



European Network Against Racism
Réseau européen contre le racisme
Europäisches Netz gegen Rassismus

ENAR POLICY SEMINAR FRAMING A POSITIVE APPROACH TO MIGRATION

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INTRODUCTION

This briefing paper provides background information on EU migration policy as support for participants at the ENAR Policy Seminar 'Framing a positive approach to Migration'.

Coming at a time when the European Council has called for a 'renewed commitment' to a 'comprehensive European migration policy'¹ and the basis for a new programme for EU policy in the area of home affairs after 2010 is developing, the Policy Seminar will enable anti-racist civil society to proactively define its vision of the EU's approach to migration policy. The Seminar will form the basis of a strategy that frames a positive approach to migration that does not undermine ENARs vision of a Europe without racism. The Policy Seminar will highlight the practical realities of EU migration policy, in order to influence the forthcoming work of the EU in bringing a renewed political commitment on a common immigration policy.

Increasingly, discourse around racism centres on migrants. Many ethnic and religious minority groups have been affected by public perception and the negative debate on migration. The negative portrayal of migration by policy-makers and by the mass media through stereotypical language and negative images has led to a worrying increase in racism and xenophobia towards third country nationals. A number of policies and actions taken by governments across Europe negatively impact on the lives of migrants in Member States and suggest an acceptance of migrants as second-class citizens.² Framing a positive discourse is therefore necessary to combat prejudice towards third country nationals, and migration policy must be developed to enhance rather than reduce the opportunities for integration.

ENARs mandate on migration is to promote the rights of third country nationals and to ensure that migration, and related policies and practices, do not undermine ENARs vision. The approach to integration and migration policies needs to be firmly grounded in a human rights-based approach ensuring anti-racism and anti-discrimination through a common set of rights for all.

This background paper is divided into four sections. Section I highlights the international standards of Human Rights in migration; section II provides an overview of EU migration policy by looking at the developments of EU competence in this area under the Tampere and Hague programmes. Section II examines where EU policy is heading in the future by looking at the recent initiatives led by the French Presidency. Section III outlines the key themes that

¹ European Council Conclusions Dec 2007:

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/97669.pdf, accessed 23 September 2008

² Catherine Lynch, Racism in Europe, ENAR Shadow Report 2007, p 16. (Available as of November 2008 on: www.enar-eu.org)

underlie the debate on migration policies; and finally, section IV identifies the essential key actors in framing the debate on migration.

1. INTERNATIONAL STANDARDS OF HUMAN RIGHTS IN MIGRATION

It is a fundamental principle of Human Rights that they apply to all persons. The rights of migrants are therefore guaranteed in both general human rights standards and standards specifically elaborated to recognize the specificities and vulnerabilities of migrants.

1.1 The United Nations (UN)³

The rights and freedoms stipulated in the **Universal Declaration of Human Rights** (UDHR) apply equally to migrants as to any other individual, as do the provisions of the human rights instruments which have subsequently been developed and adopted by the UN.⁴

International Human Rights law provides two general human rights treaties protecting all human beings regardless of nationality and their legal status, commonly known (together with the UDHR) as the 'International Bill of Rights'. The **International Covenant on Civil and Political Rights** stipulates that states should ensure the civil and political rights of all individuals within its territory and subject to its jurisdiction (article 2) without any discrimination on any ground, including race, colour, religion or national or social origin. Article 27 stipulates that ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion or to use their own language. Moreover, it guarantees freedom of movement to every person. Secondly, the **International Covenant on Economic, Social and Cultural Rights** also require rights to be recognised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

The **UN Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families** emphasises the link between migration and human rights by underlining that "Migrants are not only workers, they are also human beings".⁵ The Convention guarantees equality of treatment and the same working conditions for both migrants and nationals and underlines that migrants should have the right to remain connected to their country of origin. The UN Convention relies on the notion that all migrants should have access to a minimum degree of protection. Even though it is recognized that legal migrants

³ This is a non-exhaustive list and many other UN instruments are relevant, for example the two Protocols to the UN Organised Crime Convention i.e. the Protocol on smuggling of migrants and the Protocol on trafficking in human beings

⁴ Article 2 states that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.", UDHR

⁵ Unesco, Information Kit on the United Nations Convention on Migrants Rights, <http://www.unesco.org/most/migration/convention/>, accessed 9 September 2008

do have the legitimacy to claim more rights than undocumented or 'illegal' migrants, the Convention stresses that undocumented migrants must see their fundamental human rights respected.

The **UN Committee on the Elimination of Racial Discrimination (CERD)** establishes the rights of non-citizens. A non-citizen is defined as "any individual who is not a national of a State in which he or she is present".⁶ The Committee calls for the protection of non-citizens' rights including: racial discrimination and citizenship status, anti-terrorism measures, access to citizenship, statelessness, racially motivated violence, police misconduct, investigation of complaints, burden of proof and expulsion⁷; thereby providing effective protection to migrants.

The principle of non discrimination is also clearly recalled in the **UN Convention of the Rights of the Child** as it provides protection to all children irrespective of nationality, racial or ethnic origin. Article 22 ensures specific protection and help for refugee children.⁸

The rights granted in the **UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** are aimed at fighting and preventing all forms of discrimination suffered by women and covers the range of women's socio-economic, civil and political rights, in both the public and private spheres. CEDAW can be invoked effectively to address the concerns of women migrants, for example Article 6 invites all state parties "to take all appropriate measures, including legislation, to suppress all forms of trafficking."⁹

Finally, Section V of the **United Nations 'Road map towards the implementation of the United Nations Millennium Declaration'** reaffirms that fundamental human rights are the foundation of human dignity and must be protected.¹⁰ Despite the fact that migration is not actually in the original framework of the Millennium Development Goals ("MDGs"), it has been recognised by many countries and international development organizations (such as the World Bank or the United Nations Development Programme) that integrating migration into development policies is important. All state parties to the Millennium Declaration have international obligations to mainstream human rights by implementing relevant human rights provisions in order to reinforce and complement the Millennium Development Goals.¹¹

⁶ Article 1 of the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live (1985).

⁷ General Recommendation 30, Discrimination against non-citizens, Committee on the Elimination of Racial Discrimination, 64th Session, 23 February-12 March 2004

⁸ UN Convention on the Rights of the Child, Article 22: "Special protection is to be granted to children who are refugees or seeking refugee status, and the State has an obligation to co-operate with competent organisations providing such protection and assistance".

⁹ UN Convention on the Elimination of All Forms of Discrimination against Women:

<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article6> , accessed 9 September 2008

¹⁰ The United Nations 'Road map towards the implementation of the United Nations Millennium Declaration', Section V

¹¹ <http://www.unhcr.ch/development/mdg.html>, accessed 12 September 2008

1.2 The Council of Europe

The Council of Europe provides instruments for the protection of general human rights as well as more specific agreements relating to migrants. **The European Convention on Human Rights (ECHR)** follows the International Human Rights standards and thus applies to all persons within the jurisdiction of state parties (Article 1), including migrant workers, regardless of their legal status.¹² Furthermore it provides that these rights must be secured without discrimination, with an open list of grounds.

While there are no specific provisions on migrants in the ECHR, migrants have obtained remedies from the European Court of Human Rights under its case law in protection of a range of rights, including non-refoulement (Article 3) and right to respect for family life and the non-discrimination principle (Articles 8 and 14 respectively).¹³ Moreover some member states of the EU have ratified Protocol 12 to the European Convention on Human Rights which prohibits discrimination on any ground for any right provided for by the law.¹⁴

1.3 The International Labour Organisation (ILO)

The ILO has adopted international instruments providing for more comprehensive solutions to the problems facing migrant workers which include the Migration for Employment Convention and the Migrant Workers Convention, as well as their accompanying Recommendations.

