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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**EFFECT OF
MIGRATION POLICIES
ON HUMAN RIGHTS
IN THE EUROPEAN
NEIGHBOURHOOD**

DROI

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

EFFECT OF MIGRATION POLICIES ON HUMAN RIGHTS IN THE EUROPEAN NEIGHBOURHOOD

Abstract

Cooperation with third states constitutes an important pillar of the EU's migration policy. This study analyses to which extent the cooperation between the EU and its neighbouring countries had an impact on the protection of the rights of migrants and refugees in the respective countries. It gives a general overview of the state of the art of national migration policies and legislations in the Eastern and Western European neighbourhood and the Western Balkan states. Three case studies on Georgia, Kosovo and Lebanon illustrate further the country specific situation of migrants and refugees and provide for a detailed analysis of the implications the EU engagement had on the protection of human rights. The development of national migration policies was mainly due to the engagement of the EU, however, these policies have been shaped rather by EU security considerations than by national migration-related concerns leading to the adoption of very restrictive national migration policies likely to endanger the rights of migrants. The study concludes by offering a set of recommendations to encourage the EU to move the debate on future cooperation with neighbouring states on migration issues in a more migrants' rights centred direction that is in compliance with the principles of the rule of law, good governance, democracy and human rights.

This study was requested by the European Parliament's Committee on Subcommittee on Human Rights.

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EXECUTIVE SUMMARY

The study investigates the effect of migration policies on human rights in the European Eastern and Mediterranean Neighbourhood as well as in the potential enlargement countries and analyses the implications EU engagement – encompassing bilateral, financial and practical cooperation – had on human rights of both regular and irregular migrants and refugees. Divided into three closely interrelated parts, the study identifies firstly, in Part One, the root causes of migration and provides a general survey of human rights related problems migrants are facing. Secondly, Part One analyses the European Migration Policy with a special focus on its external dimension and provides an assessment of the tools the EU uses to increase its cooperation with its neighbouring countries in the field of migration. Subsequently, the study undertakes a comparative survey of the migration policies in the European Eastern and Mediterranean Neighbourhood and potential enlargement countries in light of its human rights compliance. The authors examine to which extent the cooperation with the EU had positive and/or negative impacts on the protection of the rights of migrants in the countries observed. In order to highlight the current situation of migrants, Part Two is devoted to three case studies, namely on Georgia, Kosovo and Lebanon, representing each one of the regions in the European Neighbourhood. Besides analysing the state of the art of national migration policies, the case studies on Georgia and Kosovo show that the progress made in the field of developing national migration policies was mainly due to the external engagement of the EU whereas in Lebanon the efforts made cannot be straightforward considered as a result of the EU's engagement under the framework of the European Neighbourhood Policy. Overall, the case studies conclude that insofar the cooperation with the EU has not contributed significantly to an improvement of the protection of the rights of migrants since in the partnership agreements main emphasis is put on the fight against irregular migration. Security considerations of the EU are the leading theme in the bilateral agreements whereas the rights of migrants and refugees only play a subordinated role. The study concludes with Part Three where the authors present recommendations on how the European Parliament can further contribute to enhancing the situation of migrants by making human rights more relevant for the European Unions' Cooperation Framework. The goal must be to assist the European Neighbourhood countries in developing effective and human rights sensitive national migration policies.

PART I - MIGRATION, HUMAN RIGHTS AND THE EUROPEAN NEIGHBOURHOOD

Part One of the study takes its point of departure in a general survey of the problems at stake arising with regard to migration and human rights. Migrants and refugees are one of the most vulnerable groups whose rights are likely to be violated regularly. Even though the EU is bound by its commitment to human rights, the EU migration and asylum policy failed to develop sufficient and effective protection mechanism especially with regard to irregular migrants. This is mirrored for instance by the reactions of EU Member States to the recent events in Tunisia, Egypt and Libya. Because of the "Arab Spring" and the subsequent outburst of violence in Libya a growing numbers of people left their home countries. While Tunisia and Egypt received the great majority of people fleeing the conflict in Libya, discussions in the EU about "burden sharing" tended to be rather driven by national protection considerations than by solidarity for the refugees themselves or solidarity for the neighbouring countries of Libya. In the last decades the EU has started to cooperate closely with neighbouring countries on migration, also with the highly repressive regimes in North Africa. Human rights only played a marginalised role in this cooperation and have been often sidelined by a strong focus on security.

Main findings

- Human rights are inalienable and their enjoyment cannot be denied any human being. However, migrants' rights are violated on a broad scale and a daily basis both with regard to civil and political as well as to economic, social and cultural rights. Especially irregular migrants are, due to their weak position, exposed to human rights violations, since they have hardly any chance to defend themselves against exploitation or abuse. Exploitation not only puts the lives of migrants at serious risk, but is very often associated with the worst human rights abuses, including slave labour, sexual exploitation, gender violence and child abuse.
- The main human rights problems identified in the European neighbourhood are related to the very restrictive approach towards irregular migration and the only marginally developed national asylum systems. It has been observed that in those countries that actually have developed national migration policies and legal frameworks, they are formally fairly in accordance with international human rights standards, but, due to the lack of implementation and enforcement mechanisms, migrants remain highly vulnerable to abuse and exploitation. Most problematic in this regard is that, in all of the regions examined, migrants have hardly any possibilities of legal redress.
- The EU has already acknowledged that measures with regard to migration have to be implemented at the beginning of the migration chain, i.e. through the promotion of peace, political stability, human rights, democratic principles and sustainable economic, social and environmental development in and of the countries of origin and transit. It has to be emphasised, that control measures at the external borders alone are an insufficient response to the increasing migration pressure and the mere restrictive approach is likely to endanger the human rights of migrants and refugees. The EU's foreign policy priorities must focus thus on combating the root causes of migration by fostering development through political and economic reforms in the countries of origin. Even though the EU has already incorporated the aforementioned issues into its general framework of bilateral cooperation, the protection of borders and the fight against irregular migration are still clearly prioritised rendering especially the bilateral cooperation imbalanced.
- The bilateral cooperation takes part through the EU accession process, the European neighbourhood Policy (ENP), the Union for the Mediterranean (Euro-Mediterranean Partnership, formerly Barcelona Process) or the Eastern Partnership. Furthermore, through intergovernmental dialogues as the Söderköping or the Budapest Process, neighbouring and potential enlargement countries are encouraged to develop national migration policies and laws consistent with the EU *acquis* on migration. The EU's fight against irregular migration is further supported by the conclusion of bilateral return and readmission agreements with countries of origin but also with transit countries.
- Even though the bilateral agreements concluded under the aforementioned frameworks reaffirm the necessity to tackle migration from a development approach, they are still imbalanced and onesided. Security considerations trump humanitarian ones as for instance domestic capacity building in areas as border control and the fight against irregular migration are higher prioritised than the protection of human rights of migrants and refugees.
- Besides the bilateral cooperation, there are several financial instruments in place at the European level like the European Neighbourhood Partnership Instrument (ENPI), the Migration and Asylum Thematic Programme 2007-2013, the European Instrument for Democracy and Human Rights (EIDHR) and the Instrument for Pre-Accession Assistance (IPA) offering funding for migration and asylum related projects in the European Neighbourhood and the potential enlargement countries related to improve the situation of migrants with regard to the protection of their human rights. Even though these instruments are not likely to address the root causes of migration *per se* and do not directly have an impact on national migration policies they can improve the situation of the most vulnerable at least at the regional or local level. So far, it has to be highlighted that they have

been rarely used to implement projects with regard to the rights of migrants. Once again the funding was mainly directed to projects related to border management capacities.

- The conclusion of readmission and return agreements is considered, in particular from the side of the EU, as an important and efficient means to fight irregular migration. However, the European neighbouring and potential enlargement countries do not benefit equally from the conclusion of such agreements. Whereas the added value of readmission agreements is clear for the EU, namely having unwanted irregular migrants effectively removed, the practice to return people to countries that are due to financial and political constraints not able to provide returnees with basic rights is strictly to be refused.
- The cooperation between the EU and neighbouring and potential enlargement countries on migration issues under the aforementioned cooperation framework shaped the development of national migration policies and laws and considerable progress has been made mainly due to this external pressure.
- However, human rights considerations have played a limited role in these developments. Generally, developing coherent migration policies emphasising the protection of migrants' rights has been of low priority in the political and public spheres of the European neighbouring and the potential enlargements countries in the Western Balkans. It is especially notable that national migration policies in the examined regions are highly fragmented and the aforementioned progress was mainly made in the field of border management regulations and legislation adopted to fight irregular migration. National migration policies vary significantly in their level of advancement, but what they do have in common is that even in those countries where fairly developed migration policies are in place their effective implementation as well as the implementation of international human rights instruments are undermined by lacking financial and personal resources as well as by corruption.
- Even though the bilateral cooperation agreements between the EU and the Eastern and Mediterranean neighbouring countries and the Western Balkans claim to promote the respect and the promotion of human rights in the respective countries, their implementation generally has had a negative effect on the protection of human rights of migrants. To comply with the EU's priorities, namely border management and the fight against irregular migration, set forth in the partnership agreements, national authorities have adopted very restrictive and only formally human rights based migration policies. The EU seems to be satisfied that restrictive laws are developed and implemented irrespectively whether the means of implementation violate human rights of migrants or not.
- In order to deal with sudden mass influxes of people as, for example, on Lampedusa or Malta, as a result of the political developments in North Africa, the EU has to develop short time solutions. Thus "burden sharing" instead of overrated security considerations must be the guiding motive in the on-going and future negotiations on reforms concerning the Common European Asylum System. Since the majority of people arriving right now on Lampedusa are economic migrants, negotiations of short stay visa facilitation agreements with the countries concerned should be envisaged. Besides short term solutions the EU must consider the Global Approach to Migration and reinforce the migration development nexus. Civil society organisations must be strengthened since a thriving civil society can help uphold human rights and contribute to democracy building and good governance.

PART II - CASE STUDIES

- Part Two of the study comprises a synthesis of the three case studies on Georgia, Kosovo and Lebanon (the case studies in full can be found in the Annex). The case studies shed light on the situation of migrants in the three countries and provide answers to the question of how migrants' rights are protected or violated by existing migration policies. Résumés of the findings made by our partners in the respective countries highlight the state of the art of migrants' rights in the respective countries, the channels the EU has used for cooperating with the country in question and the effect this EU engagement has had on the development of migration policies and thus on the protection of the rights of migrants. All three case studies examine the situation of migrant workers, irregular migrants and refugees. Additionally, country-specific related problems such as Internally Displaced Persons (IDP) in Georgia, returned and repatriated people in Kosovo, and Palestinian refugees and Migrant Domestic Workers (MDW) in Lebanon, are described and analysed in detail.

