

**Protecting and Delivering Fundamental
Rights of Irregular Migrants at Local and
Regional Levels in the European Union**

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It does not represent the official views of the Committee of the Regions.**

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Catalogue number: QC-30-12-968-EN-N
ISBN: 978-92-895-0635-9
DOI: 10.2863/61309

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1. Introduction

A common policy on irregular immigration is emerging in the EU as part of the wider Area of Freedom, Security and Justice (AFSJ). The 2009 Stockholm Programme, the third multi-annual programme in the EU's AFSJ, has positioned "the fight against illegal immigration" and the "strengthening of external border controls" at the top of the EU's policy agenda until 2014.¹ While the Treaty of Lisbon has further reinforced the EU's role in these domains, it has also placed the safeguarding and protection of fundamental rights at the heart of the EU's action in all its policies by granting a legally binding status to the EU Charter of Fundamental Rights (hereinafter the EU Charter) and calling for the Union to accede to the European Convention on Human Rights (ECHR), thus opening up a new phase in European integration for an emerging European architecture on fundamental rights.

One of the challenges now is how best to make the EU Charter a living document for those whose lives are touched by EU law and policies, including undocumented immigrants, and enable them to fully enjoy the rights enshrined within it. The 'implementation gap' of fundamental rights has been said to constitute one of the remaining unfinished tasks for Europe in times where there are still "no grounds for complacency" when it comes to human rights protection.² The European Commission has expressed concerns about the lack of awareness and information amongst the public on ways to obtain redress for breaches and/or non-delivery of EU Charter rights.³ The lack of awareness and inaccessibility are areas of particular concern for those individuals presenting a higher degree of vulnerability and insecurity in the Union. Non-EU nationals who are irregularly entering, resident or working in the Union – undocumented migrants – are amongst the most vulnerable groups as their insecure legal status favours their exposure to human rights violations and inhuman treatment.⁴ This is even more so in relation to specific categories of people such as women and children.

Their vulnerability is particularly sensitive in the current period of economic unrest and recession across the Union where solidarity, welfare and the well-being of populations are increasingly in conflict. Their insecurity is further exacerbated in a phase where 'anti-immigration', nationalistic and extreme-right discourses and policies advocated by certain European leaders and representatives at various Member State levels are increasing in pace and acceptability.

The EU's irregular immigration policy exerts a profound and multifaceted effect on a number of fundamental rights of undocumented migrants. The primary

policy focus until now, however, has been far from focusing on ‘rights protection’. In fact, ‘the irregular migrant’ as a rights holder remains an invisible category in mainstream EU-level official discourses and the personal scope of AFSJ policy agendas, which during the last few decades have been primarily concerned with repressive, preventative, criminal- and surveillance-oriented measures, funding and initiatives. Undocumented migrants have been treated *as if* they were not legitimate beneficiaries of the fundamental rights that the AFSJ bestows. The work of academics, civil society organisations and key international and regional human rights actors has been rich however in showing that irregular migrants do have rights,⁵ not only as enshrined in relevant European and international human rights instruments but also now in the EU Charter. Their lack of legal status, or the irregularity pertaining to certain administrative aspects of that status, does not detract from their entitlement to protection, basic services and effective remedies when these very rights are not delivered by the relevant public authorities.

The EU appears to have been operating under the (false) premise that irregular migrants hold no rights and henceforth should remain excluded from its AFSJ. This is illustrated by the discursive framing of rights in the Stockholm Programme which discusses rights only when applied to EU citizens and (to a lesser extent) those qualified as “legally residing third country nationals.”⁶ Further, there is currently no EU legislative measure which aims at facilitating access to rights by undocumented migrants. The apparent lack of ‘legal competence’ granted by Article 79.2 of the Treaty on the Functioning of the European Union (TFEU) to legislate from a rights-based viewpoint beyond those individuals labelled as ‘legally residing third country nationals’ has reinforced this ambivalent position.⁷ The approach of the European Commission and other EU agencies such as Frontex (the EU borders agency) and Europol (European Police Office) has served to reinforce the perception of irregular immigration as a threat to Europe’s security and as a phenomenon to ‘fight against’, lending force to a policy stance which prioritises migration control and security issues over a fundamental rights agenda. This in turn has legitimised the proliferation of EU policies and laws, financial frameworks (in the context of the current Framework Programme on Solidarity and Management of Migration Flows 2007-2013) and law enforcement practices focused on strengthening external border controls, surveillance technologies and the logics of detention and expulsion (return and readmission) and criminalisation (of solidarity and irregular employment).

Such a security-oriented approach, however, makes the effective delivery of fundamental rights to undocumented migrants a profound challenge on the ground. There is a large body of evidence emerging from social sciences research and civil society organisations proving the ineffectiveness of these

public policy responses as well as the obstacles they create for the access by individuals (irrespective of the degree or nature of irregularity) to fundamental rights such as health, fair working conditions, education and housing.⁸ These policies focus on limiting, and sometimes even criminalising, the few informal solidarity and inclusion channels which are in fact the ones allowing these people to have access to any dignity and certain basic fundamental rights.

The legally binding nature of the EU Charter, while not creating new Union competences and respecting the principle of subsidiarity⁹, creates new responsibilities for the authorities at Member State level when implementing EU law and policies. The ‘principle of subsidiarity’ has also been given special salience by the Treaty of Lisbon. Yet, little attention has been paid so far at EU level to the role of local and regional authorities (LRAs) in devising, implementing and evaluating/monitoring these policies from a fundamental rights perspective.

LRAs are already involved however in the delivery of fundamental rights through their services provision competences in areas such as health, housing, employment and education. LRAs, and urban-level bureaucracies, are the first-line actors in the practical delivery and access by any individual to the EU Charter. As the CoR has underlined “*it is at the local level that many of these fundamental rights [as envisaged by the EU Charter] are provided for and guaranteed, for instance in relation to healthcare (Article 35 of the Charter), education (Article 14), social security and social assistance (Article 34), etc*”.¹⁰ This role has also been acknowledged by the Council of Europe’s Congress of Local and Regional Authorities.¹¹ The weakness characterizing undocumented immigrants from a rights viewpoint becomes more challenging at local and regional levels. LRAs are the ones facing and addressing the everyday affairs, basic needs and inclusion/exclusion processes stemming from the presence of undocumented migrants and their families. The urban level is the one where the actual test of the extent to which fundamental rights are being effectively delivered, and the compatibility of irregular immigration policies with the EU Charter, takes place. They experience, in the first instance, the exclusionary effects of the EU security-oriented approach over a local context where poverty, discrimination and social exclusion are displayed most visibly.

The relationship between the EU Charter and EU irregular immigration and external border policies remains a dynamic and contested one in a post-Lisbon Treaty landscape. The compatibility between EU irregular immigration policies and the EU Charter at local and regional levels calls for close scrutiny and debate. It is at the urban level where the paradoxes and gaps between the security-oriented and rights-inclusive policy approaches are more strikingly revealed. The prevailing focus on EU irregular immigration and borders policies

complicates the social inclusion work of local and regional actors and authorities in fulfilling their obligations to protect the fundamental rights of undocumented people. LRAs are often encouraged to adopt experimental strategies in order to ensure proper delivery of services, address poverty and social exclusion.

This study addresses the role of LRAs in facilitating access to fundamental rights and in preserving the dignity of undocumented immigrants in the EU. It does so by examining the following research questions:

- 1) What are the guiding policy approaches and gaps in EU irregular immigration policy?
- 2) What have been the main effects of current policy priorities and practices on the phenomenon of irregular immigration in Europe?
- 3) What are the main obstacles preventing undocumented immigrants from enjoying fundamental rights in the domains of health, education, housing and fair working conditions?
- 4) What has been the role of LRAs in the delivery of fundamental rights to undocumented immigrants and which practices can be underlined for having played a positive role in ensuring access to fundamental rights by undocumented people?

On the basis of our analysis of these four questions, we draw conclusions and propose a set of 'points for reflection' for the upcoming Annual Dialogue between the Committee of the Regions (CoR) and the European Union Agency for Fundamental Rights (FRA) on Multilevel Protection of Fundamental Rights.

2. EU Irregular Immigration Policy: Policy Approaches and Gaps

The phenomenon of irregular immigration has been a salient and sensitive issue in policy-making and public debate over the last three decades of European integration. It has gained particular importance on the EU agenda since 1999 when the entry into force of the Amsterdam Treaty transferred the immigration domain to EU (shared) competence.