The **ILO Convention on Migration for Employment** applies to the whole labour migration continuum from entry to return, covers the conditions governing the orderly recruitment of migrant workers, and articulates principles such as equal treatment with national workers regarding working conditions.¹⁵ Additionally, the **Migrant Workers Convention**¹⁶ is devoted to irregular migration and interstate collaborative measures. It imposes an obligation on states "to respect the basic human rights of all migrant workers," confirming its applicability to irregular migrant workers.

The ILO has also provided a **Multilateral Framework on Labour Migration** which establishes non-binding principles and guidelines for a rights-based approach to labour migration, underlining the importance of a coherent, fair and effective approach.¹⁷

¹² OSCE, IOM, ILO Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination : http://www.osce.org/publications/eea/2006/05/19187_620_en.pdf, accessed 10 September 2008

¹³ Ibid.

¹⁴ For more information on the ECHR and the rights of non-citizens see : The Council of Europe's report on non-citizens and minority rights, adopted by the Venice Commission, 15-16 December 2006, [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)001-e.pdf](http://www.venice.coe.int/docs/2007/CDL-AD(2007)001-e.pdf), accessed 24 September 2008

¹⁵ International Labour Organisation, International Migration Programme : <http://www.ilo.org/public/english/protection/migrant/>, accessed 9 September 2008

¹⁶ See ILO Migrant Workers Convention: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143>, accessed 3 October 2008

¹⁷ See ILO Multilateral Framework on Labour Migration (2006), Non-binding principles and guidelines for a rights-based approach to labour migration: http://www.ilo.org/public/english/protection/migrant/download/multilat_fwk_en.pdf, accessed 23 September 2008

Currently fifty States have ratified one or both of the ILO Conventions, including only 11 Member States of the European Union.¹⁸

1.4 The European Union

Within the EU framework, the **EU Charter of Fundamental Rights** sets out a whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU. The Charter is divided into 6 chapters: dignity, freedoms, equality, solidarity, citizens' rights, and justice. It affirms the universal nature of rights in so far as those are for the most part accorded to everyone regardless of nationality or place of residence.¹⁹

Although the Charter is not legally binding, and will only be so once the Lisbon Treaty is ratified, the European Court of Justice confirmed that the Charter would be used together with the European Convention on Human Rights and other international Human Rights Treaties in testing the legality of European legislation against the general principles of EU law.

It is worth underlining that the Charter's new legal status under the Lisbon Treaty is an important step forward for ethnic and religious minorities across Europe in the protection of the fundamental rights to non-discrimination, religious freedoms, and social rights. The signing of the Lisbon Treaty brought into focus the fundamental rights values of the EU. All EU Member States have made a clear statement of the values on which the Union is founded.

2. OVERVIEW OF EU MIGRATION POLICY

2.1 EU competence in Migration Policy

With the entry into force of the Amsterdam Treaty in May 1999, Member States committed to working together in the field of Justice and Home Affairs²⁰, in particular to develop a common immigration and asylum policy at the European level.²¹ The Schengen Agreements on the final elimination of border controls on people were integrated within the legal framework of the EU, bringing external border control into the EU legal and policy framework more coherently.

¹⁸ See: http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Feature_stories/lang-en/WCMS_075619/index.htm, accessed 23 September 2008

¹⁹ PICUM, Undocumented Migrants have Rights! An overview of the international Human Rights Framework, March 2007, p26

²⁰ Article 63 TEC, covers - asylum, refugees and temporary protection; - regular immigration (and relevant measures on integration of third country nationals); - rights of regular third country nationals including the right to reside in another Member State; - irregular immigration (including return measures)

²¹ The common EU immigration policy does not apply to Denmark which has decided to opt out of Title IV of the Treaty establishing the European Community. The UK and Ireland decide on their involvement on a case-by-case basis (possibility of an 'opt-in').

In October 1999, at the European Summit in Tampere, Finland, EU leaders set out the elements for a common EU immigration policy. The approach agreed in Tampere was confirmed in 2004 with the adoption of the Hague programme which sets the goals and objectives to be implemented for strengthening the area of freedom, security and justice during the period 2005-2010.

2.1.1. EU Competence under the EC Treaty

Article 63 TEC is the legal basis for EU competence on immigration and asylum policy. Article 63 provides that certain measures are to be adopted by the European Council within 5 years of the adoption of the Amsterdam Treaty, including measures on asylum, refugees and displaced persons and “illegal immigration and illegal residence, including repatriation of illegal residents” (Article 63 (3) (b)). Article 63 also provides for measures related to immigration policy that are exempt from the requirement to act within 5 years.

The EU has the competence to adopt measures on immigration policy within the following areas:

- conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion,
- illegal immigration and illegal residence, including repatriation of illegal residents;
- measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.²²

Article 63 also provides that: “Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements”.

2.1.2. Areas reserved to Member States competence

Areas excluded from the measures listed under Article 63 TEC fall under the competence of Member States, such as the general conditioning for residence permits, and more significantly, labour migration (including employment, self-employment and seasonal work). Member States retain firm control over who enters their countries as no quotas are established by the EU. It is for each Member State to decide on the conditions of admission of legal migrants to its territory and, where necessary, to set their number. Any quotas involved might be implemented in partnership with the countries of origin.

²² Article 63, Treaty establishing the European Community

Finally, integration relation conditions, in particular examinations on language and civic knowledge can present an important obstacle for potential immigrants.²³

2.1.3. Limitations to EU competence – The Charter Status

The EU does not legislate for human rights as such as the EU Charter of Fundamental Rights is not legally binding. However, the European Court of Justice confirmed that the Charter would be used together with the European Convention on Human Rights and other international Human Rights Treaties in testing the legality of European legislation against the general principles of EU law.

2.1.4. Lisbon Treaty

The provisions within the Lisbon Treaty will reduce national veto power on immigration and asylum policies, and extend qualified majority voting to these areas. However, the Treaty also contains specific provisions that limit the competence of the EU in relation to the “volumes of admission of third country nationals”.²⁴

The Treaty allows for more flexibility and opens up for more effective or democratic and transparent decision-making through the ‘passerelle clause’ which enables a shift in voting procedure. The passerelle clause, which was first introduced in the Amsterdam Treaty, allows the Council to unanimously decide to shift to qualified majority voting if need be.

Furthermore, the Fundamental Rights Charter’s new legal status under the Lisbon Treaty is an important step forward for ethnic and religious minorities across Europe in the protection of the fundamental rights to non-discrimination, religious freedoms, and social rights. It affirms the universal nature of rights accorded to everyone regardless of nationality or place of residence.

2.2 Legal Migration

In June 2003, the Justice and Home Affairs Council adopted one of the integration measures foreseen in the Hague Programme, a Directive to provide for the **EC status of long-term residence** to third-country nationals who have legally resided for five years in the territory of a Member State.²⁵ This directive aims at creating an EU wide standardized status for third country nationals who are long-term residents and recognises a set of rights on an equal basis with nationals of the member states. Yet, significant differences in the national legislation of Member states can still be observed. A number continue to use

²³IOM, Comparative study of the Laws in the 27 Member States for Legal Immigration, February 2008,

²⁴ Article 79 (5) of the Lisbon Treaty

²⁵ Council Directive 2003/109/EC

their national 'permanent' residence permit besides the EC long-term residence permit whereas some have not implemented in practice the Directive at all.