Main Findings

Georgia

- Even though Georgia has been rather active in ratifying international and regional instruments protecting human rights of migrants, encompassing as well irregular migrants and refugees, the protection of the rights of migrants in practice is not yet in accordance with the international obligations it is bound by. National legislation in the field of migration is still underdeveloped and lacks implementation that increases the risk that the rights of migrants are violated on a general basis.
- In the last decade Georgia has made considerable progress in developing national migration policies. However, due to the political changes in 2003, Georgia is still in the process of renewing its former migration policies and insofar a written comprehensive migration policy document is missing. Consequently, the legislative framework in place related to migration issues appears to be rather fragmented and not always coherent. Human rights of migrants generally do not play the central role with regard to the development of national migration laws.
- The Georgian approach towards migration is generally very liberal and immigration is understood as a 'push factor' for the current weak economic situation by attracting foreign investors. This is primarily reflected by the generous labour legislation hardly foreseeing any limitations for people trying to find work in Georgia. Even though this liberalist approach could actually foster the economic development of Georgia it also has some down sides especially when it comes to the protection of the rights of migrants especially since employers only face very limited restrictions, the rights of employees and workers are hardly protected. Furthermore, effective immigration monitoring mechanisms are lacking and there is an inherent risk within this passive approach to migration that trafficking in human beings will increase significantly in the near future.
- In opposition to this very liberal labour legislation stands the rather restrictive approach towards the fight against irregular migration. During the last decade Georgia not only became a source of irregular migrants but also an important transit route for people trying to reach the territories of the EU. Emphasis was thus put primarily on the protection of its borders and irregular border crossing is now criminalised by the Georgian Criminal Code. Interestingly, for other immigration offences, e.g. overstaying a visa, only limited and loosely enforced administrative penalties are in place.
- The main human rights problems arise with regard to the great numbers of IDPs. For a long time the main obstacle for IDPs to enjoy their rights was the governmental approach that the integration of IDPs in their new domiciles could undermine the return to their former homes. Granting special social rights, financial assistance or special employment opportunities to IDPs was considered as being too much of a burden on limited financial resources. Only recently, in 2009, the Georgian government developed a new Action Plan aimed at fostering the integration of IDPs by foreseeing

- special vocational education and training programmes for IDPs to enhance their employment opportunities and improve their living conditions. Still, the human rights of IDPs are violated on a broad scale and IDPs remain a highly vulnerable group in Georgia. All the formal and legal attempts made to improve their situation have failed insofar to guarantee their basic rights, since their implementation is lacking.
- Even though the EU engagement has encouraged Georgia to become active in the field of migration it appears that this engagement has a rather ‘EUgoistic’ background. The security centred approach is primarily meeting the EU’s objectives with regard to the fight against irregular migration and not supporting Georgia in developing a coherent migration policy being adequate to approach its own migration problems. For instance, emigration combined with the brain drain problem Georgia is confronted with, only plays a subordinated role in the cooperation between Georgia and the EU.
 - Only since 2009 the EU became particularly active with regard to the funding of migration related projects in Georgia. Currently, there are a number of initiatives addressing migration funded by the EU and implemented by Georgian partner institutions, international organisations (e.g. IOM) or NGOs (e.g. Oxfam). However, neither under the ENPI nor the EIDHR, projects related to the protection of the rights of migrants are financed. Projects currently financed under the Thematic Programme on Migration and Asylum, are mainly directed at the support for the implementation of readmission and visa facilitation agreements and the return of migrants. However, a very promising project under the thematic programme is aimed to assess the impacts migration could have on children and elderly left behind. As the situation in Georgia is in particular precarious with regard to IDPs the EU is funding various related projects under the Instrument for Stability. These projects are mainly targeted to improve the living conditions of IDPs and foster their socio-economic integration. Overall, these projects contributed significantly to an improvement of the situation of IDPs in Georgia.
 - Insofar the projects funded by the EU have been implemented rather effectively and there has been no evidence for the misuse or the misusing of resources allocated under the aforementioned initiatives. However, since most of the projects are still going on it will be possible to evaluate their effectiveness comprehensively only after their accomplishment.

Kosovo

- The EU engagement had a major impact on the development of the legal and formal migration framework in Kosovo that in great parts meets international human rights standards. Still, violations of the rights of migrants, refugees, and returned and repatriated persons occur on a regular basis. The shortcomings with regard to the protection of human rights stem rather from the insufficient implementation than from the legislation in place per se. It has to be kept in mind though that Kosovo is at a very early stage with regard to the development of comprehensive national migration legislation and the institutions implementing them only recently took on their work.
- Insofar, the protection of the rights of migrants has not been a priority of the cooperation between the EU and Kosovo, even though the strengthening of human rights per se constitutes a primary objective. Due to the cooperation with the EU, Kosovo improved without doubt its border control capacities; however, the security based approach may lead to severe human rights violations of detected irregular migrants, especially when it comes to the detention of irregular migrants to verify their identities. Similarly, a lot has improved with regard to the fight against human trafficking and a rather comprehensive and progressive national law with regard to combating human trafficking is in place. Nevertheless, actual victims of human trafficking are only weakly protected and often fear self-reporting as victims to the authorities since victim intimidation and blackmailing are still present.

- The main migratory flows to Kosovo are comprised of returned and repatriated people who were not granted a permanent legal status in, primarily, Western Europe. Return and repatriation have a profound impact on human rights of people since they might interfere with the right of housing, the right to work, the right to education etc., since Kosovo often is not even able to guarantee the basic needs of returnees. Even though there has been a lot of criticism against the practice to return people belonging to a minority, in particular to the Roma minority, to Kosovo by Human Rights Watch, the CoE Commissioner on Human Rights and the European Parliament, the EU continued to do so.
- Kosovo is receiving financial assistance mainly under the IPA. Under the category political assistance the sustainable return and reintegration of refugees and IDPs is funded. For instance, the building of a new asylum centre designed to accommodate up to 200 asylum seekers is currently funded under the IPA. However, up to now the EU has not funded any project related to deported and returned people from the EU Member States to Kosovo even though forcibly returned people are one of the most vulnerable groups in Kosovo especially in case they are belonging to a minority.

Lebanon

- In Lebanon, the human rights of migrants and refugees are violated on a regularly basis. Due to the lack of political will, the absence of adequate laws enshrining provisions aimed at the protection of the rights of migrants, administrative barriers and the lack of financial resources migrants are likely to face severe human rights violations as for instance arbitrary detention, ill treatment, deportation and exploitation. Their vulnerable position is further aggravated by the fact that there are hardly any possibilities for legal redress in case of violations of their most basic rights.
- The development of a coherent national migration policy has been a topic of low priority in the political and public sphere in Lebanon and neither a domestic asylum law nor a specialised legislation protecting the rights of migrant workers have been adopted so far. In fact the migration related legal framework dates back to the 1960s.
- Migrant workers and especially migrant domestic workers (MDWs) remain one of the weakest protected groups and are highly vulnerable with regard to violations of their rights since no specialised legislation or national strategies are in place offering special protection to them.
- Whereas the situation for refugees is in general precarious since there is no national asylum system in place, Palestinian refugees who account for the majority of refugees in Lebanon, even face further discrimination and can be considered as the most vulnerable group in Lebanon. Apart from the fact that living conditions in the refugee camps are sub-standard, the rights of Palestinian refugees are violated regularly with regard to the access to the judicial system, the labour market and to social security.
- The slight progress made by Lebanon with regard to the development of migration policies and the adoption of migration related laws cannot be straightforward considered as a result of the EU's engagement under the framework of the ENP. Insofar, the main contribution of the EU with regard to the protection of labour and irregular migrants as well as of refugees has been the support of civil society organisations trying to change the situation through lobbying, advocacy, awareness raising campaigns and the providing of legal assistance and services. Due to the complex political situation, the real impact of the cooperation agreements concluded with the EU on the actual migration situation is rather limited. In order to gain more influence, the EU needs thus to take a clear stand on migration issues and pass this position directly to the Lebanese government in an explicit and decisive manner. Additionally, the EU has to understand the political and financial restrictions the Lebanese government is facing and it should rather increase its efforts to suggest reasonable alternatives instead of merely highlighting gaps and exerting pressure through critique.
- Funding of migration related projects in Lebanon occur under the ENPI and the EIDHR. Under the former in 2010 one major project implemented by the ILO was funded aiming inter alia to increase

protection for migrant workers, in particular female domestic migrant workers. Additional funding under the ENPI was directed at the improvement of living conditions of Palestinian refugees. Under the EIDHR one project was funded aimed at the protection of female domestic migrant workers and one with the objective to improve the living conditions of Iraqi refugee children. Generally, the funds allocated are used primarily for activities that organisations carry out within the auspices of their overall mission to serve the migrant community in Lebanon. Insofar, no uniquely new or innovative activities are being carried out because of EU funding.

PART III - SUMMARY OF RECOMMENDATIONS

Part Three of the study summarises the key findings made and provides recommendations for a possible future course of action. Particular attention is paid to differentiating between future bilateral cooperation, financial cooperation and practical cooperation.

The EU engagement has had, without doubt, positive impacts on the national approaches towards migration management. The effects, however, have not been exclusively positive with regard to the protection of the rights of migrants. Even though all the countries in the European Neighbourhood and the accession candidates have made some progress in developing migration policies, regular and irregular migrants and refugees can still be considered as one of the most vulnerable groups since their human rights are violated at a regular basis and they often have no possibilities to enforce their rights.

In order to improve the effectiveness of the cooperation regarding the development of national migration policies in the European Neighbourhood and to enhance the protection of human rights of migrants following recommendations should be taken into consideration by the EU and in particular by the EP in the on-going debate.

On the Bilateral Cooperation Framework

- At the European level, the EU has to develop further instruments to establish a common European immigration policy, to manage economic migration and to create further possibilities for legal migration. Additionally, against the background of the “Arab spring”, negotiations of short stay visa facilitation agreements with the countries concerned should be envisaged following a differentiated, evidence-based approach. “Burden sharing” instead of overrated security considerations must be the guiding theme in the on-going and future negotiations. However, besides focusing on short term solutions, the EU must as well consider the Global approach to migration and reinforce the migration/development nexus with a view to promoting economic and social progress in receiving and transit countries and countries of origin and to enhance social cohesion by improving European integration strategies.
- It has to be the aim of the EU to re-establish a balance between security issues and a developing agenda in the cooperation policies with its neighbouring countries and the enlargement countries based on an analysis of effects migration has on countries of origin and destination. The respect for the rights of migrants has to become a priority in any agreement related to migration between the EU and third countries. Priority has to be given to the safeguarding of the rights of migrants over the safeguarding of borders and action by the EU to prevent abuses against human rights violations and to protect migrants should be enhanced in order to be more effective.
- The EU must, firstly, enhance its efforts to encourage neighbouring countries and future Member States to develop migration policies and laws that are in accordance with international human rights standards. Secondly, the EU must undertake a collaborative relationship with its neighbouring and the future accession countries so that, once guarantees protecting the rights of migrants are incorporated into domestic legislation, they are implemented more effectively, in particular with regard to the fight against irregular migration. The respect for the rights of migrants and refugees should be thus added to the general provisions with regard to human rights foreseen in the Action Plans.

- Political cooperation with the countries in the European Neighbourhood must be made conditional to advancing towards higher standards of human rights and governance based on a set of minimum benchmarks against which performance will be assessed. These minimum benchmarks should encompass
 - Democratic performance

Free and fair elections resulting in well-established democracies are the precondition for the enjoyment of human rights. The EU must through financial, technical and practical cooperation ensure that future elections in the neighbouring countries meet international criteria and standards, thus clearing the path for good governance, democracy and human rights
 - Human Rights

Even though the ratification of international human rights instruments can be interpreted as a commitment to human rights, the EU must ensure as well that these standards are incorporated into national legislations and finally implemented effectively. In this regard EU experts should advise respective national authorities and provide for sufficient financial resources targeted at the establishment of effective implementation mechanism. In this regard the EU should further support the fight against corruption in the countries concerned.
 - Civil Society

Civil society organisations in the countries concerned must be strengthened since a thriving civil society can help uphold human rights and contribute to democracy building and good governance. With regard to the protection of migrants, civil society organisations are trying to change the situation through lobbying, advocacy, awareness raising campaigns and the providing of legal assistance and services and should thus be supported financially but also integrated into the political dialogues.

On the Financing Instruments

- Even though the EP is not consulted at any stage of the preparation of Action Plans and/or Association Agenda, its extensive budgetary and control powers nevertheless allow it to play a significant role in the ENP, the Union for the Mediterranean and the Eastern Partnership. Insofar, it is difficult to measure the impact of the budget allocations under the ENPI where migration and asylum are concerned, since the funds comprise general budgetary support. With regard to the other financing instruments such as the IPA or the EIDHR the protection of the rights of migrants has not been a priority yet.
- The EU must ensure that the new multiyear budgetary framework includes the protection of the rights of migrants and refugees as a main priority. However, the EU must ensure that in the future all relevant information on the funding is published and assessed. The programmes adopted should thus be clearly identified and have measurable objectives.
- It must be ensured that the funding of migration related projects is addressing the main human rights problems migrants are facing. Migrants should further not be addressed only as recipients of aid but financial mechanism should be developed aimed at empowering them in a long term perspective.