An evaluation of the EU's policy stance on irregular immigration since 1999 reveals an approach preoccupied with policy measures focused primarily on security and migration control. By contrast, academic research analysing and evaluating EU legislation and official EU policy documents has shown that very little attention has been devoted to the position of irregular migrants as holders of fundamental rights, or to ensuring the protection and effective delivery of those rights.¹² Indeed a rights-based approach or fundamental rights component has been virtually absent from the EU's irregular immigration policy. Now, however, the entry into force of the EU Charter is bringing this 'policy gap' into focus and calling into question claims that the EU has no competence to act in the 'rights protection' dimension of irregular immigration.

The migration control approach predominant in EU policy responses and discourses on irregular migration can be seen in the focus on return/readmission (expulsion measures), criminalisation of solidarity and 'illegal employment', and the proliferation of surveillance and border control practices. Legislative measures such as the Returns Directive,¹³ or those related to criminalising the facilitation of entry and residence¹⁴ and 'illegal employment'¹⁵ illustrate this approach, as do the growing powers of EU security agencies such as Frontex and Europol and the development of costly security and surveillance technologies for purposes of border control and migration management,¹⁶

The EU's prioritisation of a security-oriented approach to irregular immigration, and relative lack of a rights and social inclusion agenda for undocumented migrants, is supported by funding instruments under the current financial Framework Programme on Solidarity and the Management of Migration Flows for the period 2007-13. Of the four funds which constitute the Programme, undocumented migrants fall within the scope of the two – the External Borders Fund and the European Return Fund – focused on the prevention of irregular migration and the return of undocumented migrants. They are, however, systematically excluded from the European Refugee Fund and the European Integration Fund, which are reserved exclusively for "recognised refugees or asylum seekers" and "legally residing third country nationals", respectively.

This is not to say that rights and social inclusion related aspects have been entirely excluded from the discussions and legislative action pertaining to irregular migration in the context of the EU's AFSJ agenda.

Initiatives concerning 'unaccompanied minors' provide an example where consideration of rights have been taken into account. The European Commission Action Plan on Unaccompanied Minors (2010-2014)¹⁷, despite maintaining the central objective to help member states devise measures to facilitate the return of the high number of unaccompanied minors who do not require international protection, nevertheless underlined that "*the solution cannot be limited to return because the issue is much more complex and multidimensional and there are clear boundaries to the Member States' freedom of action when dealing with unaccompanied minors*". It also states that:

EU legislation and policies do not address the situation of minors who cannot be returned, leaving the granting of residence permits for compassionate, humanitarian or other reasons to national legislation...a legal status should be granted to unaccompanied minors entitling them to at least the same rights and protection as beforehand, and suitable accommodation should be found. The minors should be supported in their path toward successful integration in the host society.¹⁸

In the same vein, both the Employers Sanctions Directive,¹⁹ which lays down common minimum standards on sanctions applied to employers infringing the prohibition of employment of irregular migrants, and the Returns Directive, which provides minimum common standards and procedures for member states removing irregular third country nationals from their territory, include provisions which grant minimum guarantees and safeguards for irregular migrants.²⁰ Yet the fundamental rights dimension of these laws and policies is not at the heart of their objectives: they neither ensure a proper degree of protection nor position the protection of fundamental rights as the starting point. These few sets of rights and guarantees are exceptions to the general environment of control, prevention and criminalisation and their applicability and enforcement in the national arenas are open to question.

However, it should be acknowledged that efforts are being made at the institutional level of the EU to develop policy approaches around access to rights and social inclusion, and which could go some way to fill the policy gap left by the dominant security and migration control approach, although their actual impact has yet to be fully felt. Particularly inside the European Commission, competing policy approaches spearheaded by Commission departments working on equal opportunities, employment and health-related

strategies have looked beyond control and prevention concerns and linked irregular immigration with issues of social inclusion and access to fundamental rights in Europe. These place undocumented migrants within the category of ‘vulnerable’ or ‘disadvantaged’ groups and include references to irregular immigrants in the framework of policy coordination initiatives on social inclusion and funding actions to examine and support the situation of undocumented migrants.²¹

This rights-based approach has recently received support by the European Parliament’s Committee on the Environment, Public Health and Food Safety, whose Report on Reducing Health Inequalities in Europe²² called on EU Member States to:

... ensure that the most vulnerable groups, including undocumented migrants, are entitled to and are provided with equitable access to healthcare; calls on the Member States to assess the feasibility of supporting healthcare for irregular migrants by providing a definition based on common principles for basic elements of healthcare as defined in their national legislation [and] ... to promote access to high-quality legal advice and information in coordination with civil society organisations to help ordinary members of the public, including undocumented migrants, to learn more about their individual rights.

The Committee of the Regions has also recognised the deficiencies in the way rights are guaranteed in practice and has repeatedly emphasised the indivisibility of fundamental rights (as recognised in the EU Charter) of every individual living in the territory of the EU independently of nationality or immigration status. It has called for improvements in the protection of vulnerable groups or ‘the weak’,²³ and has regretted that current EU policy does not “*currently provide for any improvement in the rights and obligations of people from third countries*”.²⁴

3. The Europeanisation of irregular immigration policy: Effects and obstacles

What are the effects of current EU and national irregular immigration policies on the delivery of fundamental rights and what are the obstacles to access those rights by undocumented migrants at regional and local levels?

3.1 Effects

Before outlining the effects of irregular immigration policies, it is important to distinguish between ‘effects’ and ‘effectiveness’ of policy measures. ‘Effectiveness’ is often measured against the desired ‘public intended goal’ or policy outcomes which appear to dominate in the EU, i.e. to prevent and reduce irregular immigration. This framing necessarily sets aside fundamental rights considerations because, as shown in the previous section, these are not a priority in current EU policies covering irregular immigrants. ‘Effects’ relate to the actual impact and practical outcomes of these policies: as will be seen below, in the case of irregular immigration policies, these include increased casualties among irregular migrants attempting to reach European shores and obstacles to the effective and genuine delivery of fundamental rights.

It remains difficult to accurately assess the impact of policies on overall volumes of irregular migrants. Due to the lack of reliable data,²⁵ policy-making and public discussions are often marked by speculative and sometimes wrong assumptions, with the scale of the actual social problem remaining largely unknown and misrepresented in policy debates. For instance, a wide range of estimates have been cited in EU policy documents of the irregular migrant population in Europe, with figures ranging between 2 to 8 million. However, independent social science research carried out by the Commission-funded CLANDESTINO project (“Counting the Uncountable: Data and Trends Across Europe”) placed this figure at somewhere closer to 3.1 to 5.3 million in 2002, decreasing to between 1.9 to 3.8 million immigrants residing in the 27 EU member states in 2008.²⁶ Figures collected by the Frontex Risk Analysis Network also show an overall decrease in the volume of irregular migrants coming to the EU since data collection began in 2008.²⁷

There is little evidence demonstrating a causal link between the above-described statistical trends and restrictive immigration policies and tighter border controls. Indeed, the available evidence from the literature suggests that, although

immigration policies do have some effects on migration flows, these tend to be relatively small compared to other economic, social and political factors.²⁸

Undoubtedly, immigration restrictions will to some extent succeed in preventing a certain number of potential migrants from entering the EU, as well as blocking access to regular employment, public services and regular housing. But a continuous in-flow of irregular immigrants as well as the overstaying of those who are already in the country (which, as research conducted in 12 EU countries under the CLANDESTINO project indicates, is usually the most common pathway into irregularity)²⁹ suggest that such policies are relatively ineffective in preventing or reducing irregular migration. Border control enforcement in particular has been found to be costly, ineffective and risks violating the rights of irregular entrants. Research indicates that one unintended consequence of tighter border controls is to displace irregular migration to more dangerous routes for sea and land crossings.³⁰ A 2006 briefing to the European Parliament found that efforts to limit arrivals of irregular migrants had just such a displacement effect leading to an increasing number of fatalities at the EU's external borders.³¹

Although one cannot be precise regarding the number of deaths each year at the EU border by migrants attempting to enter Europe, attempts have been made by NGOs and international organisations to systematically document fatalities. These estimates indicate that the number is high, particularly at the EU's southern maritime border. One estimate suggests that as many as one in four migrants crossing by sea has lost their life during the journey,³² while the International Centre for Migration Policy Development (ICMPD) has put the number of deaths in the Mediterranean in the decade between 1991 and 2003 at 10,000.³³ United for Intercultural Action, an NGO that has been monitoring and documenting deaths as a result of EU immigration policies, has recorded 15,551 deaths since 1993.³⁴

In light of the links between border control measures and the high numbers of migrant fatalities, questions must be asked regarding the proportionality of the policy responses taken. These questions become all the more pressing given the doubts over the overall efficacy of the measures and the increasingly high financial burden they impose on national and EU budgets in a period of economic recession. Frontex has seen a substantial increase in its budget from €6 million in 2005 to €66 million in 2011,³⁵ and a growing proportion of the EU financial resources is being allocated to the development of new EU-level border control and security technologies.³⁶ Security technologies in particular are becoming an increasingly relied upon, yet untested, policy option in the so-called 'fight' against irregular immigration. Given that, as highlighted above, irregular entry is the least-common form of pathway into irregularity, one might

ask whether funds would be better channelled towards addressing the challenges associated with irregular migration in the countries of destination.

