of UNHRC’s “enforcement” mechanism, or lack thereof, reaches far beyond the scope of this Comment. For a fuller discussion of the issue, see generally Kim R. Holmes, *New World Disorder: A Critique of the United Nations*, 46 J. INT’L AFFAIRS 323 (1993) (articulating some of the problems created for the UN by the end of the Cold War); Noelle Quienvet, *Binding the United Nations to Human Rights Norms by Way of the Laws of Treaties*, 42 GEO. WASH. INT’L L. REV. 587 (2010) (discussing a recent proposal on how to make UN covenants such as the ICCPR

contrast, some other venues, specifically the ECHR, can offer binding judgments and other varied remedies.⁹⁶

B. The European Convention on Human Rights and the European Court of Human Rights

The Council of Europe (“the Council”) evaluates claims of racial discrimination through the ECHR.⁹⁷ The guiding document for the ECHR is the European Convention on Human Rights (the “Convention”),⁹⁸ which Macedonia ratified when it joined the Council in 1997.⁹⁹ Article 14 of the Convention prohibits racial discrimination.¹⁰⁰ Other substantive rights, such as freedom of movement, are protected elsewhere in the Convention and its Protocols.¹⁰¹

The ECHR’s threshold inquiry is whether there is a difference of treatment between two persons placed in analogous situations and if that difference would violate a substantive right found in the Convention.¹⁰² If a difference exists, discrimination may be permissible if the differential treatment has an objective and reasonable justification and pursues a legitimate purpose.¹⁰³ In the ECHR’s analysis, difference in

“enforceable”); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (introducing a theory-focused discussion of how and why nation states adhere to, ignore, or reject human rights instruments).

96. STRATEGIC LITIGATION, *supra* note 59, at 132.

97. *The Court in Brief*, EUR. CT. HUM. RTS., http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Nov. 22, 2014). The ECHR has heard cases since 1959 and issued over 10,000 judgments. *Id.* For a fuller description of the ECHR, see EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS (2014), *available at* http://www.echr.coe.int/Documents/50Questions_ENG.pdf [hereinafter ECHR IN 50 QUESTIONS].

98. EVELYN ELLIS & PHILIPPA WATSON, EU ANTI-DISCRIMINATION LAW 21 (2d ed. 2012). The ECHR is a direct source of general principles of EU law. *Id.*

99. *The Former Yugoslav Republic of Macedonia*, COUNCIL EUR., <http://www.coe.int/en/web/portal/-the-former-yugoslav-republic-of-macedonia-> (last visited Oct. 10, 2014).

100. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, 213 U.N.T.S. 221. The Convention reads: “The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” *Id.*

101. *Id.*; Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Sept. 16, 1963, E.T.S. 46 [hereinafter Protocol 4].

102. ELLIS & WATSON, *supra* note 98, at 108.

103. *See Abdulaziz v. United Kingdom*, App. Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471, 472 (1985), *available at*

110. See *Bekos v. Greece*, 2005-XIII Eur. Ct. H.R. 1, 14, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?#%7B%22appno%22%3A%5B%2215250%2F%22%5D%2C%22itemid%22%3A%5B%22001-71594%22%5D%7D>.

slurs, finding mere allegations did not rise to “beyond a reasonable doubt” to prove discriminatory intent.¹¹¹

However, unlike the UNHRC, when it comes to granting a remedy the ECHR has the authority to award damages and make binding policy judgments.¹¹² Article 41 of the Convention allows the ECHR to award monetary damages, called a “just satisfaction.”¹¹³ The ECHR may award up to three types of just satisfaction damages: pecuniary damages, non-pecuniary damages, and costs and expenses.¹¹⁴ In practice, although the ECHR’s judgments as to policy changes are technically binding, states do have some discretion as to how they institute the ECHR’s decision regarding policy.¹¹⁵ The just satisfaction amount, however, cannot be changed.¹¹⁶ Thus, the payment of a just satisfaction is the most certain remedy to a claimant.¹¹⁷ Precedent shows that the ECHR is willing to award just satisfactions for claims of racial discrimination.¹¹⁸ Often, when it issues just satisfactions, the ECHR also makes detailed policy recommendations, which is helpful for later cases seeking to rely on relevant precedent.¹¹⁹ However, because the ECHR has a relatively low case acceptance rate, and gives detailed recommendations in only some of its cases, available precedent on racial profiling is somewhat limited.¹²⁰

111. *Id.*

112. *The Court in Brief*, *supra* note 97.