On Practical Cooperation

- The EU must ensure that practical cooperation initiatives undertaken do not lead to an increase in human rights violations. Special emphasis must thus be placed on the qualitative improvement of the management of migration flows in the European neighbouring countries and the future Member States. In particular, substantive changes have to occur with regard to the practice of repatriation and forced return as a prerequisite for further cooperation on migration issues. The EU and its Member States should refrain from strengthening merely the border control capabilities of

the respective countries as long as detention and/or repatriation practiced by the national authorities contribute to further violations of human rights by falling under the rubric of inhuman or ill-treatment.

LIST OF ABBREVIATIONS

| | |
|---------------|--|
| AA | Association Agreement |
| AI | Amnesty International |
| AP | Action Plan |
| CARDS | Community Assistance for Reconstruction, Development and Stabilisation |
| CARIM | Consortium for Applied Research on International Migration |
| CAT | United Nations Convention against Torture |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CERD | Convention on the Elimination of Racial Discrimination |
| CIS | Commonwealth of Independent States |
| CoE | Council of Europe |
| CRC | Convention on the Rights of the Child |
| DCAM | Department of Citizenship, Asylum and Migration |
| EC | European Community |
| ECHO | Humanitarian Aid Department of the European Commission |
| ECHR | European Convention on Human Rights |
| ECLO | European Commission Liaison Office in Prishtina |
| EIDHR | European Instrument for Democracy and Human Rights |
| ENP | European Neighbourhood Policy |
| ENPI | European Neighbourhood and Partnership Instrument |
| ENP AP | European Neighbourhood Policy Action Plan |
| EP | European Parliament |
| ESS | European Security Strategy |
| EU | European Union |
| EULEX | European Union Rule of Law Mission in Kosovo |
| HRW | Human Rights Watch |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICMPD | International Centre for Migration Policy Development |
| ICRC | International Committee of the Red Cross |
| IDP(s) | Internally Displaced Person(s) |
| ILO | International Labour Organization |
| IOM | International Organisation for Migration |
| IPA | Instrument for Pre-Accession Assistance |
| JHA | Justice and Home Affairs |

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|------------------|---|
| MARRI |Migration, Asylum, Refugees Regional Initiative |
| MDW(s) |Migrant Domestic Worker(s) |
| MIDWEB |Migration for Development in the Western Balkan |
| MIDPFOTAR |Ministry of IDPs from Occupied Territories, Accommodation and Refugees |
| NIP |National Indicative Programme |
| NIS |Newly Independent States |
| PCA |Partnership and Cooperation Agreement |
| PHRO |Palestinian Human Rights Organization |
| OECD |Organisation for Economic Cooperation and Development |
| OSCE |Organization for Security and Co-operation in Europe |
| RAE |Roma, Ashkali and Egyptians |
| SAA |Stabilisation and Association Agreement |
| SAD |Stabilisation and Association Dialogue |
| SAP |Stabilisation and Association Process |
| SAPARD |Special Accession Programme for Agriculture and Rural Development |
| STM |Stabilisation and Association Tracking Mechanism |
| UDHR |Universal Declaration of Human Rights |
| UN |United Nations |
| UNDP |United Nations Development Programme |
| UNHCR |United Nations High Commissioner for Refugees |
| UNMIK |United Nations Interim Administration Mission in Kosovo |
| UNRWA |United Nations Relief and Work Agency |
| US |United States |
| USSR |Union of Soviet Socialist States |

INTRODUCTION

Respect for the rights of migrants has become a major concern for the EU, which is experiencing increasing migration flows through its neighbouring countries.¹ By concluding partnership agreements under various frameworks the EU tries to involve countries of origin and transit in its migration management policy. But, to what extent human right of migrants became an integral part of these agreements? Did the EU engagement enhance the development of human rights sensitive migration policies in the European neighbouring countries? Or have there even been negative side effects regarding the protection of migrants? And, does the EU in the external dimension of its migration policy live up to its self-proclaimed status as human rights promoter or does it trade the rights of migrants for its perception of security?

To answer these questions this study examines in the first place the extent to which human rights of migrants are protected by national migration policies and laws. Are the national policies and laws in place adequate to guarantee the protection of the rights of migrants? Have human rights considerations even played a role when these policies and laws have been drafted? And did the cooperation with the EU, mainly in the framework of the European Neighbourhood Policy and Action Plans, promote the development of human rights sensitive national migration policies and laws?

The point of departure is the identification of the main human rights problems related to both regular and irregular migration. By comparing the states of the art of national migration policies in the three countries representative for their regions by means of analysis of the human rights situation of labour migrants, irregular migrants and refugees, the study will allow conclusions as to the extent of the impact of cooperation with the EU on current migration policies and legal frameworks in these countries.

For this purpose the current attempts by the EU to enhance the cooperation with third countries in the field of migration will be analysed on the basis of relevant documents. Furthermore, it will be examined how far the 'external dimension' of the European migration policy is already implemented and which external actions the EU has taken in cooperation with its neighbouring countries to manage migration flows. In this context the spotlight will be put on debate of "security vs. human rights". For this analysis, the study will draw from research and information from NGOs, governmental sources and international organisations.

To illustrate the effects of migration policies on human rights of migrants in the European neighbourhood and potential enlargement countries and to scrutinise the possible implications of the EU cooperation policies, an empirical approach based on three case studies, namely on Georgia, Kosovo and Lebanon, has been chosen.

The problems related to migration in the three countries selected vary significantly. Georgia, which still faces internal conflicts, has to deal especially with human rights problems related to IDPs. Kosovo has to deal primarily with the high emigration rate and the forced return and repatriation of its own nationals. In Lebanon particular human rights problems arise with regard to the protection of migrant domestic workers (MDWs) and Palestinian refugees. Besides the various country-specific migration related problems, these three countries have been chosen since they are all in close but very different processes of cooperation with the EU. In the last decade the EU concluded national Action Plans under the framework of the European Neighbourhood Policy with Georgia and Lebanon which also cover migration issues. With Kosovo the cooperation is based on the European Partnership for Kosovo and the Stabilisation and Association Process, dealing inter alia with migration and human trafficking. The three countries' status of ratification of international instruments related to migration differs as well. For instance, Lebanon has not ratified the 1951 Geneva Convention on the Status of Refugees and its additional 1967 Protocol. It

¹ See Thomas Hammarberg, *Respecting the Rights of Migrants in Today's Europe: A call for Action*, in: Benedek/Benoit-Rohmer/Karl/Nowak (eds.), *European Yearbook on Human Rights 2010*, 21-30.¹

was an additional aim of the study to examine to which extent the ratification of international instruments has an actual positive impact on the protection of the rights of migrants.

The case studies first analyse the national migration policies and legislation providing migrants with human rights protection. In this regard a tripartition in the examination on how the rights of labour migrants, irregular migrants and refugees was made, following the structure already applied in the first part. Besides the examination of these general human rights questions related to migration, each case study will pay special attention to the country-specific human rights issues: IDPs in Georgia, returned and repatriated nationals in Kosovo, and MDWs and Palestinian refugees in Lebanon. In so doing, the case studies will provide the reader with a comprehensive picture of existing national policies with regard to the protection of human rights of migrants and the respective applicable EU and international instruments. The study will further analyse the possible effects of these normative instruments on the development of national migration policies. Subsequently, these policies will be evaluated in terms of how migrants' rights-friendly they are implemented in practice.

As it is the aim of the study to be as comprehensive and inclusive as possible, a number of relevant actors have been approached for the case studies. By conducting interviews with representatives from the governmental side, civil society and, as applicable, from representatives of international organisations on site, emphasis was put especially on the practical implementation of existing national migration policies.

The findings made in the comparative survey of the human rights compliance of migration policies in the European neighbourhood and the potential enlargement countries that are supported by the outcomes of the case studies build the framework for our recommendations and policy advice for future EU and European parliament course of action. The conclusions made are aimed to encourage the EU to move the debate on future cooperation with third states on migration issues in a more migrants' rights centred direction that is in compliance with the principles of the rule of law, good governance, democracy and, over all, human rights.

Part One – MIGRATION, HUMAN RIGHTS AND THE EUROPEAN NEIGHBOURHOOD

CHAPTER I – MIGRATION AND HUMAN RIGHTS – PROBLEMS AT STAKE

1 MIGRATION AND EUROPE

In 2010 out of the 500 million inhabitants of the European Union (EU) 32 million people were international regular migrants² whereas 20.1 million out of them came from other than the EU 27³. These numbers however do not reflect the real picture of migration trends in Europe as a major part of non-EU nationals residing in the EU Member States remains unrecorded – namely the irregular migrants. Irregular migrants are persons entering the territory of the EU outside the official channels by crossing the external border without the requested documents, or persons who enter legally for example with a tourist visa and just overstay it. The working definition adopted in this study characterises irregular migrants as non EU-citizens who do not have a residence status and who are liable to expulsion when detected by the authorities. Estimating the numbers of migrants who enter a country in an irregular or clandestine way or the number of people who reside undocumented in a country is inherently problematic by the very nature of being irregular in a country. Consequently there are hardly any reliable statistics on the number of irregular immigrants and estimates vary between 5 and 10 % of legal immigrants.

It is an open secret that due to the demographic developments (including ageing of the population and low birth rates) the EU and its affluent Member States rely on migration and the financial as well as labour contribution of migrants to maintain their social welfare systems and economic growth. Recent statistics forecast that without immigration from third the population of the EU 27 will drop about 50 million. Without migrants the ratio of people of working age to pensioners will further fall from its average level from 4 to 1 to 2 to 1 in 2050, bringing lower tax revenues and increased expenditure for health care and pensions. From a short and middle term perspective the logical conclusion must be thus: We need immigration from third countries!

Nevertheless, for the public opinion ‘migration’ has a negative connotation and migrants are often regarded as the carriers of many ills, as the scapegoats for the existing economic problems and as exploiters of the aforementioned social systems. In addition the increased religious and ethnic diversity is often perceived as rather undermining social cohesion in Europe than as enrichment for the cultural and social life. The comprehension that Europe needs migrants on the one hand and the stoking of fears on the other hand is reflected in the current political discourse on migration and presents one of the major dilemmas the EU and its Member States are facing at the moment. For this reason discussions tend to be rather one-sided and are targeted at the questions, firstly, how Europe can profit most from migration and, secondly, how Europe can be protected from mass influxes of migrants taking advantage of and exploiting the existing structures. The former is mirrored by tendencies of states to develop complex systems of policies to attract and integrate highly skilled workers. However, in this context migration is

² For the purpose of this study the UN definition of ‘migrant’ as follows will be used: (a) Persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another State; (b) Persons who do not enjoy the general legal recognition of rights which is inherent in the granting by the host State of the status of [...] permanent resident or naturalized person or of similar status; and (c) Persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas or other agreements; Rodríguez Pizarro, G., UN Special Rapporteur on the Rights of Migrants, *Report to the Commission of Human Rights*, E/CN.4/2000/82, 6 January 2000.

As the authors of the study hold the view that no human being can be ‘illegal’ i.e. being implicitly placed outside the scope of human right, the terms ‘illegal migrant’ and ‘illegal migration’ will be replaced by ‘irregular migrant’ and ‘irregular migration’.

³ EUROSTAT, *Demography Report 2010: Latest figures on the demographic challenges in the EU*, News Release 50/2011, 1 April 2011, available at:

http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-01042011-BP/EN/3-01042011-BP-EN.PDF.

seen in economic terms and migrants rather regarded as commodities, than as individuals entitled to the full enjoyment of their human rights. With regard to the latter 'solutions' are framed to a large extent within a security and border control framework which is shaped by a language tending to focus on control, restriction and fear⁴.