For those individuals who manage to enter the EU territory clandestinely or, as is more commonly the case, fall into a situation of irregularity having entered legally, immigration policies aimed at identifying irregular migrants or blocking irregular employment are inconsistent with a fundamental rights and social inclusion perspective. According to Eurostat, third-country nationals are at significantly greater risk of poverty or social exclusion.³⁷ The particularly precarious situation of irregular migrants has been documented by numerous reports by NGOs,³⁸ as well as the EU. The European Annual Report on Social Protection and Social Inclusion of 2009 makes several references to the vulnerable situation of irregular migrants, particularly in relation to healthcare.³⁹ Its 2010 report identified irregular migrants as a category increasingly represented among the population affected by homelessness.⁴⁰ The following section explores in greater depth the causes of social exclusion and poverty and obstacles to access by irregular migrants to fundamental rights.

3.2 Obstacles

Despite being entitled to a range of fundamental social and economic rights enshrined in European and international legal protection frameworks, ensuring the practical delivery of these rights has proved a major challenge.⁴¹

Although so-called ‘internal gate-keeping policies’, such as labour inspections, obligations to register with local authorities and frequent checks of residence status, appear to be more effective than border controls, the financial costs and administrative complications of deportation procedures undermine their impact on overall numbers. Rather than making migrants leave, they can have the effect of driving migrants further into “informal, shadow and niche activities”.⁴² Thus, legislation criminalising irregular migration exacerbates illegality. At the same time, it blocks the channels that provide migrants with a degree of solidarity and social inclusion, contributing to the progressive social marginalisation of these individuals, and pushing them into situations of poverty and destitution.

There are several general, horizontal obstacles hindering access to rights. Among the most important are, first, the lack of legal or administrative status, which sharply increases the barriers to accessing rights and vulnerability to abuse and exploitation. This despite the fact that fundamental rights should not depend on the discretionary power of the state; rather the state has the obligation to safeguard access to rights independent of the legal status and nationality of the recipient. Second, undocumented migrants are reluctant to approach service providers for fear of being identified as irregular and subsequently deported.

This is particularly acute when local authorities are expected to act as ‘police’ and are delegated the task of enforcing restrictive national immigration laws.⁴³ This has the effect of reducing the few informal channels of solidarity through which undocumented migrants have access to rights.

The following sections examine the sector-by-sector barriers in the areas of employment, health, housing and education that are linked to the general obstacles outlined above.

3.2.1 Employment

The right to fair working conditions, as enshrined in Article 31 of the EU Charter, entitles all workers regardless of status to minimum labour standards including compensation for work accidents, the right to sick leave and rest periods,⁴⁴ together with the right to fair pay (provided for by Article 23.2 of the Charter). However, there is a considerable gap between labour rights – nominally enshrined in both EU and international legal instruments – and their application to undocumented workers.

Formal exclusion from the labour market leads undocumented migrants to seek informal, undeclared work, putting them beyond the reach of standard safeguards and frequently making them victims of labour exploitation. Studies and research indicate a high occurrence among this category of unpaid wages, no holidays, long hours, dangerous conditions and uncompensated work injuries.⁴⁵

Formally many Member States recognise the right of irregular migrants to join trade unions – a key vehicle for irregular migrants to claim their labour rights. However, several practical barriers hinder undocumented migrants from filing a complaint against their employer and accessing effective remedies against instances of labour exploitation.

First, lack of awareness of labour standards and the right to judicial redress, sometimes stemming from an absence of trade unions in certain sectors, such as domestic work, can pose obstacles.⁴⁶ Second, fear of expulsion, linked to intimidation by employers or mistrust of police and institutions, also hinders the reporting of labour law violations. This is particularly the case where labour justice procedures are not independent of the immigration enforcement system.⁴⁷ In many instances, migrant workers are not entitled to a residence permit nor protection from expulsion during legal procedures, and insecurity of residence therefore forms another barrier to effective redress. Finally, the absence of legal assistance can constitute an important obstacle to the enjoyment of irregular workers’ rights, e.g. if they do not possess the means to pay a lawyer.

3.2.2 Healthcare

Access to healthcare is enshrined in Article 35 of the EU Charter, while the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates that every person has the right to the highest attainable standard of physical and mental health, obliging states to give access, at a minimum, to essential primary healthcare and primary and emergency medical care.⁴⁸ A decision by the European Committee on Social Rights (responsible for interpreting the European Social Charter) in the collective complaint *International Federation for Human Rights (FIDH) v. France*, No. 14/2003 of September 2004, found 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”. Yet despite the obligations on state parties, the project “L'accès aux soins un droit non-respecté en Europe” found that 70% of irregular migrants surveyed said they had faced barriers when attempting to access healthcare in Europe to which they were entitled.⁴⁹

In certain cases, the obstacles restricting access to healthcare are composed of formal or legal barriers. There are marked differences between national legislations of EU member states in terms of access to healthcare for irregular migrants. For instance, Germany, Greece and Switzerland limit access to emergency care only.⁵⁰ Yet, even in those countries where national legislation grants more expansive access to healthcare, practical barriers play an important role. The EU-funded project “Access to healthcare for undocumented migrants” found that the main obstacles faced by irregular migrants when seeking medical care in the EU were: first, the requirement to provide documentation proving their ability to cover hospital expenses; second, the lack of information about their right to healthcare; third, ‘the duty to denounce’ placed on hospital administrations in some member states and fourth, a lack of translators and cultural mediators.⁵¹

Lack of information on the right to healthcare is not only a problem among migrants themselves (data reveal that only a quarter of undocumented migrants theoretically entitled to healthcare are aware of this right),⁵² but also among medical practitioners and health providers. Certain EU countries lack clear regulations on access to healthcare for undocumented migrants,⁵³ generating confusion at the level of implementation and arbitrary decisions.⁵⁴ In many countries there is a high decentralisation of competences to regional and local entities and many local authorities have been found to lack information about undocumented migrants’ entitlements and may illegally deny migrants’ the right to access publicly subsidised health care.⁵⁵

3.2.3 Housing

The right to an adequate standard of living⁵⁶ includes (but is not limited to) adequate housing and is closely linked with the protection of other rights such as that of human dignity (Article 1 EU Charter) and, where families are implicated, the rights of the child (Article 24). The European Committee on Social Rights, in the complaint *Defence for Children International (DCI) v. the Netherlands*, No. 47/2008 of October 2009, declared that the exclusion of undocumented children from the provision of adequate shelter was contrary to the European Social Charter, even if they are not residing lawfully on the territory. Despite this ruling, 52% of irregular migrants interviewed for the project “L'accès aux soins un droit non-respecté en Europe” claimed to live in insecure accommodation and 34% considered their housing conditions dangerous or harmful to their children.

In terms of formal obstacles, few member states grant explicit rights for undocumented families to access housing and undocumented migrants, including families with children, are generally not eligible for housing assistance due to the lack of a residence permit. Families also encounter several practical obstacles, including a chronic shortage of housing in several member states, compounded by discrimination in the allocation of social housing.⁵⁷ Access to private housing is restricted by migrants' precarious financial position (a clear example of the way in which non-access to certain rights, such as employment, impact on access to other fundamental social rights). Access to private housing is further impeded by national laws forbidding and in most cases, criminalising the renting of private housing to irregular migrants. For instance, the assignation of houses to irregular migrants constitutes a criminal offence sanctioned with a fine and/or imprisonment in Italy, France, Germany, Greece, Denmark, Hungary, Romania, Czech Republic and Malta.⁵⁸

3.2.4 Education

The right to education, as enshrined in Article 14 of the EU Charter, together with a range of international protection instruments, obliges the provision (regardless of legal status) of free and compulsory access to primary education and access to secondary education and to vocational training on an equal basis with nationals of the state concerned.⁵⁹ A study by PICUM of nine EU Member States found that while the right to education was protected by law and not explicitly denied to undocumented children in national legislation, considerable obstacles on the ground prevent children from accessing this basic entitlement.⁶⁰