113. ECHR IN 50 QUESTIONS, *supra* note 97, at 11. Article 41 of the Convention, states “if the [ECHR] finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the [defendant–nation] allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 100, at art. 41.

114. *Just Satisfaction*, COUNCIL EUR., http://www.coe.int/t/dghl/monitoring/execution/Themes/Satisfaction_equitable/Article_41/Intro_en.asp (last visited Oct. 10, 2014). Pecuniary damages compensate for actual losses or expected future losses; non-pecuniary damages compensate for mental or physical suffering; costs and fees compensate for the costs associated with bringing the claim such as legal fees, court registration fees, and travel to appear at court. *Id.*

115. 88 ELISABETH LAMBERT-ADDELGAWAD, COUNCIL EUR., THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF RIGHTS 12 (2d ed. 2008).

116. *Id.*

117. *Id.* After the ECHR issues a judgment, notice of the judgment is transmitted to the Council of Ministers of the Council of Europe, which then consults with the offending country on how to prevent further violations. *Id.*

118. See *Bekos v. Greece*, 2005-XIII Eur. Ct. H.R. 1, 19, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22appno%22:\[%2215250/02%22\],%22itemid%22:\[%22001-71594%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{%22appno%22:[%2215250/02%22],%22itemid%22:[%22001-71594%22]}).

119. STRATEGIC LITIGATION, *supra* note 59, at 132.

120. See ECHR IN 50 QUESTIONS, *supra* note 97, at 11. In 2013, the Court received 93,397 applications. *Id.* It accepted only 3,659 cases, and delivered judgments in 916. *Id.*

1. Racial Discrimination Precedent at the ECHR

The ECHR has addressed few cases relating to racial discrimination under Article 14,¹²¹ and to complicate matters further, the text of the Convention does not define “discrimination.”¹²² The ECHR has found, however, that discrimination can exist in both direct and indirect forms.¹²³ The ECHR defines direct discrimination as “treating differently, without an objective or reasonable justification, persons in relevantly similar situations.”¹²⁴ Indirect discrimination, on the other hand, exists where “a general policy or measure . . . has disproportionately prejudicial effects on a particular group . . . notwithstanding that it is not specifically aimed at that group.”¹²⁵ In other words, a facially neutral law may violate Article 14 if it has a discriminatory effect in practice.¹²⁶

While ECHR jurisprudence on racial discrimination is relatively underdeveloped, one case that is relevant to a claim against the Macedonian government for racial profiling is *Timishev v. Russia*.¹²⁷ In *Timishev*, the Russian government prohibited a man from entering certain territory on the basis of his Chechen origin.¹²⁸ The ECHR found the Russian government liable for racial discrimination under Article 14 for restricting an individual’s freedom of movement guaranteed by Protocol 4 of the Convention.¹²⁹ The ECHR awarded a just satisfaction of 5,000 euro as non-pecuniary damages.¹³⁰

121. See STRATEGIC LITIGATION, *supra* note 59, at 132. The ECHR’s overall case acceptance rate is low. See ECHR IN 50 QUESTIONS, *supra* note 97, at 11. In 2013, the Court decided 93,397 applications. *Id.* It accepted only 3,659 cases, and delivered judgments in 916. *Id.*

122. ELLIS & WATSON, *supra* note 98, at 107.

123. *Id.*

124. Zarb Adami v. Malta, 2006-VIII Eur. Ct. H.R. 305, 323, available at http://www.echr.coe.int/Documents/Reports_Recueil_2006-VIII.pdf.

125. D.H. and Others v. Czech Republic, 2007-IV Eur. Ct. H.R. 241, 310 available at http://www.echr.coe.int/Documents/Reports_Recueil_2007-IV.pdf (finding indirect discrimination where Roma children were disproportionately placed in special education programs because the government failed to make accommodations for Roma test takers).

