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Undocumented Immigrants and Rights in the EU Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?

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Abstract

Undocumented migrants are one of the most vulnerable groups in the EU. This report assesses the main findings and synergies of a selection of EU-funded research projects on irregular immigration and the status of undocumented migrants. It reveals that the results emanating from social science research contrast with the EU policy documents adopted in light of the forthcoming Stockholm Programme – the third multi-annual programme on an Area of Freedom, Security and Justice. The authors argue that acknowledgement of the findings of independent research is lacking in EU policy, which continues promote a control-based approach to migration that has profound ethical and human rights implications. The report concludes with a set of policy recommendations aimed at overcoming the current inconsistencies in EU and national policies as well as in practices on irregular migration under the mandate of the Stockholm Programme.

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UNDOCUMENTED IMMIGRANTS AND RIGHTS IN THE EU ADDRESSING THE GAP BETWEEN SOCIAL SCIENCE RESEARCH AND POLICY-MAKING IN THE STOCKHOLM PROGRAMME? *CEPS LIBERTY AND SECURITY IN EUROPE/DECEMBER 2009* SERGIO CARRERA & MASSIMO MERLINO*

1. Introduction

There is a difficult relationship between undocumented migration and rights in the EU. The current political trends and official rhetoric driving policy-making at both the EU and national levels poorly reflect the knowledge emanating from social science research. A number of research projects funded by the EU institutions reveal the tensions provoked by some of the dynamics influencing the management of immigration and the access of irregularly staying third-country nationals (TCNs) to fundamental socio-economic rights and social inclusion. A key role of research is to inform policy-making. This role is particularly important in domains with a prominent social and human dimension, such as that of undocumented immigration. During recent years, the EU has funded projects comprising interdisciplinary networks of academics, civil society organisations and practitioners across Europe, which have provided sound and independent knowledge about the phenomenon of irregular immigration. The European Commission has been a major actor in this regard, with several of its directorates-general (DGs) supporting projects that pursue various goals and perspectives in this domain (most notably the DG for Research, DG for Justice, Freedom and Security (JFS), DG for Employment, Social Affairs and Equal Opportunities, DG for Health and Consumers (SANCO) and the EuropeAid Cooperation Office). As we show in this report, there is nonetheless a gap between the EU policy documents on irregular immigration that have been adopted in advance of the forthcoming Stockholm Programme and EU-funded social science research. This gap not only affects policy coherency, it also undermines the capacity of EU policies on migration to add value, to meet social needs and to resolve dilemmas.

From the beginning of 2010, the EU's Area of Freedom, Security and Justice (AFSJ) will enter into a new and decisive phase of the EU integration process. It has already been ten years since migration policy was transferred to (shared) competence between the European Community and the member states. This decade has seen the adoption of several EU legislative measures dealing with diverse aspects of irregular immigration. The Stockholm Programme will constitute the third multi-annual programme providing the political priorities and legislative agenda for the development of the AFSJ during the next five years. Furthermore, the entry into force of the Treaty of Lisbon brings important innovations for EU cooperation in the area of migration. It makes the Charter of Fundamental Rights of the EU legally binding and further expands the

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jurisdiction of the European Court of Justice (ECJ). The Charter includes rights that are applicable to everyone, independent of the administrative status of stay or residence. In addition, the preliminary rulings reaching the ECJ on the irregular immigration law of the European Community will only increase in the years to come.

It is therefore an appropriate time to address the gap between EU policies on irregular immigration and social science research funded by the EU institutions, and for thinking of possible strategies for how current policy deficiencies at the EU level could potentially be overcome. This report takes stock of the main results of a selection of EU-funded projects that focus on the phenomenon of irregular immigration and the status of undocumented immigrants in the EU. It aims at identifying common findings and synergies among them. Special attention is paid to those projects that have been supported by different DGs of the European Commission. We also include some relevant studies funded by the DG for Internal Policies (Citizens' Rights and Constitutional Affairs) of the European Parliament. Their results are contrasted with policy discourses and priorities in light of the expected adoption of the Stockholm Programme at the European Council meeting of 10 and 11 December 2009.

The report is structured around four sections. Section 2 starts by briefly outlining the central policy inputs for the Stockholm Programme presented by the European Commission (Communication on an Area of Freedom, Security and Justice for the Citizen) and the Council (European Pact on Immigration and Asylum), and the ways in which they frame undocumented migration from both a discursive and normative perspective. These inputs will be compared with the last two draft versions of the Stockholm Programme, which were respectively published by the Swedish presidency on 16 October and 23 November 2009. Section 3 offers a synthesised overview of the projects' results and examines their common conclusions under five major headings: 1) terminology and statistics, 2) regularisation, 3) criminalisation and detention, 4) return and readmission, and 5) access to social and human rights. The projects have been selected based on the relevance of their objectives and themes for undocumented migration and the EU policy processes underway. Also, a majority of them have taken place in the period coinciding with the last five years of EU integration – corresponding with the mandate of the second multi-annual programme on an AFSJ (the 2004–09 Hague Programme). We compare their results with EU priorities in this policy domain, highlighting some of the critical tensions and lacuna. Section 4 concludes and puts forward a set of recommendations for overcoming the present inconsistencies in policies on undocumented migrants. We argue that the Stockholm Programme should be founded on the lessons learned from the Hague Programme period – lessons that have chiefly emerged from the independent assessment carried out by social science research. The new AFSJ programme should leave room for the implementation of new strategies that address today's weaknesses and gaps. Moreover, it should call for the development of evidence-based policy-making to drive the next phase of the EU's AFSJ, which would reduce the strains in the nexus between undocumented migration and rights.

2. Irregular immigration and undocumented migrants: Towards the Stockholm Programme

In December 2009, the European Council will adopt the next multi-annual programme on an AFSJ – the Stockholm Programme. The latter will succeed the 2004 Hague Programme¹ and

¹ See Council of the European Union, Presidency Conclusions of the Brussels European Council, 4 and 5 November, 14292/1/04, Brussels, 8 December 2004, Annex I, "The Hague Programme: Strengthening Freedom, Security and Justice in the European Union", point 1.5 (OJ C53/1, 3.3.2005). See also T. Balzacq and S. Carrera, "The Hague Programme: The Long Road to Freedom, Security and Justice", in T. Balzacq and S. Carrera (eds), *Security versus Freedom: A Challenge for Europe's Future*, Farnham: Ashgate Publishing, 2006, pp. 1-34.

present the guiding principles, political priorities and policy agenda upon which future EU policies on irregular immigration will be based during the period 2010–15.² The beginning of 2010 will also be a decisive period for the upcoming Spanish presidency of the EU, which will need to start implementing the EU's new AFSJ agenda envisaged by the Stockholm Programme and the Treaty of Lisbon with its important innovations in EU migration policy. The Treaty of Lisbon transforms the Charter of Fundamental Rights into a legally binding instrument and expands the jurisdiction of the ECJ beyond its current limitations in the migration domain, on the basis of which only last-instance national tribunals can present preliminary rulings.³

The development of the Stockholm Programme has already entailed various contributions, among which the following two are the most crucial: the European Pact on Immigration and Asylum and the Commission Communication on an Area of Freedom, Security and Justice for the Citizen (COM(2009) 262). Also, the Swedish presidency published two drafts of the Stockholm Programme, on 16 October⁴ and 23 November 2009.⁵ How do these policy documents and the first preliminary versions of the Stockholm Programme deal with the phenomenon of irregular immigration and the status of undocumented migrants? What are the dynamics influencing their terminology/official discourse and priorities?

The European Pact on Immigration and Asylum was a proposal by France during its presidency of the EU in the second half of 2008. It was adopted by the Council in October 2008.⁶ The Pact was subject to criticism from diverse fronts – including both civil society and academia – owing to its narrow vision of the rights of TCNs in the EU⁷ and its predominant intergovernmental and nationalistic approach towards future EU cooperation on migration policy.⁸ The discourse and terminology used by the Pact advocated the promotion of further migration controls and common actions “against illegal immigration”.⁹ The Council agreed on a series of general

² Refer to E. Guild, S. Carrera and A. Faure Atger, *Challenges and prospects for the EU's area of freedom, security and justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, Centre for European Policy Studies, Brussels, 2009; and also to S. Carrera and G. Pinyol, *Local and Regional Authorities in the Future Area of Freedom, Security and Justice: Towards a Multigovernance Strategy for the Stockholm Programme*, Study commissioned by the Commission for Constitutional Affairs, European Governance and the Area of Freedom, Security and Justice of the Committee of the Regions, Brussels, 2009.

³ Refer to Art. 68 EC Treaty, Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 115/47, 9.5.2008; and also to S. Carrera and F. Geyer, “The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice”, in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Farnham: Ashgate Publishing, 2008, pp. 289-307.

⁴ Council of the European Union, Multi-annual Programme for an Area of Freedom, Security and Justice serving the Citizen (the Stockholm Programme), The Stockholm Programme: An open and secure Europe serving the Citizen, 14449/09, Brussels, 16 October 2009(a).

⁵ Council of the European Union, The Stockholm Programme: An open and secure Europe serving and protecting the Citizen, 16484/09, Brussels, 23 November 2009(b).

⁶ Council of the European Union, European Pact on Immigration and Asylum, 13440/08, Brussels, 24 September 2008.

⁷ The only allusion to rights was a general sentence stating (in a rather formal style) that “[i]n line with the values that have consistently informed the European project and the policies implemented, the European Council solemnly reaffirms that migration and asylum policies must comply with the norms of international law, particularly those that concern human rights, human dignity and refugees”. Ibid.

⁸ S. Carrera and E. Guild, *The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanism? Security vs. Rights?*, CEPS Policy Brief No. 170, Centre for European Policy Studies, Brussels, September 2008.

⁹ The Pact starts with the following statement:

commitments. One of them consisted of the “control [of] illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit”.¹⁰ It was held that “[on] principle” irregular immigrants on member states’ territory should leave the Union.¹¹ The priorities identified to guide the irregular immigration aspects of the future, common EU immigration policy were to

- use “only” case-by-case regularisation for humanitarian or economic reasons;
- conclude bilateral and multilateral readmission agreements with third countries;
- develop cooperation on common arrangements for the expulsion of undocumented migrants (reference was made to biometric identifiers and joint flights);¹²
- create “incentive systems” for voluntary return with EU financial support;
- apply “dissuasive and proportionate penalties” against those who exploit irregular immigrants, especially employers; and
- foster the mutual recognition of expulsion decisions.

The DG JFS presented its vision and proposals for the Stockholm Programme in the Communication on an Area of Freedom, Security and Justice for the Citizen (COM(2009) 262) on 10 June 2009.¹³ The first section of the Communication identified various areas of ‘success’ achieved during the last ten years of EU cooperation as well as a number of ‘challenges’ for the future. In listing successes, the Communication highlighted that “stronger action is being taken against illegal immigration and human trafficking”.¹⁴ Concerning the challenges ahead, it called for providing the best possible service to the ‘citizen’ and stated that “[a]ccording to estimates, there are about *eight million illegal immigrants living in the Union*, many of whom work in the informal economy. *Tackling the factors that attract clandestine immigration and ensuring that policies for combating illegal immigration are effective* are major tasks for the years to come”¹⁵ (emphasis added).

The European Union, however, does not have the resources to decently receive all the migrants hoping to find a better life here. Poorly managed immigration may disrupt the social cohesion of the countries of destination. The organisation of immigration must consequently take account of Europe’s reception capacity in terms of its labour market, housing, and health, education and social services, and protect migrants against possible exploitation by criminal networks. (Council of the European Union, 2008)

¹⁰ Ibid, p. 4.

¹¹ The Pact stated that “[e]ach Member State undertakes to ensure that this principle is effectively applied with due regard for the law and for the dignity of the persons involved, giving preference to voluntary return, and each Member State shall recognise the return decisions taken by another Member State” (ibid., p. 7).

¹² On joint flights, refer to the European Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or member states, of third-country nationals who are subjects of individual removal orders, OJ L 261/28, 06.08.2004, pp. 28-35.

¹³ European Commission, Communication on an Area of Freedom, Security and Justice Serving the Citizen: Wider Freedom in a Safer Environment, COM(2009) 262, Brussels, 10 June 2009(a). For a critical analysis, refer to S. Carrera, and E. Guild, *Towards the Next Phase of the EU’s Area of Freedom, Security and Justice: The European Commission’s Proposals for the Stockholm Programme*, CEPS Policy Brief No. 196, Centre for European Policy Studies, Brussels, August 2009.

¹⁴ See European Commission (2009a), op. cit., p. 3.

¹⁵ Ibid., p. 4.

The Commission stressed that not only should the Stockholm Programme be built on the progress made so far, it should also learn lessons from the present weaknesses. Among the political priorities for the next phase, the Communication underlined “[p]romoting a more integrated society for the citizen – a Europe of solidarity”. In addition, “[t]he practical use of the tools available to combat illegal immigration should be improved” with methods that pay special attention to national implementation and enhance the use made of evaluation. Section 2.2 of the Communication, entitled “Living together in an area that respects diversity and protects the most vulnerable”, emphasised that the Union should provide a safe environment where “the most vulnerable [are] protected”. Reference was made to the rights of the child only in this statement: “Children in particularly vulnerable situations will receive special attention, notably in the context of immigration policy (unaccompanied minors, victims of trafficking, etc.)”¹⁶ Furthermore, section 5, with the title “Promoting a more integrated society: a Europe that displays responsibility and solidarity in immigration and asylum matters”, referred to the so-called ‘global approach to migration’ and proposed the development of “the comprehensive approach” by controlling “illegal immigration and trafficking in human beings more effectively by developing *information* on migration routes, promoting cooperation on *surveillance and border controls*, and facilitating *readmission* by promoting support measures for return” (emphasis added).

The line of discourse used by the Commission in its contribution to Stockholm only concerned rights for EU citizens and (to a lesser extent) those qualified as “legally residing third-country nationals”. Indeed, one of the key political priorities purported by the Communication was “to provide the best possible service to the citizen”, adding that all actions taken in the future should have the citizen at heart. The concept of ‘citizen’ used by the Communication referred exclusively to those individuals holding the nationality of one of the member states of the Union, and consequently benefiting from the status of EU citizenship.¹⁷ Section 5.1.4 of the Communication focused on irregular immigration under title “Better controls on illegal immigration”. This section began with the following statement: “*Preventing and reducing illegal immigration and related criminal activities while upholding human rights* is an essential counterpart to the development of a common policy on legal immigration. *Efforts to combat criminal networks must be stepped up*” (emphasis added).

The European Commission then identified four main policy areas for common action, which are further discussed below.

1) “Illegal employment”

The Communication referred to the Employer Sanctions Directive (2009/52/EC) and the need to monitor closely its transposition by the EU member states. The Employer Sanctions Directive constitutes the first hard law at the EU level in the migration domain that includes criminal sanctions under the scope of the European Community’s first pillar (Title IV of the EC Treaty).¹⁸ The deadline for transposition by the EU member states is

¹⁶ Ibid., p. 8.

¹⁷ S. Carrera and A. Faure-Atger, *Yes! A rights-based approach is possible for the Stockholm Programme! Provided...*, ENARgy Newsletter, No. 29, European Network Against Racism (ENAR), Brussels, 2009 (retrieved from www.enar-eu.org).

¹⁸ See Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24, 30.6.2009. The first occasion on which EU law criminalised third parties was with the combination of first and third pillar instruments: Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328/17, 5.12.2002, and the Council Framework Decision 2002/20 of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ 328/1, 05.12.2002.

20 July 2011. The Directive lays down common minimum standards on sanctions and measures to be applied by the EU member states to employers infringing the prohibition of “employment of illegally staying third-country nationals”.¹⁹ It provides the following definition of an illegally staying TCN: “a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State”.

One of the core objectives of the Directive is to deter irregular immigration by tackling undeclared work, which has been categorised as “illegal employment”. The latter is defined as the exercise by an “illegally staying third-country national” of “activities covering whatever form of labour or work regulated under national law or in accordance with established practice for or under the direction and/or supervision of an employer”.²⁰ Illegal employment is transformed into a criminal offence when committed intentionally and falling under the circumstances enshrined in Art. 9. In the case of non-compliance with several administrative obligations,²¹ financial and criminal sanctions will apply to employers. According to Art. 10, the penalties need to be “effective, proportionate and dissuasive”.

2) Policy on removal and control “in accordance with the law and human dignity”

Here the Communication alluded to the Returns Directive (2008/115/EC) and to the need for careful monitoring of its national implementation, especially concerning “the effective enforcement of expulsion measures, detention, appeal procedures and treatment of vulnerable people”.²² The Returns Directive is to be implemented by member states by 24 December 2010.²³ It aims at providing minimum standards and procedures at the EU level for the return of immigrants staying irregularly on the territory of a member state,²⁴ i.e. who do not or no longer fulfil the conditions of entry as set out in Art. 5 of the Schengen Borders Code²⁵ or other conditions for entry, stay or residence in that member state. “The illegality of stay” provides the determining factor for the measure to become operational.²⁶ The Directive establishes a harmonised procedure, leading to the termination of the irregular stay and the consequent expulsion of the irregular immigrant, consisting first of a return decision and second a removal order, or the two decisions or acts together.²⁷

Member states are obliged, in light of the Returns Directive, to issue a return decision to any TCN staying irregularly on their territory, unless one of a limited number of

¹⁹ See Art. 1 of Directive 2009/52/EC of 18 June 2009 (*supra*).