Barriers stem from administrative difficulties associated with registering in national school systems: for instance some schools require a residence permit or

other identification documents for enrolling pupils. Organisations assisting undocumented families have reported cases of schools being reluctant to accept undocumented children and schools in certain regions in Germany have been obliged to denounce undocumented migrants to the police.⁶¹ Even where there is no duty on schools to denounce, fear of detection among parents can prevent them from registering children in education systems. Irregular migrants are also affected by practical barriers which stem from their position of economic and social marginalisation, including a lack of assistance in covering school-related costs, linguistic problems and precarious living conditions which can interrupt schooling.⁶²

4. Delivering Fundamental Rights to Undocumented Immigrants: Selection of Practices by Local and Regional Authorities

LRAs have the choice to become active players in delivering fundamental rights by playing a key role in overcoming the obstacles to fundamental rights access by undocumented immigrants. City officials and practitioners are often in a position calling upon their formal and informal competences to mitigate, at times in rather imaginative fashions, some of the exclusionary consequences emerging from the security-oriented approach predominating in national and EU public policies on irregular immigration.⁶³ LRAs have the complex task of navigating between conflicting policy agendas and implementing (state-centric) immigration laws that are unsuitable for evolving urban and social environments characterised by complex processes and populated by persons facing exclusion, poverty and inequalities.⁶⁴ The city offers a privileged public (networked) space from which to witness and examine the tension between restrictive national migration policy agendas and the effective delivery of the EU Charter to every individual as part of a wider social inclusion (service delivery) agenda.

This section offers a selection of practices and experiences carried out by LRAs, in their own capacity or in cooperation with other local and regional actors, in the delivery of fundamental rights to undocumented people. They include a variety of examples of formal and informal policy interventions addressing horizontal and sector-by-sector barriers affecting access to rights in the domains of health, education, housing and employment, as well as access to justice.⁶⁵

The publicly available information on the provision by LRAs of fundamental rights to undocumented immigrants is generally scarce. The evidence provided here is mainly based on a contribution by the Platform for International Cooperation on Undocumented Migrants (PICUM), an NGO aimed at promoting respect for the human rights of undocumented migrants within Europe.⁶⁶ It also includes input by Eurocities, a network of the local governments of more than 140 large cities in over 30 European countries, and its social affairs working group on migration and integration.⁶⁷ This is complemented by other publicly available sources and data, such as reports by the Congress of Local and Regional Authorities (CLRA) of the Council of Europe, websites of local and regional authorities and other civil society organisations working on the issues at stake. Relevant academic sources and

reports by key actors working in this field, such as the FRA, have been also taken into consideration.

The presentation of practices by LRAs and other relevant actors at local and regional levels, facilitating the provision of and accessibility to fundamental rights by undocumented immigrants has been structured around the following four thematic categories: 1) legislative and policy local and regional actions, 2) consultation, special services and informal structures, 3) legal advice and counselling, and 4) monitoring, evaluation and networking. The practices gathered below present one and/or more of the following features:

- 1) They are primarily intended to facilitate access to and ‘find solutions’ for the provision of fundamental socio-economic rights to undocumented migrants through the (direct or indirect) involvement of LRAs. Some of them focus on specific categories of people presenting higher degrees of vulnerability such as women and children.
- 2) They are driven by a social inclusion and rights-based (service provision) policy approach, which is founded on an understanding of the intrinsic relationship (in their everyday life) between an effective delivery of fundamental rights and the EU Charter, social justice and inclusion and urban well-being/stability of all residents, independently of nationality and legal/administrative status.
- 3) They present an ‘experimental’ and imaginative nature and alternative (material) scope in the delivery of fundamental rights to undocumented people which sometimes moves away from or even directly contradicts the predominant national government policy agenda and state-centric politics on irregular immigration. These legislative and/or policy interventions depart from (and challenge) the attributed (delegated) tasks of immigration management/control and/or lifting the requirement to check documentation as a condition for having access or the duty to denounce by education, health, housing or labour market professionals.
- 4) Some of these practices occur not only in the framework of powers attributed to LRAs and/or competences within the national multi-governance/constitutional setting, or through the setting up of ‘formal’ services designed for this group of people, but also at times through informal practices and interventions and in other cases non-official or invisible structures.

- 5) They often entail the cooperation, partnership and assistance with other local and regional actors from civil society organisations (such as migrants' rights or migrants-self organisations) and the social partners (like trade unions).
- 6) They show an increasing trend towards the development of 'networking' strategies with other authorities at local, regional, national and European levels in the context of an emerging multi-governance agenda on fundamental rights in the city.

This File Note uses the term 'LRAs practices promoting fundamental rights access by undocumented immigrants'. It intentionally avoids speaking about 'good' or 'best' or 'promising' practices as such qualification would entail a rather complex exercise, possibly based on a methodology containing subjective considerations concerning the 'standards' against which to evaluate the practice.⁶⁸ It would be extremely difficult to scientifically measure the actual practical and positive impact of a particular practice in the actual delivery of fundamental rights protection to undocumented immigrants and gauge its transferability to other local and regional contexts.

4.1 Legislative and Policy Local and Regional Actions

Experimentation represents a key factor driving innovative legislative and policy actions by LRAs in fundamental rights delivery to undocumented immigrants. Within the context of their attributed public policy competences, which often correspond to the provision of services in areas such as education or health, several instances show how some LRAs have actively intervened through the enactment of laws and policies in granting access to fundamental rights to undocumented people. These interventions do not always correspond with the set of priorities and policy approaches adopted at national level. The right to education constitutes an illustrative example of this practice.

Several LRAs have recognised and granted the right to have access to education to undocumented migrants irrespective of national policy approaches. For example, several cities in **Italy**⁶⁹ (Florence, Torino and Genoa) have publicly provided extended access to education by undocumented children compared to national legislation by granting all children the right to attend nursery school regardless of migration status.⁷⁰ A similar situation has occurred in **Germany**. Since 2009 regions like Hesse took the initiative to allow children to enrol in school without proof of local residence and freeing school principals from the obligation to denounce undocumented migrants as envisaged in national immigration law.⁷¹ Other municipalities like Frankfurt, Hamburg and Munich have followed the same approach in lifting the obligation on the staff working in the education sector to report undocumented children in schools. Some cities in

the Netherlands have similarly embarked on imaginative ways to ensure access to education by undocumented children by covering extra expenses for children unable to pay. A Dutch cooperative “*Learning Without Papers*” asked local governments in the Netherlands to make education for undocumented children practically accessible by providing financial help. Many local governments have agreed to support undocumented children for extra expenses necessary for their education such as materials, sport clothes, as well as fees for school trips.⁷²

The domain of health care has experienced rather active and dynamic legislative and policy interventions by LRAs. **Italy** constitutes a case in point where regional governments have taken legislative steps to advance the fundamental rights of all migrants irrespective of the administrative status.⁷³ Regions like Tuscany have implemented more generous policies than the current national immigration law contemplates in the context of the so-called “Community Health Partnership of the north-west zone of Florence” (*Società della Salute*), which includes eight municipalities.⁷⁴ Tuscany passed a regional law in 2009 that addressed the treatment and status of undocumented migrants. Special emphasis was put on the human rights of all immigrants, and in particular those socially excluded, and the granting of free access to healthcare and other forms of socio-sanitary assistance, such as meals at municipal cafeterias and beds in shelters. The Marche region has a similar law.⁷⁵ In **Belgium**, the city of Ghent provides emergency re-housing facilities for the most urgent cases, victims of ‘slumlords’ and exploitative renters funded from the local budget.⁷⁶ In **Spain**, undocumented migrants have access to the national healthcare system and education (pre-school, primary and secondary), under the same conditions as nationals and documented persons, with the only requirement being to enrol in the local registry denominated as *padrón*.⁷⁷

4.2 Consultation, Special Services and Informal Structures

LRAs have also been active in the provision of consultation and targeted public services for the provision of fundamental rights. This has been for instance the case in the area of access to health care. In **Germany**, consultation services have been set up with a particular focus on undocumented women. The Department of Health of the City of Frankfurt joined with Maisha (*Selbsthilfegruppe Afrikanischer Frauen in Deutschland*),⁷⁸ an African women’s NGO in the city, to provide health services for undocumented migrants. The centre offers anonymous medical consultations and treatments for migrants fearful of detection. Targeted services are offered to migrant women; those working in prostitution can receive information on the prevention of sexually transmitted diseases and specific consultation hours are available for African and Roma

women. Following this initiative, several other municipal authorities have followed suit establishing similar projects offering ‘Humanitarian Consultation Hours’ (*Humanitäre Sprechstunde*), with low-threshold drop-in centres providing medical consultation and basic health services specifically to irregular migrants now existing in Munich, Dusseldorf, Berlin and other major cities.⁷⁹ Consultation is offered free of charge, while patients are expected to contribute to medical treatment according to their means. In cases of serious health problems, the facilities would either refer patients to a cooperating network of specialists, and/or check the possibilities for regularisation based on medical grounds.