126. Thlimmenos v. Greece, 2000-IV Eur. Ct. H.R. 263, 265, available at http://www.echr.coe.int/Documents/Reports_Recueil_2000-IV.pdf (finding a violation of Article 14 where a law criminalized failure to wear a military uniform and a Jehovah’s Witness who was sentenced to jail for refusing to wear uniform was later denied employment on the basis of his conviction).

127. Timishev v. Russia, 2005-XII Eur. Ct. H.R. 169, available at http://www.echr.coe.int/Documents/Reports_Recueil_2005-XII.pdf.

128. *Id.* at 171.

129. *Id.* at 172; see Protocol 4, *supra* note 101, at art. 2; see also *Timishev v. Russia*, MINORITY RTS. GRP. INT’L (Dec. 13, 2005),

The ECHR also addressed racial discrimination under Article 14 in *Bekos and Koutropoulos v. Greece*.¹³¹ In *Bekos*, two young Roma men were arrested for robbing a kiosk.¹³² The men alleged that they were beaten, sexually assaulted, and subjected to repeated explicit racial insults in violation of Article 14 of the Convention.¹³³ While the ECHR did not find the government responsible for the assaults and insults, it did affirm a procedural fairness requirement by stating that government officials have a reasonable duty to investigate whether or not discrimination has played a role in alleged violations of the Convention.¹³⁴ The ECHR also made clear that state officials' participation and police participation in racial discrimination is a human rights violation even if the victims are breaking the law.¹³⁵ Each applicant was awarded 10,000 euro in non-pecuniary damages as just satisfaction for the government's failure to properly investigate their claims.¹³⁶ The cases of *Timishev* and *Bekos* illustrate the potential fate of a Roma individual bringing a claim to the ECHR against Macedonia, which would likely be successful based on these important precedents.¹³⁷

2. Application of the Convention and its Precedent to Events in Macedonia

There are two potential claims that could be brought by a Roma alleging racial discrimination by the Macedonian government before the

<http://www.minorityrights.org/2671/minority-rights-jurisprudence/timishev-v-russia.html>.

130. See *Just Satisfaction*, *supra* note 114 (describing the basis for awarding non-pecuniary damages).

131. *Bekos v. Greece*, 2005-XIII Eur. Ct. H.R. 1, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?%22appno%22:\[%2215250/02%22\],%22itemid%22:\[%22001-71594%22\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?%22appno%22:[%2215250/02%22],%22itemid%22:[%22001-71594%22]).

132. *Id.* at 6.

133. *Greece in Breach of Articles 3 and 14 of the European Convention on Human Rights*, EUR. ROMA RTS. CTR. (Dec. 14, 2005), <http://www.errc.org/cikk.php?cikk=2437>.

134. *Bekos*, 2005-XIII Eur. Ct. H.R. at 14.

135. *Id.* The Court also emphasized the government's crucial role in fighting racial discrimination, "a particular affront to human dignity [that] . . . requires from the authorities special vigilance and vigorous reaction." *Id.* at 16.

136. *Id.*

137. However, the ECHR's low case acceptance rate does extend to Macedonia and could prove a barrier to the hearing of a case; in 2013, the ECHR received 859 applications concerning the government of Macedonia and accepted only nine of them for judgment. *The Former Yugoslav Republic of Macedonia*, EUR. CT. HUM. RTS. 3-4, http://www.echr.coe.int/Documents/CP_The_former_Yugoslav_Republic_of_Macedonia_ENG.pdf (last updated July 2014). The ECHR has issued only two noteworthy cases on discrimination involving Macedonia in the past decade, and neither dealt with racial discrimination. *Id.*

ECHR. The first is for racial profiling as a means of restricting freedom of movement; the second is for government failure to investigate racial profiling due to discriminatory intent.