In September of the same year, the EU Council of Ministers approved a second integration measure on the right of third country nationals legally established in a Member State to **family reunification**.²⁶ This directive aimed at establishing common minimum standards in this area, but has been criticised for its restrictive approach. The directive was challenged unsuccessfully by the European Parliament, although the ECJ judgment emphasized the importance of using Fundamental Human Rights principles, including those flowing from international law, in interpreting its provisions and as providing limits to the exceptions that were allowed.²⁷ Member States still maintain significant discretion with regard to certain important aspects such as the eligibility of family members that are not part of the nuclear family, or age restrictions for spouses and children.²⁸ Several Member states are restrictive in the admission of these family members and only a few admit unmarried partners under family reunification schemes. Furthermore Article 7(2) of the directive allows Member States to require that third country nationals comply with integration measures. The trend seems to be that Member States will impose integration conditions (such as language requirements) rather than actual integration measures.²⁹

However, the ECJ has recently secured the right to family reunification by ruling against Ireland in a case where it refused residence permits to four third country nationals married to EU citizens, arguing that free movement and residence rights enjoyed by EU citizens must be granted to their spouses and families, irrespective of their nationality.³⁰

Furthermore, the Council adopted in October 2005 the **Students Directive**³¹ and the **Researchers Directive**³². The former regulates the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service; the latter facilitates the admission of researchers into the EU. Both directives had to be implemented by all Member States by the 12 January 2007 and the 12 October 2007 respectively. However there are considerable issues with regard to transposition in Member States.³³

In December 2005, the European Commission adopted its Policy Plan on Legal Migration, listing the actions and legislative initiatives considered necessary for the consistent development of EU legal migration policy. It outlines four specific directives on the **conditions of entry and residence of highly skilled workers**,

²⁶ Council Directive 2003/86/EC

²⁷ Case C-540/03, Parliament v Council, 27/06/2006

²⁸ IOM, Comparative study of the Laws in the 27 Member States for Legal Immigration, February 2008, p32

²⁹ Ibid.

³⁰ Case C-127/08, Metock and Others v Minister for Justice, Equality and Law Reform, 25/07/2008

³¹ Council Directive 2004/114/EC

³² Council Directive 2005/71/EC

³³ Europa Press Release, '15 Member States have not implemented the 'Researchers' visa' Directive, 15 October 2007: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1499&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed 23 September 2008

on **seasonal workers**, on **intra-corporate transferees** and on **remunerated trainees**.³⁴ It also outlines a proposal for a general framework directive on the rights of all third-country nationals legally employed in the European Union.

In October 2007, the European Commission put forward a proposal for an **EU Blue Card Directive** (highly skilled workers) and for a framework directive on basic socio-economic rights for all migrant workers. The focus is to improve the EU's ability to attract highly qualified workers from non-EU Member States; to facilitate admission by harmonizing entry and residence conditions throughout the European Union and to simplify, and improve the legal status of those already in the EU. The Blue Card proposal does not create a right of admission; therefore Member states will maintain control over admission to their labour markets. Concerns have been raised that the EU 'Blue Card' must not lower standards among workers already in Europe or stop investment in their training.

The Framework Directive on basic socio-economic rights for all migrants intends to secure the legal status of already admitted third-country workers and to introduce procedural simplifications for the applicants. It aims to establish a single application procedure for third country nationals seeking to enter the territory of a Member State for the purpose of residence and employment and a common set of rights for third country workers residing legally, such as working conditions, including pay and dismissal, association, access to vocational training and to the main social security benefits, etc. Once admitted, the migrant will receive a "single permit", which will entitle him/her to stay and work for the period granted: in practical terms, information on access to the labour market will be on the residence permit. With regard to the single procedure, a number of procedural safeguards are established, such as the need to give reasons for a decision rejecting the application for a single permit; in any event – and where this matter falls within the remit of the Member States – the conditions and criteria on the basis of which an application for a single permit can be rejected have to be laid down in national law.

CRITICAL ANALYSIS OF THE FRAMEWORK DIRECTIVE

Advantages:

- The goal is clearly stated to be a common set of rights.
- Important recognition of the 'rights gap' and this recognition is backed up by the analysis of the Impact Assessment

Disadvantages:

- It excludes seasonal workers from its scope and gives the possibility to

³⁴ COM(2005) 669 final

member states to limit the right to equal treatment, including with regard to working conditions and freedom of association.³⁵

- It does not aim to provide the same rights to Third Country Nationals as EU citizens, but rather that equal treatment is granted in relation to a limited set of rights.³⁶
- The link with economic rather than human rights goals is also explicit.³⁷

2.3 Irregular Migration

The regulation of short-term visas falls within the EU competency in order to prevent irregular immigration at EU level. This common policy finds its roots in the intergovernmental framework of the **Schengen agreement**. Since the entry into force of the Schengen Convention³⁸, visa policy has progressively been removed from the member states' competence. However, long-term visas remain the exclusive competence of the Member States.³⁹

In February 2002, the Council of Ministers adopted a comprehensive plan to combat 'illegal immigration' and trafficking of human beings in the European Union. The plan identifies a number of areas where action is deemed necessary: visa policy, the exchange and analysis of information, readmission and repatriation policies, pre-frontier measures, measures relating to border management.

In November 2002, the Council adopted a Return Action Programme which suggested developing a number of short- medium- and long-term measures, including common EU-wide minimum standards or guidelines, in the field of return of illegal residents.

In 2004, the Council adopted a directive on **residence permits for victims of trafficking** (that Member States can extend to persons that were smuggled into the EU). The directive states that Member States shall grant a reflection period to victims, allowing them to recover and take an informed decision about their co-operation with law enforcement in future criminal proceedings against the perpetrators of human trafficking. During this period, no expulsion order can be enforced against them. After that, they are granted a residence permit of at least six months on condition that they co-operate with law enforcement authorities. During the reflection period and the term of validity of the residence permit they receive assistance and support.

³⁵ See for example ETUC/CP/SP/MC/em – 19/12/2007

³⁶ The principle of equal treatment excludes seasonal workers admitted for a period not exceeding six months in any twelve-month period. Thus it can be seen that certain vulnerable groups are excluded from the scope of the directive.

³⁷ The purpose of granting rights is "to recognize that such third-country nationals legally working in a Member States contribute to the European economy through their work and tax payments and to serve as a safeguard to reduce unfair competition between own nationals and third-country nationals resulting from possible exploitation of the latter." (Recital 9)

³⁸ Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML), accessed 25 September 2008

³⁹ IOM, Comparative study of the Laws in the 27 Member States for Legal Immigration, February 2008, p32

In order to fully implement the Return Action Programme agreed in 2002 the Commission adopted in September 2005 a proposal for a directive on common standards and procedures in Member States for returning illegally staying third-country nationals ('**Return Directive**').⁴⁰ At the same time a number of readmission agreements with third countries have also been negotiated and signed by the Commission.⁴¹ The adoption of the 'Return Directive' by the Council in August 2008, was vehemently criticised by human rights NGOs and Latin American countries. Amnesty International⁴² stated that the directive did not guarantee the return of irregular migrants in safety and dignity, and that it risked promoting prolonged detention practices in EU Member States and impacting negatively upon access to EU territory.⁴³

In July 2006, the Commission adopted a Communication on policy priorities against illegal immigration of third-country nationals, outlining the following as key priorities: cooperation with third countries, integrated management of external borders; the fight against human trafficking; illegal employment; return policy and carrier's liability.⁴⁴

In May 2007, the Commission presented its proposal for an **Employers Sanctions Directive**, targeting those that hire clandestine workers as part of an EU-wide crackdown on illegal immigration. Employers would face fines and be forced to pay for the return of illegal migrants or make up for outstanding wages and social contributions. Criminal penalties, including prison sentences, may be envisaged for repeat offenders, notably in cases where clandestine workers are subjected to exploitative conditions or have been victims of human trafficking. ENAR, PICUM, Solidar, and a number of other organizations reminded EU Ministers of the crucial need to follow a human rights-based approach in taking forward the proposed Directive. The joint statement also underlines that:

"Identifying 'illegal' employment as a 'pull' factor for 'illegal' migration does not pay attention to the fact that the overwhelming majority of migrants would rather have regular employment contracts and contribute to the social security system than live outside the legal system, under a constant threat of deportation. On the other hand, undeclared work is a major factor

⁴⁰ COM(2005) 391 final

⁴¹ Following the Council decisions on the conclusion of agreements between the European Community and the western Balkans in 2007, any western Balkan country which is not a member of the European Union and has signed a readmission agreement shall readmit, at the request of a Member State, its nationals who do not comply with, or no longer comply with, the entry or residence conditions of that State

⁴² Amnesty International EU Office Reaction to Return Directive Vote:

<http://www.aieurope.be/static/html/pressrelease.asp?cfid=7&id=366&cat=4>, accessed 23 September 2008

⁴³ The directive establishes a common discipline for all Member States to either expel every illegally resident migrant or grant him/her a definite legal status. Once a decision is taken to deport an individual who cannot claim asylum or refugee status, a voluntary departure period (7-30 days) follows. If the deportee does not leave, national authorities will issue a removal order, which can include an entry ban of up to five years. If the judicial authority issuing the removal order has serious grounds to believe that the deportee might be hiding, the person can be put into custody. The 'Return Directive' (article 15) sets the maximum period of custody at six months, with a possible twelve-month extension.