Migration is not a new phenomenon; on the contrary, the European history is shaped by immigration as well as emigration flows characterising the development of the current legal migration regime. On the one hand the European integration process, born out of rationales of reconciliation, security and reconstruction after World War II with the aim of creating a common single market, with resulted in the establishment of the freedom of movement allowed people to accept offers from employers in another Member State, to move freely for that purpose within the territory of the European Community (EC), and to live there after being employed. On the other hand the transformation of Europe from a continent of emigration to a continent of immigration with increasing numbers coming from third countries marked a turning point in the development of a common European migration policy⁵.

Whereas the former process may be regarded as a linear process that has been effectively supranationalised since the 60s the relationship between Europe and immigrants from third countries appears rather inconsistent and ambiguous. Whereas the economic boom after World War II caused European states to adopt liberal labour migration regimes, including recruitment schemes for guest workers (e.g. Germany, Austria), the recession in the 70s with stagnating economic growth rates and higher levels of unemployment caused European states to employ stricter requirements for the issuing of working permits and the gates for labour migrants to the affluent European states where closed gradually. These restrictions had two major consequences: On the one hand family reunification became one of the most important sources for immigration to the EU. On the other hand, due to the limitations on legal entry and the constrained field of application for family reunification, only the asylum channel has been left for those wanting to settle regularly in a European country. This led to an increase of asylum applications combined with a logical increase of migrants abusing this means to receive a permit of residence. Not surprisingly, these developments encouraged European policy makers to aggravate the conditions to receive a positive asylum decision imposing more and more burdens on asylum seekers to prove their status as refugees. However, these restrictive and only reactive measures to control the influx of third country nationals to the EU have proven to be rather counterproductive as they could not hinder migrants searching for a better life in Europe. The prospect to evade poverty is a too strong incentive that administrative burdens would hinder people migrating to Europe. As there are hardly any legal possibilities, except for those who are considered to be of advantage for Europe, to enter the territory of the EU, many persons are trying to obtain entry by irregular means and the number of people migrating to Europe outside the official channels has grown constantly in the last years. Irregularity arises in a number of ways. The most obvious one is that migrants enter irregularly a country without valid travel documents, by avoiding border controls or by using false identities. However, in the majority of cases migrants enter the country legally, for example with a tourist visa, but overstay and become thus irregular.

2 REASONS FOR MIGRATION

One of the main principle drivers for contemporary migration is economic globalisation. Migration is primarily understood as a response to disparities in income levels and employment disparities between countries. However, even though economic asymmetries are an underlying factor for migration, wage and income inequalities are not the only reasons for people to take up the long and often very dangerous journey to prosperous Europe. Famine, denial of social and economic rights, corrupt and instable

⁴ UN (2010), High Commissioner for Human Rights, *Information Note: Protect the Rights of All Migrants*, July 2010.

⁵ Compare for the numbers of people immigrating to and emigrating from EU member states EUROSTAT, *Statistics in Focus*, January 2011, available at:

http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-001/EN/KS-SF-11-001-EN.PDF.

governance, conflicts and other forms of instability are further 'push' factors for people to emigrate as it was also confirmed by the European Parliament (EP) on various occasions⁶. The driving force 'poverty' can be understood as the outcome of violations of basic economic, social and cultural rights. In contrast job opportunities, higher levels of income and the possibility to live at least to a certain extent in freedom and wealth can be considered as 'pull' factors attracting migrants to come to Europe. People emigrate thus rather out of necessity than choice, considering migration not only as a possibility to improve their own living conditions but also as a means to support their families or even whole communities at home. Remittances to developing countries are estimated to have reached \$325 billion in 2010, reducing the level of (severity of) poverty in the countries of origin⁷.

3 MIGRATION AND HUMAN RIGHTS

In the discussions on migration one fact remains constantly left behind: Migrants are first and foremost human beings possessing fundamental and inalienable rights regardless of their status. Because they are aliens, being often unfamiliar with the national language, laws and practices and without social networks to rely on, they are particularly vulnerable. The conceptualisation of migration as an issue of national security undermines the human dimension of migration and results in the adoption of discriminatory and migrant-insensitive laws leading to broad scale human rights violations including the violation of civil and political rights as well as the denial of access to the basic economic, social and cultural rights, such as the right to an adequate standard of living including appropriate housing, the access to health care or the access to education. Violations of migrants' rights are so widespread, generalised and commonplace that they became a defining feature of migration today running as a red thread through all stages of migration.

As already mentioned, the special vulnerability of migrants stems from the fact that they are not citizens of the country they live in. Due to this dissociation between nationality and residence and their alien status, migrants are likely to face discrimination and be subjected to unequal treatment and unequal opportunities in the working sphere but also on a daily life basis. Furthermore, in times of economic crisis or political tensions, migrants will be the first to be suspected as security risks. Especially since 9/11 national policy makers tend to link security issues with immigration control which fuel a climate of racism and xenophobia against migrants. It has been the dominant approach of many European states to put migration in the context of combating organised crime and criminality subordinating the human rights of migrants to cross-border movement and anti-crime measures. Most significantly for these developments is that irregular migrants are characterised as being 'illegals' what often places them outside the protection of human rights and the rule of law.

Even though all migrants suffer from being discriminated due to their status as aliens, the human rights situation of regular and irregular migrants varies significantly. On the one side of the spectrum there are the highly skilled third country nationals who are regarded as enrichment for Europe due to their qualifications and their potential at the labour market. As already mentioned, since the 70s European policy makers developed selective immigration policies targeted to attract highly skilled workers (e.g. 'Blue card' directive). Those migrants are relatively well integrated and enjoy a high level of equality at the labour market.

On the other side of the spectrum poor, unskilled migrants who are excluded from societies and the social systems can be found, a vast part of them being irregular migrants. These irregular migrants are doubly vulnerable. Additionally to being foreigners they are clandestine in a country and thus more likely to be victims of severe human rights violations. However, entering a country in violation of its immigration laws

⁶ European Parliament, Resolution on migration flows arising from instability: scope and role of EU foreign policy, INI/2010/2269, 5 April 2011, p. 4.

⁷ World Bank, *Migration and development*, Brief 13, 8 November 2010, available at: <http://siteresources.worldbank.org/INTPROSPECTS/Resources/3349341110315015165/MigrationAndDevelopmentBrief13.pdf>.

does not deprive migrants of the fundamental human rights provided by human rights instruments nor does it affect the obligation of states to protect the human rights of migrants in an irregular situation⁸.

Because of shrinking opportunities for legal migration, the tightening of legal controls and the strengthening of national borders, human trafficking and smuggling increased⁹, the routes chosen became more and more hazardous and the dangers that migrants are facing during their way to Europe have grown exponentially often leading to a significant loss of life (e.g. people drowning, dying of exposure and dehydration). Irregular migrants cannot rely on the protection of their rights at any stage of their journey. Transit countries, often poor and lacking both experience and capacities to deal with migration flows, do not meet their obligations to protect the human rights of people crossing their territories. Migration flows are rather considered as an additional burden and states concerned are mainly interested in the onward movement of the mass of people. Consequently, transit countries are primarily reluctant to provide migrants on their routes to Europe with accommodation facilities or basic services.

Once migrants reach the external borders of the EU they have to face further dangers with regard to their human rights. Border guards are often insensitive to the special situation of detected migrants and not well enough trained to deal with large scale arrivals in an adequate way often using unreasonable force endangering the lives and integrity of migrants. In the context of border control and the arrest of migrants irregularly crossing the European frontiers, detention as a pre-expulsion mechanism has blossomed across Europe in the last decade¹⁰. Not only that the preventive detention of migrants contributed as a major facet to the phenomenon of criminalisation of migration in Europe, persons in detention are likely to suffer from severe human rights abuses because of excessive periods of detention, cramped and unsuitable accommodation facilities with poor sanitation, lack of contacts with the outside world, inadequate legal assistance and few if any recreational activities and others. Physical attacks, violence and extortion are frequently reported by human rights organisations monitoring the conditions in reception facilities¹¹.

Some of the arriving and caught migrants are removed speedily, without leaving detention. However, in some cases removal may not take place within several years be it because identity and nationality of the migrants are unclear or because the return is impossible for practical reasons (e.g. outburst of conflict in the country of origin). In these cases migrants are often left in a continuing uncertainty, even a 'limbo', where they have no legal immigration status, can be removed at any unspecified time, are not allowed to work and are excluded from subsistence rights.

With regard to the arrival of migrants new challenges arose concerning the protection of refugees due to the fact that in the last ten years the patterns of human mobility became more and more complex. Today migrants reach the territories in mixed migration flows composed of, inter alia, economic migrants, victims of trafficking, smuggled migrants and migrants for other, as for example environmental, reasons. However, within these mixed movements, besides the aforementioned groups, also refugees and asylum seekers can be found towards whom states have special responsibilities under international refugee law, including the obligation to safeguard against refoulement. Because all of them are travelling together using the same routes the distinction between refugees and non-refugees has been constantly blurred having direct consequences on the special status of refugees. The restrictive measures introduced by the European states to curb irregular migration are mainly indiscriminate in their application on people arriving at the external borders and often prevent refugees from gaining access to the territory of the EU and asylum procedures.

⁸ Global Commission for International Migration, *Migrating in an Interconnected World: New directions for action*, Geneva, 2005, p. 55.

⁹ European Parliament, Resolution on Preventing Trafficking in Human Beings, 10 February 2010.

¹⁰ Council of Europe, Commissioner for Human Rights, *Criminalisation of migration in Europe: Human Rights implications*, Strasbourg, 2010, available at: <http://oppenheimer.mcgill.ca/IMG/pdf/CoE-hamm-criminalisation-of-migration.pdf>.

¹¹ E.g. The CoE Committee for the Prevention of Torture (CPT), Human Rights Watch (HRW), Amnesty International (AI).

Even though the irregular entry in a country does not deprive migrants of their fundamental rights, irregular migrants are exposed to manifold human rights violations during their irregular stay. As already mentioned above, all migrants are likely to be confronted with discrimination, racism and xenophobia, however the special vulnerability of irregular migrants stems from their limited possibilities to defend themselves against human rights violations as they always have to fear detention and expulsion because of their undocumented status. Irregular migrants are on their own as states often deny them access to economic and social rights. The ulterior motive of this rejection is to force irregular migrants to leave the country 'voluntarily'. However, the exclusion of irregular migrants from the access to social services and health care systems urges them to expose themselves to exploitative employment in the private sector as they have to take care of their own survival and of their families. Irregular migrants are at the margin of protection by labour standards related to working place conditions and safety, health, and minimum wages making them the ideal reserve to fill the 'three-D' jobs (dirty, dangerous and difficult)¹². Moreover, the denial of access to basic social and economic rights does not only affect migrants themselves but also their family members and especially their children. By being deprived of their right to education, migrants' children have to face social exclusion endangering their future perspectives on the labour market¹³.

¹² Taran, P.A., *Human Rights of Migrants: Challenges of the New Decade*, International Migration, Vol. 38, Issue 6, 2002, p.13.

¹³ UN (2005), Committee on the Rights of the Child, Thirty-ninth session, 17.5.-3.6.2005, *Treatment of unaccompanied and separated children outside their country of origin*, General Comment No. 6, CRC/GC/2005/6, 1 September 2005.