The first claim would likely allege racial discrimination under Article 14, linked to a violation of freedom of movement under Protocol 4.¹³⁸ The threshold inquiry for racial discrimination before the ECHR asks whether two people placed in the same situation would be treated similarly.¹³⁹ With respect to Roma asylum seekers, this requires the court to ask whether a Roma and a non-Roma person would face the same treatment at a border crossing. Under the strict scrutiny standard used in racial discrimination cases before the ECHR, it is likely that the ECHR would answer this question in the negative.¹⁴⁰ Because many Roma report that they face different treatment than non-Roma at border crossings, the ECHR would most likely conclude that different groups of individuals are treated differently at border crossings depending on their race.¹⁴¹

The second potential claim that a Roma could bring before the ECHR could allege a violation of the procedural fairness requirement found in Article 14. Similar to the ECHR's finding in *Bekos*, if the Macedonian government failed to investigate a Roma's disparate treatment at a border crossing for racial motives, a Roma could potentially succeed on a claim of this type.

The primary legal obstacle to bringing a racial discrimination claim under the Convention would be overcoming the high burden of persuasion.¹⁴² Because the inquiry is fact-specific, it can often be difficult for a claimant to satisfy the elevated standard.¹⁴³ In *Bekos*, for example, although the claimants described racial slurs used by the police, without corroboration, the ECHR did not find the allegations sufficient to support the "beyond a reasonable doubt" standard.¹⁴⁴ Thus, in a Roma's case against Macedonia, it seems unlikely that the court would accept any assertions of racial discrimination without corroboration.¹⁴⁵

138. See a discussion of similar claims made in *Timishev v. Russia*, in MINORITY RTS. GRP. INT'L, *supra* note 129.

139. See Ellis & Watson, *supra* note 98, at 182.

140. See *Bekos*, 2005-XIII Eur. Ct. H.R. at 4.

141. CHACHIPE, *supra* note 2, at 41.

142. See *Bekos*, 2005-XIII Eur. Ct. H.R. at 4.

143. See *id.* at 17.

144. *Id.*

145. See BANULESCU-BOGDAN & GIVENS, *supra* note 15, at 6 (summarizing statistical reports indicating that most Roma who are victims of crimes do not report those crimes because they believe nothing will be done, do not know how to, or believe that it is not worth reporting a commonplace occurrence).

IV. EVALUATING A COURSE OF ACTION

There are three key factors to consider when evaluating the likelihood of success for a racial profiling claim by a Roma individual.¹⁴⁶ The factors include: (1) substantive concerns, including the burden of persuasion and clarity of precedent; (2) the power to provide a remedy and; (3) implications for effect on national policy. Considering these factors together, it seems likely that a claim against the Macedonian government for racial profiling of a Roma would be most successful if brought before the ECHR.

A. *Substantive Concerns*

The burden of persuasion before the ECHR differs slightly from that before the UNHRC. The ECHR has the highest burden of proof and requires complainants to prove their cases beyond a reasonable doubt.¹⁴⁷ The UNHRC requires a somewhat lower burden of proof.¹⁴⁸ Specifically, the UNHRC recognizes that in some cases complainants are unable to provide evidentiary corroboration of their claims against state actors and places a higher burden on the state to rebut those allegations.¹⁴⁹ Unlike the UNHRC, The ECHR does not use flexible corroboration requirements.¹⁵⁰ Therefore, it would be easier for a Roma person to satisfy the burden of persuasion before the UNHRC.

In addition, both the UNHRC and the ECHR have different bodies of case law that could have precedential effect in a Roma individual's case against Macedonia. Some observers believe that the UNHRC has the most developed and comprehensive case law of all international adjudicative bodies because it finds violations for a variety of forms of discrimination.¹⁵¹ The UNHRC has also explicitly found against a state government for racial profiling, in the *Lecraft* case.¹⁵² Dissimilarly, the ECHR requires claims for discrimination to be paired with an allegation of a violation of another substantive right, which some see as doubling

146. For a more comprehensive analysis of a wider range of factors that affect choice of venue for a Roma discrimination claim, from opportunity to recover attorneys' fees to filing deadlines, see generally STRATEGIC LITIGATION, *supra* note 59.

147. *Nachova & Others v. Bulgaria*, 2005-VII Eur. Ct. H.R. 1, 33, available at http://www.echr.coe.int/Documents/Reports_Recueil_2005-VII.pdf.

148. *BANULESCU-BOGDAN & GIVENS*, *supra* note 15, at 4.

149. See discussion *supra* Part III.A.

150. See STRATEGIC LITIGATION, *supra* note 59, at 132.

151. *Id.* at 131-32.