⁴⁴ COM(2006) 402

*in enabling exploitation and ensuing poor working conditions, health risks and insufficient social protection coverage.*⁴⁵

While the issue of 'illegal' migration is increasingly visible on the European policy agenda, initiatives focus on border control and return policies, and very little exists in the view of the human rights and social protection of irregular and undocumented migrants. This approach has been criticised as adversely affecting the fight against racism and xenophobia, and as enhancing negative public perception.

2.4 Asylum

All measures and procedures relating to asylum policy are currently still under the competence of the Member States, and therefore vary across Europe. Most of the EU directives that have been adopted merely set minimum standards for the reception, examination of applications and recognition of persons as refugees or entitled to subsidiary protection.

In January 2003, the **Reception Conditions Directive** was adopted. This directive outlines minimum standards for the reception of asylum-seekers in Member States, including material reception conditions such as housing, education and healthcare, as well as access to information for asylum-seekers regarding their rights and obligations.

In February 2003, the Council of Ministers adopted the Dublin Regulation which aimed to establish rules determining the Member State responsible for assessing an application for asylum and prevent the occurrence of multiple asylum claims.⁴⁶ NGOs have expressed concern over the regulation's impact, arguing that it fails to guarantee a fair hearing, complicates application procedures and extends wait times causing unnecessary suffering and putting claimants at risk.

The **Qualification Directive** of April 2004 provides minimum standards for the status of third-country nationals or stateless persons to be defined as refugees or as persons who otherwise need international protection and sets out what rights are attached to each status.⁴⁷ The directive introduces a harmonised regime for the protection of those persons who fall outside the scope of the Refugee Convention, but who nevertheless still need international protection, such as victims of civil war.

In December 2005, the **Asylum Procedures Directive** was adopted outlining that all procedures at first instance are subject to the same minimum standards across the EU, with certain exceptions. The Directive also introduces the

⁴⁵ ENAR, PICUM, Solidar, Joint Statement: Employers Sanctions' Directive – will migrant workers pay the price of their exploitation? 15 April 2008

⁴⁶ Council Regulation (EC) No 343/2003

⁴⁷ Council Directive 2004/83/EC

obligation for all Member States to ensure an 'effective remedy before a court or tribunal'.

In February 2006, the Commission adopted a **Communication on Strengthened Practical Cooperation in the area of asylum**, which presents the Commission's plan on how Member States should further cooperate on asylum with a view to the establishment of a fully harmonised EU system. The Communication sets out a work programme for operational cooperation between Member States towards improvements in the efficiency of the asylum systems of Member States.

In June 2007, the Commission launched a wide debate **on the future architecture of the Common European Asylum System** with its Green Paper and consultation on the future of the CEAS, in which the Commission sought to outline the main issues at stake and invited constructive suggestions from all stakeholders to take these issues forward. The Green Paper provides that:

"Member states' asylum systems are seen as forming a single regional protection area. As the external dimension of EU asylum policy grows in importance, greater expectations arise as to the role of the EU."⁴⁸

Finally, in June 2008 the Commission adopted the **Communication on "A Common immigration policy for Europe: principles, actions and tools" and a Policy Plan "Asylum – an integrated approach to protection across the EU"**. The Commission Communication on a Common EU Migration policy underlined the need for a renewed political commitment, and stressed that developing a comprehensive European migration policy remained a fundamental priority in order to better manage legal migration and integration, as well as to fight illegal immigration and human trafficking.

2.5. Overview of key policy areas and issues of policy coherence

It has been increasingly recognized that immigration and social integration are very much interlinked. The EU's Social Policy agenda which was introduced under the Lisbon Strategy aims to modernise the European social model by investing in human resources and combating social exclusion.

The 'Renewed Social Agenda' which sets out the EU's main policy actions and initiatives for the 2010-2015 period, is tied to the "Social Package" which was adopted by the Commission on 2nd July 2008. The Social Package includes a set of 21 policy documents covering a wide range of fields from employment and social affairs, to education, non-discrimination, health, information society and economic affairs.' The package and the agenda both aim to show the

⁴⁸ See European Commission Green Paper on the future Common European Asylum System: http://ec.europa.eu/justice_home/news/intro/doc/com_2007_301_en.pdf , accessed 12 September 2008

Commission's commitment to put social concerns back at the top of EU's priorities.

The Commission had launched the so-called 'Social Reality Stocktaking' consultation in spring 2007 to develop a diagnosis on Europe's social situation. ENAR submitted a response to the 'Social Reality Stocktaking' consultation building on the Shadow Reports 2006 and calling on the EU to put non-discrimination, anti-racism and social inclusion at the heart of the new social agenda and to address the impediments that hinder ethnic minorities and migrants' well-being. ENAR stated that:

"... it is essential that integration is linked to both the anti-discrimination and social inclusion strategies at the European and national levels."

A Green Paper on Migration and Education was adopted by the Commission on 3 July 2008. This initiative opens the debate on how education policies may better address the challenges posed by immigration and internal EU mobility flows.⁴⁹ However the Green Paper fails to address racial discrimination.

The Commission and the French EU Presidency have both declared social policy a priority in 2008.

2.6. Where are we going on EU Migration Policy?

With the Hague Programme coming to an end, the European Union has called for a renewed commitment to a common immigration policy currently led by the French Presidency. There is now a talk of a 'Stockholm' programme (under the Swedish Presidency during the second half of 2009) as a follow up to the Hague Programme to set out the EU's renewed commitments in this area.

2.6.1. French Presidency: Immigration Pact

2.6.1.1. Overview of the contents of the Pact

The French Presidency of the European Union presented a 'European Pact on Immigration and Asylum' at an informal ministerial meeting held on 7-8 July 2008 in Cannes. The Pact sets out the principles for the European Union on the European approach to immigration and asylum.

Five major guidelines were developed:

- Strengthening Frontex and border control. Two permanent bodies of command are to be established, one for the southern and the other for the

⁴⁹ The presence of significant numbers of migrant children has substantial implications for European education systems, such as school segregation, equity in education; how to accommodate the increased diversity of mother tongues and cultural perspectives and build intercultural skills; and how to adapt teaching skills and build bridges with migrant families and communities.

eastern EU borders. The countries themselves will be responsible for the control of their part of the EU external borders, but the most exposed countries will also benefit from "solidarity on the European scale".

- To organise legal migration in harmony with the capacity of each member country to receive immigrants and in a spirit of solidarity. Here the centerpiece is the European 'Blue Card' initiative. The idea is to attract highly-skilled immigrants to solve the shortage of qualified workers as opposed to Canada and the USA.
- To organise the selective repatriation of illegal immigrants. The backbone here is the Returns Directive. The pact only adds better co-operation between member countries, which could use joint flights for the repatriation of illegal immigrants, improve the legal base of readmission agreements and increase the fight against human trafficking, etc.
- To build a Europe of asylum. The countries are expected to put in place by 2010 common guarantees on asylum and a uniform refugee status.
- To promote the development of the countries of immigration. In exchange of their commitment to finding common answers for the fight against illegal migration, the EU will offer third countries opportunities for legal migration for work or studies.