CHAPTER II – INSTRUMENTS FOR THE PROTECTION OF MIGRANTS’ RIGHTS IN THE EUROPEAN UNION AND ITS NEIGHBOURHOOD

4 THE EUROPEAN MIGRATION POLICY AND ITS EXTERNAL DIMENSION

4.1 State of the Art of the European Migration Policy

Cooperation in the area of migration and asylum at the European level started under the pressure of events – namely the realisation of a Single market with the free movement of workers and the abolishment of internal borders – and not on the basis of a pre-existing political will. On the contrary, Member States were traditionally highly reluctant in transferring competences to the Community in the field of migration and relentless competence debates shaped EU actions in this field for years. Only after the fall of the Berlin wall and the collapse of the former Soviet Union, Member States, fearing a mass influx of refugees and migrants from the former East, began to consider the harmonisation of their migration policies and the possibility of transferring these policies in the Community framework. The term immigration made its first appearance in the Treaty of Maastricht 1992 in the newly created intergovernmental pillar dealing with Justice and Home Affairs (JHA)¹⁴. The intergovernmental approach to migration proved however to be inappropriate for the creation of a common European migration policy as Member States jealously tried to preserve national sovereignty in the field of migration and decisions remained of a non binding nature. The deep divergence of views over a series of vital issues, as for example access to labour market, and the unanimity criteria of the 3rd pillar JHA led to almost deadlock situation in the end of the 90s. Only with the Treaty of Amsterdam of 1997 the Community obtained shared competences under the newly established Title IV ‘Visas, asylum, immigration and other policies related to the free movement of persons’ and migration was moved from the previous intergovernmental to a common approach with the aim to establish an area of freedom, security and justice¹⁵. The process of communitarisation of migration matters finally found its end with the Lisbon treaty in 2009 conceding the EU new and far reaching powers to develop legislation in this field and introducing co-decision and qualified majority on legal migration as well¹⁶.

Whereas it seems to be relatively persuasive to describe the institutional development related to the field of migration as a continuous progress of declining national autonomy, it gets more difficult to identify a common thread in the development of a common comprehensive European migration policy. The EU and its Member States during the last decade indeed have managed to gradually establish the foundations for a legal framework on migration and asylum based on the multi-annual (five years) programmes in the fields related to an Area of Freedom, Security and Justice, the Tampere programme 1999, the Hague programme 2004 and the Stockholm programme 2009¹⁷. However, even after a decade of policy development, progress in the field of migration remains patchy due to the diverging dynamics driving Member States. Whereas efforts to collaborate on border control and irregular migration have been, due to the correlation between migration and national security, more successful, attempts to establish a

¹⁴ European Union (1992), The Treaty on European Union, signed in Maastricht on 7 February 1992, entry into force 1 November 1993.

¹⁵ European Union (1997), The Treaty of Amsterdam, amending the Treaty on the European Union, the Treaties establishing the European Communities and other related acts, signed on 2 October 1997, entered into force on 1 May 1999.

¹⁶ European Union, Treaty on the Functioning of the European Union, OJ C 115, 9.5.2008.

¹⁷ Council of the European Union, Presidency Conclusions, Tampere European Council, 15 – 16.10.1999, available at: http://www.europarl.europa.eu/summits/tam_en.htm; Presidency Conclusions, The Hague European Council, 5.11.2004, available at: http://ec.europa.eu/home-affairs/doc_centre/docs/hague_programme_en.pdf; Presidency Conclusions, Stockholm European Council, 10 – 11.12.2009.

common system for legal migration have largely stalled and the common agenda for legal migration remains piecemeal focusing on highly skilled and thus economically profitable migrants¹⁸.

Due to the impasse over harmonised immigration policies, a shift away from legislative to practical cooperation in the field of migration has occurred. In this regard the collaboration with third countries and the external dimension element of the EU's migration policy became the area that has developed most clearly in the last decade.¹⁹ Based on the idea that border-control measures alone are an insufficient response to increasing migration pressures from outside Europe, the Tampere programme stressed that the EU needed to develop a comprehensive approach to migration that required combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring the respect for human rights in regions and countries of origin and transit²⁰. Furthermore the Tampere programme promoted the voluntary return of irregular migrants from the EU to their countries of origin or other third countries and called for the conclusion of return and readmission agreements with non-EU countries. Whereas Tampere considered immigration still as necessary and as enrichment, its successor programmes, The Hague and Stockholm, follow a rather security driven approach emphasising the need of intensified collaboration with third countries with regard to irregular migration and border control.

In 2005 the Global Approach to Migration reaffirmed the aim of the EU to formulate comprehensive and coherent policies addressing a broad range of migration related issues and bringing together different policy areas – as JHA, development, social affairs, trade etc – to address the root causes of migration²¹. However, the various dialogues with non-EU countries under the existing mechanisms (as for example the European Neighbourhood Policy (ENP)) proved to have a disproportionate focus on border management and irregular migration while regular migration or development programmes played a rather inferior role. This intensifies the image that the EU is rather concerned with offloading responsibility for border control and migration management onto countries which surround the EU area, than with addressing core push factors for migration²². In 2008 the European Pact on Immigration and Asylum was adopted, a non-legally binding act, aiming to guide future EU policies in the field of immigration, asylum and border management.

Mainstreaming of human rights within migration policies when cooperating with third countries is a continuing process and its impact needs to be analysed from time to time. This study will examine developments made in this regard²³.

4.2 Migration and Asylum in the European Neighbouring countries in the framework of EU cooperation

¹⁸ Council of the European Union, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L155, 18.6.2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:155:0017:0029:EN:PDF>; Council of the European Union, Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L375, 23.12.2004, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0114:EN:NOT>.

¹⁹ See Benedek, W., *EU Action on Human and Fundamental Rights in 2009*, in Benedek, W., et al., *European Yearbook on Human Rights 2010*, Neuer Wissenschaftlicher Verlag, Vienna and Graz, 2010, pp. 87-108.

²⁰ Council of the European Union, Presidency Conclusions, Tampere European Council, 15 – 16.10.1999, para.11, available at: http://www.europarl.europa.eu/summits/tam_en.htm.

²¹ European Union, *Global approach to migration*, MEMO/07/549, Brussels, 5 December 2007, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/549>

²² Collett, E., *The Global Approach to Migration: Rhetoric or Reality?*, European Policy Centre, Policy Brief, Brussels, November 2007.

²³ See European Parliament, Study of the Directorate-General for External Policies, Policy Department, *Human Rights Mainstreaming in EU's External Relations*, EXPO/B/DROI/2008/66, September 2009.

As already described, one major priority for the EU within the external dimension of its migration and asylum policy is the enhancement of cooperation with third countries in these fields. In 2005 the European Commission identified the foreign-policy priorities of the EU in the area of migration, asylum and border management²⁴:

- improve third countries' capacities for migration management and refugee protection in accordance with international law;
- support the operational border-management capacities of the Neighbouring countries;
- enhance document security;
- prevent illegal migration²⁵;
- encourage synergies between migration and development;
- provide refugees with better access to durable solutions;
- ensure the return of illegal migrants.

To implement these policies in the European Neighbourhood, the EU has incorporated them into its general framework for bilateral cooperation (ENP, the Euro-Mediterranean Partnership, and the Eastern Partnership) and into the accession criteria. Furthermore, the EU uses other instruments as for example financial instruments (e.g. European Neighbourhood and Partnership Instrument (ENPI)), intergovernmental dialogues (as the Söderköping Process and the Budapest Process) or readmission agreements²⁶.

Even though all the bilateral agreements concluded under the respective frameworks are following the Global Approach to Migration affirming the necessity to develop comprehensive migration strategies encompassing as well development considerations, they seem to be rather imbalanced and one sided. For instance, domestic capacity building in areas such as border control and irregular-migration management is higher prioritised than the guarantees of migrants' rights. Furthermore, the aim to develop domestic capacities in the area of asylum with the establishment of long-term solutions for refugees have not been met yet as it was shown in the previous section. In this regard the question arises, whether this prioritisation of security considerations in the field of migration and asylum might contribute to the implementation of migration and asylum policies that are contrary to the basic rights of migrants and refugees.

4.2.1 Bilateral Cooperation Framework

1. The European Neighbourhood Policy

The ENP was introduced in 2004 and is intended to develop a privileged relationship, building upon a mutual commitment to common values, as democracy, human rights, rule of law, good governance, market economic principles and sustainable development. Whereas the 'golden carrot' of a membership perspective has been applied to the Western Balkans, in the relation to other neighbouring countries²⁷ the ENP is intended to offer a 'silver carrot', i.e. progressive integration in most of the EU policy areas with associated processes of monitoring and reporting but without the prospect of EU membership²⁸.

²⁴ European Commission, Communication from the Commission, A Strategy on the External Dimension of the Area of Freedom, Security and Justice, Brussels, 12.10.2005, COM (2005) 491 final.

²⁵ In this regard it is worth mentioning that the EU still refers to irregular migration as 'illegal' migration, placing irregular migrants implicitly outside the law.

²⁶ EU readmission agreements with Albania, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Moldova, Montenegro, Ukraine and Serbia. The EU readmission agreement with Georgia has been signed in November 2010.

²⁷ E.g. NIS and Mediterranean countries.

²⁸ Compare for the ENP, Bretherton, C., Vogler, J., *The European Union as a Global Actor*, Routledge, 2nd edition, New York, 2006; Dannreuther, R., *Developing the Alternative to Enlargement: The European Neighbourhood Policy*, European Foreign Affairs Review, Vol. 11, 2006, pp. 183-201.

With regard to migration the Commission stated, that ‘the EU should assist in reinforcing the neighbouring countries’ efforts to combat irregular migration and to establish efficient mechanisms for returns, especially illegal transit migration’²⁹. This was reaffirmed by a Strategy Paper in 2004, emphasising that priorities of the ENP could include inter alia the cooperation on migration and asylum³⁰. The prevailing instrument to achieve the cooperation with Neighbouring countries is the drawing up of Action Plans (APs) for each partner state. In this regard it was recognised by the EU that because of the great diversity of the countries participating in the ENP a ‘one size fits all’ policy was counterproductive. Consequently, the approach of the APs established is to be differentiated according to the ambitions and capabilities of the individual states. Insofar 12 national APs have been adopted³¹ setting out a programme of economic and political reforms with short- and medium-term priorities. Still, those APs are not legally binding. The Association and Cooperation Agreements concluded under the Mediterranean and the Eastern Partnership are the documents primarily governing the bilateral relations between the EU and its neighbouring countries.

When examining the impacts the ENP had insofar on the national migration policies in the European Neighbouring Countries, one has to keep in mind, that the ENP is based on the 2003 European Security Strategy (ESS) identifying the objective of building security in the European neighbourhood³² as a central element for the protection of the EU’s external borders. These considerations are based on the assumption that even though the integration of acceding states increases security of the EU, it also brings it closer to troubled areas³³. Consequently, security and strategic considerations are a common thread throughout the APs adopted within the framework of the ENP. With regard to migration most of the APs³⁴ contain priority areas in which the EU and the individual neighbouring country should take increasingly cooperative actions, particularly in the field of asylum, illegal migration, border management and the combat against organised crime (including the smuggling of migrants and trafficking in human beings). Most of the measures foreseen in the APs include the initiation of dialogues, technical support and trainings, as well as the launching of information campaigns.

All the APs adopted include objectives related to the fulfilment of human rights. However, they do not contain any reference to the protection of the rights of migrants per se, except for the commitment to combat discrimination, xenophobia and racism. More specifically, all of the APs call for the development of strategies to fight illegal migration without mentioning the implementation of international and domestic safeguards with regard to the protection of migrants. Still, most of the national APs³⁵ stress the implementation of the Principles of the Geneva Convention 1951 and its Protocol 1967 and foresee the cooperation between the EU and the respective countries to develop domestic capacities to safeguard the rights of refugees.

However, the ENP was not the jump start for cooperation in the field of migration between the EU and its neighbouring countries. When the ENP was developed in 2004, it was rather introduced as a

²⁹ European Commission, Communication from the Commission to the Council and the European Parliament, Wider Europe— Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, Brussels, 11.03.2003, COM(2003) 104 final.

³⁰ European Commission, Communication from the Commission, European Neighbourhood Policy: Strategy Paper, Brussels, 12.5.2004, COM(2004) 373 final.

³¹ Namely: Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, The Occupied Palestine Territory, Tunisia and Ukraine.

³² Council of the European Union, *A Secure Europe in a Better World: European Security Strategy 2003*, Brussels, 12.12.2003.

³³ *Ibid*, p. 9

³⁴ Exception: The Occupied Palestinian Territories.