²⁰ *Ibid.*, Arts. 2c and 2d.

²¹ *Ibid.*, Art. 4.

²² See p. 26 of the Communication (European Commission, 2009a), *op. cit.*

²³ See Directive 2008/115/EC of 16 December 2008 on common standards and procedures in member states for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008, p. 98.

²⁴ *Ibid.*, Art. 1.

²⁵ Art. 5 of the Convention implementing the Schengen Agreement (OJ L 239, 22.09.2000, pp. 19-62) applies only to stays not exceeding three months.

²⁶ Art. 3.2 of Directive 2008/115/EC defines ‘illegal stay’ as the presence of a third-country national on the territory of a member state who does not fulfil the conditions of entry, stay or residence.

²⁷ Art. 6.6 of Directive 2008/115/EC states that “[t]his Directive shall not prevent Member States from adopting a decision on the ending of a legal stay together with a return decision and/or a decision on a removal and/or entry ban in a single administrative or judicial decision or act”. Similarly, Art. 8.3 establishes that “Member States may adopt a separate administrative or judicial decision or act ordering the removal”, implying that they may also issue the removal order together with the return decision.

exceptions applies.²⁸ Art. 6.4 allows member states to grant an autonomous residence permit or “another sort of authorization” conferring a right of stay for compassionate, humanitarian or other reasons, to an irregular immigrant.²⁹ In this case, no return decision will be issued or an existing return decision will be withdrawn or suspended.³⁰ When using coercive measures for non-voluntary removal, Art. 8.4 obliges the member states to carry them out in a proportional manner, not exceeding reasonable force and in accordance with fundamental rights and due respect of the dignity of the person concerned.³¹ The Directive also deals with detention for the purpose of removal. Detention may only be imposed if no less coercive measures can be applied effectively, for instance if there is a ‘risk of absconding’ or if the person hampers or avoids the removal.³² It is stated that detention shall be ordered by administrative or judicial authorities.³³ Detention orders will be subject to judicial review at different intervals, and detention will be limited to a maximum of 6 months. This maximum period can be extended up to 18 months based on a lack of cooperation by the immigrant or delays in obtaining the necessary documentation from non-EU countries.³⁴

In addition to referring to the Returns Directive, Communication COM(2009) 262 recommended that “[i]n the longer term, and after evaluation of this legislation, *the principle of mutual recognition of removal decisions* should be implemented. The obligatory recording of entry bans in the SIS [Schengen Information System] will give full effect to this principle” (emphasis added).

Furthermore, it stated that in the absence of clear rules, national needs and practices should be subject to study to explore the establishment of common EU standards “for taking charge of illegal immigrants who cannot be deported”.

3) “Regularisation”

Council Decision 2006/688/EC established a mutual information mechanism on member states’ measures in the areas of asylum and immigration, when in accordance with Art. 2 they are likely to have “a significant impact on several Member States or on the European Union as a whole”.³⁵ The adoption of this Decision was largely driven by political fears

²⁸ A ‘return decision’ is defined in Art. 3.4 of Directive 2008/115/EC as “an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return”.

²⁹ D. Thym, “Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Right to Regularize Illegal Stay?”, *International Comparative Law Quarterly*, Vol. 57, No. 1, 2008, pp. 87-112.

³⁰ Similarly, para. 5 of the same article in Directive 2008/115/EC stipulates that if an irregular migrant is subject to a pending procedure for being granted a residence permit, the member state concerned *shall consider* refraining from issuing a return decision, until the pending procedure is finished.

³¹ Furthermore, according to Art. 8.5 of Directive 2008/115/EC, the member states “shall take into account” (yet not being obliged to follow) the guidelines on security provisions for joint removal by air included in Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more member states, of third-country nationals who are subjects of individual removal orders, OJ L 261/28, 6.8.2004.

³² See Art. 15.1 of Directive 2008/115/EC.

³³ *Ibid.* Art. 15.2 states that in cases where the detention has been ordered by administrative authorities, speedy judicial review shall be made available.

³⁴ *Ibid.*, Art. 15.6.

³⁵ See Council of the European Union, Decision 2006/688/EC of 5 October 2006 on the establishment of a mutual information mechanism concerning member states’ measures in the areas of asylum and immigration, OJ L 283/40, 18.10.2006.

from certain EU member states and the Commission on regularisations.³⁶ The system is not mandatory for the member states. Therefore, Communication COM(2009) 262 for the Stockholm Programme states that “[t]he exchange of information between Member States concerning regularisations should be improved. Guidelines for their implementation could be formulated.”

4) “Unaccompanied minors entering the territory illegally”

In Art. 10, the Returns Directive provides special rules for the return and removal of unaccompanied minors, who must be granted assistance by appropriate bodies other than the authorities enforcing return. Before removal, it must be ensured that the child will be returned to a family member, a nominated guardian or “adequate reception facilities in the State of return”.³⁷ In addition, the Returns Directive makes special reference to the detention conditions of minors and families.³⁸ Recital 21 of the preamble stresses that in line with the 1989 UN Convention on the Rights of the Child, the best interest of the child should be a primary consideration of member states when implementing the Directive. It also calls for the respect for family life as included in the European Convention on Human Rights – which needs to be read in conjunction with Art. 5, reiterating that when implementing this Directive, member states shall take due account of the best interests of the child. In this regard, Communication COM(2009) 262 advances the need to adopt an action plan “to underpin and supplement the relevant legislative and financial instruments and strengthen forms of cooperation with the countries of origin, including cooperation to facilitate minors’ return to their countries of origin”.

On 16 October and 23 November 2009, the Swedish presidency published the first official drafts of the Stockholm Programme, entitled “An open and secure Europe serving and protecting the citizen”.³⁹ The drafts very closely follow the priorities and official discourse put forward by the Commission’s Communication, most notably in the following ways:

- Its predominant focus continues to be on the interests and needs of “the citizen”.⁴⁰ There is a similarly narrow personal scope in the rights and integration-related proposals for legally residing TCNs.
- The language of ‘illegality’ is still widespread in its wording.⁴¹
- Finally, the Programme confirms the prioritisation given to coercive (control-oriented) measures on irregular immigration (e.g. criminalisation, return and readmission).

³⁶ According to Recital 5 of the preamble of Decision 2006/688/EC, these measures can include “policy intentions, long-term programming, draft and adopted legislation, final decisions of the highest courts or tribunals which apply or interpret measures of national law and administrative decisions affecting a significant number of persons”.

³⁷ See Art. 10.2 of Directive 2008/115/EC.

³⁸ Art. 17 of Directive 2008/115/EC states that unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period. Moreover, families shall be accommodated separately, guaranteeing adequate privacy.

³⁹ Council of the European Union (2009a), op. cit. and (2009b), op. cit.

⁴⁰ It is interesting to note, however, that in section 1.1 of the 16 October version (Council of the European Union, 2009a, op. cit.), entitled “Political priorities”, a sentence has been added in contrast with the Communication: “All actions taken in the future should be centred on the citizen *and other persons for whom the EU has a responsibility*” (p. 2, emphasis added). See also p. 4 of the 23 November draft (Council of the European Union, 2009b, op. cit.).

⁴¹ For instance, section 5.1.4 of Communication COM(2009) 262, entitled “Better controls on illegal immigration”, has become section 5.1.5 on “Effective policies to combat illegal immigration”, on p. 28 of the 16 October version of the Programme (Council of the European Union, 2009a, op. cit.).

Still, there are a few important differences from the perspective of undocumented migrants and irregular immigration policy. In particular, the current version of the Stockholm Programme presents two omissions in contrast with the Commission's previous initiatives: the proposal for establishing common EU standards for taking charge of non-removable irregular immigrants and the guidelines for implementing regularisations at the national level.⁴² Among the policies emphasised by the Programme under the heading "Effective policies to combat illegal immigration", two can be underlined: first, evaluation of the readmission agreements as well as the Directives on Returns and Employer Sanctions;⁴³ and second, the development of an EU action plan on unaccompanied minors.⁴⁴

3. Results from social science projects funded by EU institutions: Revealing a gap

This section synthesises the main results of a selection of 14 research projects funded by the EU institutions (13 of them by different services of the European Commission – 5 by the DG for Research, 2 by the DG JFS, 1 by EuropeAid, 2 by the DG for Employment, Equal Opportunities and Social Affairs and 3 by DG SANCO – and 1 by the European Parliament; see Appendix 2). We can see how the DG for Research has become a central actor in the support of social science research covering various aspects of irregular immigration and undocumented immigrants in Europe.⁴⁵ The 14 projects analysed in this section involve a substantial number of universities and research centres across Europe and an even larger number of academics and experts specialising in migration studies from assorted disciplinary perspectives, as well as practitioners and civil society organisations working on irregular immigration. There are five major themes around which EU-funded projects have contributed to the academic and policy debate about the intersection of undocumented migrants and rights in the EU: 1) terminology and statistics, 2) regularisation, 3) criminalisation and detention, 4) return and readmission, and 5) access to

⁴² See p. 28 of the 16 October version of the Stockholm Programme (Council of the European Union, 2009a). As regards regularisations, the Programme only alludes to the need for "improving the exchange of information on developments at the national level in the area of regularisation". The 23 November draft of the Programme has added to that the following phrase "with a view to ensuring consistency with the principles of the Pact on Asylum and Migration" (Council of the European Union, 2009b, op. cit., p. 60).

⁴³ The precise wording of the text states is as follows: "It is important to ensure that the newly adopted instruments in the area of return and sanctions against employers, as well as the readmission agreements in force, are closely monitored in order to ensure their effective application" (Council of the European Union, 2009a, op. cit., p. 28 and Council of the European Union, 2009b, op. cit., p. 60).

⁴⁴ The programme welcomes the Commission's initiative "to develop an action plan to be adopted by the Council on unaccompanied minors, which underpins and supplements the relevant legislative and financial instruments and combines measures directed at both prevention and protection. The action plan should underline the need for cooperation with countries of origin, including cooperation to facilitate the return of minors", p. 29 (Council of the European Union, 2009a, op. cit., October version). The version of 23 November (Council of the European Union, 2009b, op. cit.) has added to that paragraph the need for cooperation "to prevent further departures. The action plan should also examine practical measures to facilitate the return of the high number of unaccompanied minors that do not require international protection, while recognizing that the best interest for many may be their reunion with their families and development in their own social and cultural environment" (pp. 61-62).

⁴⁵ For a general overview of all the projects funded by the DG for Research on migration, refer to European Commission, *Moving Europe: EU Research on Migration and Policy Needs*, Report by A. Singleton (University of Bristol), Luxembourg: Office for the Official Publications of the European Communities, 2009(b) (retrieved from ftp://ftp.cordis.europa.eu/pub/fp7/ssh/docs/ssh_research_migration_20090403_en.pdf). See also the European Commission's CORDIS website (<http://cordis.europa.eu>).

rights. Table 1 encapsulates the main research themes that have been dealt with by each of the EU projects under analysis.

Table 1. Projects by theme

Project	Theme									
	Categories of irregular migrants	Data and statistics	Terminology	Regularisations	Detention	Criminalisation	Readmission and return	Access to health	Access to education	Access to housing and work
Access to health care for undocumented migrants								*		
Book of Solidarity: Providing Assistance to Undocumented Migrants			•			•		*	*	*
The Changing Landscape of European Liberty and Security (CHALLENGE)	*		•	•	•	•				
Undocumented Migration: Counting the Uncountable Data and Trends across Europe (CLANDESTINO)	•	*								
Assessing Deviance, Crime and Prevention in Europe (CRIMPREV)		•				*				
Fighting Discrimination-based Violence against Undocumented Children								*	*	
Health for Undocumented Migrants and Asylum Seekers (HUMA) network								*		•
International Migration, Integration and Social Cohesion (IMISCOE)	•			*						•
<i>L'accès aux soins un droit non respecté en Europe</i>		•						*		•
Migrant-Friendly Hospitals (MFH)								*		
Collective Action to Support the Reintegration of Return Migrants in their Country of Origin (MIREM)							*			
Regularisations in the European Union (REGINE)	•	•		*			•			
The conditions in centres for TCNs with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states					*					
Trends in the regularisation of TCNs in irregular situations of stay across the EU				*						
A typology of different types of centres for TCNs in Europe					*					
Undocumented Worker Transitions (UWT)	•	•	•	•				•	•	*

(*) The theme is directly addressed by the project

(•) The theme is indirectly addressed

Source: Authors' compilation.

Our goal in this section is two-fold: first, to synthesise the major findings connected with each of these themes and to identify potential synergies between their outputs and recommendations (see Appendix 1 of this report for an overview of the key cross-cutting synergies); and second, to reveal the gap between these findings and current EU official discourses and policy priorities for the Stockholm Programme.

3.1 Terminology and statistics

The policy documents outlined in section 2 show the persisting use of certain language in framing the debate around irregular immigration and undocumented migrants, in a way that is concerning. The European Pact, the Commission Communication COM(2009) 262 and the drafts of the Stockholm Programme use a language of illegality (i.e. illegal immigration) and verbs like ‘combating’, ‘fighting’ and ‘better controlling’ irregular human movements. Terminology (and the way things are put) has deep implications for how public policy responses are justified, developed and implemented. The official rhetoric at the EU level has continued framing the debate about undocumented migration in an insecurity continuum that ranges between irregular immigration and criminality (Bigo, 1996). This continuum institutionalises a connection between immigration and other aspects widely categorised as dangers to internal security and social cohesion in the EU.⁴⁶ EU policy is fostering an artificial link between what is principally a social issue and penal/repressive administrative law and practices. This link creates a critical overlap between the category of the undocumented migrant and a potential criminal. The (in)security process this link gives rise to allows for the application of coercive public measures (e.g. return and readmission), and a progressive transition from the use of administrative law towards a criminalisation of ‘third parties’ involved in the undocumented migration (sanctions for employers and individuals facilitating unauthorised entry, transit and residence, etc.) as well as of TCNs themselves.

A substantial number of European actors and organisations with a mandate on migration have argued for the need to change the discourse on irregular immigration at the EU level. For instance, the European Parliament adopted a Resolution in January 2009 on the situation of fundamental rights in the EU 2004–08,⁴⁷ in which it stressed that the EU institutions should stop using the term ‘illegal immigrants’ and instead to refer to irregular/undocumented workers or migrants. The European Union Agency for Fundamental Rights (FRA) also uses language that is more neutral. In its contribution to the Stockholm Programme, it has referred to “curbing irregular immigration in a fundamental rights-oriented spirit”.⁴⁸ A similar approach was taken by the European Economic and Social Committee in its contribution towards the Stockholm Programme.⁴⁹ The Council of Europe’s Parliamentary Assembly stated in its Resolution 1509 (2006) that it “prefers to use the term ‘irregular migrant’ to other terms such as ‘illegal migrant’

⁴⁶ Refer to the ‘insecurity continuum of threats’ elaborated by D. Bigo, *Police en Réseaux: L’expérience européenne*, Paris: Presses de Sciences Po, 1996, pp. 258-266; see also D. Bigo, “Security and Immigration: Toward a Critique of the Governmentality of Unease”, *Alternatives: Global, Local, Political*, Vol. 27, Special Issue, February 2002, pp. 63-92.

⁴⁷ See European Parliament Resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (P6_TA-PROV(2009)0019).

⁴⁸ Refer to European Union Agency for Fundamental Rights (FRA), “The Stockholm Programme: A Chance to put Fundamental Rights Protection Right in the Centre of the European Agenda”, Opinion, 29 June 2009(b) (retrieved from http://www.fra.europa.eu/fraWebsite/news&events/infocus_290709_en.htm).

⁴⁹ See the European Economic and Social Committee, Opinion on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen (COM(2009) 262 final), SOC/352, Brussels, 4 November 2009.

or ‘migrant without papers’. This term is more neutral and does not carry, for example, the stigma of the term ‘illegal’.⁵⁰

Similarly, the Final Declaration of the 8th Council of Europe Conference of Ministers responsible for Migration Affairs,⁵¹ while insisting on the need “to develop measures to promote and protect the human rights of especially vulnerable migrants and persons of immigrant background”, refers to the protection of “irregular migrants”.

A majority of the research projects analysed in this report have studied and highlighted the negative implications of using criminal categories or the term ‘illegal’ to describe undocumented migrants (see appendix 2). For instance, the project Undocumented Worker Transitions (UWT)⁵² funded by the Sixth Framework Programme (FP6) of the DG for Research, elaborated an *Undocumented Migration Glossary*, intending to challenge this terminology.⁵³ Literature from the project argued that terms like ‘undocumented’, ‘irregular’, ‘semi-compliant’ and ‘non-compliant’ should all be preferred to that of ‘illegal immigrants’.⁵⁴ Similarly, the CHALLENGE and CRIMPREV projects, also funded by FP6 of the DG for Research, have examined how the use of this language connects the status of undocumented immigrants with criminality and security risks (and a stereotype of the enemy). They both point out how the present discourse favours increased (in)security practices by public authorities, describing undocumented persons as ‘non-rights holders’ and even as ‘non-persons’.