In **Belgium** access to mainstream healthcare services is facilitated by special services at local public social welfare offices (CPAS – *Centre Publics d’Action Sociale* /OCMW – *Openbaar Centrum voor Maatschappelijk Welzijn*).⁸⁰ They are responsible for facilitating access to healthcare services for persons without health insurance coverage. Acknowledging the specific health needs and social situation of undocumented migrants, the social welfare office of Molenbeek created a specific unit for health care assistance to undocumented migrants. The service is delivered by social workers who are aware of the health needs and vulnerabilities of undocumented migrants. Another positive example is the health service department of the CPAS in Liege, created in 2004, which is responsible for ensuring the correct enforcement of the provision of healthcare services to undocumented migrants and destitute persons. They assess the administrative situation of the migrant, refer the case to the appropriate institution for the payment of the medical costs and prepare a referral document to the mainstream care system to facilitate the administrative process. The creation of this mediation service has been encouraged and well received by NGOs working on the issue of health. Following this initiative, the NGO *Médecins Sans Frontières* withdrew its services in the city of Liege and passed all responsibility concerning healthcare for undocumented migrants to the mainstream health system.⁸¹

There are also some examples in the field of housing that merit attention. In **the Netherlands**, in 2005, the Dutch non-profit organisation STIL started a shelter for undocumented women and children called *Fanga Musow* (“Strong Women”) with the support of the Utrecht city government. This initiative was set up specifically for undocumented women, who due to their irregular migration status are disproportionately vulnerable to violence and exploitation and face difficulties in accessing basic social services. Fanga Musow offers women and children safe and stable accommodation, financial help, legal assistance, education and medical services.⁸²

There are also cases where the municipalities are relieved from establishing formal public services, especially for undocumented immigrants, by relying on and supporting the informal provision of rights to undocumented persons by public service and social work organisations showing a flexible and intentionally vague material and personal scope of services and clients. **Germany** constitutes an interesting example in this respect.⁸³ The “Anonymous advice centre for sexually transmitted diseases including AIDS” (*Beratungsstelle zu sexuell übertragbaren Erkrankungen (STD) einschließlich Aids*) is an immediate medical support programme provided by the municipal health department in Cologne. Wilmes (2011) has found that it takes a flexible approach to the patients and the illnesses treated, which in practice (yet unofficially) include female undocumented migrants.⁸⁴ Another case is the *Malteser Migranten Medizin* (MMM),⁸⁵ a social work organisation, in Cologne has provided since 2005 medical assistance to individuals lacking health insurance and necessary economic means. They have played a key complementary function in parallel to the formal healthcare system by filling the gaps for vulnerable groups such as the undocumented. Wilmes (2011) has noted that these unofficial services or ‘foggy organizational structures’ are “*useful for the municipality in terms of being relieved from the obligation to create special services for undocumented persons, which would be difficult in the context of formal structures, also because of possible public disapproval in terms of communicating moral judgments patters, which can then usually be avoided*”.⁸⁶ This, she argues, is beneficial for the city which sees these organisations as “useful deviations” because they play a key role in facilitating growth and stability and providing formal basic services for the undocumented.

4.3 Legal Assistance and Counselling

LRAs can also play a central role in the provision of legal advice and assistance directly or by supporting the work of trade unions and civil society organisations. In the city of Ghent in **Belgium**, free legal advice is offered to all migrants, documented or not. This legal advice is supplied by Information Point Migration, which is organised by the Integration Service of the city of Ghent and is funded by the local government.⁸⁷

The role played by civil society and social partners, sometimes in cooperation with LRAs, in access to justice has been recently recognised by the FRA (Fundamental Rights Agency) in its report “*Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*”.⁸⁸ The report also identified “promising practices” in the field of legal assistance to undocumented immigrants through the action by a trade union ‘Ver.di (*Vereinte Dienstleistungsgewerkschaft* – United

Services Union) in **Germany** which offers legal assistance and representation to undocumented migrants in labour court proceedings.⁸⁹

The function performed by civil society organisations can be indeed equally central in ensuring access to justice and effective remedies by undocumented immigrants. As a way of illustration, in the **United Kingdom**, Kalayaan, a registered charity that has provided advocacy and support services in the UK for migrant domestic workers since 1987, was acknowledged by Cities of Migration⁹⁰ for playing a fundamental role in ‘putting justice to work for domestic caregivers’.⁹¹ Kalayaan receives a proportion of its funding from a London council (the Royal Borough of Kensington and Chelsea). In the same vein, the city of Barcelona in **Spain** provides free legal advice to all migrants through a Latin American civil society organisation Fedelatina (*Federación de Entidades Latino-Americanas de Cataluña*) on legal and labour-related matters.⁹²

4.4 Monitoring, Evaluation and Networking

LRAs, and in particular cities, are well-placed to monitor, evaluate and foster municipal implementation of providing fundamental rights to undocumented immigrants on the ground. The network of towns and cities for human rights in Catalonia (**Spain**) has developed since 2003 the Charter of Towns and Cities on Human Rights (*La Xarxa de Pobles i Ciutats pels Drets Humans*). The CLRA Resolution on “The role of local and regional authorities in the implementation of human rights” of March 2010 identified this initiative as an excellent example of ‘strategic planning’ and ‘self-evaluation’.⁹³ The signatory cities (a total number of 147 towns and cities in the province of Barcelona) have committed themselves to establish a commission to evaluate every two years the activities and programmes carried out by the signatories in the implementation of the ECHR in their local and municipal context in light of a number of commonly agreed strategic objectives.⁹⁴ The findings will then be published and followed up by a new working programme establishing specific objectives for the coming year and targeted activities intended to meet them.⁹⁵ The goal is to develop a concrete agenda for local human rights. The agenda will include not only actions focused on training on human rights but also the provision of information and awareness-raising regarding the Charter.⁹⁶ The same CLRA Resolution highlighted as another example of municipal initiatives on human rights the peer review activities carried out by municipalities in **Sweden** on the implementation of the Convention on the Rights of the Child.⁹⁷

A similar initiative has taken place at EU level. The Charter of Towns and Cities on Human Rights also promotes the support of cities and towns for the so-called European Charter for the Safeguarding of Human Rights in the City, which is promoted by the town hall or *ajuntament* of Barcelona (**Spain**).⁹⁸ The Charter,

which is not legally binding, was originally approved in 2000 at Saint Denis (France), and has now been signed by 350 cities. The origins date back to 1998 when the city organised an event commemorating the 50th anniversary of the ECHR and adopted the so-called ‘Barcelona Compromise’, in which a number of cities committed themselves to respect human rights in their local and municipal spheres of action. A follow-up action was the setting up of a committee that drafted the Charter, which was originally approved by 70 cities. Every two years a conference is held at which the participating cities present and exchange their experiences in implementing human rights and adopt general conclusions including commonly agreed decisions, goals and ways forward. The main objective is to bringing about “*new and more effective ways of achieving the enjoyment and guarantee of human rights in cities.*”⁹⁹

Although the charters highlighted here do not, for the large part, refer specifically to undocumented migrants, they have an explicitly broad scope, covering all inhabitants irrespective of nationality. They also include an explicit focus on vulnerable groups - for instance the Charter of Towns and Cities on Human Rights calls for “the most vulnerable groups and citizens to enjoy special protection” (Art. IV.1) – and could therefore serve as a platform for increasing awareness of the rights of irregular migrants and for mainstreaming such considerations into the everyday politics of local and regional authorities.

5. Conclusions and Points for Reflection

This File Note examines the role of LRAs within the wider context of EU and national policy and practices affecting the rights of irregular immigrants. LRAs are on the frontline of promoting processes of social inclusion and well-being and ensuring the protection of fundamental rights and human dignity to all residents independent of nationality and immigration status. This is particularly important as regards the weakest sections of local communities, those undocumented migrants facing acute degrees of insecurity and vulnerability and at risk of social exclusion. The note reveals the ways in which a security-oriented policy approach makes the effective delivery of fundamental rights a profound challenge on the ground and highlights practices and specific examples of activities of LRAs to overcome these obstacles.