³⁵ Exceptions: The occupied Palestinian territories, Jordan, Lebanon and Israel.

new tier on top of already existing regional cooperation complementing and reinforcing agreements already in place.

2. Eastern Partnership

In the 90s the EU concluded ten similar Partnership and Cooperation Agreements (PCAs) with Russia and each of the Newly Independent States (NIS)³⁶ foreseeing in Title VII the cooperation on prevention of illegal activities and the prevention and control of illegal migration. Even though the agreements as well include provisions on the cooperation on matters relating to democracy and human rights, no reference is made to the protection of the rights of migrants or refugees. In 2009, the EU launched the so called 'Eastern Partnership', as the Eastern dimension of the ENP, which foresees inter alia the conclusion of new Association Agreements (AAs) allowing for deep and comprehensive free trade agreements with those countries willing and able to enter into a deeper engagement and gradual integration in the EU economy. The Eastern Partnership would furthermore allow for easier travel to the EU through gradual visa liberations, accompanied by measures to tackle illegal immigration³⁷. No Agreement has been concluded insofar with Belarus due to the repressive regime in place.

3. The Mediterranean Union

A very similar pattern can be seen in the southern Mediterranean region where in 1995 the Barcelona Process was launched. The Barcelona Process, since 2008 Union for the Mediterranean, originally established a partnership between the EU and the southern Mediterranean countries in three main areas, namely political and security cooperation, economic and financial cooperation, and cultural, social and human cooperation. In 2005, cooperation on migration issues became officially a fourth component of the process. Bilateral treaties, so called Association Agreements (AAs), are the main instruments and the legal foundation between the EU and the Mediterranean countries in the area of migration. Common to all AAs, Art 2 stipulates that the protection of human rights and the respect for democratic principles is an essential element for the cooperation with the EU. Comparable to its Eastern equivalents the AAs all foresee articles dealing with the enhanced cooperation between the EU and the Mediterranean Countries in order to avoid and combat illegal migration³⁸. The most recent agreements³⁹ also include the principle of readmission of irregular migrants providing for negotiations for the conclusion of readmission agreements. However, these notions, the cooperation with regard to combat irregular migration, are the only ones with regard to migration. In none of the agreements a reference to the rights of migrants or to refugees can be found.

4. Mobility Partnerships

With two of the ENP countries, namely Georgia (2009) and Moldova (2008)⁴⁰, the EU concluded 'Mobility partnerships', the 'bronze carrots', which, according to the Commission 'identify novel approaches to improve the management of legal movements of people between the EU and third countries ready to make significant efforts to fight illegal migration'⁴¹. These mobility partnerships mirror the quid-pro-quo approach of the EU in the external dimension of its migration policy. The idea behind the Mobility partnerships is to offer the partner countries legal migration opportunities in return for their support for

³⁶ Namely: The Republic of Armenia, the Republic of Azerbaijan, Georgia, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, the Russian Federation, Ukraine, the Republic of Uzbekistan and Tajikistan.

³⁷ Further information on the Eastern Partnership is available at: http://eeas.europa.eu/eastern/index_en.htm.

³⁸ Cooperation and preventive measures to control irregular migration are not mentioned within the AAs with Morocco (1995) and Tunisia (1996), but they are included in the agreements signed after 2000 with Lebanon, Egypt and Algeria.

³⁹ Compare the AA with Algeria.

⁴⁰ A third Mobility partnership was concluded with Cap Verde in 2008.

⁴¹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, On Circular Migration and Mobility Partnerships between the European Union and Third Countries, COM(2007) 248 final, Brussels, 16.5.2007.

controlling irregular migration. Consequently, the Mobility Partnerships are coherent with the prevailing trend of the EU's migration policy to link migration with security.

5. Accession Framework

The Copenhagen criteria⁴² contain the basic requirements for accession of new Member States to the EU. The criteria prescribe the stability of democracy-guaranteeing institutions, the rule of law, human rights, respect for and protection of minorities, a functioning market economy, acceptance of the Community acquis and the ability to take on the obligations of membership. To assist the Western Balkan countries to meet the criteria, the Stabilisation and Association Process (SAP) was launched in 1999 defining the cooperation in JHA as a priority area. Under the SAP individual Stabilisation and Association Agreements (SAAs)⁴³ with potential candidate countries were negotiated⁴⁴. The SAAs include several provisions providing for improved cooperation in the areas of visa, border control, asylum and migration. The cooperation mainly should be based on technical and administrative assistance regarding the exchange of information on legislation and practices, the drafting of legislation, the enhancement of the efficiency of the institutions and the training of staff. Furthermore, all the SAAs foresee enhanced cooperation with regard to the fight against irregular migration⁴⁵. The SAAs make explicit reference that cooperation with candidate countries and potential candidates should focus in particular 'on the area of asylum and the implementation of national legislation to meet the standards of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967 thereby to ensure that the principle of 'non-refoulement' is respected as well as other rights of asylum seekers and refugees' and that in 'the field of legal migration [...] Parties agree to the fair treatment of nationals of other countries who reside legally on their territories and [...] promote an integration policy making their rights and obligations comparable to those of their citizens'⁴⁶. Furthermore, the SAA with Serbia, for instance, reaffirms the right of return for all refugees and IDPs and to the protection of their property and other related human rights⁴⁷.

Within the framework of the SAP the EU established so called European Partnerships with potential candidates⁴⁸ and Accession Partnerships with candidate countries⁴⁹. Both instruments are aimed to support the Western Balkan countries' efforts to implement the SAP and the Copenhagen criteria. All the Council decisions dealing with the principles, priorities and conditions of these partnerships contain references to the cooperation with regard to justice, freedom and security. Whereas high priority is once again given to the coordination and cooperation in border management issues, e.g. with regard to the

⁴² Council of the European Union, Presidency Conclusions, Copenhagen European Council, 22 June 1993, Bulletin, EU 6-1993, Para. 13, available at: http://ec.europa.eu/bulgaria/documents/abc/72921_en.pdf.

⁴³ SAAs are in force with regard to Albania (2009), Bosnia and Herzegovina (2008), Croatia (2005), Montenegro (2010), Serbia (2010) and The Former Yugoslav Republic of Macedonia (2001).

⁴⁴ The Stability Pact for South East Europe, a platform for international cooperation, was launched in the same year. The Pact came to be an independent process mainly driven by OSCE.

⁴⁵ E.g. see Council and Commission Decision of 29 March 2010 on the conclusion of the Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, OJ L 108, 29.4.2010, available at: http://ec.europa.eu/enlargement/pdf/montenegro/key_documents/lexuriserv2nd_en.pdf.

⁴⁶ See for example the SAA with The Former Republic of Macedonia, Art 75, available at:

http://ec.europa.eu/enlargement/pdf/the_former_yugoslav_republic_of_macedonia/saa03_01_en.pdf.

⁴⁷ See SAA with Serbia, p. 6, available at: http://ec.europa.eu/enlargement/pdf/serbia/key_document/saa_en.pdf.

⁴⁸ The EU has set up European Partnerships with Albania (2008), Bosnia and Herzegovina (2008), Montenegro (2007) and Serbia (2008), including Kosovo.

⁴⁹ Accession Partnerships have been established with regard to Croatia (2008), the Former Yugoslav Republic of Macedonia (2008) and Turkey (2008).

implementation of Integrated Border Management APs⁵⁰, provisions dealing with the rights of migrants are not part of the Partnership agreements.

4.2.2 Financial Cooperation

There are several European financing instruments in place offering funding for migration and asylum related projects in the European neighbourhood that could contribute to enhance the situation of migrants and refugees.

1. European Neighbourhood and Partnership Instrument (ENPI)

Until 31 December 2006 EU assistance in the European neighbourhood was provided under various geographical programmes such as TACIS (for Eastern neighbours) and MEDA (for Southern Mediterranean neighbours). Since 2007 the ENP is however only financed by one single instrument, namely the ENPI. Among the various objectives the ENPI have, those which have an impact on migration are:⁵¹

- supporting policies to promote social development, social inclusion, gender equality, non-discrimination, employment and social protection including protection of migrant workers [...];
- ensuring efficient and secure border management;
- supporting reform and strengthening capacity in the field of JHA, including issues such as asylum, migration and readmission, and the fight against, and prevention of, trafficking in human beings [...]

Under the ENPI for the Financial Framework 2007-2013, €12 billion are available for reforms in the European neighbouring countries. Following national indicative programmes (NIP)⁵² identifying certain priorities of the respective country, the European assistance is paid into the state's general budget and is used to implement reform programmes or projects in the designated policy area⁵³. However, this approach makes it very difficult to assess the effectiveness of the ENPI and its impacts on the rights of migrants in the European Neighbourhood. As there are no lists of achievements available, it is nearly impossible to trace back the funding and to find out for which projects the money granted was used.

2. Migration and Asylum Thematic Programme 2007-2013

The Migration and Asylum Thematic Programme 2007-2013, whose processor was the AENEAS-programme 2004-2006, emphasises the need to enhance the capacities of countries of origin and countries of transit in the field of migration and asylum. Its main objectives are:⁵⁴

- Fostering the links between migration and development;
- Promoting well-managed labour migration;
- Fighting illegal immigration and facilitating the readmission of illegal immigrants;

⁵⁰ See e.g. Council of the European Union, Council Decision 2008/212/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC, OJ L 080, 19.3.2008, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:080:0032:01:EN:HTML>; Council Decision 2008/213/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC, OJ L 080, 19.3.2008, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:080:0046:01:EN:HTML>.

⁵¹ Council Regulation (EC) No 1638/2006 of the European parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ L310, 9.11.2006.

⁵² Further information is available at <http://www.enpi.org.ua/en/enpi/national-programs/>.

⁵³ The multi-annual allocations of funding, available at:

http://ec.europa.eu/world/enp/pdf/country/0703enpi_figures_en.pdf.

⁵⁴ See Migration and Asylum Thematic Programme, available at:

http://ec.europa.eu/europeaid/how/finance/dci/migration_en.htm.

- Protecting migrants against exploitation and exclusion and supporting the fight against trafficking in human beings;
- Promoting asylum, international protection and the protection of the stateless persons;

Even though the thematic programme covers various aspects of migration, as e.g. migration and development, labour migration, illegal migration and traffic in persons, migrants' rights, asylum and international protection, it will not per se address the deeply-rooted causes of migration. The strategy paper for the Thematic Programme of Cooperation with Third Countries on Migration and Asylum sets the general priorities for the various 'migration flows' as part of the calls for proposals⁵⁵. In 2010 the priorities for the Thematic Programme were inter alia to improve the protection of migrants' rights with special emphasis on the protection of women, children and trafficked victims. Further priorities cover the fight against irregular migration, readmission agreements, border control, and the fight against smuggling and trafficking of human beings⁵⁶.

3. European Instrument for Democracy and Human Rights (EIDHR)

It is the main aim of the EIDHR that was established in 2007 as the successor of the European Initiative for Democracy and Human Rights of the EP, to promote human rights and democratisation in third countries. Even though the EIDHR is not explicitly directed to protect migrants, several of its priority areas should make it possible to fund projects focused on the promotion and protection of migrants' and/or refugees' rights. For instance, one of the objectives of the EIDHR is to strengthen civil society groups involved in the protection, promotion or defence of human rights of vulnerable groups, as migrants. Furthermore, the promotion and protection of equal treatment of people belonging to minorities, as another priority of the EIDHR, could encompass migrants as well⁵⁷. However, it seems that migration related projects in the European neighbourhood and the potential enlargement countries have been very rarely funded under the EIDHR and its antecessor the European Initiative for Democracy and Human Rights⁵⁸.