The CHALLENGE project assessed the migration–insecurity continuum in EU security policies and practices, and their implications for the respect of human rights.⁵⁵ The project’s conclusions in this regard argued for a change in current EU official terminology because these individuals are neither illegal nor criminals.⁵⁶ While their presence on a territory may not be authorised or

⁵⁰ See the Council of Europe, Parliamentary Assembly, Resolution 1509 (2006) on the human rights of irregular migrants, 26 June 2006, para. 159.

⁵¹ Refer to the 8th Council of Europe Conference of Ministers Responsible for Migration Affairs, “Economic migration, social cohesion and development: Towards an integrated approach”, Final Declaration, CDMG (2008) 43 fin, Kyiv, 4-5 September 2008.

⁵² The UWT Project was coordinated by the Working Lives Research Institute at the London Metropolitan University, with partners in six other EU member states (Austria, Belgium, Bulgaria, Denmark, Italy and Spain). The project aimed at shedding some light on the experiences of undocumented migrant workers in Europe, their working conditions and the relationship with migration status. See S. McKay, E. Markova, A. Paraskevopoulou and T. Wright, *The relationship between migration status and employment outcomes*, Final Report, Working Lives Research Institute, London, March 2009, p. 5 (retrieved from http://www.undocumentedmigrants.eu/londonmet/library/v65239_3.pdf).

⁵³ See Roskilde University and Working Lives Research Institute, *Undocumented Migration Glossary*, Work Package 5, UWT Project, London, September 2008 (retrieved from http://www.undocumentedmigrants.eu/londonmet/library/h11625_3.pdf).

⁵⁴ M. Ruhs and B. Anderson, *Semi-compliance in the migrant labour market*, COMPAS Working Paper, Centre on Migration, Policy and Society, University of Oxford, 1 May 2006 (retrieved from <http://www.compas.ox.ac.uk/changingstatus>).

⁵⁵ CHALLENGE was a five-year integrated project (running from June 2004 to May 2009). It was coordinated by the Justice and Home Affairs Section of the Centre for European Policy Studies and Science Po (Paris). The project involved 23 universities and research centres across the EU. It aimed at facilitating a more responsive assessment of the rules and practices of security in Europe (see <http://www.libertysecurity.org>).

⁵⁶ See E. Guild, *Security and Migration in the 21st Century*, Cambridge: Polity Press, 2009; see also E. Guild, “Who is an Irregular Immigrant”, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, 2004, pp. 3–28.

their administrative status as an immigrant may lack proper documentation, the project sustained that this does not put them in a category in which their very presence constitutes ‘illegality’.⁵⁷ The only offence committed by the person on the move is not respecting the administrative rules for legal entry and residency developed by the receiving state. It is therefore a ‘crimeless’ offence, in which the only ‘victim’ is the receiving state, whose capacity to manage mobility effectively is profoundly challenged. The simple lack of a state’s authorisation makes “illegal” the individual presence and characterises her/him as a “security threat” (Guild, 2009).⁵⁸ CHALLENGE research sustained that the policy debate about irregular immigration is structured around a very specific category of individuals on the move – non-EU nationals who are poor, including at times those fleeing from their country of origin and in search of international protection. These are the persons who are actually conceived as an ‘(in)security problem’ by the state and the EU, against whom it is claimed that measures are needed to combat and fight against. This line of discourse also prevents a debate from being opened up about the fundamental human rights of these persons in light of international and European human rights instruments – which apply to everyone within the jurisdiction of signatory states.⁵⁹ The rhetoric of illegality justifies a false presumption that undocumented migrants are not holders of rights and it blurs their high degree of vulnerability and marginalisation in the EU. Among the conclusions of the CHALLENGE project were that the rights, inclusion and protection of undocumented migrants should also be at the heart of the EU’s attention and social protection strategies.⁶⁰ The CRIMPREV project has likewise examined the ways in which certain discourses, ‘facts’ (and statistics) and practices of the police, judicial authorities, local

⁵⁷ CHALLENGE also addressed the implications of the link between irregular immigration policies and anti-terrorism measures. Refer to C. Fernandez, A. Manavella and J.M. Ortuño, “Migration Controls in the Euro-Mediterranean Border: A Critical Analysis from the Human Rights Overview”, in G. Rodriguez Fernandez, C. Fernández Bessa, I. Rivera Beiras and H.C. Silveira Gorski (eds), *Warlike Outlines of the Securitarian State: Life Control and the Exclusion of People*, OSPDH, Universidad de Barcelona, 2009, pp. 121-148 (retrieved from <http://www.ub.edu/ospdh>); and also to A. Baldaccini and E. Guild, *Terrorism and the Foreigner – A Decade of Tension around the Rule of Law in Europe*, Leiden: Martinus Nijhoff Publishers, 2007.

⁵⁸ See Guild (2009), op. cit.

⁵⁹ This has also been pointed out by R. Cholewinski, “The Criminalisation of Migration in EU Law and Policy”, in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart Publishing, 2007, pp. 301-336. Cholewinski argued that the use of this military and negative language

gives no recognition to the fact that for many irregular migrants their first entry into the country was lawful, and that their slide into an unauthorised situation may not have been entirely their fault...it also downplays or even overlooks the calmer assertion that every human being has recognition before the law and possesses fundamental human rights, which are protected by major international and regional human rights instruments...which applies to everyone within the jurisdiction of state parties.

⁶⁰ See D. Bigo, S. Carrera and E. Guild, *Final Policy Recommendations on the Changing Landscape of European Liberty and Security*, CHALLENGE Research Paper No. 16, Centre for European Policy Studies, Brussels, 2009; see also D. Bigo et al., “The Changing Landscape of European Liberty and Security: The Mid-Term Report of the CHALLENGE Project”, *International Social Science Journal*, Vol. 59, No. 192, 2008, pp. 283-308.

governments, media and the population have led to a criminalisation of migrants in the EU,⁶¹ evidencing how this has only increased migrants' victimisation.⁶²

As regards statistics, the Communication COM(2009) 262 on an AFSJ serving the citizen referred to the estimation of 8 million irregular immigrants in Europe. This figure originally appeared in an annex of the impact assessment that accompanied the proposal for a directive on employer sanctions in 2007.⁶³ This misinformed use of statistics increases the perception in the political and public imagination that the EU is being flooded by massive numbers of undocumented migrants. Moreover, it furthers restrictive immigration policies fostering the criminalisation of migration. CLANDESTINO (Undocumented Migration: Counting the Uncountable Data and Trends across Europe), another FP6 project of the DG for Research, showed that "there are fewer irregular migrants in the EU than previously assumed".⁶⁴ The project's report on methodological issues revealed that the estimates of irregular immigrants in the EU used by the Commission are based on numbers "without any reliable source and specification of time frame".⁶⁵ The project also focused on the ethical implications inherent to data collection, the elaboration of estimates and their use.⁶⁶ A detailed review of the situation in the selected member states, presented in a database created by the project, demonstrates that the undocumented population in 2005 more likely ranged between 2.8 and 6 million persons.⁶⁷ A recent estimation conducted by the project indicates that the size of the undocumented population in the EU in 2008 declined to 1.9 to 3.8 million (for the EU-27) (Kovacheva and

⁶¹ The project is coordinated by the Centre National de la Recherche Scientifique, and involves an interdisciplinary consortium of 31 participants from 10 European countries. The project's aim is to produce "a comparative, European added value, based on knowledge accrued within national frameworks about social, political, economic, legal and cultural factors conducive to socially deviant behaviour and crime, their perceptions among the public and the public policies pertaining to these phenomena" (see the project website, <http://www.crimprev.eu>).

⁶² S. Palidda, "Some Considerations on the Situation in the Main European Countries", in S. Palidda (ed.), *Racial Criminalisation of Migrants in XXIst Century*, University of Genoa, 2009(a).

⁶³ Annex 2 of the Impact Assessment stated, "[t]he nine largest former EU15 Member States would have between 4.4 and 5.5 million illegal migrants. Transposing these figures to the EU25 would give an estimate of between 6 to 8 million undocumented migrants." See European Commission, *Impact Assessment – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals*, Staff Working Document, SEC(2007) 603, Brussels, 16 May 2007.

⁶⁴ CLANDESTINO ran from September 2007 to August 2009. It sought to provide actual and reliable data on undocumented migration in Europe. Consistent data on undocumented migration are essential for policy-makers to design and implement appropriate policies. The project consortium involved the Hellenic Foundation for European and Foreign (project coordinator), the Centre for International Relations, the International Centre for Migration Policy Development, the Centre for the Study of Migration Policy and Society, the Hamburg Institute of International Economics and the NGO Platform for International Cooperation on Undocumented Migrants (PICUM) (see the project website at <http://clandestino.eliamep.gr/>).

⁶⁵ M. Jandl, D. Vogel and K. Iglicka, *Report on Methodological Issues*, CLANDESTINO, Athens, October 2008, p. 4 (retrieved from http://clandestino.eliamep.gr/wp-content/uploads/2009/02/clandestino_report-on-methodological-issues_final1.pdf).

⁶⁶ F. Düvell, A. Triandafyllidou and B. Vollmer, *Report on ethical issues in irregular migration research*, CLANDESTINO, Athens, October 2008 (retrieved from [http://irregular-migration.hwwi.net/typo3_upload/groups/31/4.Background Information/4.1.Methodology/Ethical Report Clandestino Feb09.pdf](http://irregular-migration.hwwi.net/typo3_upload/groups/31/4.Background%20Information/4.1.Methodology/Ethical%20Report%20Clandestino%20Feb09.pdf)).

⁶⁷ The database is available on the website (<http://irregular-migration.hwwi.net>). Refer also to the CLANDESTINO Press Release, "Fewer Irregular Residents in Europe than Assumed – New online information on irregular immigration", 20 February 2009.

Vogel, 2009, p. 9). Given these figures, it is estimated that undocumented migrants amount to around 1% of the total EU population. In practical terms, the CLANDESTINO project provided evidence that the feared substantial growth of irregular migration in the EU, upon which policies dealing with irregular immigration have been justified, has not materialised.

3.2 Regularisations

There has been widespread fear across the EU about regularisations. This has been accompanied by a common perception that some EU member states, particularly southern EU countries,⁶⁸ have not stopped regularising massive numbers of irregular immigrants without any apparent requirements or formalities. Regularisations are in this way equated with general amnesties and anarchic public-policy choices. The literature and reports on cross-member state comparisons of regularisations has proliferated since 2000.⁶⁹ EU policy documents reflect politically and socially constructed fears about large-scale regularisations in a number of ways. The Council took a step further (in contrast with previous policy documents) in the European Pact on Immigration and Asylum, and referred –for the first time – to the possibility for the EU member states to carry out regularisations “only” on a case-by-case basis. This idea had already been highlighted by the Future Group (2008) report on *Freedom, Security, Privacy – European Home Affairs in an Open World*, which stated that “in the future, regularisations in exceptional circumstances and with [an] individual case-by-case approach could be acceptable”.⁷⁰

As the European Economic and Social Committee highlighted in its Opinion on Respect for Fundamental Rights in European Immigration Policies (SOC/335), concerning regularisations,

governments are acting hypocritically. Return policy is not the only answer to irregular immigration. Many Member States have implemented procedures to put irregular immigrants on a legal footing, seeing regularisation *under specific conditions* as appropriate in order to guarantee fundamental rights and in the light of their economic and social needs.⁷¹ (Emphasis added.)

⁶⁸ See C. Finotelli and G. Sciortino, “The Importance of Being Southern: The Making of Policies of Immigration in Italy”, *European Journal of Migration and Law*, Vol. 11, No. 2, pp. 119-138; see also S. Carrera and J. Apap, “Spain’s New ‘Regularisation’ Procedure: Is this the way forward?”, CEPS Commentary, Centre for European Policy Studies, Brussels, February 2005.

⁶⁹ See Council of Europe, *Policies Concerning Irregular Migrants: Synthesis Report*, Council of Europe, Strasbourg, 27-28 November 2008, p. 4; see also L. Zanfrini and W. Kluth, *Policies on irregular migrants, Volume I – Italy and Germany*, Strasbourg: Council of Europe Publishing, 2008, p. 15; and also J. Apap, P. De Bruycker and C. Schmitter, “Regularisation of Illegal Aliens in the European Union: Summary Report of a Comparative Study”, *European Journal of Migration and Law*, Vol. 2, Nos. 3-4, 2000, pp. 263–308; and the European Migration Network, *Illegally resident third-country nationals in EU member states: States’ approaches towards them, their profile and social integration*, Synthesis Report, European Migration Network, 2007 (retrieved from <http://emn.eurodyn.com/Downloads/prepareShowFiles.do;jsessionid=D898480ED40F7453F4362131FADEFAE7?directoryID=71>).

⁷⁰ See Future Group, *Freedom, Security, Privacy – European Home Affairs in an Open World*, Report of the Informal High Level Advisory Group on the Future of European Home Affairs Policy, Brussels, June 2008, p. 32.

⁷¹ See European Economic and Social Committee, Opinion on Respect for Fundamental Rights in European Immigration Policies and Legislation, SOC/335, Brussels, 4 November 2009. The Opinion adds the following point: “The EESC agrees that the flow of information between Member States concerning regularisation should be improved, and that European implementing guidelines should be drawn up, on the basis of the Council’s commitment under the European Pact on Immigration and Asylum, in which it was agreed to carry out case-by-case regularisations under national law, for humanitarian or economic reasons.”

A report by the Committee on Migration, Refugees and Population of the Council of Europe urged member states to examine the option of regularisation programmes.⁷² The report cited as “a success” the programme conducted in Spain in 2005, in which over 570,000 persons were regularised,⁷³ and stressed the importance of learning from previous experience and establishing common guidelines on the use of such programmes.⁷⁴ The Commission’s Communication COM(2009) 262 also made express reference to the need to improve the existing system of information exchange among member states on regularisations and proposed the adoption of “Common Guidelines” for their implementation. As discussed in section 2 of this report, the fact that the latest draft of the Stockholm Programme⁷⁵ does not make any reference to “guidelines” shows (once again) that member states are reluctant to accept any EU influence on this issue.

Social science research has investigated the issue of regularisations, for example through the IMISCOE (International Migration, Integration and Social Cohesion) and REGINE (Regularisations in the European Union) projects.⁷⁶ In the context of IMISCOE, an FP6 project of the DG for Research,⁷⁷ Kraler (2009) argued that in many EU countries,

regularisation programmes have become part of the ‘toolbox’ of contemporary migration management...and shows the difficulty in implementing more rigid systems of migration management, but above all, it points at the mismatch between formal conditions for entry and residence concerning migrant workers and a reality which is characterised by widespread informality, which, by implication, makes it relatively difficult for many immigrants to comply with the condition to be formally employed.⁷⁸ (Emphasis added.)

IMISCOE has highlighted that regularisation measures are often used to ‘re-regulate’ the labour market, aimed at identifying undeclared work, enforcing social and labour rights, and even promoting the social integration of regularised TCNs. Furthermore, the project has deconstructed the myth around the ‘pull effect’, in which regularisations are supposed to play a role, as a factor influencing migration because “they are rarely granted indiscriminately and at a minimum require a minimum duration of residence” [*sic*].⁷⁹

⁷² See Council of Europe, *Regularisation programmes for irregular migrants*, Report, Doc. 11350, Council of Europe, Strasbourg, July 2007.

⁷³ *Ibid.*, para. 10.

⁷⁴ *Ibid.*, para. 6.

⁷⁵ Council of the European Union (2009a), *op. cit.*

⁷⁶ See the website of the International Centre for Migration Policy Development for further information about the REGINE project (<http://research.icmpd.org/1184.html>).

⁷⁷ IMISCOE is an EU ‘Network of Excellence’ initiative coordinated by the Institute for Migration and Ethnic Studies of the Universiteit van Amsterdam. It consists of 23 European research institutes and puts together more than 500 researchers. Its aims are to create a joint research programme on migration, integration and social cohesion, to organise training in these fields (and) to disseminate research results to the general public and to policy-makers. For more information, see the IMISCOE website (<http://www.imiscoe.org/index.html>).

⁷⁸ See A. Kraler, *Regularisation: A misguided option or part and parcel of a comprehensive policy response to irregular migration?*, IMISCOE Working Paper No. 24, International Migration, Integration and Social Cohesion, Amsterdam, 2009, p. 21.

⁷⁹ *Ibid.*, p. 32.