The Pact has been through a number of drafts and amendments so far, many of which have not been made publicly available. A new non-official version was circulated at the beginning of September.⁵⁰

2.6.1.2. Critical analysis of the Pact

Advantages:

Having a pact which sets out common principles for a common EU immigration and asylum policy can be an important step towards a coherent and effective common immigration policy. The French immigration pact has the potential to lead to a more coherent, fair and effective approach, that can contribute to building a Europe without racism.

After further refinement of the Pact, the latest non-official version⁵¹ introduces the following sentences:

"In 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."⁵²

⁵⁰ This non-official version of the Pact is available at www.statewatch.org, accessed 17 September 2008

⁵¹ See introduction of the Pact available at : www.statewatch.org, accessed 17 September 2008

⁵² See introduction of the Pact available at : www.statewatch.org, accessed 17 September 2008

“The European Council stressed the importance of adopting policy that enables fair treatment of migrants...”

Disadvantages:

Despite mentioning fundamental rights in its introduction and introducing a sentence on fair treatment of migrants, the Pact can be criticized as not going far enough in ensuring the fundamental right to equal treatment of third country nationals, and failing to identify the respect of human rights and the respect of the rule of law as one of the key principles of any future common policy on migration, borders, and asylum.⁵³

Linked to this is the concern that the primary focus on control of illegal immigration through a security and penal approach seriously undermines the fight against racism. There is a concern that reinforcing methods of control at borders will result in profiling individuals and trying to differentiate between ‘good’ and ‘bad’ population flows, thus undermining the protection of fundamental rights, equality and non-discrimination.

Moreover, the question is asked if the assumption of a selective system of migration is realistic, particularly with respect to the needs of the European Union’s labour market which requires both skilled and unskilled migrants? Will the current approach convince Europeans to be more welcoming as claimed, or, as evidence has demonstrated, will a negative political dialogue lead to a negative public reaction? And will the Pact contribute to integration in line with the common basic principles established and with a two way approach? These are some of the questions that are put forward as needing answers in order to ensure that the fundamental right to equal treatment of third country nationals is respected.⁵⁴

The Social Platform has also expressed some concerns towards the Pact, asking in its press release on the evaluation of the French Presidency:⁵⁵

“Has the French Presidency guaranteed the adoption of a European Pact for Immigration that conforms to European and International human rights conventions, that sends a positive message on the contribution of migrants to European society and that underlines the importance of the social dimension of immigration policies, e.g. gender and equality related issues, access to housing, healthcare and employment?”

On the eve of the Justice and Home Affairs Council that took place on 25th September 2008, the Social Platform called on all EU Justice and Home Affairs Ministers to push for a Pact of Migration which is “the cornerstone of a Europe

⁵³ Sergio Carrera & Elspeth Guild, The French Presidency’s European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights? CEPS Policy Brief Nr. 170, September 2008

⁵⁴ ENAR Press Release, The Immigration pact: Can the French Presidency’s Immigration Pact contribute to a Europe without racism? 10 July 2008

⁵⁵ <http://www.socialplatform.org/News.asp?news=18221>, accessed 12 September 2008

that is respectful of human rights, free of xenophobia and committed to international cooperation and solidarity".⁵⁶

2.6.2. The Communication on a Common EU Migration

2.6.2.1 Why a common immigration policy?

In June 2008, the Commission adopted the Communication on "A Common immigration policy for Europe: principles, actions and tools" and a Policy Plan "Asylum – an integrated approach to protection across the EU". The Commission Communication on a Common EU Migration policy underlined the need for a renewed political commitment, and stressed that developing a comprehensive European migration policy remained a fundamental priority in order to better manage legal migration and integration, as well as to fight illegal immigration and human trafficking. The rise of international migration has affected all EU Member States, and common action is needed to help meet the challenges and opportunities related to migration.

2.6.2.2 What is the approach?

The communication lists ten common principles that are grouped under three main strands and cover the whole spectrum of immigration and outline the Commission's view on how to develop a common immigration policy.

COMMUNICATION ON A COMMON EU MIGRATION POLICY 10 COMMON PRINCIPLES UNDER THREE MAIN STRANDS

- Prosperity and Immigration: 1 – Clear rules and a level playing field; 2 – Matching skills and needs; 3 – Integration is the key to successful immigration.
- Solidarity and Immigration: 4 – Transparency, trust and cooperation; 5 – Effective and coherent use of available means; 6 – Partnership with third-countries.
- Security and Immigration: 7 – A visa policy that serves the interests of Europe;
- 8 – Integrated border management; 9 – Step up fight against illegal immigration and Zero tolerance for trafficking in human beings; 10 – Sustainable and effective return policies⁵⁷.

⁵⁶ See Social Platform letter sent to Ministers of Employment and Social Affairs : http://cms.horus.be/files/99907/MediaArchive/Policies/Integration_of_migrants/2008-09-18%20EPSCO%20Council%20-%20Social%20NGOs%20proposals%20for%20the%20European%20pact%20on%20immigration%20and%20asylum.pdf, accessed 2 October 2008

⁵⁷ COM MEMO/08/402, 17.06.2008:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/948&format=HTML&aged=0&language=EN&guiLanguage=en>, accessed 13 September 2008

The common immigration policy will be delivered in partnership between the Member States and the EU institutions and will be followed up regularly through a new monitoring and evaluation mechanism, including an annual assessment and recommendations on the basis of a Commission's report on the immigration situation at European and national level. This could be seen as an attempt to build Open Methods of Coordination (OMC) on migration which would enable consultation and participation of civil society.⁵⁸

2.6.3. Proposal of a Common European Asylum System (CEAS)

The CEAS was first defined at the Tampere Summit, Finland in 1999, and was intended to be built in two phases. The first phase (1999-2004), was comprised of four main legal instruments. Two regulations were adopted: the Dublin Regulation and Eurodac Regulation in order to avoid situations where refugees were shuttled from one Member State to another, with none accepting responsibility, as well as to prevent multiple or applications.⁵⁹ According to the Hague Programme, the second phase instruments should be adopted by the end of 2010. The Commission launched a wide debate on the future architecture of the CEAS in June 2007, with its Green Paper outlining the main issues at stake and inviting suggestions from all stakeholders. The Green Paper establishes that:

"Member states' asylum systems are seen as forming a single regional protection area. As the external dimension of EU asylum policy grows in importance, greater expectations arise as to the role of the EU."

Following this consultation the Second phase of the CEAS was introduced in parallel to the Communication of a Common European immigration policy in June 2008 in a separate policy plan on asylum. The policy plan proposes to improve EU standards for protection, in order to achieve the ambitious objectives set out in the Hague Programme, by amending the existing legal instruments.⁶⁰ It also sets out a number of tools to foster solidarity vis-à-vis those Member States confronted with strong pressures on their asylum systems. Finally, it presents ideas for supporting third countries which host high numbers of refugees, by the establishment of an EU-wide resettlement scheme and the expansion of the existing Regional Protection Programmes.

⁵⁸ The OMC, created under the Luxembourg process, is as an instrument of the Lisbon Strategy and provides a framework for cooperation between Member States so that their national policies can be directed towards common objectives. It is a voluntary, intergovernmental method through which the Member States undergo peer evaluation, identify common objectives, establish measuring instruments, and exchange best practices.

⁵⁹ The Dublin Regulation adopted in 2003 replaced the 1990 Dublin Convention, to avoid 'asylum in orbit' and 'asylum shopping' and with the general principle of having an asylum application examined by a single Member State. Eurodac aimed at improving the effectiveness of the Dublin Convention by introducing an identification system through fingerprint data. The practice varies widely between member states, under the specifics of the present Dublin Regulation system, and has proved to be inadequate.

⁶⁰ At the same time, it acknowledges that legal convergence must be complemented by adequate practical cooperation mechanisms (exchange of information and best practices, common trainings, etc.) if convergence in asylum decisions, and therefore equality of protection across the EU, is to be reached. A European Support Office on Asylum is to be established in order to coordinate practical cooperation activities.