4. Instrument for Pre-accession Assistance

With regard to the establishment of the SAP a series of programmes and financial instruments were developed, however, CARDS (for potential candidate countries) and Phare, SAPARD and ISAP (for candidate countries) were replaced by the Instrument for Pre-Accession Assistance (IPA) in 2007⁵⁹ offering financial assistance to all countries engaged in the accession progress to the EU for the period 2007-2013. The five components included in the instruments concern the assistance for transition and institution building, cross-border cooperation, regional development, human resources and rural development, whereby the last three are open to the candidate countries only. With regard to migration-related programmes in the Western Balkan countries, various have been funded under the IPA. For instance, the project 'Migration for Development in the Western Balkan (MIDWEB)', implemented by the Migration, Asylum, Refugees Regional Initiative (MARRI)⁶⁰ together

⁵⁵ See *Strategy Paper for the Thematic Programme of Cooperation with Third Countries on Migration and Asylum 2007-2013*, available at: <http://ec.europa.eu/europeaid/how/finance/documents/eidhr/strategy-paper2007-2010.pdf>.

⁵⁶ Annual Work Programme for Grants for 2010, *Thematic programme 'Migration and Asylum'*, available at: http://ec.europa.eu/europeaid/documents/awp/2010/awp_2010_dci-migr_en.pdf.

⁵⁷ Council Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ L 108, 29.12.2006.

⁵⁸ Lebanon: 'Promoting the Rule of Law and Human Rights Relevant to Migrants in Lebanon', 2002/2009; Ukraine: 'Promotion to the Respect of Human Rights and Fundamental Freedoms of Refugees and Migrants, Combating Irregular Migration in Ukraine', 2005; Turkey: 'Effective Protection of the Rights of Refugees, Asylum Seekers, and Other Persons in Need of International Protection' 2009; Jordan: 'Building a Movement to Protect Rights of Migrant Workers', 2009; Algeria: 'Reinforcement of the access to HIV prevention to immigrants in Algeria', 2009.

⁵⁹ Council Regulation (EC) No [1085/2006](#) of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ L210, 31.7.2006.

⁶⁰ MARRI was formed in 2003 within the context of the Stability Pact for South Eastern Europe and comprises of the members Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia.

with IOM, is aimed to support informed migration to the EU and to contribute to the positive impact of labour migration on socio-economic development in the Western Balkan⁶¹. Further projects funded by the IPA in the region are directed at the strengthening of border management, e.g. in Bosnia and Herzegovina or Albania⁶², or are aimed to support the national authorities in developing coherent migration policies, as it does a three year Twinning Project in Kosovo.

5 EUROPEAN NEIGHBOURHOOD – MIGRATION CHALLENGES AND NATIONAL MIGRATION POLICIES

5.1 International and regional human rights framework

All of the European neighbouring countries and the potential accession states have ratified the core international human rights treaties (International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC) and Convention on the Elimination of Racial Discrimination (CERD)). Crucially, only 9 of them⁶³ have ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In the context of irregular migration, human trafficking and human smuggling, most of the countries in question⁶⁴ have ratified the 2000 UN Convention against Transnational Crime and its two protocols (Protocol against the Smuggling of Migrants by Land, Sea and Air and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children).

With regard to refugee rights most of the countries have been very active in ratifying the Geneva Convention relating to the Status of Refugees 1951 and its 1967 Protocol⁶⁵.

Besides the international framework relevant for the protection of the rights of migrants, various regional instruments oblige the European neighbouring countries and potential future Member States to respect human rights in this regard.

For the Eastern neighbouring countries and the West Balkan states, being all members of the Council of Europe (CoE)⁶⁶, the European Convention on Human Rights (ECHR) is the main instrument of reference when it comes to the protection of the rights of migrants, regular and irregular ones irrespectively. Furthermore, the Convention on the Legal Status of Migrant Workers is concerned with the principal aspects of the legal situation of migrant workers – however, only Moldova and Ukraine have ratified it insofar. With regard to the protection of victims of trafficking and the safeguard of their rights under the framework of the CoE, European neighbouring countries and potential Member States have all ratified the European Convention on Action against Trafficking in Human Beings.

For some of the neighbouring countries in North Africa the African Union provides the regional legal framework with regard to the protection of human rights of migrants. The main instruments in this regard are the African Charter on Human and Peoples' Rights, the Convention Governing the Specific

⁶¹ For further information see <http://www.marri-rc.org/Default.aspx?Lan=EN&mid=4&eid=912>.

⁶² European Commission, Enlargement, *New headquarters of the border police*, available at: http://ec.europa.eu/enlargement/projects-in-focus/selected-projects/reform-of-police-and-judiciary/police/bosnia_new-headquarters-for-the-border-police_en.htm; and European Commission, Enlargement, *Joint border crossing point to Montenegro*, available at: http://ec.europa.eu/enlargement/projects-in-focus/selected-projects/reform-of-police-and-judiciary/police/albania_cbc_crime_en.htm.

⁶³ Namely: Albania, Algeria, Azerbaijan, Egypt, Libya, Morocco, Syria, Bosnia and Herzegovina and Turkey.

⁶⁴ Exceptions: Jordan and Morocco.

⁶⁵ Only Jordan, Lebanon and Libya continue to be reluctant in this regard.

⁶⁶ Exception: Kosovo.

Aspects of Refugee Problems in Africa 1969 and the Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2011.

However, even though there are various international and regional instruments protecting the human rights of migrants in place, it has to be remembered that ratification is only the first step and that the effective implementation is the key to the realisation of these standards in national laws and administrative practices.

In practice all of these treaties are limited by national legislation in the field of migration in the examined countries. And in countries where legal safeguards do exist, they are inadequately implemented and migrants remain highly vulnerable to abuse and exploitation. Besides the widespread discrimination due to racist and xenophobic sentiments, the most widespread problems include withholding of wages, confiscation of passports and restrictions on communication, associations and movement. Other common problems include physical, verbal, and sexual abuse as well as arbitrary detention. Highly problematic in this regard is that migrants facing those abuses, often lack avenues for legal redress.

Still, in most of the countries in the European Neighbourhood and the future Member States, positive steps have been taken to improve the existing or develop new regulatory frameworks governing the treatment of migrants in greater or lesser detail. However, most of the policies in place still fail to address migration in its whole complexity and the inefficiency of state management of migration flows becomes apparent in the growth of illegal and criminal displacements and illegal employment of migrants. In the European Neighbourhood, states usually responded to migration pressure by strengthening police and border measures against irregular migration without creating avenues for regular migration. This exclusive circle leads in most of the countries to the mass marginalisation of migrants and to systematic violations of their fundamental rights.

| | Geneva Conv. | Pro 1967 Geneva Conv. | Palermo Conv. | Pro I Pal. Conv. | Pro II Pal. Conv. | UN Conv. Protection of migrant workers | ICCPR | ICESCR | Conv. on the rights of the child | Int. Conv. Elimination of discr. | ILO Nr. 143 | CEDAW |
|------------|--------------|-----------------------|---------------|------------------|-------------------|--|-------|--------|----------------------------------|----------------------------------|-------------|-------|
| Algeria | X | X | X(0) | X | X | X(0) | X(0) | X(0) | X(0) | X | - | X(0) |
| Armenia | X | X | X | X | X | - | X | X | X | X | X | X |
| Azerbaijan | X | X | X(0) | X | X | X | X | X | X | X | - | X |
| Belarus | X | X | X(0) | X | X | - | X | X(0) | X | X(0) | - | X |
| Egypt | X | X | X(0) | X | X | X(0) | X(0) | X(0) | X | X(0) | - | X(0) |
| Georgia | X | X | X | X | X | - | X | X | X | X | - | X |
| Israel | X(0) | X | X(0) | X | - | - | X(0) | X | X | X(0) | - | X(0) |
| Jordan | - | - | X(0) | - | - | - | X | X | X | X | - | X(0) |
| Lebanon | - | - | X | X | X | - | X | X | X | X(0) | - | X(0) |
| Libya | - | - | X | X | X | X | X(0) | X(0) | X | X | - | X(0) |
| Moldova | X | X | X(0) | X | X | - | X | X | X | X | - | X |
| Morocco | X | X | X | - | - | X(0) | X | X | X(0) | X(0) | - | X(0) |
| OPT | | | | | | | | | | | | |
| Syria | - | - | X(0) | X | X | X | X(0) | X(0) | X(0) | X(0) | - | X(0) |
| Ukraine | X | X | X(0) | X | X | - | X(0) | X(0) | X | X(0) | - | X |
| Tunisia | X | X | X(0) | X | X | - | X | X | X(0) | X | - | X(0) |
| Albania | X(0) | X | X | X | X | X | X | X | X | X | X | X |
| Bosnia H. | X | X | X | X | X | X | X | X | X | X | X | X |
| Kosovo | | | | | | | | | | | | |
| Croatia | X | X | X | X | X | - | X | X | X(0) | X | - | X |
| Macedonia | X(0) | X | X(0) | X | X | - | X | X | X | X | X | X |
| Montenegro | X | X | X | X | X | S | X | X | X | X | X | X |
| Serbia | X | X | X | X | X | S | X | X | X | X | X | X |
| Russia | X(0) | X | X(0) | X | X | - | X(0) | X(0) | X | X(0) | - | X |

5.2 State of the Art of national migration policies in the European Neighbourhood

National migration policies in the European Neighbourhood, potential accession countries and classic ENP countries irrespectively, vary significantly in their level of advancement and are characterised by the different migration flows, patterns, volumes and dynamics in the regions concerned. The development of coherent and comprehensive national migration policies encompassing immigration, emigration and refugee issues has been, due to political circumstances, generally not a priority for the respective countries. Whereas the countries in the EU's Eastern neighbourhood and the West Balkan were after the collapse of the Union of Soviet Socialist States (USSR) and the Former Yugoslavia have been rather concerned with developing the foundations of their new statehood than with managing migration flows, neighbouring countries in the Middle East and North Africa seemed to be mainly concerned to put halt on outward migration hindering their citizens to escape the mostly repressive regimes⁶⁷. Due to globalisation and the increasing mobility of people, countries in the European neighbourhood were more and more confronted with changing patterns of migration making it necessary to amend existing or adopt new legal frameworks governing entry into, transit, residence and exit from their territories. The development of national migration policies was however not only driven by national considerations but also influenced by the engagement of external actors, mainly the EU but also other International Organisations as the International Organization for Migration (IOM), the International Labour Organization (ILO) or the UN High Commissioner for Refugees (UNHCR). As already described, the EU increasingly integrated countries of origins and transit in its efforts to develop a comprehensive migration policy. Through numerous bilateral and multilateral processes as the EU accession process, the ENP⁶⁸, the Euro-Mediterranean Partnership⁶⁹ (formerly the Barcelona Process) or the Eastern Partnership,⁷⁰ the EU started to develop systematic cooperation partnerships with its neighbouring countries in the field of migration encouraging them to develop national migration policies being consistent with the EU aquis on migration⁷¹.

Today, most of the countries in question are, to a certain degree, countries of origin, destination and transit and in some instances the migration flows from and into their territory are furthermore intertwined with refugee movements. Due to the complexity of migration patterns various questions arise with regard to the protection of human rights of migrants in the countries of the European Neighbourhood and the potential Member States.

5.2.1 European Eastern Neighbourhood⁷²

1. General remarks

The development of coherent migration policies in the Eastern European Neighbourhood has been in most countries of the region a topic of low priority in the political and public sphere. After the collapse of the USSR the newly established states did not pay too much attention on supervising migration flows but were rather concerned with the establishment of their statehood. During the last

⁶⁷ E.g. Algeria put unilaterally halt on the mass emigration to France in 1973. Compare CARIM, *Migration Profile: Algeria*, European University Institute, December 2010, available at: http://www.carim.org/public/migrationprofiles/MP_Algeria_EN.pdf.

⁶⁸ Further information on the ENP available at: http://ec.europa.eu/world/enp/index_en.htm.

⁶⁹ Further information on the Euro-Mediterranean Partnership available at: http://www.eeas.europa.eu/euromed/index_en.htm.

⁷⁰ Further information on the Eastern Partnership available at: http://www.eeas.europa.eu/eastern/index_en.htm.