Similar conclusions were reached by the REGINE project, which focused on regularisation practices across the EU-27 member states and which was funded by the DG JFS.⁸⁰ This project constituted a follow-up to the Communication on policy priorities in the fight against the illegal immigration of third-country nationals (COM(2006) 404 of July 2006,⁸¹ in which the Commission referred to the priority of conducting a study on regularisations in the EU to inform policy-making processes. REGINE evidenced that although some EU member states consider regularisation an exceptional policy, they have been regularly practiced all across the Union. The study showed that between 1996 and 2008, around 4.7 million persons applied for regularisation through 43 regularisation programmes (including de facto regularisation programmes) across 17 EU member states.⁸² During that period, the legal status of at least 3.2 million persons was recognised.⁸³ The project revealed that in practice, there are national procedures that – while not formally identified as regularisations – essentially have the same goals and effects. Finally, the project pointed out that the outcomes of regularisations and their impact have remained positive overall.⁸⁴

3.3 Criminalisation and detention

The various dimensions surrounding the phenomenon of undocumented migration are increasingly subject to a progressive criminalisation at both the national and EU levels. The link between the management of migration and criminal penalties (or administrative sanctions/practices with similar effects, such as detention) has given rise to many concerns, because of the risk it poses to the fundamental human and social rights of undocumented migrants. There has been an incremental transition towards the use of criminal/penal law sanctions for individuals directly or indirectly involved in the irregular immigration process, including ‘third parties’ engaged in solidarity assistance. The EU has played a significant part in that transition,⁸⁵ not only on the subject of the trafficking/smuggling of human beings, but also as regards measures foreseeing criminal sanctions against employers and other persons assisting undocumented migrants.⁸⁶ EU legal measures and the national legislations of certain member states exemplify the gradual shift from administrative to penal law in the area of migration control, where criminalisation is acquiring a broader meaning with huge social and human rights implications. In September 2008, the Council of Europe’s commissioner for human rights

⁸⁰ The REGINE project was managed by the International Centre for Migration Policy Development from December 2007 until July 2008. It aimed at providing a mapping of regularisation practices in Europe (see the project website, <http://research.icmpd.org/1184.html>).

⁸¹ See European Commission, Communication in accordance with Article 27.3 of Directive 77/388/EEC, COM(2006) 404 final, Brussels, 19 July 2006.

⁸² See Regularisations in the European Union (REGINE), *Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU*, Policy Brief, ICMPD, Vienna, February 2009(b), p. 3.

⁸³ Ibid.

⁸⁴ Refer to Regularisations in the European Union (REGINE), *Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU*, Final Report, Ref. JLS/B4/2007/05, ICMPD, Vienna, January 2009(a), p. 47.

⁸⁵ For an analysis of the key points in the European Community *acquis* on irregular immigration, see S. Peers and N. Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary*, Chs. 25-32, Leiden: Martinus Nijhoff Publishers, 2006.

⁸⁶ For a study of how the criminalisation approach drives EU law on irregular immigration, refer to Cholewinski (2007), op. cit. Refer also to E. Guild, “The Criminalisation of Migration in Europe: The Human Rights Implications”, Paper presented at the Conference on irregular migration and human rights organised by the Council of Europe in Paris on 24-25 September 2009(b).

asserted that it is wrong to criminalise migration and expressed his concerns about the increasing trend in the EU towards the criminalisation of undocumented migrants. The commissioner stated that “such a method of controlling international movement corrodes established international law principles, it also causes many human tragedies”.⁸⁷ He went on to say that

[c]riminalisation is a *disproportionate measure* which exceeds a state’s legitimate interest in controlling its borders. To criminalise irregular migrants would, in effect, *equate them with the smugglers or employers who, in many cases, have exploited them*. Such a policy would cause further stigmatisation and marginalisation, even though the majority of migrants contribute to the development of European states and their societies. *Immigration offences should remain administrative in nature*.⁸⁸ (Emphasis added.)

Some EU measures, such as the Employer Sanctions Directive, have provoked reactions by social partners and civil society because of their potentially negative consequences for migrant workers, who could become the ultimate victims.⁸⁹ The FRA has also pointed out two other, important ramifications of the criminalisation of irregular immigration at the EU level.⁹⁰ First, it has underlined that careful attention should be paid to the implementation of the Employer Sanctions Directive, to prevent the increase in administrative procedures for employers from discouraging them from taking into consideration the job applications of TCNs. Second, it has called for an evaluation of the impact of the Facilitation Directive (2002/90/EC),⁹¹ and for consideration to be given to making the humanitarian clause included in its Art. 1.2 mandatory.⁹²

Various EU-funded research projects have examined the criminalisation of irregular immigration in the EU. The CHALLENGE project studied the way in which immigration becomes incorporated into criminal law from a legal and sociological point of view. It looked at how the foreigner often comes to be regarded as a criminal and the parts played by national and

⁸⁷ T. Hammarberg, “It is wrong to criminalise immigration”, in *Human Rights in Europe: Time to Honour our Pledges, Viewpoints by T. Hammarberg, Commissioner for Human Rights*, Council of Europe, Strasbourg, 2009.

⁸⁸ *Ibid.*, p. 94.

⁸⁹ See European Trade Union Confederation (ETUC), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar, “Joint Comments on Expected Commission Proposals to Fight ‘Illegal’ Employment and Exploitative Working Conditions”, ETUC, PICUM and Solidar, Brussels, 26 April 2007 (retrieved from <http://www.picum.org>); see also European Network Against Racism (ENAR), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar, “Employer’s Sanctions Directive: Will migrant workers pay the price of their exploitation?”, Joint Statement, ENAR, PICUM and Solidar, Brussels, 15 April 2008 (retrieved from <http://www.enar-eu.org>).

⁹⁰ See European Union Agency for Fundamental Rights (FRA), “The Stockholm Programme: A Chance to put Fundamental Rights Protection Right in the Centre of the European Agenda”, Opinion, 29 June 2009(b) (retrieved from http://www.fra.europa.eu/fraWebsite/news&events/infocus_290709_en.htm). A recent survey conducted by the FRA reported that 21% of the sub-Saharan African and 19% of the North African TCNs interviewed had experienced discrimination while looking for a job or at the workplace in the last 12 months – see European Union Agency for Fundamental Rights (FRA), *EU MIDIS at a glance: Introduction to the FRA’s EU-wide discrimination survey*, FRA, Vienna, 2009(c) (retrieved from http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_GLANCE_EN.pdf).

⁹¹ See Council of the European Union, Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ 328/17, 5.12.2002.

⁹² Art. 1.2. of Council Directive 2002/90/EC states that “[a]ny Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned”.

EU law in this process. While one of the objectives of the project was to study the security framing of the trafficking/smuggling of human beings, the research also encompassed an assessment of wider issues related how mobility becomes ascribed as a criminal activity by the mere act of crossing borders at (some) member state and EU levels.⁹³ The effects of anti-terrorism debates and policies at the national level on immigration legislation were also part of the analysis. CHALLENGE concluded that the protection of the undocumented migrant and of victims of human trafficking does not appear to be the driving force behind the intensification of EU action in the field of criminal law from the perspective of migration policy.⁹⁴ Its assessment also pointed out that the application of a greater number of punitive measures and administrative burdens, as well as criminal sanctions, could increase concerns when making such measures subject to the proportionality test. For instance, the Employer Sanctions Directive will transform employers into ‘watchdogs’ of irregular immigration. They will be asked to play a role in controlling TCNs’ access to employment. At the same time, employers will be subject to more administrative and bureaucratic burdens. Policy analysis by the CHALLENGE project argued that the use of criminal law may actually have counterproductive effects on employment and working conditions.⁹⁵ By establishing a tighter penal framework, the Employer Sanctions Directive could undermine the achievement of its own objectives in terms of creating jobs, guaranteeing employment security, preventing exploitation and increasing work opportunities in the EU. Employers may be potentially dissuaded from hiring TCNs for fear of being sanctioned. In this way, the EU policy could end up penalising all employment of TCN workers. Therefore, the measure could be manifestly disproportionate with regard to the objective it seeks to pursue.

The CRIMPREV project similarly assessed the effects of the criminalisation of migrants in the EU. The project reported that a relevant share of police actions are often grounded on constructed stereotypes and prejudices towards TCNs. CRIMPREV showed that police controls especially tend to target individuals ‘who look different’, who deviate from normality. In this logic, the newly arrived in the society (the immigrant) is more subject to controls, which at the same time increases statistics on foreign crimes. The project studied how the drastic restriction of the channels of regular immigration together with repressive migration policies have produced a dual result in the EU: i) the reproduction of “clandestine” migrants, representing an exploitable workforce without rights; and ii), the creation of “the enemy” to which all the fears, insecurities and socio-economic problems caused by neo-liberalism itself can be attributed.⁹⁶ What is more, CRIMPREV found that, even though foreign prisoners are still a minority among those interned in penal institutions across the EU member states, during the last two decades their proportion has risen everywhere. In 2006, foreign prisoners represented more than 20% of the total inmate population, with significant differences between Eastern (less than 5%) and Western Europe (up to 37%).⁹⁷

⁹³ See M. Merlino, *The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU*, CHALLENGE Research Paper No. 14, Centre for European Policy Studies, Brussels, 2009.

⁹⁴ E. Guild and P. Minderhoud (eds), *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings*, Leiden: Martinus Nijhoff Publishers, 2006.

⁹⁵ S. Carrera and E. Guild, *An EU Framework on Sanctions against Employers of Irregular Immigrants: Some Reflections on the Scope, Features and Added Value*, CEPS Policy Brief No. 140, Centre for European Policy Studies, Brussels, August 2007.

⁹⁶ S. Palidda (ed.), *Razzismo democratico, la persecuzione degli stranieri in Europa* [Democratic racism: The persecution of foreigners in Europe], Milan: Agenzia X, 2009(b).

⁹⁷ For instance, Germany, Spain and Italy were regarded as those EU member states with the largest number of foreign inmates – see Palidda (2009a), op. cit.

The criminalisation trend leads to profound hindrances for undocumented migrants gaining access to basic rights. The Book of Solidarity (Providing Assistance to Undocumented Migrants), a project funded by the DG for Employment, Social Affairs and Equal Opportunities in 2003,⁹⁸ demonstrated how it is actually thanks to social networks (migrants' communities and political activists, church-based groups, teachers, local communities, health-care providers, etc.) that undocumented migrants do have access to basic social rights and security. After reporting that solidarity with undocumented migrants is actually criminalised and penalised in many EU member states to varying degrees,⁹⁹ the project concluded that it was striking to see the EU doing nothing against the criminalisation of solidarity across Europe.

Furthermore, as discussed in section 2 above, one of the key priorities to be addressed under the mandate of the Stockholm Programme is to evaluate the implementation of the Returns Directive by the EU member states, especially “the effective enforcement of expulsion measures, detention, appeal procedures and treatment of vulnerable people”.¹⁰⁰ A report by the Committee for the Prevention of Torture (CPT) of the Council of Europe recognised that while a number of member states have made efforts to improve the conditions of detention of undocumented migrants,

there are still far too many instances where the CPT comes across places of deprivation of liberty for irregular migrants, and on occasion asylum seekers, which are totally unsuitable. An illustrative example of such a place would be a disused warehouse, with limited or no sanitation, crammed with beds or mattresses on the floor, accommodating upwards of a hundred persons locked in together for weeks or even months, with no activities, no access to outdoor exercise and poor hygiene. CPT delegations also continue to find irregular migrants held in police stations, in conditions that are barely acceptable for twenty-four hours, let alone weeks. In some States, irregular migrants are detained in prisons.¹⁰¹

The issue of detaining undocumented migrants has been at the heart of some EU-funded projects. The CHALLENGE project (in cooperation with MIGREUROP)¹⁰² analysed the effects of the proliferating rationale for migrants' detention and imprisonment in the EU, as ‘regimes of exception’. It also examined the externalisation of detention policies in cooperation with third

⁹⁸ PICUM was the lead agency in the project while the BAG Asyl in der Kirche (Germany) and ASKV Steunpunt Vluchtelingen (the Netherlands) acted as partners. The primary outcome of the project was a three-volume series, which focuses on three different geographical regions in Europe: Volume I groups Germany, the Netherlands, Belgium and the UK; Volume II covers France, Spain and Italy; and Volume III covers Sweden, Austria and Denmark (see the PICUM website, <http://www.picum.org/Publications/bos1.pdf>).

⁹⁹ Assistance is criminalised in countries such as Germany, France, Denmark, and Belgium (unless assistance is provided “on merely humanitarian considerations”). See PICUM, *Book of Solidarity (Volume I): Providing Assistance to Undocumented Migrants in Belgium, Germany, the Netherlands and the UK*, PICUM, Brussels, 2002, pp. 43-45, 47-48; PICUM, *Book of Solidarity (Volume II): Providing Assistance to Undocumented Migrants in France, Spain and Italy*, PICUM, Brussels, 2003(a), pp. 45-46; and PICUM, *Book of Solidarity (Volume III): Providing Assistance to Undocumented Migrants in Sweden, Denmark and Austria*, PICUM, Brussels, 2003(b), pp. 28-29.

¹⁰⁰ See European Commission (2009a), p. 26.

¹⁰¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT), *20 Years of Combating Torture*, 19th General Report, 1 August 2008–31 July 2009, Strasbourg: Council of Europe Publishing, 2009, p. 37.

¹⁰² See the MIGREUROP website (www.migreurop.org).

countries.¹⁰³ The project pointed out the problems when juxtaposing these exceptional security policies with human rights. In a similar vein, the DG for Internal Policies (Citizens' Rights and Constitutional Affairs) of the European Parliament has funded a couple of studies concerning the detention of undocumented migrants in the EU, which have raised related concerns.¹⁰⁴ A briefing paper on *A typology of different types of centres for third-country nationals in Europe*¹⁰⁵ argued that it is central to distinguish between open centres (frequently referred as to reception centres), where individuals are able to leave at will and closed centres, where they cannot. The paper expressed concerns about closed centres, adding the reminder that detention should be made to conform to the provisions of the European Convention on Human Rights (ECHR). In addition, the paper stated that “first, detention is *prima facie* contrary to the principle of liberty of the person and must be justified on the basis of Art. 5(1) ECHR; secondly, the conditions of detention must not constitute torture, inhuman or degrading treatment as prohibited by Art. 3 ECHR and interpreted by the ECtHR”.¹⁰⁶

Another study funded by the European Parliament examined “[t]he conditions in centres for third-country nationals with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states”.¹⁰⁷ The study revealed an alarming situation in closed centres, particularly in relation to the following issues: poor living conditions in the centres; lack of privacy and hygiene in the centres of some member states; the isolation of detainees, including difficulties in accessing information on their rights and legal aid; problematical access to health care; repeated incidents and acts of violence. Finally, the presence of detained minors (accompanied foreign minors) was reported in the vast majority of the states investigated, and in some states, unaccompanied minors as well.¹⁰⁸ The presence of elderly individuals, persons with disabilities and pregnant women was equally underlined.

3.4 Return and readmission

The removal of immigrants under an irregular status of stay from the territory of a member state has been encapsulated at the EU level under two different policy headings: return and readmission. Both policies continue being framed at the EU level as a panacea for dealing with irregular immigration. There is a commonly shared official position at the EU level, according to which ‘illegality’ justifies expulsion not only to the country of origin, but also to that of transit and even to any other non-EU country. This stance has materialised most notably in the adoption of the Returns Directive and in the conclusion of a series of readmission agreements

¹⁰³ Refer for instance to the special issues of the journal *Cultures & Conflits* (A. Belguendouz et al., “L’Europe des Camps: La Mise à l’Écart des Étrangers”, *Cultures & Conflits: Sociologie Politique de l’Internationale*, No. 57, Paris: L’Harmattan, 2005; and A. Amicelle et al., “Confinement des Étrangers: Entre Circulation et Enfermement”, *Cultures & Conflits: Sociologie Politique de l’Internationale*, No. 71, Paris: L’Harmattan, 2008); refer also to *Conflitti Globali*, “Internamenti CPT e altri campi”, Vol. 4, Milano: Agenzia X, 2006.

¹⁰⁴ All the studies funded by the European Parliament dealing with the AFSJ are available online (<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>).

¹⁰⁵ E. Guild, *A typology of different types of centres for third-country nationals in Europe*, DG Internal Policies, Policy Unit C, Citizens' Rights and Constitutional Affairs, European Parliament, Brussels, 2005.

¹⁰⁶ *Ibid.*, p. 3.

¹⁰⁷ Steps Consulting Social, *The conditions in centres for third-country nationals (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states*, Study commissioned by European Parliament Committee on Civil Liberties, Justice and Home Affairs, Brussels, 2006.

¹⁰⁸ For a general overview of the rights of children, see Save the Children, Briefing Note on the Stockholm Programme, Save the Children, Brussels, June 2009.

between the European Community and non-EU countries. Guild (2009b) has stressed that most of the EU legal instruments that have been adopted on irregular immigration policy, such as the Returns Directive, constitute minimum common standards that do not altogether prevent risks of human rights violations after transposition by the EU member states. Indeed, it will be in the phase of national transposition that the compatibility of the regime provided by the Returns Directive with fundamental human rights will become clear.¹⁰⁹ Of special importance will be the ways in which various EU member states implement the period of voluntary return, as well as the rights and procedural guarantees envisaged by the Directive during detention and forced return.¹¹⁰ It is regrettable that the proposal put forward by Communication COM(2009) 262 “to consider the possibility of establishing common standards for taking charge of illegal immigrants who cannot be deported”¹¹¹ has not been included in the latest drafts of the Stockholm Programme.