3. KEY THEMES IN THE DEBATES

3.1 *The Economic approach to migration policy*

3.1.1. Key arguments

The main argument behind economic migration is that migrants contribute to helping the EU achieve its economic objectives. At the recent Spring European Summit, heads of state and government underlined the importance of immigration and the impact it has on the EU economy. With the Lisbon Strategy as a key political driver in the EU, achieving the objective of ‘the most competitive and dynamic knowledge-driven economy by 2010’ is paramount. To achieve this objective the EU has recognised that immigrant labour is needed, and will be even more so in the future.

According to estimates, currently 18.5 million people with a migration background live in the EU and immigration accounts for 80% of the population change today.⁶¹ Demographic ageing, as well as labour and skills shortages have meant that the EU may need larger migration flows in the future. Growing labour market needs and needs for high skilled workers led to the Commission adopting a proposal for an EU Blue Card. This proposal highlights the fact that highly skilled workers are needed to make Europe a player on the emerging global labour market, to enhance its competitiveness and lure highly skilled workers to Europe and away from countries like the United States.

3.1.2 Critique

Utilitarian in nature, the economic approach views migrants merely as factors of economic activity and often leads to them being employed at lower standards of pay and conditions, and promotes temporary migration schemes where certain rights are traded-away in exchange for access to employment.

The lack of recognition and value placed on migrants’ contribution to other spheres such as Europe’s society and culture is a key feature of the debate. This is a feature of the debate for both ‘highly skilled’ migrants and those defined as ‘unskilled’. The utilitarian approach recognises the economic necessity of highly skilled migration, but lacks recognition of the broader contribution to European society. Those not defined as ‘highly skilled’ are excluded even from recognition of the economic value of migration, excluding recognition of their economic, social and cultural importance to European society. This approach which treats migrants as economic units and not as human beings is not consistent with European values of respect of human dignity, equality and fundamental rights.⁶²

⁶¹ Eurostat, ‘Statistics in focus: first demographic estimates for 2006 – 2007

⁶² ENARgy, EU migration policy: Is it fair? August 2008, Issue 25

The consequences of this approach have been summed up by the UNESCO report on Europe and the International Convention on the Rights of Migrant Workers:

“When such understandings of the role and function of rights are allowed to dominate, it is easy to see how the entitlements guaranteed by international human rights instruments come to be truncated, or, in the case of irregular migrants, almost entirely neglected. There is no guarantee that the logic of economics and that of human rights will lead to exactly the same protections and to exactly the same degree; indeed, where one is systematically subordinated to the other, such convergence seems unlikely.”⁶³

Furthermore, successful integration measures are a crucial element of any immigration strategy. A purely economic approach risks adversely affecting the success of integration and social inclusion policies aimed at migrants, including ‘legally resident’ third country nationals and ethnic and religious minorities who are EU citizens. A successful integration policy is crucial and needs to be supported by the establishment of a secure legal position of the migrant, as well as the further development of common frameworks to support integration to meet current and future integration challenges.⁶⁴

3.2 Securitisation of the Migration agenda

3.2.1. Key arguments

Following the 9/11 events and the London and Madrid bombings, counter-terrorism has been at the heart of the national and European security agendas. Consequently, the migration/security link has intensified, with increasingly restrictive and intrusive policies in this area. Migration has been increasingly perceived as a security threat causing criminality, social unrest and inter-ethnic conflict.

“Global terrorist attacks, increased awareness of people-smuggling and trafficking, organised crime, and an ever-present public perception that immigration is a ‘threat’ to European life’ have made effective control of external borders a priority in itself.”⁶⁵

Restriction of population flows and secure EU external frontiers have repeatedly been argued as necessary preconditions for ensuring security and maintaining open internal frontiers within the EU. According to the Schengen Convention, it is only through securing the external borders of - and movement into - the

⁶³ ‘The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives’, Euan MacDonald, Ryszard Cholewinski, UNESCO Migration Studies 1 (<http://unesdoc.unesco.org/images/0015/001525/152537E.pdf>)

⁶⁴ ENARgy, EU migration policy: Is it fair? August 2008, Issue 25

⁶⁵ Elizabeth Collett, EPC, Issue 14 - Towards a European Area of Freedom, Security and Justice? External border control - security before freedom?, 2005

Schengen area that freedom of movement within the Schengen area can be realized. The Schengen Borders Code on crossing external borders⁶⁶ modified legislation on border checks carried out on people, and intended to improve the legislative part of the integrated border management policy by setting out the rules on crossing external borders and on reintroducing checks at internal borders.

Frontex has therefore become the key agency in strengthening border security by ensuring the coordination of Member States' actions in the implementation of Community measures relating to the management of the external borders. Strengthening Frontex has increasingly become a priority for the EU in order to fight 'illegal' immigration and human trafficking at EU's external frontiers, and is one of the fundamental guidelines of the French Immigration Pact.

Securitisation of migration has meant that an entry-exit system via the European "Schengen Information System" was developed to facilitate better oversight of persons entering and exiting the Schengen space in order to maintain security and public order, as well as to combat 'illegal' immigration. In June 2005, the Commission published proposals to upgrade the system to SIS II to incorporate the new member states and include new functions. The new system will contain biometric data (Visa Information System) and be used to store and disseminate information on extradition, third-country nationals who are refused entry to the EU and individuals subject to a European arrest warrant or under surveillance for criminal activity. The testing phase is already taking place and the new system is designed to enable exchange of information between a range of European agencies, should a decision to do so be made in the future.

3.2.2 Critique

The link between terrorism and migration has resulted in increasingly restrictive and intrusive policies in this area. Biometrics in EU passports, visas and residence-permits may lead to infringement of privacy.

Moreover, it has been argued that insufficient attention has been given to the interaction between counter-terrorism strategies and the fight against racism. As a result of the fight against terrorism and the intrinsic link between terrorism and migration, certain communities have become increasingly vulnerable to racism and discrimination. Focusing on control of illegal immigration through a security and penal approach has been criticised as seriously undermining the fight against racism. Evidence from the ENAR Shadow Reports demonstrates that racial profiling is a growing phenomenon in the European Union in making law enforcement decisions to arrest, stop and search, and check identification documents. Racial profiling undermines the rights of individuals, contributes to

⁶⁶ See: [Regulation \(EC\) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders \(Schengen Borders Code\)](#)

the exclusion and stereotyping of particular communities and has proved an ineffective strategy.⁶⁷

Securitisation of the migration agenda may give rise to a lack of safeguards for the rights of migrants within countries, at borders and in home countries. Detention of migrants on the basis of security is sought to be justified, as well as difficulties in obtaining visas where a person is applying from an Islamic country.

Therefore, it has been argued that a coherent approach requires respect for fundamental rights of all, including third country nationals as a core principle.

3.3. A rights-based approach to migration

3.3.1 Key arguments

The rights-based approach is based on human rights standards and is directed at promoting and protecting human rights. Such an approach integrates the norms, standards and principles of human rights into policies and initiatives. It also values social dialogue as a key instrument in pursuing these objectives, placing importance on both consultation with civil society and the participation of stakeholders. Mainstreaming equality and non-discrimination across all EU policy areas, including immigration is therefore essential. ENAR states:

“Policy and decision makers must adopt a holistic and coherent approach to integration and migration and recognise that anti-discrimination and social inclusion are prerequisites for successful integration strategies.”

A rights-based approach to migration that includes anti-discrimination and social inclusion as successful integration strategies at its core is a key mechanism in achieving policy coherence between the migration and integration policy agendas. Applying a rights-based approach to EU migration and integration policy implies explicitly linking these policy areas and setting the achievement of human rights as an objective across the board. In other words, it is essential that EU migration policy move beyond considerations of demographics and economics alone, towards developing a dynamic perspective on migration that allows for mutual benefits of migrant and host communities and views migrants as individuals with rights that are to be valued and protected.

The EU has to comply with international standards, including respect for the fundamental rights of third country nationals (regardless of legal status), including equal access to employment, housing, education and health.