We present below six key findings of this report and suggest a number of points for further reflection:

1. The security and migration control focus that shapes policy interventions of EU and national governments on irregular immigration contradicts policies designed to promote societal inclusion and protection and ensure delivery of fundamental rights contained in the EU Charter. The exclusionary effects of the prevailing EU policy approach are displayed most visibly in the urban setting through poverty, discrimination and social exclusion.
 - How can the EU Charter be positioned as the starting point and at the centre of efforts to respond to the public policy dilemmas stemming from the phenomenon of irregular migration at local and regional levels?
2. There are serious questions regarding the cost/efficiency balance of EU budgetary expenditure on migration management and border control policies. Although the effectiveness of new security and surveillance technologies as well as border control practices (such as those employed by Frontex) have yet to be demonstrated, they feature as key priorities under the proposed new Financial Framework 2014-20. In the meantime, local level service providers are coming under increasing financial strain to effectively deliver fundamental rights.
 - What role could LRAs play in the future in shaping EU budgetary priorities in the field of migration? Is there a way to ensure that EU funding is more directly channelled to fulfilling the objectives of fundamental rights delivery to the most vulnerable on the ground?

3. LRAs are the first level at which compliance with obligations deriving from the EU Charter can be guaranteed, making the ‘principle of subsidiarity’ especially salient. Yet, little attention has been paid so far at EU level to the role of LRAs in devising, implementing and evaluating/monitoring these policies from a fundamental rights perspective.
 - How can LRAs add value to EU level policy-making processes surrounding irregular migration and implementation of the EU Charter with respect to undocumented migrants? For instance, how could they be more actively involved in monitoring and evaluating EU irregular immigration policies and the use of EU funding (solidarity funds) to better assess the added value of such funds on the ground and their effectiveness in meeting the needs of specific vulnerable groups, particularly in the field of basic service provision?
4. Data and research indicate that irregular migrants are overrepresented among the EU population affected by poverty and social exclusion. Unintended side-effects of control-oriented policies aiming to curb irregular immigration can have severe consequences for the safety, dignity and fundamental rights situation of undocumented migrants.
 - What are the experiences of LRAs in addressing the social exclusion obstacles associated with irregular migration? How do irregular immigration and borders policies interact with the social inclusion work of local and regional actors and authorities in fulfilling their commitments and responsibilities to protect the fundamental rights of undocumented people?
5. Informal practices by service providers as well as civil society and migrant organisations acting beyond their formal remit play a key role in providing unofficial channels of solidarity and access to rights for irregular migrants.
 - How can LRAs further ensure that the provision of basic services (health, education, shelter etc) is interpreted in a less restrictive fashion, and that degree of vulnerability rather than migration status is the defining factor for receiving basic social assistance and services that underpin access to justice and fundamental rights?
6. An overview of practices highlights the crucial role of partnership for the delivery of fundamental rights for irregular migrants. LRAs can expand their outreach and impact when they join forces/support the work of bodies representing civil society, such as NGOs (including migrant organisations) and social partners.

- What mechanisms are available to LRAs to foster this partnership approach and to encourage “a culture of multilevel promotion and protection of rights”?¹⁰⁰ For instance, could financial resources be channelled more effectively? How can networks of LRAs, service providers, NGOs and civil society actors be fostered at local, regional and EU level?

¹ European Council, The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115/01, 04.05.2010.

² T. Hammarberg (2011), Human Rights in Europe: No grounds for complacency, Council of Europe: Strasbourg.

³ European Commission, Communication on a Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573, Brussels, 19 October 2010.

⁴ European Union Agency for Fundamental Rights (2011), Fundamental Rights: Challenges and Achievements in 2010, Annual Report, Vienna, page 34.

⁵ Council of Europe, *The Human Rights of Irregular Migrants in Europe*, Issue Paper, 17th December 2007, Strasbourg; PICUM, *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework* (2007); Cholewinski R., Bogusz B., Cygan A., and Szyszczak E. (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*. Leiden: Martinus Nijhoff, 2004; Guild, E. (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.

⁶ See S. Carrera and M. Merlino (2009), *Undocumented Immigrants and Rights in the EU: Addressing the Policy Gap between Social Science Research and Policymaking in the Stockholm Programme*, CEPS Liberty and Security in Europe, December 2009.

⁷ Article 79.2 TFEU states that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (b) the definition of rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorized residence, including removal and repatriation of person residing without authorization”.

⁸ 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; 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; 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 (retrieved from http://www.undocumentedmigrants.eu/londonmet/library/v65239_3.pdf); EU Fundamental Rights Agency, (2011), *Migrants in an irregular situation: access to healthcare in 10 European Union Member States*; EU Fundamental Rights Agency, (2011), *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*; Platform for International Cooperation on Undocumented Migrants (2009), *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, PICUM, Brussels; Platform for International Cooperation on Undocumented Migrants (2007), *Access to Health Care for Undocumented Migrants in Europe*, PICUM, Brussels.

⁹ Article 51 of the EU Charter establishes that “1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”.

¹⁰ Committee of the Regions, Draft Opinion, Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, CdR 406/2010, 11/12 October 2011, paragraph 14.

¹¹ The Congress of Local and Regional Authorities, The role of local and regional authorities in the implementation of human rights, 18th Session, CG(18)6, 1 March 2010.

¹² M. Merlino and J. Parkin (2011), *Irregular Migration in Europe: EU Policies and the Fundamental Rights Gap*, CEPS Report for the European Trade Union Confederation Project “What Price the Tomatoes?”; See R. Cholewinski (2004), ‘European Union Policy on Irregular Migration’, 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, p.182; S. Carrera and G. Pinyol (2009), *Local and Regional Authorities in the Future Area of Freedom, Security and Justice: Towards a Multilevel Governance Strategy for the Stockholm Programme?* Report for the Committee of the Regions, November 2009.

¹³ Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, (OJ 2008 L 348/98).

¹⁴ Directive 2002/90 on the facilitation of unauthorized entry, transit, and residence. Human Smuggling (OJ 2002 L328/17).

¹⁵ 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 , 30/06/2009.

¹⁶ Commission Communication, Preparing the next steps in border management in the European Union, COM(2008) 69 final, 13.2.2008.

¹⁷ European Commission, Communication, Action Plan on Unaccompanied Minors (2010-2014), COM(2010)213 final, 6.5.2010, Brussels.

¹⁸ Ibid. page 14 in Point 5.2. on 'International Protection Status, Other Legal Status and Integration of Unaccompanied Minors.

¹⁹ 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 , 30/06/2009.

²⁰ Arts. 13 and 14 of the Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, (OJ 2008 L 348/98).

²¹ See for instance the Commission staff working document – joint report on social protection and social inclusion accompanying document to the Commission Communication on a Proposal for the Joint Report on Social Protection and Social Inclusion 2010, SEC(2010) 98 final, 5.2.2010, Brussels.

²² European Parliament, Report on Reducing Health Inequalities in Europe, (2010/2089/INI), 8.2.2011, Rapporteur: Edite Estrela, paragraphs 5 and 8.

²³ Committee of the Regions, Draft Opinion, Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, CdR 406/2010, 11/12 October 2011.

²⁴ Committee of the Regions, Opinion, Delivering an Area of Freedom, Security and Justice for Europe's Citizens – Action Plan implementing the Stockholm Programme, CdR 170/2010, 1/2 December 2010.

²⁵ Difficulties associated with quantifying the irregular migrant population are explored in C. Pinkerton, G. McLaughlan and J. Salt, Sizing the Illegally Resident Population in the UK, Home Office Online report 58/04, 2004.

²⁶ See 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.

²⁷ Frontex, FRAN Quarterly Issue 1, January – March 2011. It is worth noting that indicators from the first quarter of 2011 record an upswing in irregular entries detected due to the instability in North Africa and resulting human flows to Italy and Malta.

²⁸ M. Czaika and H. de Haas (2011), The Effectiveness of Immigration Policies: A Conceptual Review of Empirical Evidence, DEMIG (Determinants of International Migration) Working Paper No.33, April 2011.

²⁹ CLANDESTINO Project, *Final Report*, November 2009, retrievable from: http://www.epim.info/wp-content/uploads/2011/01/clandestino-final-report_november-2009.pdf; See also F. Düvell (2011), *Paths into Irregularity: The Legal and Political Construction of Irregular Migration*, European Journal of Migration and Law, Vol.13, pp.275-295.

³⁰ T. Spijkerboer, "The Human Costs of Border Control", *European Journal of Migration and Law* (2007) 9, 127-139; Illegal Immigration: *Border Crossing Deaths have Doubled since 1995; Border Patrol's efforts to Prevent Deaths have not been Fully Evaluated*, US Senate doc. GAO-06-770, August 2006.

³¹ Trends in the different legislations of the member states concerning asylum in the EU: the human costs of border control, Briefing paper, doc. IPOC/C/LIBE/FNC/2005-23-SC1, July 2006 cited in S. Grant, "Recording and Identifying European Frontier Deaths", *European Journal of Migration and Law*, (2011) 13, p.140.