The conclusion of readmission agreements between the European Community and non-EU countries continues to be a political priority at the EU level, despite the substantial difficulties experienced by the Commission in concluding them and the questions expressed by several academics about the dilemmas they pose for human rights.¹¹² European Community readmission agreements aim at imposing a reciprocal obligation on the contracting parties to readmit, upon application and without any further formality, their nationals if they do not or no longer fulfil the conditions for entry to, presence in or residence on the territory of the requesting state. This obligation covers non-nationals or stateless persons (or persons of another jurisdiction) if it is proved that they hold (or at the time of the entry held) a valid visa or residence permit issued by the requested state, or that they entered the EU after having stayed on or transited through that state. The Council has since then repeatedly urged the Commission to conclude as many such agreements as possible and “in a timely manner”,¹¹³ and it has lately attempted to link their conclusion with legal migration possibilities (mobility partnerships) as another incentive for

¹⁰⁹ See A. Baldaccini, “The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive”, *European Journal of Migration and Law*, Vol. 11, No. 1, 2009, pp. 11-17. For an analysis of the effects of the Returns Directive on the EU’s external relations, especially with Latin America, see D.A. Arcarazo, *Latin American Reactions to the Adoption of the Returns Directive*, CEPS Liberty and Security in Europe papers, Centre for European Policy Studies, Brussels, November 2009.

¹¹⁰ Refer to Council of Europe, *Twenty Guidelines on Forced Return*, Council of Europe, Strasbourg, September 2005 (retrieved from www.coe.int).

¹¹¹ European Commission (2009a), op. cit., p. 26.

¹¹² For instance, see S. Peers, “Irregular Immigration and EU External Relations”, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, 2004, pp. 193-220.

¹¹³ Since 1999, the Council has given the green light to the European Commission to enter into negotiations on multilateral readmission agreements with the following governments: Albania, Algeria, China, Hong Kong, Macao, Morocco, Pakistan, Russia, Sri Lanka, Turkey and Ukraine. On 21 July 2006, this mandate was expanded to also include Bosnia and Herzegovina, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia. See N. Coleman, *European Readmission Policy: Third-Country Interests and Refugee Rights*, Leiden: Martinus Nijhoff Publishers, 2009.

non-EU countries to agree to become part of the EU readmission regime.¹¹⁴ To date, readmission agreements have been agreed with the following governments: Hong Kong, Macao, Sri Lanka, Albania, Russia, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine.¹¹⁵ According to the 23 November 2009 draft of the Stockholm Programme, the Commission will present an evaluation of European Community readmission agreements (including ongoing negotiations) sometime during 2010, and propose a mechanism to monitor their implementation. On that basis, “[t]he Council should define a renewed, coherent strategy on readmission, taking into account the overall relations with the country concerned, including a common approach towards third countries that do not cooperate in readmitting their own nationals”.¹¹⁶

The MIREM project, co-financed by EuropeAid and the European University Institute in Florence, aims at examining the challenges linked to return migration and its impact on development in the Maghreb countries.¹¹⁷ The project has assembled an inventory of agreements of the EU-27 member states linked to readmission, which was most recently updated in August 2009. The project has also developed a database with field data on the reintegration processes of a thousand return migrants and their post-return conditions in their countries of origin.¹¹⁸ MIREM has shown that during the last decade, there has been a proliferation of mechanisms and cooperative instruments to sustain the removal or expulsion of irregularly staying TCNs, something that constitutes a direct expression of the tightening of migration policies in the EU. According to research from the project, there are presently around 116 countries with which EU member states have concluded these sorts of agreements. Furthermore, the research has sustained that a sudden interruption of ‘the migration cycle’ – due to a removal order – has negative implications for the reintegration of the returnees.¹¹⁹ Also among its findings are that

¹¹⁴ See S. Carrera and R. Hernández i Sagrera, *The Externalisation of Europe’s Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?*, CEPS Working Document No. 321, Centre for European Policy Studies, Brussels, October 2009. It is interesting to note that the 16 October draft of the Stockholm Programme said that priority should be given to “the conclusion of readmission agreements, on a case-by-case basis at EU or bilateral level, either separately or as part of Mobility Partnerships, with the principal countries of origin and of transit” (Council of the European Union, 2009a, op. cit., p. 28). This has surprisingly disappeared in the 23 November draft, which only says that focus should be placed on “the conclusion of effective and operational readmission agreements, on a case-by-case basis at EU or bilateral level” (Council of the European Union, 2009b, op. cit., p. 60).

¹¹⁵ Negotiations still appear to be underway with Morocco, Turkey, Pakistan and Georgia, while mandates also exist with respect to China, Algeria and Cape Verde.

¹¹⁶ See the 23 November draft of the Stockholm Programme (Council of the European Union, 2009b, op. cit., p. 61).

¹¹⁷ The MIREM project was established in December 2005, with the financial support of the EU and the European University Institute, coordinated by the Robert Schuman Centre for Advanced Studies of the European University Institute. The MIREM project aims at examining the challenges linked to return migration and its impact on development in the Maghreb countries. The project provides analytical tools to better understand the return migration phenomenon as applied to Algeria, Morocco and Tunisia. Those tools seek to identify the factors shaping returnee’s patterns of reintegration, as well as their opportunities to participate in the development of the Maghreb countries (refer to the project website <http://www.mirem.eu>). For more information about EuropeAid, see http://ec.europa.eu/europeaid/who/index_en.htm.

¹¹⁸ See the MIREM data (retrieved from <http://www.mirem.eu/datasets/survey>).

¹¹⁹ For instance, the interviews of returnees conducted under the scope of the project showed that at the time of the survey, only 6% of migrants who had decided to return were unemployed, as opposed to 25% of the migrants who were forced to return. See J.P. Cassarino (ed.), *Return Migrants to the Maghreb Countries: Reintegration and Development Challenges*, MIREM General Report, European University Institute and Robert Schuman Centre for Advanced Studies, Florence, 2008.

the security-oriented approach of the current Community policy on return makes southern Mediterranean countries unwilling to cooperate on this issue. Moreover, it has argued that a new approach is needed. This should take into account the influence of pre- and post-return conditions on migrants' reintegration patterns as well as their capacity to contribute to the development of their countries of origin.

3.5 Access to rights by undocumented immigrants

Undocumented immigrants are holders of rights.¹²⁰ This fact is often in conflict with many official discourses and policies on irregular immigration that foster undocumented migrants' invisibility in the EU and their non-entitlement to basic social and economic rights. Indeed, a number of civil, political, social and economic rights apply to any individual irrespective of his/her administrative status of residence in the Union at the EU and national levels. Both the Charter of Fundamental Rights¹²¹ and the ECHR stipulate rights applying to everyone, including undocumented migrants. Other instruments in international human rights law, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR) as well as some from the United Nations (UN), International Labour Organisation (ILO)¹²² and the Council of Europe,¹²³ also foresee a series of rights applying to all individuals.

The disparity between the formal recognition of the principle of universal human rights protection and the actual attribution of and access to such rights by individuals has been raised by civil society organisations.¹²⁴ The ethical and human rights tensions emerging from the exclusion of undocumented migrants from social rights have been also highlighted by a Council of Europe report of 2005, which identified the minimum level of social rights that undocumented migrants are entitled to in accordance with the law, as well as the practical obstacles to their enjoyment. Exclusion and marginalisation are unfortunately the rule for these persons in relation to basic social and economic rights in the EU.¹²⁵ A notable exception is Spain, where all migrants (independent of the regularity of their status) have access to basic social rights (access to health care and education).¹²⁶ The effects of migration policies on access

¹²⁰ See the Platform for International Cooperation on Undocumented Migrants (PICUM), *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, PICUM, Brussels, 2007(a) (retrieved from <http://www.picum.org/?pid=210>). See also the Council of Europe, *Human Rights of Irregular Migrants*, Doc. 10924, Parliamentary Assembly, Committee on Migration, Refugees and Population, Rapporteur: Mr Ed van Thijn, Strasbourg, 4 May 2006; and also T.A. Aleinikoff and V. Chetail (eds), *Migration and International Legal Norms*, The Hague: TMC Asser Press, 2003.

¹²¹ Refer to the Charter of Fundamental Rights of the European Union, OJ C 303/01, 14.12.2007.

¹²² R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford: Clarendon Press Oxford, 1997.

¹²³ E. Guild, *The European Convention on the Legal Status of Migrant Workers (1977): An Analysis of its Scope and Benefits*, CDMG (99) 11, Council of Europe, Strasbourg, 1999.

¹²⁴ See Platform for International Cooperation on Undocumented Migrants (PICUM) (ed.), *PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe in 2006*, PICUM, Brussels, 2006 (retrieved from <http://picum.org/HOME/PAGE/PICUM's%20Main%20Concerns%202006.pdf>).

¹²⁵ Refer to R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg: Council of Europe Publishing, 2005; refer also to S. Tonelli, "Irregular Migration and Human Rights: A Council of Europe Perspective", in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, 2004, pp. 301-310.

¹²⁶ Council of Europe (2008), op. cit., p. 2.

are worrying in light of the progressive criminalisation of irregular immigration and other restrictive measures proliferating across the EU as identified in section 3.3 above. For instance, Italian policies have recently moved towards the German approach on undocumented migration, which is driven by the criminalisation of irregular immigration and of ‘solidarity’.¹²⁷ Frictions in this domain are exacerbated by the unwillingness expressed by a majority of EU member states not to become party to key international and regional instruments granting rights and protection to migrant workers – such as the International Convention for the Protection of the Rights of all Migrant Workers and the Members of their Families (ICMW)¹²⁸ and the European Convention on the Legal Status of Migrant Workers.¹²⁹

As noted in section 2, the European Pact on Immigration and Asylum, the Commission’s Communication COM(2009) 262 and the first two drafts of the Stockholm Programme impart a weak link between migration and rights. A rights-based approach is largely absent from these policy documents in relation to irregular immigration beyond unaccompanied minors and victims of trafficking.¹³⁰ The draft Stockholm Programme refers to rights, integration and a common status ‘comparable’ to EU citizens exclusively in relation to those TCNs who are “legally residents”. It is striking to see how none of these EU documents recognises undocumented migrants as one of the most vulnerable categories of persons in the EU today. Yet, there have been various research projects funded by different DGs of the European Commission providing evidence of the barriers faced by undocumented migrants in their access to basic social and economic rights – particularly concerning health care, education, housing and fair working conditions – which we synthesise below.

3.5.1 Health

The right to health care is enshrined in various international legal instruments, such as the ICESCR, which recognises that everyone has the right “to the enjoyment of the highest attainable standard of physical and mental health”.¹³¹ The ICMW also recognises the right of all migrant workers and their family members to receive emergency medical care, independent of their administrative status of stay.¹³² Some provisions of the ECHR are also relevant in those

¹²⁷ See Merlino (2009), op. cit., p. 9. In Germany, irregular immigration is considered a criminal offence and public authorities and practitioners (doctors and teachers) have a duty to denounce irregular residents to the competent authorities. These regulations interfere deeply with the right of access to medical care and education, which German law recognises for irregular residents. See Council of Europe (2008), p. 20.

¹²⁸ Refer to the International Steering Committee for the Campaign for Ratification of the Migrants’ Rights Convention, *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 2009 (retrieved from www.migrantsrights.org). According to this report, as of March 2009, 41 states had ratified the UN Migrant Workers’ Convention, 48 had ratified ILO Convention No. 97, and 23 had ratified ILO Convention No. 143.

¹²⁹ See the European Convention on the Legal Status of Migrant Workers (1977) (retrieved from <http://conventions.coe.int/Treaty/EN/Treaties/Html/093.htm>).

¹³⁰ In section 4 of Communication COM(2009) 262 (European Commission, 2009a, op. cit), entitled “A Europe that Protects”, there is subheading 4.3 on “Common Objectives”, one of which is the “fight against international organized crime”, including “human trafficking”. It states that “[h]uman trafficking is a serious crime against human rights. The fight against human trafficking must mobilise all means of action, bringing together prevention, law enforcement, and victim protection.” Furthermore, “[v]ictims must be protected and helped by various measures: immunity from criminal prosecution, regularisation of their stay, development of compensation schemes, and assistance with reintegration into society in the country of origin if they return voluntarily and also in order to facilitate cooperation with investigations”.

¹³¹ See Art. 12.1 of the ICESCR.

¹³² See Art. 28 of the ICMW.

situations where health care for undocumented immigrants is denied.¹³³ Furthermore, at level of the Council of Europe, in the formal complaint *FIDH v. France*¹³⁴ the European Committee on Social Rights stated that “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter”. The Committee stressed that health care is a prerequisite for the preservation of human dignity, which is a fundamental value in European human rights law.¹³⁵

The “Access to Health Care for Undocumented Migrants” project,¹³⁶ funded by the DG for Employment, Social Affairs and Equal Opportunities, demonstrated how the right to medical care is generally neglected in a majority of EU member states. The final report published in 2007 outlined the main obstacles faced by undocumented migrants when seeking medical care in the EU: first, the requirement to provide documentation proving their ability to cover hospital expenses; second, the lack of information about their right to health care; third, ‘the duty to denounce’ of hospital administrations in some member states; and fourth, a lack of translators and cultural mediators in hospitals.¹³⁷

Similar findings were reached by the two other projects. The project “L’accès aux soins un droit non respecté en Europe”, led by Médecins du Monde, was funded by the French ministry of health, the French ministry of social services, the European Commission’s DG SANCO and the European Programme for Integration and Migration (EPIM).¹³⁸ The research conducted by the project confirmed that access to health care is not always recognised as an individual right across the EU. While the 11 countries that were studied provide access to health care for undocumented migrants, TCNs are often required to pay for health services, making access for some impossible in practice. By way of illustration, the report pointed out that in Belgium, France, Italy, the Netherlands, Portugal and Spain the law provides for the system to cover fully or partially the costs for the undocumented migrants who cannot afford to pay them. In contrast, Germany,¹³⁹ Greece and Switzerland restrict access to health care to emergency care alone. In

¹³³ See Arts. 2, 3 and 8 of the ECHR.

¹³⁴ See the European Committee on Social Rights, *International Federation for Human Rights (FIDH) v. France*, Collective Complaint No. 14/2003, Decision on the merits of 8 September 2004 (retrieved from http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC14Merits_en.pdf).

¹³⁵ *Ibid.*, paras. 31 and 32.

¹³⁶ The project was led by PICUM and it involved 19 partners in the following 11 EU member states: Austria, Belgium, France, Germany, Hungary, Italy, Portugal, Spain, Sweden, the Netherlands and the UK. The overall aim of the project was to improve access to health care for excluded migrant groups. Refer to Platform for International Cooperation on Undocumented Migrants (PICUM), *Access to Health Care for Undocumented Migrants in Europe*, PICUM, Brussels, 2007(b) (retrieved from <http://www.picum.org/data/Access%20to%20Health%20Care%20for%20Undocumented%20Migrants.pdf>).

¹³⁷ *Ibid.*, p. 9.

¹³⁸ The project looked at the access of undocumented migrants to health care. The final report combined the results of two complementary surveys carried out in 2008. The first was a statistical survey focusing on adult undocumented migrants and the second, based on interviews, looked at the situation of their children. In total, the surveys involved more than 1,200 undocumented migrants living in 31 towns in 11 European countries (Belgium, France, Germany, Greece, Italy, Netherlands, Portugal, Spain, Sweden, Switzerland and the UK). See the report, Médecins du Monde, *Access to healthcare for undocumented migrants in 11 European countries, 2008 Survey Report*, European Observatory on Access to Healthcare, London, September 2009 (retrieved from http://www.mdm-international.org/index.php?id_rubrique=1). See also the EPIM website (<http://www.epim.info>).

¹³⁹ It has to be noted that in Germany, official institutions (including hospitals and schools) have a duty to denounce the presence of undocumented migrants to the office for foreigners. For a study on this issue, refer to PICUM (2002), *op. cit.*, pp. 44-45.

Sweden, undocumented migrants are not entitled to access the health system unless they pay for the full cost of health services, even in emergencies.¹⁴⁰ In the UK, the system leaves the choice of accepting undocumented migrants to general practitioners (only in relation to primary health care). The report also notes that even in those countries where the legislative framework envisages access to health care, in practice it is limited by various factors: differing interpretations of the law, administrative complexities, fears of being reported and scarce knowledge (on both sides) about the legal provisions on access to health care. Some 70% of the persons interviewed were ‘theoretically’ entitled to health care (ranging from 3% in Greece to 98% in Belgium), but a quarter of them were unaware of this right. Again, a series of impediments – mainly administrative – hindered their access to health care. Nearly 70% of respondents said that they had faced barriers when seeking healthcare.¹⁴¹ The project deconstructed the myth according to which TCNs come to certain EU member states to profit from free access to health care. Only 6% of the respondents cited health as being among their reasons for coming to the EU. Economic reasons (56%) and those related to politics, religion, ethnicity, sexual orientation and war (26%) – which theoretically entails the right to political asylum – were the push factors to migrate.¹⁴²

The project on “Fighting Discrimination-based Violence against Undocumented Children”, financially supported by the Daphne II Programme (2007–13) of the DG JFS,¹⁴³ pointed out that in reality, in a majority of cases access to health care by undocumented children does not differ from that generally applying to undocumented migrants. Undocumented children are frequently given the right to health care only in emergencies and the interpretation of ‘urgent care’ differs from country to country and from doctor to doctor. Similar to the Médecins du Monde project, the factors cited as hampering access to health care were lack of information and awareness of rights, administrative barriers and the knowledge gap of health professionals about the health care entitlements of undocumented migrants.