⁶⁷ ENAR, General Policy Paper No.4, Counter-terrorism and combating racism, November 2007, p7.

3.3.2 Critique

The European Commission tends to take the view that a purely rights based approach is unrealistic. The security and economic implications are such that a number of conflicting policy measures will unavoidably be adopted, thereby impeding on fundamental rights and a true rights-based approach.

3.4 The emerging approach of the European Commission

3.4.1 Key arguments

The European Commission favours a balanced approach to migration policy by recognising the role of economic immigration and enhanced security but also by recognizing that fundamental rights of all migrants should be respected. Both the economic approach and security approach are regularly discussed at Council level, whereas the Commission seems to attribute slightly higher importance to fundamental rights and repeatedly states that EU immigration policy should promote and ensure respect for fundamental rights of all migrants. It is argued that a balanced approach is pursued, with a restrictive measure being balanced by a more liberal measure. Thus a focus on returning irregular third country nationals is justified by proposals to open additional legal routes for labour migration.

3.4.2 Critique

The Commission has been criticized for not providing a coherent and effective strategy as many of the measures put forward appear to be conflicting, and directly impact on the protection of the fundamental rights of migrants, both individually and collectively. It is argued that the high priority given to restrictive measures under 'control of illegal immigration' does not reflect the claim of a balanced approach and that more liberal proposals face significant delays and a lack of political will for adoption. Thus the aim of 'balance' is not always achieved in practice. Additionally, the approach of balancing a restrictive measure with a more permissive one can be criticized as overlooking the rights of the individual and that further efforts are needed to promote rights within each proposal.

Despite the Race Equality Directive and statements supporting the promotion of fundamental rights for all, it can be argued that the main focus remains on measures to combat irregular migration through border control and return policies, and that very little exists in the view of the human rights and social protection of irregular and undocumented migrants. This approach has been criticized as adversely affecting the success of integration and social inclusion policies aimed at migrants, including 'legally resident' third country nationals and ethnic and religious minorities who are EU citizens.

Furthermore, it has been pointed out that the Commission does not take into account the fact that migration policies must address the wide-range of migrant

situations: long-term and short-term workers; students; asylum-seekers and refugees; spousal and family dependants; and undocumented migrants. While proposals are put forward on these areas, they are not given the same level of priority in discussions as those focusing on 'highly skilled' migrants. By prioritising highly skilled migration and denying access and rights to other categories of migrants, this approach may not only create disparities in the rights enjoyed by different migrant workers, leading to an unacceptable situation of discrimination, but may also jeopardize efforts in the fields of integration, social inclusion and anti-discrimination.

4. KEY ACTORS IN FRAMING THE DEBATE

4.1 The Media

The media can play a positive and negative role in the struggle against racism. The EUMC (now FRA) report on Racism and Cultural Diversity in the mass media analyses the way the mass media reports on ethnic issues by providing a comparative overview of media research in 15 Member States.⁶⁸ In the UK it has been reported that there is a broad range of coverage of issues relating to immigration and ethnic relations in broadcasting and print media, including the tabloid newspapers. Although most media coverage carries broadly anti-racist themes, some newspapers, such as the Daily Mail, take an antiimmigrant stance that sometimes becomes expressed in images that stigmatise migrants and refugees⁶⁹. In many other Member States, the mass media use hate language when covering issues related to immigrants and ethnic minorities. The EUMC report found that:

“A general problem with the representation of migrants in the media registered for various countries is that negative images...were not compensated by positive images. The latter was missing completely and any perspective on aspects of daily life and the individual was often absent (in Austria, Italy, Spain, Denmark).”⁷⁰

Extreme events or opinions are generally the preferred source of news. Mass media reporting is especially insensitive when it comes to ethnic, cultural and religious relations in society. The use of images and language by the media often maintains and strengthens racism, and is a powerful tool for manipulating public opinion. Therefore, the media does not always portray issues of immigration and ethnic relations in an impartial way. German television has been reported as portraying migrants either as problem cases or laughing stocks, and migration often appears as a threat or and rarely as a normality/opportunity. The issue of

⁶⁸ Racism And Cultural Diversity In The Mass Media: An Overview Of Research And Examples Of Good Practice In The EU Member States, 1995-2000, EUMC, February 2002, P.47

⁶⁹ The EUMC Report on the UK : http://fra.europa.eu/fra/material/pub/media_report/MR-CH4-15-United-Kingdom.pdf

⁷⁰ Racism And Cultural Diversity In The Mass Media: An Overview Of Research And Examples Of Good Practice In The EU Member States, 1995-2000, EUMC, February 2002, P.47

inadequate representation is being discussed by both government institutions and some NGOs.⁷¹

The negative portrayal of migration in the mass media can also be traced to the dominant political and policy agenda. The EUMC report found a worrying tendency of media to follow rather than question the dominant political discourse on migration, repeating, and legitimising, restrictive policy proposals and xenophobia.⁷²

CASE-STUDY: MIGRATION DEBATE IN ITALY

The situation in Italy with regard to the media is particularly worrying, but by no means an isolated case. The media in Italy has shaped the migration debate in a way that has had a tremendous impact on how public opinion perceives migrants and in particular the Roma. Segregation and discrimination is seen as being the minorities' fault. Mainstream newspapers use hate language when referring to Roma or Sinti and have depicted the presence of immigrants as a 'criminal invasion'.⁷³ Luciano Scagliotti, ENAR Board Member for Italy reports:

*"Representations given by mass media transformed the – false but somehow 'reasonable' – idea that one third of crimes are committed by foreigners into pure prejudice: regardless of who actually commits crimes, the insecurity of Italian citizens arises from the presence of immigrants and gypsies."*⁷⁴

The media has an essential role in democracy by disseminating information and holding key players to account. The mass media have an influence on people's attitudes and common knowledge, and it therefore has the responsibility to cover stories accurately, to enhance the democratic process, to respect the law and to uphold fundamental rights.

As reported in the Ireland Shadow Report 2007, the media is also a key mechanism for bringing attention to racist incidents and crime, and for promoting positive images of ethnic minority groups. The internet has been a very useful media tool in Ireland to under-resourced NGOs who can use it relatively inexpensively to disseminate information.⁷⁵

It can be argued that in order to avoid negative portrayal of migrants and ethnic minorities, hiring minorities within the media may be a solution in presenting an ethnically diverse picture of society. In 2006 French public television introduced the first black newsreader. On his first night, his bulletin included an item on a

⁷¹ Ulku Guney & Andreas Hieronymus, ENAR Germany Shadow Report, 2007, p.25

⁷² Ibid, P.37

⁷³ ENARgy, EU migration policy: is it fair? The role of the media in relation the migration debate in Italy, Issue 24

⁷⁴ Ibid.

⁷⁵ Catherine Lynch, ENAR Ireland Shadow Report, 2007, p.23.

black woman who had been refused a job as a hairdresser because of the colour of her skin. This would not normally have made the national TV news.⁷⁶

4.2 NGOs and civil society

It is of crucial importance for NGOs to monitor closely the debates and ensure that equality is upheld amidst the legislation proposed. Civil society organisations and social partners have a particularly important role to play in ensuring the coherence and effectiveness of the social processes of integrating immigrants, in defining and evaluating policies in the EU. Unfortunately, civil society is often not engaged in the political process and its capacity to engage needs to be enhanced. Enhancing the role of trade unions, NGOs and civil society at large is key.

As part of the process launched by the Commission to develop a Common Agenda for the Integration of Third-Country Nationals in the EU, it was decided to involve all stakeholders active in the area of integration by assembling them in a platform for civil society participations, known as the European Integration Forum. This process is being carried out in cooperation with the European Economic and Social Committee (EESC). For the Commission, the main functions of the forum will be consultation, exchange of expertise and drawing up recommendations to be published on the integration website.

4.3 Political players

4.3.1 The EU Presidency

The Presidency of the Council of the European Union has a key role in establishing EU priorities, thereby influencing the direction of EU policy during its term. The current French Presidency is particularly important as immigration policy and social policy are top priorities.