³² Interview with Robert Strondl of Frontex, cited in S. Grant, "Recording and Identifying European Frontier Deaths", *European Journal of Migration and Law*, (2011) 13, p.137.

³³ ICMPD, *Irregular Transit Migration in the Mediterranean – Some Facts, Futures and Insights*, Vienna, ICMPD, 2004.

³⁴ See the 'United' webpage on 'Fortress Europe' at:

<http://www.unitedagainstracism.org/pages/underframeFatalRealitiesFortressEurope.htm>.

³⁵ Council of the European Union, "Strengthening the European external borders agency Frontex – Political Agreement between Council and Parliament", 11916/11, Presse 192, Brussels, 23 June 2011(a). See also the Frontex webpage on Budget and Finance at: http://www.frontex.europa.eu/budget_and_finance/.

³⁶ According to the Commission's proposal for the Multiannual Financial Framework 2014-2020, spending on security and IT systems will reach a total of just below 4.2 billion euro. See Communication From The Commission A Budget for Europe 2020 - Part II: Policy fiches, COM(2011) 500 final PART II, SEC(2011) 867 final.

³⁷ There is a gap of 13 percentage points relative to the overall population in the 20-64 age group. See Eurostat, *Indicators of Immigrant Integration: A Pilot Study*, Eurostat Methodologies and Working Papers, 2011 Edition, p.170.

³⁸ Jesuit Refugee Service Europe, *Living in Limbo: Forced Migrant Destitution in Europe*, March 2010, Brussels; Joseph Rowntree Charitable Trust, *Still Destitute*, 2009; PICUM's *Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe 2010*.

³⁹ Commission staff working document - Joint Report on Social Protection and Social Inclusion accompanying document to the Communication from the Commission - Proposal for the Joint Report on Social Protection and Social Inclusion 2009 - Supporting document COM(2009) final SEC(2009)141.

⁴⁰ Commission staff working document - Joint Report on Social Protection and Social Inclusion accompanying document to the Communication from the Commission - Proposal for the Joint Report on Social Protection and Social Inclusion 2010 - Supporting document COM(2010)25 final SEC(2010)99.

⁴¹ See for instance R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg: Council of Europe Publishing, 2005; Platform for International Cooperation on Undocumented Migrants (PICUM), *Access to Health Care for Undocumented Migrants in Europe*, PICUM, Brussels, 2007(b)

(<http://www.picum.org/data/Access%20to%20Health%20Care%20for%20Undocumented%20Migrants.pdf>);

See also 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

(http://www.mdminternational.org/index.php?id_rubrique=1); and also 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 (http://www.undocumentedmigrants.eu/londonmet/library/v65239_3.pdf).

⁴² See the CLANDESTINO Project Final Report, November 2009, available at: http://clandestino.eliamep.gr/wp-content/uploads/2010/03/clandestino-final-report_-november-20091.pdf.

Refer also to Pathways into Irregularity: The Social Construction of Irregular Migration, Policy Brief for the CLANDESTINO Research Project Counting the Uncountable: Data and Trends across Europe, October 2009.

⁴³ See A. Silvestri (2010), "Research projects by the European union Agency for Fundamental Rights on Undocumented Migration", in S. Carrera and M. Merlino (eds.) *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS Liberty and Security in Europe Series.

⁴⁴ See the labour rights enshrined in the International Convention on the Protection of the Rights of all Migrant Workers and their Families (ICRMW), Art. 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). See also relevant ILO instruments, particularly the Migrant Workers Convention N.143 and the 2004 ILO Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy.

⁴⁵ For instance, data collected within the project "L'accès aux soins un droit non-respecté en Europe" found that 37% of migrants interviewed worked more than 10 hours a day, 20% work night shifts and 8% have been the victim of a work related injury: Medecins du Monde, *Access to healthcare for undocumented migrants in 11 European countries, 2008 Survey report*, European Observatory on Access to Healthcare, London, September 2009. See also the findings of the EU funded Undocumented Worker Transitions (UWT) project based on interviews with more than 200 migrant workers in McKay et al. (2009), *The Relationship between Migration Status and Employment Outcomes*, Final Report, Working Lives research Institute, London, March 2009.

⁴⁶ EU Agency for Fundamental Rights, *Migrants in an Irregular Situation Employed in Domestic Work: Fundamental Rights Challenges for the European Union and its Member States*, 2011.

⁴⁷ Ibid, p.38.

⁴⁸ Here the relevant legal provisions include Arts. 3 ECHR and 4 EU Charter, Art. 12.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and Arts. 13 and 17 of the European Social Charter (ESC).

⁴⁹ Medecins du Monde, *Access to healthcare for undocumented migrants in 11 European countries, 2008 Survey report*, European Observatory on Access to Healthcare, London, September 2009. See also 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.

⁵⁰ Ibid.

⁵¹ 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)

(<http://www.picum.org/data/Access%20to%20Health%20Care%20for%20Undocumented%20Migrants.pdf>).

⁵² See S. Carrera and M. Merlino (2009), *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policymaking in the Stockholm Programme*, CEPS Liberty and Security in Europe, December 2009, p. 27.

⁵³ PICUM (2010), *PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe*, October 2010, p.18.

⁵⁴ M. LeVoy and K. Soova (2010), "Access to Healthcare for Undocumented Migrants" in S. Carrera and M. Merlino (eds.) *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS Liberty and Security in Europe Series.

⁵⁵ PICUM (2007), *Access to Healthcare for Undocumented Migrants in Europe*.

⁵⁶ See Art. 25 of the Universal Declaration of Human Rights (UDHR) and Art. 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

⁵⁷ PICUM (2008), *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, Brussels.

⁵⁸ This approach is supported by the EU's Facilitation Directive (Council Directive 2002/90/EC) which imposes on states the duty to provide for sanctions for persons who, for financial gain, intentionally assist an irregular migrant to reside in the EU and does not exclude that humanitarian actions also be subject to sanctions.

⁵⁹ The right to education is enshrined in Article 28 of the Convention on the Rights of the Child (CRC), Article 13 of the ICESCR, Article 26 of the UDHR. At EU level the right to education is provided by Art. 14 of the EU Charter and Article 17 of the European Social Charter.

⁶⁰ PICUM (2008), *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, Brussels, pp. 12-41. See also PICUM (2008), *Fighting Discrimination based violence against undocumented children*.

⁶¹ PICUM (2002, 2003a and 2003b), "Book of Solidarity" (Providing Assistance to Undocumented Children).

⁶² PICUM (2008), *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, Brussels, pp. 12-41.

⁶³ G. Engbersen and D. Broeders (2011), "Immigration Control and Strategies of Irregular Immigrants: From Light to Thick Fog," in M. Bommers and G. Sciortino (eds.) *Foggy Social Structures: Irregular Migration, European Labour Markets and the Welfare State*, Amsterdam University Press, Amsterdam; M. Wilmes (2011), "Irregular Migration and Foggy Organisational Structures: Implications of a German City Study", in M. Bommers and G. Sciortino (eds.) *Foggy Social Structures: Irregular Migration, European Labour Markets and the Welfare State*, Amsterdam University Press, Amsterdam; D. Gebhardt (2010), *Irregular Migration and the Role of Local and Regional Authorities*, in S. Carrera and M. Merlino (eds.), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS Liberty and Security in Europe Series, Centre for European Policy Studies, Brussels; J. Mai Sims, "Cities of migration: What Works to Integrate Urban Migrants?" available at: <http://www.opendemocracy.net/5050/jessica-mai-sims/cities-of-migration-what-works-to-integrate-urban-migrants>.

⁶⁴ N. Sigona and V. Hughes (2010), *Being Children and Undocumented in the UK: A Background Paper*, ESRC Centre on Migration, Policy and Society, Working Paper No.78, University of Oxford.

⁶⁵ The Section does not provide examples of practices or policies by LRAs constituting barriers for undocumented immigrants' access to fundamental rights, and which could be qualified as 'practices not to be promoted'. There are certainly cases where LRAs across the EU follow a similar migration management and police approach when dealing with the social phenomenon of irregular immigration. An illustrative example could be for instance the decision taken by the mayor of the Belgian city of Ostend to arrest 20 undocumented immigrants a day and detain them for 12 hours <http://www.dhnet.be/infos/faits-divers/article/367574/objectif-20-illegaux-tous-les-jours.html>.

⁶⁶ <http://picum.org/en>.

⁶⁷ <http://www.eurocities.eu/main.php>.