¹⁴⁰ See the report by Health for Undocumented Migrants and Asylum Seekers (HUMA) network, *Access to health care for undocumented migrants and asylum seekers in 10 EU countries: Law and practice*, HUMA, 2009, p. 150.

¹⁴¹ Similar critical concerns about undocumented migrants’ lack of access to health care were raised by the HUMA network (an initiative also supported by DG SANCO and EPIM). This initiative was led by Médecins du Monde. It is a three-year initiative, which started in June 2008. Its general objective is “to contribute to the improvement of the health conditions of undocumented migrants and asylum seekers to reduce inequalities to health care access” (refer to <http://www.huma-network.org/>).

¹⁴² See the final report, Médecins du Monde (2009), op. cit., p. 9.

¹⁴³ The project was carried out by PICUM from February 2007 to February 2009. It aimed at “fighting discrimination-based violence against undocumented children in Europe by developing the capacity of concerned partners to protect undocumented children from discrimination in gaining access to housing, education and health care”. The project focused the situation in nine EU member states: Belgium, France, Hungary, Italy, Malta, the Netherlands, Poland, Spain and the UK. The project partners were Save the Children (Denmark), Defence for Children International (the Netherlands), Association Jeunes Errants (France) and Andalucía Acoge (Spain). Refer to Platform for International Cooperation on Undocumented Migrants (PICUM), *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels, 2008 (retrieved from <http://www.picum.org/data/Undocumented%20Children%20in%20Europe%20EN.pdf>).

The results of the Migrant-Friendly Hospitals (MFH) project,¹⁴⁴ likewise funded by DG SANCO, aimed at putting “migrant-friendly, culturally competent health care and health promotion higher on the European health policy agenda and support[ing] other hospitals by compiling practical knowledge and instruments”. Based on a needs assessment, the study identified three areas of particular concern: language and communication barriers, the health of mothers and children who are migrants and ethnic minorities, and a lack of cultural competence – cultural unawareness, misunderstanding and prejudices – among hospital staff.¹⁴⁵ The partners of the project, which counted 12 pilot hospitals, jointly launched the “Amsterdam Declaration towards migrant-friendly hospitals in an ethno-culturally diverse Europe”.¹⁴⁶ The Declaration asserted that access to health care services must be seen as a basic right for everyone and stated that improving the quality of health care for migrants and ethnic minorities – by making hospitals more responsive to the ethnic, cultural and other social differences of patients and staff – would serve the general interest of all patients.

3.5.2 Education

The right to education is provided in several international legal instruments, such as the UDHR,¹⁴⁷ the UN Convention on the Rights of the Child,¹⁴⁸ the ICESCR¹⁴⁹ and the ECHR.¹⁵⁰ Here again, EU-funded research projects have confirmed a difference between the letter of the law and practice. The final report of the project “Fighting Discrimination-based Violence against Undocumented Children”¹⁵¹ revealed that even though the right to compulsory education for undocumented children is not explicitly denied in any of the states investigated, there are barriers impeding access to this right on the ground. According to the report, among others these obstacles are the need to show a residence permit or other identification documents, families’ fears of detection by authorities, and denial of financial support for extracurricular expenses such as books and transport. Finally, another important finding of the project was that besides the difficulties of registering in the school system, undocumented children encounter language problems and discrimination, because in most cases they do not receive a diploma at the end of their studies.¹⁵²

¹⁴⁴ This project was coordinated by the Ludwig Boltzmann Institute for the Sociology of Health and Medicine (LBISHM) at the University of Vienna, which put together a group of 12 pilot hospitals from 12 member states (Austria, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Spain, Sweden, and the UK). The overall project conducted a needs assessment within the partner hospitals, which included the viewpoints of clients, staff and hospital management. A “Migrant-Friendly Quality Questionnaire” was developed as an assessment instrument of “migrant-friendly structures”, such as interpreting services and information for migrant patients. For more information, see the project website (<http://www.mfh-eu.net/public/home.htm>).

¹⁴⁵ Refer to the project summary for the Migrant-Friendly Hospitals project, p. 10 (retrieved from <http://www.mfh-eu.net/public/files/mfh-summary.pdf>).

¹⁴⁶ The Amsterdam Declaration is on the website of the Migrant-Friendly Hospitals project (retrieved from http://www.mfh-eu.net/public/european_recommendations.htm).

¹⁴⁷ See Art. 26 of the UDHR.

¹⁴⁸ See Art. 28 of the UN Convention on the Rights of the Child.

¹⁴⁹ See Art. 13 of the ICESCR.

¹⁵⁰ See Art. 2 of the first protocol of the ECHR.

¹⁵¹ See PICUM (2008), *op. cit.*

¹⁵² *Ibid.*, p. 35.

The project “Book of Solidarity” (Providing Assistance to Undocumented Migrants)¹⁵³ illustrated how undocumented children face legal, administrative and practical blocks in accessing education in various EU member states. The situation varies greatly across countries. In France for example, the children of undocumented immigrants have the right to education and the risk of being denounced appears small.¹⁵⁴ In Italy, undocumented minors have the same scholastic obligations as nationals,¹⁵⁵ while in Belgium, the national disposition has established the right to education for children. As far as access to education for undocumented adults is concerned, they can arbitrarily be rejected or accepted.¹⁵⁶ Belgian law guarantees that headmasters do not have to report the presence of irregular children and their parents to the police. Schools in Germany are under the obligation to denounce undocumented migrants to the office for foreigners.¹⁵⁷ The research found that in certain countries, voluntary organisations have often experienced schools being reluctant (and in some cases even refusing) to register undocumented children.¹⁵⁸ At first glance, in Sweden and Denmark, access to education for undocumented children is not provided by the law, but it appears that some schools allow them to attend classes, although they will not obtain a diploma at the end of their studies.¹⁵⁹ The Book of Solidarity has stressed the important work carried out by voluntary organisations in the area of education for undocumented migrants. Their contributions are actually linked to the legislative landscape of the country in which they operate and the ways they try to address these legal shortcomings. For instance, in Denmark and Sweden, organisations focus more on facilitating the access of children and adolescents to primary and secondary schools. In countries such as Belgium, Italy, France and Spain, the organisations focus on facilitating access for adults to free language and literacy courses.¹⁶⁰

3.5.3 Housing

The right to an adequate standard of living, which is intrinsically linked to other basic social and economic rights, is stipulated for all persons in the UDHR and the ICESCR.¹⁶¹ Notwithstanding these international human rights guarantees, a number of EU-funded research projects show that when it comes down to it, this social right is extremely difficult to realise. The interviews conducted by the study “L'accès aux soins un droit non respecté en Europe”¹⁶² revealed that 52.4% of those interviewed lived in insecure accommodation and 34% of them considered their housing conditions dangerous or harmful to their health or that of their children. This inadequate housing situation was mostly related to their low levels of financial resources and the limited supply of social housing.¹⁶³

¹⁵³ PICUM (2002, 2003a and 2003b), op. cit.

¹⁵⁴ PICUM (2003a), op. cit., p. 25.

¹⁵⁵ Ibid., p. 27.

¹⁵⁶ PICUM (2002), op. cit., p. 22.

¹⁵⁷ Ibid., p. 27.

¹⁵⁸ Ibid., p. 60.

¹⁵⁹ PICUM (2003b), op. cit., p. 20 (Sweden), p. 22 (Denmark).

¹⁶⁰ See the PICUM (2002), op. cit., p. 60 (Belgium) and PICUM (2003a), op. cit., p. 61 (Italy, France and Spain).

¹⁶¹ See Art. 25 of the UDHR and Art. 11 of the ICESCR.

¹⁶² See the project description in section 3.5.1 above and the final report by Médecins du Monde (2009), op. cit.

¹⁶³ Refer here to the findings of Cholewinski in the Council of Europe report (*Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg: Council of Europe Publishing, 2005, p. 34), in which he says that

The “Fighting Discrimination-based Violence against Undocumented Children” project¹⁶⁴ revealed that among the EU member states surveyed by the project there was no specific reference to the right of undocumented children to housing. The final report pointed out that while the national legislation generally granted accommodation to all children (in shelters), undocumented families were not eligible for housing assistance and access to social housing was almost impossible on the ground.¹⁶⁵ As a result, family unity was often threatened, with negative impacts on the children. Furthermore, the report stressed that the right of undocumented children to housing is tied to the very conditions of social exclusion that irregular immigrant families experience (such as limited access to work, exploitation and exclusion from social housing owing to the lack of a residence permit). The study identified the following obstacles that are usually encountered by undocumented immigrants concerning the access of undocumented children to housing: the reluctance by local authorities to take responsibility for these children, the exclusion of irregular families from social assistance and discrimination of irregular families in access to housing.¹⁶⁶

3.5.4 Fair working conditions

The right to fair working conditions is recognised in the ICMW,¹⁶⁷ the ICESCR¹⁶⁸ and ILO labour standards.¹⁶⁹ The European Trade Union Confederation (ETUC), however, has expressed profound concerns about the exploitation of irregular immigrants in the EU and has called for measures ensuring the protection of human rights and labour standards for all migrant workers. More specifically, ETUC has called for

more active social policies – and their effective implementation and enforcement at national and EU level – to end unfair competition between companies and Member States *at the expense of workers’ rights*. At the same time there must be a recognition that *every person – with proper documents or not – is to be valued and respected as a human being and should be entitled to the basic human rights and minimum labour standards* (including decent working conditions, freedom of association and protection against forced labour) that all citizens should enjoy.¹⁷⁰ (Emphasis added.)

[i]n fact, the principal problem with housing in Europe concerns the availability of generally poor social housing. Inadequate living conditions or irregular migrants are therefore closely connected with problems of supply in social housing. Indeed, it is not unusual for public authorities to spend a lot of money on the provision of hotel accommodation [for] undocumented or irregular migrants when these funds would be better spent on constructing social housing.

¹⁶⁴ Refer to the project description in section 3.5.1 above and PICUM (2008). op. cit.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid., p. 65.

¹⁶⁷ Art. 25 of the ICMW specifies the right of equal treatment between nationals and non-nationals irrespective of their legal status in working conditions (working hours, holidays, health and security, etc.). Art. 26 provides for the right to be part of trade unions.

¹⁶⁸ Art. 7 of the ICESCR recognises the right of “just and favorable conditions of work” for all workers.

¹⁶⁹ See R. Cholewinski, “International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization”, in J. Graig and S. Lynk (eds), *Globalization and the Future of Labour Law*, Cambridge: Cambridge University Press, 2006, pp. 409-444. This was based on the findings of a previous study offering a review of the legal status of migrants admitted for employment purposes in a selection of European countries – see Cholewinski (1997), op. cit.

¹⁷⁰ European Trade Union Confederation (ETUC), “Illegal immigration: ETUC calls for enforcement of minimum labour standards and decent working conditions as a priority”, ETUC, Brussels, 2006 (retrieved from <http://www.etuc.org/a/2699>).

The Book of Solidarity (Providing Assistance to Undocumented Migrants)¹⁷¹ project has shown that yet again these international rights are not respected across the EU. The project has revealed the ways in which most undocumented migrants find work and how the fact of being undocumented excludes them from the formal work market. The practical consequences are very harsh in daily life. For the most part, undocumented migrants hold jobs at the bottom of the ladder (agriculture, catering, construction, domestic work, prostitution, etc.). Those who are not self-employed are usually exploited by being forced to work long hours, not being given a regular monthly salary and not being covered by any work insurance in case of accident. Not being in a position to claim the enforcement of their labour rights makes undocumented migrants extremely vulnerable and leads to cases of modern slavery. This situation of general vulnerability and exploitation of undocumented migrants in the EU is also confirmed by the data collected within the project “L'accès aux soins un droit non respecté en Europe”.¹⁷² It found that 43% of the undocumented migrants interviewed in the context of the project worked in cleaning and individuals' care (such as looking after children, older persons or individuals who are ill in their homes). A further 15% work in the construction industry, 9% in hotel and restaurant services and 11% in prostitution.¹⁷³ The interviews carried out also uncovered extremely difficult working conditions. For instance, 37% said they work more than ten hours a day, 20% work night shifts (especially women) and 8% have been the victim of a work-related injury.¹⁷⁴

The UWT¹⁷⁵ project – a two-year FP6 project funded by the DG for Research – confirmed that working conditions are strictly correlated with the administrative status of the individual. The project concluded that first, undocumented migrants may rarely exit from the informal economy, within which the growth of inequalities has been observed; and second, undocumented migrants earn less than documented workers, have fewer rest breaks and their irregular status has a negative impact on their health (also in relation to accidents).¹⁷⁶ According to the UWT results, undocumented women are even more vulnerable, because they work in sectors with very low levels of collective organisation. For instance, their work in private homes often does not allow them to separate their private lives from work.¹⁷⁷ Moreover, the project has revealed how the common trend in the EU of tightening migration controls over family reunification and labour immigration does not eliminate undocumented workers but actually pushes them into the shadows of the economy and towards irregularity. Finally, the UWT,¹⁷⁸

¹⁷¹ PICUM (2002, 2003a and 2003b), op. cit.

¹⁷² See the project description in section 3.5.1 above and Médecins du Monde (2009), op. cit.

¹⁷³ Ibid., p. 64.

¹⁷⁴ Ibid., p. 65.

¹⁷⁵ The UWT project (described in section 3.1 above) has collected data from *interviews of more than 200 migrant workers* who at some stage had been irregular. Before starting the interview process, each partner carried out a literature review of existing research on the issue and produced a country report. The country reports summarise the national legislative and policy framework for migration, the currently available statistical data on documented and undocumented migration and existing literature on undocumented migrant workers. A summary of the country reports is provided in an overview report, which also includes the European and international legal framework for migration. Country reports are on the UWT website (retrieved from http://www.undocumentedmigrants.eu/country/country_home.cfm).

¹⁷⁶ See McKay et al. (2009), op. cit., p. 68.

¹⁷⁷ This specific problem has been also highlighted within the context of the CHALLENGE project. See for instance the chapter by F. Scrinzi, “Interni domestici”, in *Conflitti Globali*, “Internamenti CPT e altri campi”, Vol. 4, Milano: Agenzia X, 2006.

¹⁷⁸ See Working Lives Research Institute (WLRI) (2009), *The relationship between migration status and employment outcomes*, Final Report, WLRI, London Metropolitan University, p. 68.

CHALLENGE¹⁷⁹ and CRIMPREV¹⁸⁰ projects have all reached a similar conclusion about the way in which undocumented migration is a response to economic demands for casual work, which put the burdens and risks on the workers and for which it is easier to use undocumented workers as a right-less and exploitable workforce. As highlighted by the Book of Solidarity, “all of the countries studied need and make use of the labour of undocumented migrants, but are at the same time not willing to give any rewards for their contributions”.¹⁸¹

4. Conclusions and policy recommendations

This report has shown the gap between how EU policy frames the debate about undocumented immigrants in the EU and the ‘knowledge’ emanating from a selection of research projects financed by the EU institutions. While evidence stemming from social science research and practical experience would be expected to constitute the basis for any policy-making on irregular migration, it has been demonstrated that public responses on migration in the EU remain blind to their results and are far from following an evidence-based approach. The EU (most notably the Council and the DG JFS) continues to refrain from acknowledging the findings of social science research, and instead persists in advocating migration control policies that give rise to multiple ethical and fundamental human rights dilemmas within the EU and outside it. The gap between EU policy and research findings undermines the capacity of the EU’s immigration policy to deal satisfactorily with these challenges. It also calls into question its coherency in light of evolving social dilemmas and realities.

In its Communication COM(2009) 262 on an AFSJ serving the citizen, the Commission stressed that the Stockholm Programme should learn lessons from weaknesses that have characterised the policy processes on an AFSJ in the last ten years. When examining the current discourses and initiatives proposed in the European Pact on Immigration and Asylum, the latest drafts of the Stockholm Programme and those by the DG JFS, it becomes evident that the same weaknesses prevail and that the results of EU-funded research projects are simply disregarded. This report has illustrated the profound mismatch between EU policy and independent research at the EU level on five major themes, around which social science projects have provided policy-relevant inputs on terminology, statistics, regularisations, criminalisation, return and readmission, and access to socio-economic and fundamental rights.