In its memorandum, ENAR has called for the French Presidency to:

“... ensure equal protection for the rights of all people in Europe, lay the foundations of Social Europe for all, adopt an approach to migration and asylum that helps building a Europe free from racism, ensure that respect and realisation of fundamental rights is the cornerstone of all justice, freedom and security legislation, policy and action; Promote a Europe committed to intercultural dialogue, diversity and equal treatment in education⁷⁷”.

⁷⁶ Reader Working Groups, Migration and Integration: Europe's big challenge, what role do the media play? November 2006, quoting John Lichfield in The Independent (27 July 2006)

⁷⁷ ENAR Memorandum to the French Presidency of the European Union, 15 July 2008

4.3.2 The European Commission

The European Commission has an essential role in framing the debate on migration as the sole initiator of proposals for new legislation. Most of its proposals developing a common EU migration policy have now become EU legislation. The main objective of the Commission as explored in the section above is to better manage migration flows by a coordinated approach which takes into account the economic and demographic situation of the EU. Furthermore the European Commission is increasingly involving stakeholders in the debate through public consultations and through its initiative of setting up a European Integration Forum as mentioned above, although criticisms remain of a lack of engagement with civil society on this area of EU policy.

4.3.3 The European Parliament

The European Parliament has a key role in launching debates as the main representative and democratic body of the European Union. It also has co-decision powers on measures to address irregular migration. Its reports on migration have recognised the need for migrant workers in an ageing Europe, their positive contribution to societies and the need for an active, two way integration strategy. The European Parliament has also become important in upholding human rights and democracy issues. As stated in the EU Annual Report on Human Rights 2007:

" It (the EP) contributes to the drafting, implementation and evaluation of policies in the field of human rights through its resolutions, reports, missions to third countries, human rights events, interparliamentary delegations and joint parliamentary committees with third countries, oral and written questions, special hearings on specific issues and its annual Sakharov Prize. Through public discussions in plenary, committees, subcommittees and working groups, it holds the Council and the Commission to account."⁷⁸

Many MEPs have made significant contributions to the debate on migration. MEP Sarah Ludford for instance contributed to the debate on the securitization of the migration agenda, by issuing on 19 December 2007 a proposal for a recommendation to the Council on the issue of racial profiling. The report underlines the fact that the criteria used for profiling is troubling as it includes ethnicity and religion, rather than individual behaviour. The reports recommends amongst other things that law enforcement must always be conducted with due respect for data protection, fundamental rights and the principle of non-discrimination; that current law enforcement and security practices which entail racial, ethnic and behavioural profiling and risk assessment should be subjected

⁷⁸ See EU Annual Human Rights Report 2007 : http://ec.europa.eu/external_relations/human_rights/doc/report07_en.pdf, accessed 16 September 2008

to research, analysis and political discussion, with the justification and benefits weighed against the harm from these practices.⁷⁹

4.3.3 The Economic and Social Committee (EESC)

The EESC plays an important role as institutional intermediary between the EU and organised civil society. It organised, with the Commission, a conference involving representatives of social partners and most representative NGOs of all Member States and European Networks in 2002. The EESC welcomed the Commission's initiative on setting up the European Integration Forum and elaborated a working document on the "Elements for the structure, organisation and functioning of a platform for greater involvement of civil society in the EU-level promotion of policies for the integration of third-country nationals".

Furthermore, the EESC has issued a number of opinions on migration. The Opinion of 30 June 2004 (SOC/173) on the International Convention on Migrants supports and promotes the convention in order to protect the human rights and dignity of people across the globe, who emigrate for economic or employment-related reasons by means of appropriate legislation and good national practice. The EESC underlines that the common basis for such international legislation on migratory policies should be the promotion of democracy and human rights.

⁷⁹ Proposal for a recommendation to the Council, by Sarah Ludford on behalf of the ALDE Group, on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control, 19.12. 2007

Selected resources on migration

- Carrera, S, & Guild, E, *The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights? CEPS Policy Brief Nr. 170, September 2008*
http://shop.ceps.eu/BookDetail.php?item_id=1706
- Collett, E, *EPC, Issue 14 - Towards a European Area of Freedom, Security and Justice? External border control - security before freedom?, 2005*
<http://www.epc.eu/en/ce.asp?TYP=CE&LV=177&see=y&t=42&PG=CE/EN/detail&l=2&AI=456>
- ENAR, *Memorandum to the French Presidency of the European Union, 15 July 2008*
<http://cms.horus.be/files/99935/MediaArchive/pdf/en/ENAR%20Memorandum%20to%20the%20French%20Presidency%20Final%282%29.pdf>
- ENAR, *ENARgy, EU migration policy: Is it fair? August 2008, Issue 25*
http://cms.horus.be/files/99935/MediaArchive/pdf/ENARgy_08_2008_version_EN_final.pdf
- ENAR, *General Policy Paper No.4, Counter-terrorism and combating racism, November 2007*
http://cms.horus.be/files/99935/MediaArchive/pdf/gpp_4_en.pdf
- EUMC, *Racism And Cultural Diversity In The Mass Media: An Overview Of Research And Examples Of Good Practice In The EU Member States, 1995-2000, February 2002*
http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=3fb3f9cfb3592
- European Council Conclusions December 2007
http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/97669.pdf
- Eurostat, *'Statistics in focus: first demographic estimates for 2006 – 2007'*
http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1073,46587259&_dad=portal&_schema=PORTAL&p_product_code=KS-SF-07-041
- Lynch, C, *Racism in Europe, ENAR Shadow Report 2007*

Available as of November 2008 on: www.enar-eu.org

- Ludford Sarah, *Proposal for a recommendation to the Council on behalf of the ALDE Group, on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control*, 19.12. 2007
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//NONSGML+MOTION+B6-2007-0483+0+DOC+WORD+V0//EN&language=EN>
- *Immigration Pact (Non-Official Version 17 September 2008)*
www.statewatch.org
- IOM, *Comparative study of the Laws in the 27 Member States for Legal Immigration*, February 2008
http://www.iom.int/jahia/webdav/shared/shared/mainsite/law/legal_immigration_en.pdf
- MacDonald, E, & Cholewinski, R, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives*, UNESCO Migration Studies
<http://unesdoc.unesco.org/images/0015/001525/152537E.pdf>
- OSCE, IOM, ILO *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* :
http://www.osce.org/publications/eea/2006/05/19187_620_en.pdf
- PICUM, *Undocumented Migrants have Rights! An overview of the international Human Rights Framework*, March 2007
<http://www.picum.org/HOMEPAGE/Undocumented%20Migrants%20Have%20Rights!.pdf>
- The Council of Europe's *Report on non-citizens and minority rights, adopted by the Venice Commission*, 15-16 December 2006
[http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)001-e.pdf](http://www.venice.coe.int/docs/2007/CDL-AD(2007)001-e.pdf)
- The Opinion of the European Economic and Social Committee on *'Migration and development: opportunities and challenges'* (2008/C 120/18)
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:120:0082:0088:EN:PDF>
- The Opinion of the European Economic and Social Committee on *EU level promotion of policies to integrate third country nationals*.
http://www.epim.info/docs/documents/Integration%20Forum%20-%20Explanatory%20Opinion%20EESC%201208-2008_ac_en.doc

Selected International Human Rights Documents

- The International Convention on the Elimination of All forms of Racial Discrimination
- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social and Cultural Rights
- The UN Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families
- The UN Convention of the Rights of the Child
- The UN Convention on the Elimination of All forms of Discrimination Against Women
- The United Nations 'Road map towards the implementation of the United Nations Millennium Declaration'
- The ILO Convention on Migration for Employment
- The Migrant Workers Convention
- The Multilateral Framework on Labour Migration
- The EU Charter of Fundamental Rights
- EU Annual Human Rights Report 2007
- The European Convention on Human Rights and Fundamental Freedoms