152. *Lecraft v. Spain*, United Nations Human Rights Committee, Communication No. 1493/2006 (2009).

the burden on the plaintiff.¹⁵³ Furthermore, the ECHR has not articulated precedent explicitly on racial profiling.¹⁵⁴ Therefore, available UNHRC precedent is more favorable to a Roma claim for racial discrimination. After evaluating precedent, the power of each body to provide remedy is key consideration.

B. Remedy

There are also wide differences in the ability of each adjudicative body, the UNHRC and the ECHR, in terms of providing a remedy to a claimant. While the the UNHRC can recommend that a state party provide monetary damages to an injured claimant, the court does not specify the amount of the penalty and the recommendation is not binding.¹⁵⁵ In contrast, the ECHR can specify the amount of any monetary damages it awards and its recommendation is binding.¹⁵⁶ Thus, the ECHR could attach a monetary value to a Roma individual's racial discrimination claim and order the Macedonian government to deliver payment accordingly.

C. Effect on Macedonian National Policy

The final factor to consider is the likelihood that a UNHRC or ECHR decision will affect Macedonian national policy in a meaningful way. In terms of which venue will have the most relevant precedent, the ECHR issues binding judgments that often include detailed reasoning and policy recommendations.¹⁵⁷ In contrast, communications of the UNHRC may or may not include detailed reasoning and are non-binding recommendations.¹⁵⁸ Both bodies can make recommendations that defendant nations change certain policies or implement new ones, but the ECHR's views are binding while the UNHRC's are not.¹⁵⁹ Even though the UNHRC's views are not binding, some observers note that they can serve as powerfully persuasive precedent, due to the UN's global profile.¹⁶⁰ Still, assuming a Roma individual would bring a claim for racial profiling with the goal of ending the Macedonian government's

153. STRATEGIC LITIGATION, *supra* note 59, at 131–32.

154. *See id.* at 131.

155. *See id.*

156. *See* EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN FACTS & FIGURES 2013, at 4 (2014), available at http://www.echr.coe.int/Documents/Facts_Figures_2013_ENG.pdf.

157. STRATEGIC LITIGATION, *supra* note 59, at 132.

158. *See* FACT SHEET No. 15, *supra* note 60, at 27.

159. *Id.*

160. STRATEGIC LITIGATION, *supra* note 59, at 131–32.

racial profiling policies, the ECHR is most likely to issue a judgment that will create specific policy changes in Macedonia.

D. A Better Likelihood of Success With the ECHR

Based on the factors described above, a Roma individual pursuing a racial profiling claim should initiate action before the ECHR. In the ECHR, a Roma would be able to receive individual monetary damages.¹⁶¹ Furthermore, because the ECHR issues opinions that are both binding and sufficiently detailed, it has the real possibility of creating precedent that could affect policy in Macedonia. Unfortunately, however, the ECHR places a high burden on the claimant.¹⁶² A claim before the UNHRC, on the other hand, would likely provide little payoff, since the UNHRC does not recommend damages or make binding policy suggestions.¹⁶³

V. CONCLUSION

Visa liberalization was initiated to allow Macedonian citizens easy access to EU nations. As a result of such liberalization, however, waves of false asylum seekers, especially Roma, began flooding the borders of EU countries. The financial and administrative burden caused by droves of false asylum seekers forced the EU to put pressure on Macedonia to create domestic policies to stop the phenomenon. Unfortunately, Macedonia has chosen to institute racially charged policies to limit false asylum seekers, which constitute possible violations of a number of bodies of international law. For a Roma individual who wishes to address his or her grievances against the Macedonian government, the ECHR is most likely to provide relief. While a claim under the UNHRC is also possible, it is much less likely that the UNHRC would provide a realistic remedy. Therefore, a Roma individual seeking remedy for racial profiling should consider initiating a claim before the ECHR.

161. *Just Satisfaction*, *supra* note 114.

162. *Bekos v. Greece*, 2005-XIII Eur. Ct. H.R. 1, 16, [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1532780-1603912#{%22itemid%22:\[%22003-1532780-1603912%22\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1532780-1603912#{%22itemid%22:[%22003-1532780-1603912%22]}).

163. STRATEGIC LITIGATION, *supra* note 59, at 131.