EU policy continues to make use of negative terminology that links undocumented migration with illegality, criminality and (in)security. This official language justifies repressive immigration measures and attempts to perpetuate the invisibility and marginalisation of undocumented migrants. Furthermore, the use of statistics based on unreliable sources or speculation to justify the adoption of certain policies is another issue of concern. Research has shown that the EU’s official language of (in)security in relation to irregular immigration is inappropriate and has justified the development of a whole series of coercive immigration policies that have human rights and exclusionary implications for TCNs. Some EU research projects have also provided figures about the numbers of undocumented migrants in the EU that are more reliable and which fundamentally challenge some official discourses. Similarly, they have deconstructed fears and attempted to inform perceptions about regularisations in the EU, by pointing out that a significant number of EU member states have used formal or de facto regularisation procedures in recent years, and by revealing the inadequacy of arguments considering such procedures ‘pull factors’.

¹⁷⁹ See the introductory article of the journal, *Conflitti Globali*, “Internamenti CPT e altri campi”, Vol. 4, Milano: Agenzia X, 2006.

¹⁸⁰ See Palidda (2009), op. cit., p. 13.

¹⁸¹ See the PICUM (2002), p. 94.

A common message of the projects reviewed in this report is that the phenomenon of irregular immigration has been subject to a process of criminalisation and (in)securitisation at both the national and EU levels, which challenge the relationship between liberty and security in the EU, especially the protection of the fundamental human rights of individuals. An increasing number of EU member states are using criminal law in the scope of migration management. EU-funded projects have warned about the counterproductive effects that criminal penalties have on social inclusion, access to human rights and the basic social and economic rights of undocumented migrants. Evidence has revealed how criminalisation increases the vulnerability, insecurity and marginalisation of undocumented TCNs; consequently, it is hard to reconcile this tendency with human rights standards. Concerns have been raised as regards the implications of criminalising third parties and ‘solidarity’ efforts for the security and inclusion of migrants, and compatibility with the principle of proportionality. According to research, in a majority of cases, it is actually thanks to social networks and solidarity that undocumented migrants can effectively have access to basic rights. The criminalisation of solidarity therefore fosters social exclusion and constitutes a direct challenge to an EU of rights.

The trend towards criminalisation has been accompanied by another one, advocating the detention and expulsion of irregular immigrants in the EU, whose effects on fundamental rights have also been the focus of study. The adoption of the Returns Directive has sparked critical reactions all over the globe as well as within the EU. Research has illustrated how these legal measures make up ‘common minimum standards’ that do not altogether prevent risks of human rights violations after transposition by the EU member states. A proper evaluation and proofreading for fundamental rights in the practical implementation of EU law on irregular immigration in the different national arenas has been identified as a central priority for the future.

Finally, the projects studied in this report remind us that undocumented migrants are holders of fundamental human rights and basic social and economic rights. Yet, it has been made clear that a wide range of practical barriers prevent them from having access to these rights. Progressively restrictive regimes for the provision of welfare and socio-economic rights for undocumented migrants – with increasing emphasis on the denial of basic rights – makes migrants victims of social exclusion and increases their vulnerability in diverse areas of life. Indeed, access to rights is at times impossible in practice because of factors such as scarce awareness of the existence of these rights, fear of being detected or reported, administrative or financial impediments, exclusion from social assistance and discrimination. All these factors put the respect of rights in the EU in conflict with international and regional human rights treaties and obligations. They also weaken the foundations of the next phase of the EU’s AFSJ.

In light of the above, we propose the policy recommendations outlined below.

- 1) The EU should address the gap between social science research and EU policy-making on irregular migration. EU policies need to benefit and draw their basis from the knowledge and experiences coming out of social science research. Taking on board their results is not only necessary to ensure a good relation between political goals and ambitions in the EU research area and EU policy-making in the AFSJ, but also for the EU to be capable of developing public responses on immigration that appropriately match and address changing social realities, and which duly protect fundamental human rights. The Stockholm Programme should provide an opportunity to implement evidence-based policy in the field of undocumented migration in the EU.
- 2) The European Commission should fine-tune an interservice and transversal (inter-DG) strategy to better link policy-making processes and the results of social science projects. The DG JFS should work more closely with the other DGs in order to take on board the

findings of EU-funded projects, before putting forward new legislative or policy proposals or when evaluating the present ones on irregular immigration.

- 3) The EU institutions (particularly the DG JFS and the Council) should stop using (in)security terminology such as ‘illegal migrants’ and ‘illegal migration’, and verbs like ‘fighting’ and ‘combating’. The EU should adopt a common terminology that is neutral. This would make it consistent with the standards set (and largely agreed) by other international and regional organisations as well as many civil society actors. A common EU manual on migration-related terminology should be developed to ensure that any EU policy documents avoid this kind of rhetoric in all EU official languages.
- 4) The EU needs to recognise that undocumented migrants are among the most vulnerable groups in the EU and that they are holders of rights. The rights, inclusion and protection of undocumented migrants should also be at the heart of the EU’s attention and social protection strategies for the years to come. The EU cannot just benefit ‘citizens’ or those categories of persons labelled as ‘legally residing TCNs’ and marginalise all the others. Many undocumented migrants are workers and as such should be entitled to employment rights and protection. The EU should adopt a common framework of protection for the rights of all workers. A common EU status of undocumented migrants should be developed. This common status should be inspired by a rights-based approach to migration and focus on overcoming the practical obstacles hindering the access of undocumented migrants to the rights of health care, education, housing and fair working conditions across the EU.
- 5) EU measures and policy discourses are silent on the rights of TCNs who work in the EU without authorisation. The EU should shed light on this social phenomenon and promote the adoption and practical implementation of international and regional legal frameworks that protect the social, economic, civic and political rights of undocumented migrants. In particular, it should put forward strategies for promoting member states’ ratification of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Family.
- 6) The European Commission should react against the increasing criminalisation of solidarity in some member states, given the negative implications that the use of penal law has for the liberty and security (and fundamental rights) of undocumented persons in the EU. The progressive Europeanisation of irregular immigration policies makes it necessary for the EU to play a more proactive role when assessing certain national migration-control practices for overall consistency (and fundamental rights compliance) with a common EU immigration policy.
- 7) The EU should develop better monitoring and (independent) evaluation mechanisms for the national transposition of irregular immigration laws, with an emphasis on respect for the rule of law and fundamental rights standards. These mechanisms would be of special importance when examining the implementation of the Employer Sanctions and the Returns Directives in the next phase of the EU’s AFSJ. They should be accompanied by an expansion of the FRA’s mandate, evaluation competences and a monitoring remit on the fundamental rights and rule of law across the EU-27. Independent, social science research and networks should be given active roles in this respect to guarantee objective and impartial evaluation.
- 8) Finally, the EU should adopt a four-point plan to reduce irregularity:
 - First, member states should regularise those immigrants who cannot be returned within three months.

- Second, member states should have an obligation to deal with applications for the renewal of work permits in a timely manner and to enact legislation guaranteeing that between the application and the administrative decision, the individual has access to lawful employment and appeal rights.
- Third, facilitated mechanisms for the issue of labour permits, particularly for those sectors most affected, should be adopted.
- Fourth, the Commission should propose a directive establishing a common set of rights for *all* migrant workers in the EU – ensuring, *inter alia*, equal pay for equal work, decent working conditions and collective organisation. The European Parliament should put pressure on the Council to prioritise this policy measure in the EU's decision-making processes.

REFERENCES

- Aleinikoff, T. A. and V. Chetail (eds) (2003), *Migration and International Legal Norms*, The Hague: TMC Asser Press.
- Amicelle, A., C. Cournil, M. Darley, A. Garcia Castro, M. Iserte, C. Kobelinski, C. Makaremi, T. Ruie-Rivas, S. Willen and C. Wasinski (2008), “Confinement des Étrangers: Entre Circulation et Enfermement”, *Cultures & Conflits: Sociologie Politique de l’Internationale*, No. 71, Paris: L’Harmattan.
- Apap, J., P. De Bruycker and C. Schmitter (2000), “Regularisation of Illegal Aliens in the European Union: Summary Report of a Comparative Study”, *European Journal of Migration and Law*, Vol. 2, Nos. 3-4, pp. 263–308.
- Arcarazo, D.A. (2009), *Latin American Reactions to the Adoption of the Returns Directive*, CEPS Liberty and Security in Europe papers, Centre for European Policy Studies, Brussels, November.
- Baldaccini, A. (2009), “The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive”, *European Journal of Migration and Law*, Vol. 11, No. 1, pp. 11-17.
- Baldaccini, A. and E. Guild (2007), *Terrorism and the Foreigner – A Decade of Tension around the Rule of Law in Europe*, Leiden: Martinus Nijhoff Publishers.
- Balzacq, T. and S. Carrera (2006), “The Hague Programme: The Long Road to Freedom, Security and Justice”, in T. Balzacq and S. Carrera (eds), *Security versus Freedom: A Challenge for Europe’s Future*, Farnham: Ashgate Publishing, pp. 1-34.
- Belguendouz, A., M. Bietlot, N. Fisher, A. Garcia Castro, C. Intrand, P. Arnaud Perrouy, F. Ragazzi, C. Rodier, C. Teule and J. Valluy (2005), “L’Europe des Camps: La Mise à l’Écart des Étrangers”, *Cultures & Conflits: Sociologie Politique de l’Internationale*, No. 57, Paris: L’Harmattan.
- Bigo, D. (1996), *Police en Réseaux: L’expérience européenne*, Paris: Presses de Sciences Po, pp. 258-266.
- (2002), “Security and Immigration: Toward a Critique of the Governmentality of Unease”, *Alternatives: Global, Local, Political*, Vol. 27, Special Issue, February, pp. 63-92.
- Bigo, D., S. Carrera and E. Guild (2009), *Final Policy Recommendations on the Changing Landscape of European Liberty and Security*, CHALLENGE Research Paper No. 16, Centre for European Policy Studies, Brussels.
- Bigo, D., S. Carrera, E. Guild and R.B.J. Walker (2008), “The Changing Landscape of European Liberty and Security: The Mid-Term Report of the CHALLENGE Project”, *International Social Science Journal*, Vol. 59, No. 192, pp. 283-308.
- Carrera, S. and A. Faure-Atger (2009), *Yes! A rights-based approach is possible for the Stockholm Programme! Provided...*, ENARgy Newsletter, No. 29, European Network Against Racism (ENAR), Brussels (retrieved from www.enar-eu.org).
- Carrera, S. and E. Guild (2007), *An EU Framework on Sanctions against Employers of Irregular Immigrants: Some Reflections on the Scope, Features and Added Value*, CEPS Policy Brief No. 140, Centre for European Policy Studies, Brussels, August.

- (2008), *The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanism? Security vs. Rights?*, CEPS Policy Brief No. 170, Centre for European Policy Studies, Brussels, September.
- (2009), *Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission's Proposals for the Stockholm Programme*, CEPS Policy Brief No. 196, Centre for European Policy Studies, Brussels, August.
- Carrera, S. and F. Geyer (2008), "The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice", in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Farnham: Ashgate Publishing, pp. 289-307.
- Carrera, S. and G. Pinyol (2009), *Local and Regional Authorities in the Future Area of Freedom, Security and Justice: Towards a Multi-governance Strategy for the Stockholm Programme*, Study commissioned by the Commission for Constitutional Affairs, European Governance and the Area of Freedom, Security and Justice of the Committee of the Regions, Brussels.
- Carrera, S. and J. Apap (2005), "Spain's New 'Regularisation' Procedure: Is this the way forward?", CEPS Commentary, Centre for European Policy Studies, Brussels, February.
- Carrera, S. and R. Hernández i Sagrera (2009), *The Externalisation of Europe's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?*, CEPS Working Document No. 321, Centre for European Policy Studies, Brussels, October.
- Cassarino, J.P. (2008) (ed.), *Return Migrants to the Maghreb Countries: Reintegration and Development Challenges*, MIREM General Report, European University Institute and Robert Schuman Centre for Advanced Studies, Florence.
- Cholewinski, R. (1997), *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford: Clarendon Press Oxford.
- (2005), *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg: Council of Europe Publishing.
- (2006), "International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization", in J. Graig and S. Lynk (eds), *Globalization and the Future of Labour Law*, Cambridge: Cambridge University Press, pp. 409-444.
- (2007), "The Criminalisation of Migration in EU Law and Policy", in A. Baldaccini, E. Guild and H. Toner (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Oxford: Hart Publishing, pp. 301-336.
- Coleman, N. (2009), *European Readmission Policy: Third-Country Interests and Refugee Rights*, Leiden: Martinus Nijhoff Publishers.
- Conflitti Globali* (2006), "Internamenti CPT e altri campi", Vol. 4, Milano: Agenzia X.
- Council of Europe (2005), *Twenty Guidelines on Forced Return*, Council of Europe, Strasbourg, September (retrieved from www.coe.int).
- (2006), *Human Rights of Irregular Migrants*, Doc. 10924, Parliamentary Assembly, Committee on Migration, Refugees and Population, Rapporteur: Mr Ed van Thijn, Strasbourg, 4 May.
- (2007), *Regularisation programmes for irregular migrants*, Report, Doc. 11350, Council of Europe, Strasbourg, July.

- (2008), *Policies Concerning Irregular Migrants: Synthesis Report*, Council of Europe, Strasbourg, 27-28 November, p. 4.
- Council of the European Union (2004), Presidency Conclusions of the Brussels European Council, 4 and 5 November, 14292/1/04, Brussels, 8 December 2004, Annex I, “The Hague Programme: Strengthening Freedom, Security and Justice in the European Union”, point 1.5 (OJ C53/1, 3.3.2005)
- (2008), European Pact on Immigration and Asylum, 13440/08, Brussels, 24 September.
- (2009a), Multi-annual Programme for an Area of Freedom, Security and Justice serving the Citizen (the Stockholm Programme), The Stockholm Programme: An open and secure Europe serving the citizen, 14449/09, Brussels, 16 October.
- (2009b), The Stockholm Programme: An open and secure Europe serving and protecting the citizen, 16484/09, Brussels, 23 November.
- Düvell, F., A. Triandafyllidou and B. Vollmer (2008), *Report on ethical issues in irregular migration research*, CLANDESTINO, Athens, October (retrieved from http://irregular-migration.hwwi.net/typo3_upload/groups/31/4.Background_Information/4.1.Methodology/Ethical_Report_Clandestino_Feb09.pdf).
- European Commission (2006), Communication in accordance with Article 27.3 of Directive 77/388/EEC, COM(2006) 404 final, Brussels, 19 July.
- (2007), *Impact Assessment – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals*, Staff Working Document, SEC(2007) 603, Brussels, 16 May.
- (2009a), Communication on an Area of Freedom, Security and Justice Serving the Citizen: Wider Freedom in a Safer Environment, COM(2009) 262, Brussels, 10 June.
- (2009b), *Moving Europe: EU Research on Migration and Policy Needs*, Report by A. Singleton (University of Bristol), Luxembourg: Office for the Official Publications of the European Communities.
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (CPT) (2009), *20 Years of Combating Torture*, 19th General Report, 1 August 2008 – 31 July 2009, Strasbourg: Council of Europe Publishing.
- European Migration Network (2007), *Illegally resident third-country nationals in EU member states: States’ approaches towards them, their profile and social integration*, Synthesis Report, European Migration Network (retrieved from <http://emn.eurodyn.com/Downloads/prepareShowFiles.do;jsessionid=D898480ED40F7453F4362131FADEFAE7?directoryID=71>).
- European Network Against Racism (ENAR), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar (2008), “Employer’s Sanctions Directive: Will migrant workers pay the price of their exploitation?”, Joint Statement, ENAR, PICUM and Solidar, Brussels, 15 April (retrieved from <http://www.enar-eu.org>).
- European Trade Union Confederation (ETUC) (2006), “Illegal immigration: ETUC calls for enforcement of minimum labour standards and decent working conditions as a priority”, ETUC, Brussels (retrieved from <http://www.etuc.org/a/2699>).