⁶⁸ On the methodological deficits of benchmarking integration refer to S. Carrera (2009), *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU*, Martinus Nijhoff Publishers: Leiden, pp. 129-143.

⁶⁹ On a critical analysis of Italy's mechanisms of migration control refer to C. Finotelli and G. Sciortino (2009), *The Importance of Being Southern: The Making of Policies of Immigration Control in Italy*, *European Journal of Migration and Law*, 11, pp. 119-138.

⁷⁰ *La Repubblica*, 12.03.2010, "Materne comunali per baby clandestini".

<http://ricerca.repubblica.it/repubblica/archivio/repubblica/2010/03/12/materne-comunali-per-baby-clandestini.html>;

La Stampa, 01.04.2010, *Padoin: "Sì ai figli dei clandestini al nido, lo dice la legge"*

<http://www3.lastampa.it/torino/sezioni/cronaca/articolo/1stp/177332/> and Elvio Pasca, “Bologna. Asili nido vietati ai clandestini”, 08.04.2010,

http://www.stranieriinitalia.it/attualita-bologna.asili_nido_vietati_ai_clandestini_10732.html.

⁷¹ N. Cyrus and V. Kovacheva (2009), Undocumented Migration in Germany: Many Figures, Little Comprehension, in A. Triandafyllidou (ed), *Irregular Migration in Europe: Myths and Realities*, Ashgate, pp. 125-144. See also N. Cyrus (2009), Undocumented Migration: Counting the Uncountable – Data and Trends across Europe, Country Report Germany, July 2009,

http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino_report_germany_final_2.pdf.

⁷² PICUM, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, Brussels, PICUM, 2008, p.32.

⁷³ See U. Karl-Trummer, S. Novak-Zezula and B. Metzler (2010), Access to Health Care for Undocumented Migrants in Europe: A first landscape of NowHereland, *Eurohealth*, Migration and Health in the European Union, Vol. 16, No. 1, pp. 13-16.

⁷⁴ For more detailed information refer to S. Naldoni, Italy (Tuscany region): The Community health partnership of the north-west zone of Florence, in World Health Organisation (WHO), *Poverty and Social Exclusion in the WHO Region: Health systems respond*, pp. 86-94.

⁷⁵ The Italian government contested the constitutionality of such legislation, claiming it surpasses the rights and liberties stipulated in the Italian Constitution and is discriminatory to Italian citizens. The Italian government’s appeal was declared inadmissible and unfounded by the Italian Constitutional Court. Michele Bocci, *Immigrati, la Toscana batte il governo "Sanità gratis anche ai clandestini"*, 24.07.2010

http://www.repubblica.it/cronaca/2010/07/24/news/immigrati_consulta_toscana-5789495/ (Cf. PICUM, *PICUM’s Main Concerns About the Fundamental Rights of Undocumented Migrants in Europe 2010*, p.13, 2010, PICUM, Brussels).

⁷⁶ Information provided by Eurocities. See also D. Gebhardt (2010), “Irregular Migration and the Role of Local and Regional Authorities,” in S. Carrera and M. Merlino (eds), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS Liberty and Security in Europe Series, Centre for European Policy Studies, Brussels, pp. 15-17.

⁷⁷ C. Hernandez Quevedo and D. Jimenez Rubio (2010), New citizens, new challenges for the Spanish national health system, *Eurohealth*, Migration and Health in the European Union, Vol. 16, No. 1, pp. 24-26. See also C. González-Enríquez (2009), Spain, the Cheap Model. Irregularity and Regularisation as Immigration Management Policies, *European Journal of Migration and Law*, 11, pp. 139-157.

⁷⁸ <http://www.maisha.org>.

⁷⁹ PICUM, Position Paper on “*Promoting and Protecting the Rights of Undocumented Migrant Women: Partnerships for Migration and Human Development*” submitted at the High Level Pre GFMD IV Consultation on “*On Promoting and Protecting the Rights of the World’s Women Migrant Workers: Partnerships for Migration and Human Development: Shared Prosperity – Shared Responsibility*” organized by the Government of Mexico in partnership with UNIFEM in Mexico 7-8 September 2010, Mexico City, Mexico, pp. 5-6 http://picum.org/picum.org/uploads/file_/PICUM%20Submission%20to%20UNIFEM%20Mexico%207-8%20September%202010.pdf.

⁸⁰ http://www.ocmw-info-cpas.be/index.php/home_fr. See also:

http://www.ocmw-info-cpas.be/index.php/fiche_FV_fr/le_cpas.

⁸¹ PICUM, “*Undocumented Migrants’ Health Needs and Strategies to Access Health Care in 17 EU Countries: Belgium Country Report*,” 2010, p. 8, Brussels, Health Care in Nowhereland: Improving Services for Undocumented Migrants in the EU, <http://files.nowhereland.info/706.pdf>.

⁸² <http://www.fangamusow.nl/> and PICUM Report on Undocumented Women, forthcoming in December 2011..

⁸³ M. Wilmes (2011), “Irregular Migration and Foggy Organisational Structures: Implications of a German City Study”, in M. Bommers and G. Sciortino (eds.) *Foggy Social Structures: Irregular Migration, European Labour Markets and the Welfare State*, Amsterdam University Press, Amsterdam.

⁸⁴ <http://www.stadt-koeln.de/buergerservice/adressen/00296>.

⁸⁵ <http://www.malteser-migranten-medizin.de>.

⁸⁶ M. Wilmes (2011), Irregular migration and foggy organizational structures: implications of a German city study, in M. Bommers and G. Sciortino (eds), *Foggy Social Structures: Irregular Migration, European Labour Markets and the Welfare State*.

⁸⁷ Information provided by Eurocities. Refer to <http://www.gent.be/eCache/THE/38/702.html>.

⁸⁸ The Report states that “*The effective protection of the rights of migrants in an irregular situation is facilitated by, and dependent on, the support and legal representation available from the civil society organizations who defend their rights, such as migrant’s rights associations, migrants’ self-organizations and trade unions.*” (page 44).

⁸⁹ <http://www.verdi.de> The FRA report states that “*They first start mediation procedure with employers. If there is no settlement they may assist migrants in an irregular situation – assuming they are members of the trade union – with trade union lawyers in a labour court procedure. This is a risk for claimants as their residence status of a foreigner in the labour court procedure. It is also possible that migrants in an irregular situation are represented by a lawyer before court and do not have to appear personally, and they are not required to give their personal address*”. Page 39 of the report.

⁹⁰ <http://citiesofmigration.ca>.

⁹¹ http://citiesofmigration.ca/good_idea/putting-justice-to-work. For more information refer to <http://www.kalayaan.org.uk> / http://citiesofmigration.ca/good_idea/putting-justice-to-work.

⁹² <http://www.fedelatina.org>.

⁹³ The Congress of Local and Regional Authorities, The role of local and regional authorities in the implementation of human rights, 18th Session, CG(18)6, 1 March 2010, page 19.

⁹⁴ <http://www.diba.cat/es/web/participacio/que-es-la-xarxa>. The scientific secretary is the Human Rights Institute of Catalonia (IDHC), see http://www.idhc.org/eng/131_ceuropea.asp.

⁹⁵ See Diputació Barcelona, Are d’Igualtata i Ciutadania, Xarxa de pobles i ciutats pels drest humans, Memòria d’activitats 2009, <http://www.diba.cat/es/web/participacio/dresthumans/quisom> Diputació Barcelona, Are d’Igualtata i Ciutadania, Xarxa de pobles i ciutats pels drest humans, Pla de Treball 2011, <http://www.diba.cat/es/web/participacio/dresthumans/quisom>.

⁹⁶ A new action plan for the period 2011-2014 is currently under development.

⁹⁷ Paragraph 62 of the CLRA Opinion, page 19 states that “*Every third year the municipality performs an evaluation based on the CRC. The evaluation group consists of three reviewers from three other municipalities. These reviewers liaise with three municipal reference groups: a group of politicians, a group of municipal managers and a group of field workers. There are about ten people in each group and the meetings are held on a regular basis and each meeting lasts approximately an hour and a half. The municipality has also made a survey to obtain the views of children and youth. What emerges from these discussions and questionnaires is compiled in a report which can be used in the municipality*”. See also

http://www.humanrights.gov.se/extra/pod/?module_instance=2&action=pod_show&id=15.

⁹⁸ http://www.idhc.org/cat/documents/Carta_ingles.pdf;

<http://www.diba.cat/es/web/participacio/dresthumans/carta>.

⁹⁹ http://www.idhc.org/eng/131_ceuropea.asp.

¹⁰⁰ Draft Opinion of the Committee of the Regions on the Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union, CdR 406/2010 rev.2.