- European Trade Union Confederation (ETUC), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar (2007), “Joint Comments on Expected Commission Proposals to Fight ‘Illegal’ Employment and Exploitative Working Conditions”, ETUC, PICUM and Solidar, Brussels, 26 April (retrieved from <http://www.picum.org>).
- European Union Agency for Fundamental Rights (FRA) (2009a), *The Roma*, Data in Focus Report, EU MIDIS, European Union Minorities and Discrimination Survey, FRA, Vienna (retrieved from <http://www.fra.europa.eu/eu-midis>).
- (2009b), “The Stockholm Programme: A Chance to put Fundamental Rights Protection Right in the Centre of the European Agenda”, Opinion, FRA, Vienna, 29 June (retrieved from http://www.fra.europa.eu/fraWebsite/news&events/infocus_290709_en.htm).
- (2009c), *EU MIDIS at a glance: Introduction to the FRA’s EU-wide discrimination survey*, FRA, Vienna (retrieved from http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_GLANCE_EN.pdf).
- Fernandez, C. A. Manavella and J.M. Ortuño (2009), “Migration controls in the Euro-Mediterranean border: a critical analysis from the human rights overview”, in G. Rodriguez Fernandez, C. Fernández Bessa, I. Rivera Beiras and H.C. Silveira Gorski (eds), *Warlike Outlines of the Securitarian State: Life Control and the Exclusion of People*, OSPDH, Univeridad de Barcelona, pp. 121-148 (retrieved from <http://www.ub.edu/ospdh>).
- Finotelli, C. and G. Sciortino (2009), “The Importance of Being Southern: The Making of Policies of Immigration in Italy”, *European Journal of Migration and Law*, Vol. 11, No. 2, pp. 119-138.
- Future Group (2008), *Freedom, Security, Privacy – European Home Affairs in an Open World*, Report of the Informal High Level Advisory Group on the Future of European Home Affairs Policy, Brussels, June.
- Guild, E. (1999), *The European Convention on the Legal Status of Migrant Workers (1977): An Analysis of its Scope and Benefits*, CDMG (99) 11, Council of Europe, Strasbourg.
- (2004), “Who is an Irregular Immigrant”, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, pp. 3-28.
- (2005), *A typology of different types of centres for third-country nationals in Europe*, DG Internal Policies, Policy Unit C, Citizens’ Rights and Constitutional Affairs, European Parliament, Brussels.
- (2009a), *Security and Migration in the 21st Century*, Cambridge: Polity Press.
- (2009b), “The Criminalisation of Migration in Europe: The Human Rights Implications”, Paper presented at the Conference on irregular migration and human rights organised by the Council of Europe in Paris on 24-25 September.
- Guild, E. and P. Minderhoud (eds) (2006), *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings*, Leiden: Martinus Nijhoff Publishers.

- Guild, E., S. Carrera and A. Faure Atger (2009), *Challenges and prospects for the EU's area of freedom, security and justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, Centre for European Policy Studies, Brussels.
- Hammarberg, T. (2009), "It is wrong to criminalise immigration", in *Human Rights in Europe: Time to Honour our Pledges, Viewpoints by T. Hammarberg, Commissioner for Human Rights*, Council of Europe, Strasbourg.
- Health for Undocumented Migrants and Asylum Seekers (HUMA) (2009), *Access to health care for undocumented migrants and asylum seekers in 10 EU countries: Law and practice*, HUMA.
- International Steering Committee for the Campaign for Ratification of the Migrants' Rights Convention (2009), *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (retrieved from www.migrantsrights.org).
- Jandl, M., D. Vogel and K. Igllicka (2008), *Report on Methodological Issues*, CLANDESTINO, Athens, October, p. 4 (retrieved from http://clandestino.eliamep.gr/wp-content/uploads/2009/02/clandestino-report-on-methodological-issues_final1.pdf).
- Kovacheva, V. and D. Vogel (2009), *The size of the irregular foreign resident population in the European Union in 2002, 2005 and 2008: A dynamic aggregate country estimate*, Working Paper No. 4/2009, Database on Irregular Migration, Hamburg Institute of International Economics, Hamburg (retrieved from <http://irregular-migration.hwwi.net/>).
- Kraler, A. (2009), *Regularisation: A misguided option or part and parcel of a comprehensive policy response to irregular migration?*, IMISCOE Working Paper No. 24, International Migration, Integration and Social Cohesion, Amsterdam.
- McKay, S., E. Markova, A. Paraskevopoulou and T. Wright (2009), *The relationship between migration status and employment outcomes*, Final Report, Working Lives Research Institute, London, March, p. 5 (retrieved from http://www.undocumentedmigrants.eu/londonmet/library/v65239_3.pdf).
- Médecins du Monde (2009), *Access to healthcare for undocumented migrants in 11 European countries, 2008 Survey Report*, European Observatory on Access to Healthcare, London, September.
- Merlino, M. (2009), *The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU*, CHALLENGE Research Paper No. 14, Centre for European Policy Studies, Brussels.
- Palidda, S. (2009a), "Some Considerations on the Situation in the Main European Countries", in S. Palidda (ed), *Racial Criminalisation of Migrants in XXIst Century*, University of Genoa.
- (ed.) (2009b), *Razzismo democratico, la persecuzione degli stranieri in Europa* [Democratic racism: The persecution of foreigners in Europe], Milan: Agenzia X.
- Peers, S. (2004), "Irregular Immigration and EU External Relations", in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, pp. 193-220.
- Peers, S. and N. Rogers (eds) (2006), *EU Immigration and Asylum Law: Text and Commentary*, Chs. 25-32, Leiden: Martinus Nijhoff Publishers.

- Platform for International Cooperation on Undocumented Migrants (PICUM) (2002), *Book of Solidarity (Volume I): Providing Assistance to Undocumented Migrants in Belgium, Germany, the Netherlands and the UK*, PICUM, Brussels.
- (2003a), *Book of Solidarity (Volume II): Providing Assistance to Undocumented Migrants in France, Spain and Italy*, PICUM, Brussels.
- (2003b), *Book of Solidarity (Volume III): Providing Assistance to Undocumented Migrants in Sweden, Denmark and Austria*, PICUM, Brussels.
- (2007a), *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, PICUM, Brussels (retrieved from <http://www.picum.org/?pid=210>).
- (2007b), *Access to Health Care for Undocumented Migrants in Europe*, PICUM, Brussels (retrieved from <http://www.picum.org/data/Access%20to%20Health%20Care%20for%20Undocumented%20Migrants.pdf>).
- (2008), *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels (retrieved from <http://www.picum.org/data/Undocumented%20Children%20in%20Europe%20EN.pdf>).
- (ed.) (2006), *PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe in 2006*, PICUM, Brussels (retrieved from <http://picum.org/HOMEPAGE/PICUM's%20Main%20Concerns%202006.pdf>).
- Regularisations in the European Union (REGINE) (2009a), *Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU*, Final Report, Ref. JLS/B4/2007/05, International Centre for Migration Policy Development, Vienna, January.
- (REGINE) (2009b), *Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU*, Policy Brief, ICMPD, Vienna, February, p. 3.
- Roskilde University and Working Lives Research Institute (2008), *Undocumented Migration Glossary*, Work Package 5, UWT Project, London, September.
- Ruhs, M. and B. Anderson (2006), *Semi-compliance in the migrant labour market*, COMPAS Working Paper, Centre on Migration, Policy and Society, University of Oxford, 1 May (retrieved from <http://www.compas.ox.ac.uk/changingstatus>).
- Save the Children (2009), Briefing Note on the Stockholm Programme, Save the Children, Brussels, June.
- Scrinzi, F. (2006), “Interni domestici”, in “Internamenti CPT e altri campi”, *Conflitti Globali*, Vol. 4, Milano: Agenzia X.
- Steps Consulting Social (2006), *The conditions in centres for third-country nationals (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states*, Study commissioned by European Parliament Committee on Civil Liberties, Justice and Home Affairs, Brussels.
- Thym, D. (2008), “Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Right to Regularize Illegal Stay?”, *International Comparative Law Quarterly*, Vol. 57, No. 1, pp. 87-112.

Tonelli, S. (2004), “Irregular Migration and Human Rights: A Council of Europe Perspective”, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, pp. 301-310.

Working Lives Research Institute (WLRI) (2009), *The relationship between migration status and employment outcomes*, Final Report, WLRI, London Metropolitan University.

Zanfrini, L. and W. Kluth (2008), *Policies on irregular migrants, Volume I – Italy and Germany*, Strasbourg: Council of Europe Publishing, p. 15.

APPENDIX 1. CROSS-CUTTING PROJECT SYNERGIES

Table A1.1 Common findings of projects

Common findings	Projects														
	A typology of different types of centres for TCNs in Europe	Access to Health Care for Undocumented Migrants	Book of Solidarity: Providing Assistance to Undocumented Migrants (Volumes I-III)	CHALLENGE	CINEFOGO	CLANDESTINO	CRIMPREV	Fighting Discrimination-based Violence against Undocumented Children	HUMA	IMISCOE	<i>L'accès aux soins un droit non respecté en Europe</i>	MFH	REGINE	The conditions in centres for TCNs...	UWT
Restrictive policies and increasing controls do not reduce irregular immigration				*			*								*
Negative implications of the use of the terminology implying criminality and insecurity				*		*									*
Criminalisation of irregular migration			*	*			*								
Conditions in closed detention centres often violate human rights	*			*										*	
Irregularity is often a consequence of withdrawals and losses of legal status												*			*
Regularisations are widely used across member states; they have an overall positive impact; there is little evidence that they constitute a 'pull factor'												*			*

Table A1.1 Cont'd

Common findings	Projects														
	A typology of different types of centres for TCNs in Europe	Access to Health Care for Undocumented Migrants	Book of Solidarity: Providing Assistance to Undocumented Migrants (Volumes I-III)	CHALLENGE	CINEFOGO	CLANDESTINO	CRIMPREV	Fighting Discrimination-based Violence against Undocumented Children	HUMA	IMISCOE	<i>L'accès aux soins un droit non respecté en Europe</i>	MFH	REGINE	The conditions in centres for TCNs...	UWT
Irregular status is an obstacle to accessing basic social services and rights		*	*												*
Access to health care is a human right recognised for everyone; it is generally neglected (in law and/or in practice) for undocumented migrants		*	*		*			*	*		*	*			*
Undocumented migrants' right to access education is often not respected in Europe			*					*							
Undocumented migrants' rights to housing is not respected in Europe		*	*					*			*				
Undocumented migrants are vulnerable workers without rights; they are exploited in EU labour markets			*	*			*				*				*
Undocumented migrants are increasingly reliant on services provided by NGOs and voluntary organisations for access to basic social and human rights		*	*												*

Source: Authors' compilation.

APPENDIX 2. LIST OF EU-FUNDED PROJECTS ANALYSED IN THE REPORT

Table A2.1 Projects

Financing institution	EU-funded projects	Period	Leading organisation/coordinator	Webpage	
European Commission	DG for Research	CHALLENGE The Changing Landscape of European Liberty and Security	June 2004– May 2009	Center for European Policy Studies (CEPS)	http://www.libertysecurity.org/
		CLANDESTINO Undocumented Migration: Counting the Uncountable, Data and Trends across Europe	September 2007–August 2009	Hellenic Foundation for European and Foreign Policy (ELIAMEP)	http://clandestino.eliamep.gr/
		CRIMPREV Assessing Deviance, Crime and Prevention in Europe	2006–09	Centre National de la Recherche Scientifique (CNRS)	http://www.crimprev.eu
		IMISCOE International Migration, Integration and Social Cohesion	2004–09	Institute for Migration and Ethnic Studies (IMES), University of Amsterdam	http://www.imiscoe.org/index.html
		UWT Undocumented Worker Transitions	March 2007– February 2009	Working Lives Research Institute (WLRI), London Metropolitan University	http://www.undocumentedmigrants.eu/
	DG for Justice, Freedom and Security	Fighting Discrimination-based Violence against Undocumented Children	February 2007–February 2009	Platform for International Cooperation on Undocumented Migrants (PICUM)	http://www.picum.org/?pid=242
		REGINE Regularisations in the European Union	December 2007–July 2008	International Centre for Migration Policy Development (ICPMD)	http://research.icmpd.org/1184.html
	DG for Health and Consumer Protection (SANCO)	HUMA Health for Undocumented Migrants and Asylum Seekers	June 2008– June 2011	Médecins du Monde	http://www.huma-network.org/
		Migrant Friendly Hospitals (MFH)	October 2002 March 2005	Ludwig Boltzmann Institute for the Sociology of Health and Medicine (LBISHM) at the University of Vienna	http://www.mfh-eu.net/public/home.htm
		<i>L'accès aux soins un droit non respecté en Europe</i>	Report published Sept. 2009	Médecins du Monde	http://www.mdm-international.org/index.php?id_rubrique=1

Table A2.1 cont'd

	DG for Employment, Social Affairs and Equal Opportunities	Access to Health Care for Undocumented Migrants	Report published 2007	Platform for International Cooperation on Undocumented Migrants (PICUM)	http://www.picum.org/?pid=21
		Book of Solidarity: Providing Assistance to Undocumented Migrants (Volumes I-III)	Reports published 2003	Platform for International Cooperation on Undocumented Migrants (PICUM)	http://www.picum.org/Publications/bosI.pdf
	EuropeAid	MIREM Collective Action to Support the Reintegration of Return Migrants in their Country of Origin	December 2005–	European University Institute – Robert Schuman Centre	http://www.mirem.eu/research/analytical-reports-and-documents?set_language=en
European Parliament	DG for Internal Policies Policy Department C Citizens Rights and Constitutional Affairs	The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states (Study)	December 2007	STEPS Consulting Social	http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=19148
		<i>A typology of different types of centres for third country nationals in Europe</i> (Briefing paper)	February 2006	Center for European Policy Studies (CEPS)	http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=12774

Source: Authors' compilation.

APPENDIX 3. OTHER RELEVANT EU-FUNDED PROJECTS

Table A3.1 Projects

Financing institution		Projects and studies	Period	Leading organisation/coordinator	Webpage
European Commission	DG for Research	CINEFOGO Civil Society and New Forms of Governance in Europe – The Making of European Citizenship	September 2005– August 2009	Roskilde University, Department of Society and Globalisation	http://www.cinefogo.dk/
		EUROSPHERE Diversity and the European Public Sphere: Towards a Citizens' Europe	February 2007– January 2012	University of Bergen (UiB)	http://www.eurosphere.uib.no/index.htm
		GLOCALMIG Migrants, Minorities, Belongings and Citizenship: Globalisation and Participation Dilemmas in EU and Small States	February 2003– January 2004	University of Bergen (UiB)	http://www.eurosphere.uib.no/glocalmig/docs/Glocalmig_Final_Report_Published_by_the_ECF
		INCLUD-ED Strategies for inclusion and social cohesion in Europe From education	November 2006– November 2011	Center of Special Research in Theories and Practices that Overcome Inequalities (CREA), University of Barcelona	http://www.ub.edu/includ-ed/about.htm
		MAFE Migrations entre l'Afrique et l'Europe	–	Institut National d'Etudes Démographiques (INED)	http://www.mafeproject.com/
		PROMINSTAT Promoting quantitative comparative research in the field of migration and integration in Europe	March 2007– February 2010	International Centre for Migration Policy Development (ICMPD)	www.prominstat.eu
		THESIM Towards Harmonised European Statistics on International Migration	April 2004– August 2005	Groupe d'étude de démographie appliquée (GéDAP), Université catholique de Louvain (UCL)	http://www.uclouvain.be/en-7823.html

Table A3.1 cont'd

	DG for Justice, Freedom and Security	EUCITAC Access to Citizenship in Europe	January 2009–June 2010	European University Institute – Robert Schuman Centre	http://www.eucitac.eu/
		PIELAMI Building cooperation on preventing illegal employment of labour migrants	May 2006–December 2006	International Organisation for Migration (IOM)	http://iom.fi/content/view/159/8/
		Study on the assessment of the extent of different types of trafficking (sexual exploitation, labour exploitation, organs etc.) in EU countries	October 2008–November 2009	International Centre for Migration Policy Development (ICMPD)	http://research.icmpd.org/1327.html
	DG for Health and Consumer Protection (SANCO)	Health Care in NowHereland Improving Services for Undocumented Migrants in the EU	2008–2010	Ludwig Boltzmann Society	http://www.nowhereland.info/
		MIGHEALTHNET Information network for good practice in health care for migrants and minorities in Europe	April 2007–April 2009	National Kapodistrian, University of Athens	http://mighealth.net
	EuropeAid	CARIM Consortium for Applied Research on International Migration	February 2004–2007 (MEDA)/from 2007 to present (AENEA)	European University Institute	http://www.carim.org/
Fundamental Rights Agency	Migrants, minorities and employment A comparative study regarding discrimination on grounds of race and ethnicity in the area of employment in the EU	June 2008–June 2009	International Centre for Migration Policy Development (ICMPD)	http://fra.europa.eu/fraWebsite/research/research_projects/proj_migrantsminoritiesandemployment_en.htm	

Table A3.1 cont'd

European Parliament DG for Internal Policies	DG for External Policies of the Union, Directorate B Policy Department	<i>Analysis of the external dimension of the European Union's asylum and immigration policies' – Summary and recommendations for the European Parliament (Study)</i>	June 2006	Author: Claire Rodier	http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=17101
		<i>The policy of the EU in the field of border control and the fight against organised crime: How does it impact on the promotion of human rights and fundamental freedoms in third countries? (Briefing paper)</i>	October 2006	Author: Prof. Elspeth Guild	http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=17140
		<i>Readmission agreements and respect for human rights in third countries. Review and prospects for the European Parliament (Briefing paper)</i>	October 2007	Author: Claudia Charles	http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=18200
	Policy Department C Citizens Rights and Constitutional Affairs	<i>Centres for third-country nationals (Briefing paper)</i>	July 2006	Author: Mathieu Bietlot (GERME – Université Libre de Bruxelles)	http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=27895
		<i>Respect of international obligations and of the provisions of the European Charter of Fundamental Rights in the definition and implementation of the EU return policy (Briefing paper)</i>	July 2006	Author: Prof. dr Thomas Spijkerboer	http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=12724
		<i>Trends on regularisation of third country nationals in irregular situation of stay across the European Union (Briefing paper)</i>	January 2008	Author: Jochen Blaschke	http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=19755

Source: Authors' compilation.