⁷¹ For further information on development of cooperation see: European Parliament, Study of the Directorate-General for External Policies, Policy Department, 'Analysis of the External Dimension of the EU's Asylum and Immigration Policies' – summary and recommendations for the European Parliament, DGExPo/B/PolDep/ETUDE/2006_11, June 2006.

⁷² Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

decade, all countries concerned made considerable progress in developing migration policies, encompassing immigration and emigration as well as refugee and IDP issues. The national migration policies in this regard have, however, been rather developed under pressure from external actors than in the context of national convictions. Even though in some countries fairly evolved migration legislation exists,⁷³ they are all characterised by external influences and thus rather fragmented than comprehensive. Furthermore, the countries in the South Eastern Europe still lack institutionally and organised social bodies being able to promote and influence policy formulation.

Even though most of the national authorities⁷⁴ made attempts to tighten the regulation of free movement and residence, the entrance regimes are still fairly liberal, particularly with regard to the no-visa movement within the region⁷⁵. Due to lacking registration mechanism and the weak border management migration flows within the respective countries remain undocumented and uncontrolled. With regard to Belarus, it always has to be kept in mind, that national migration policies have been subordinated to the political objectives of the Lukashenka regime. As a consequence it is difficult to assess these policies and the legislation in place from a human rights perspective since one of their primary aim is to keep control over the political activities of people, nationals and foreigners irrespectively, by monitoring and controlling their movements. The case of Belarus will thus play a subordinated role in this study.

2. Migrant workers⁷⁶

With regard to labour migration none of the countries in the region has developed specific instruments to protect the rights of migrant workers. From an international perspective, only Azerbaijan has ratified the 1990 International Convention on the Protection of Migrant Workers and Their Families, even though its ratification can be considered more as a declaration of intent than as a real commitment since it was not supported by any legal actions at the national level. At the CoE level, only Moldova and Ukraine are parties to the European Convention on the Legal Status of Migrants. Furthermore, under the framework of the Commonwealth of Independent States (CIS) the Agreement on Cooperation in the Sphere of Labour Migration and Social Protection of Migrant Workers defining the mechanisms of employment and taxation of incomes, envisages the protection of migrants' rights concerning social insurance, pension maintenance, health, protection of the rights of members of migrants' families, etc. However, due to financial constraints, it never has been implemented in the national legislations. At the national level, labour immigration, was till the end of the 90s generally outside the awareness of the states, as, because of the prevailing difficult economic situations, the countries in the Europeans Eastern Neighbourhood are rather emigration than immigration countries. Today immigration has increased, especially in Azerbaijan because of the rapid development in the oil sector. Still, most of the countries have a negative migration balance⁷⁷. Due to the limited labour immigration possibilities in the main countries of destination (EU), most of the labour emigrants work on an irregular basis abroad, facing exploitation and violations of their social and economic rights. For the purpose of the security and protection of their own nationals working abroad, the respective countries signed a number of bilateral agreements on the social

⁷³ E.g. Ukraine and Armenia.

⁷⁴ Belarus is a special case, where the authoritarian regime of Lukashenka, restricted the rights of foreigners to enter as well as the right of its citizen to leave the country in the last years.

⁷⁵ Exceptions: Russia-Georgia and Armenia-Azerbaijan.

⁷⁶ For a detailed study on the protection of migrant workers rights in the region compare: UNESCO, *The Protection of the Rights of Migrants Workers in the Countries of Central and Eastern Europe and the CIS and Perspectives of Joining the 1990 UN Convention*, UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants, July 2004, available at: <http://unesdoc.unesco.org/images/0013/001395/139533e.pdf>.

⁷⁷ Exception: Ukraine.

protection and labour activities of their potential migrants⁷⁸. At the national level, in most of the countries⁷⁹ national labour laws enshrine the basic rights of migrant workers, as the principle of non-discrimination or equal access to social services. However, in practice, the situation of migrant workers in the region remains precarious due to the inefficiency of state institutions being in charge to carry out migration policies and of control mechanism over the implementation of the existing legislation and mass corruption. The failure of state authorities to establish comprehensive policies with regard to the management of migration in the region results in only a small percentage of labour migrants immigrating to the respective countries is registered⁸⁰. The rest, the unregistered irregular mass of labour migrants, remains even more vulnerable to exploitation and human rights abuses.

3. Irregular migrants

The problematic combination of weak border management and the failure of governments to develop coherent legislation regulating the granting of residence and work permits in a coherent way and constraining the discretionary power of state authorities is the reason for a relatively big amount of people staying irregularly or becoming irregular in the countries of the European Eastern Neighbourhood. Additionally, the region became in the last decade not only a source of irregular migration but also a transit route for an increasing number of irregular migrants trying to reach Europe by crossing it. Being in line with international approaches, the countries in the European Eastern Neighbourhood, when developing their national migration policies, put clear emphasis on the fight against irregular immigration. Consequently, in all countries examined, irregular migration in general and human smuggling and trafficking in particular is criminalised. From an international perspectives, all countries in the European Eastern Neighbourhood, have ratified the UN Convention against Transnational Organized Crime and the two Protocols against the Smuggling of Migrants by Land, Sea and Air and to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. Still, following the Trafficking in persons Report 2010 of the United States (US) Department of State, with the exception of Georgia, all the countries in the region do not yet fully comply with international trafficking in human beings standards, even though they are making significant efforts to bring themselves into compliance with those standards⁸¹. Additionally, all the countries have ratified the CoE Convention on Action against Trafficking in Human Beings⁸².

With regard to the fight against irregular migration some of the countries foresee disproportionately high criminal penalties for illegal border crossing, whereas for other immigration offences, such as over-stay, only rather limited and lax administrative penalties are in place. This leads to the situation that illegal border crossing by itself without further criminal intents committed is criminalised and people crossing the borders irregularly are kept in detention together with other criminally charged offenders⁸³. Due to the incomplete and highly discretionary legislation, detected irregular migrants have to fear arbitrary detention and ill-treatment. The problems related to detention are further

⁷⁸ E.g. Treaty between Ukraine and the Republic of Bulgaria on Social Security, ratified 22. November 2002; Agreement between Ukraine and Armenia on labour activity and social protection of citizens of Ukraine and Armenia working beyond the borders of their states, entry into force 1996.

⁷⁹ In Georgia no legislative on migration can be found.

⁸⁰ E.g. in Azerbaijan only 5 thousand of estimated 60 thousand labour migrants have been registered by the governmental authorities. Compare UNESCO, 2004, p. 34.

⁸¹ U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report 2010*, 10th edition, June 2010, available at: <http://www.state.gov/g/tip/rls/tiprpt/2010/142755.htm>.

⁸² See Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.: 197, 16.5.2005, available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>.

⁸³ For the case of Georgia see e.g. IOM, *Review of Migration Management in Georgia: Assessment Mission Report*, January 2008, available at: http://iom.ge/pdf/Migration_Assessment.pdf.

aggravated by the fact, that most of the countries in the region have not yet established the required infrastructure to return irregular migrants to their home countries. In this regard, return and readmission agreements concluded for example with the EU can impose unmanageable burdens on the respective countries. Due to overstrained authorities and lacking facilities, irregular migrants are highly vulnerable finding themselves in situations without resort⁸⁴.

4. Refugees

Due to various violent conflicts, refugees and IDPs⁸⁵ account for a significant number of migrants in the region, in particular in Georgia, Armenia and Azerbaijan⁸⁶. For years the states concerned, however, were rather reluctant to make significant efforts to strengthen and enforce the political and civil rights especially of IDPs mainly because of political considerations. Integration of IDPs until recently has been considered as hindering the future return of IDPs to their habitual residences. Already facing severe economic problems, the states concerned remained aloof from granting IDPs special rights with regard to access to the labour market and housing. Mismanagement, corruption, and lacking financial resources have been furthermore conducive to the failure to establish sustainable solutions with regard to IDPs, refugees and returnees. In recent years, the respective governments have however improved their national strategies dealing with IDPs by developing fairly well established legal frameworks regulating their rights and duties and improving their general situation and establishing the corresponding organisational structures⁸⁷. IDPs in the region remain nevertheless highly vulnerable and unprotected. Especially with regard to shelter and accommodation of IDPs, cross violations of human rights occur on a daily basis. Forced evictions of IDPs without providing them adequate alternatives, large scale resettlements to rural areas and inadequate living conditions in collective centres are only the tip of the iceberg with regard to violations of the right to housing⁸⁸.

From an international point of view, all countries in the region have ratified the 1951 Geneva Convention and its 1967 Protocol and have all adopted legislation with regard to the determination of refugees. However, once again, especially financial constraints hinder the effective implementation of the legislation in place and the prevailing mass corruption undermines the functionalism of asylum systems in place even further. In general, the countries in the European Eastern Neighbourhood are with regard to refugees rather transit countries than countries of destination with the exemption of Ukraine. Even though the numbers of asylum seekers in Ukraine remain still rather low, they will very probably increase in the coming years as they are connected

⁸⁴ Compare in this regard for the case of Ukraine, Human Rights Watch, *Buffeted in the Borderland: The Treatment of Migrants and Asylum Seekers in Ukraine*, December 2010, available at: <http://www.hrw.org/en/reports/2010/12/16/buffed-in-borderland>.

⁸⁵ For the purpose of this study the definition for IDPs of the Internal Displacement Monitoring Centre (IDMC), established in 1998 by the Norwegian Refugee Council will be used: Internally displaced persons are 'persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border'. See IDMC, available at: <http://www.internal-displacement.org/idp>.

⁸⁶ Most recently: conflict between Russia and Georgia over South Ossetia 2008; conflict between Armenia and Azerbaijan Nagorno – Karabakh war (February 1988 – May 1994).

⁸⁷ Armenia remains the only country in the region that has not yet adopted a national legal framework with regard to the rights of conflict induced IDPs. Georgia adopted in 2009 a new Action Plan to implement its new strategy on IDPs regarding their integration not anymore as obstacle for future return. Azerbaijan only recently, in February 2011, approved a Decree on Additional Measures for Improvement of Housing and Internally Displaced Persons, available at: <http://www.refugees-idps-committee.gov.az/en/news/77.html>.

⁸⁸ See for the case of Georgia, Human Rights Watch, *World Report 2011: Events of 2010*, 2011, pp. 437 ff, available at: <http://www.hrw.org/en/world-report-2011>.

with the as well increasing number of refugees who cannot pass the EU's borders or who are returned from the EU to the Ukraine because of readmission agreements. The asylum system in Ukraine is however far from being in compliance with international refugee protection standards. Especially the principle of non-refoulement is violated by national authorities on a regular basis and refugees kept in detention have to suffer ill-treatment⁸⁹.

5. EU engagement

Cooperation between the EU and the European Eastern neighbourhood countries has been taken place under the framework of the ENP and the Eastern Partnership, which foresees inter alia the conclusion of AAs, aimed at a deeper engagement and the gradual integration in the EU's economy that as well would allow for easier travel to the EU through visa liberalizations, accompanied by measures to tackle irregular migration. Additionally the EU concluded Mobility Partnerships with Georgia and Moldova offering both countries legal migration opportunities in return for their support for controlling irregular migration. It was inter alia the aim of these partnerships to develop a privileged partnership, building upon a mutual commitment to democracy, human rights, rule of law, good governance, market economic principles and sustainable development. The priority with regard to migration and asylum related issues clearly lies on the fight against irregular migration as well as on the establishment of efficient mechanisms for returns, whereas human rights of migrants only played a subordinated role. Even the national APs are mainly based on security and strategic considerations, thus most of the APs determine the promotion of border management and the fight against organised crime, including the smuggling of migrants and trafficking in human beings. However, none of the bilateral agreements includes clear references with regard to the protection of the rights of migrants, except for the commitment to combat discrimination, xenophobia and racism.

6. Key findings

– Lack of human rights, lack of protection mechanism

All countries in the region have fairly developed migration policies and legislation in place. However, human rights of migrants have not been a main priority for policy makers when migration frameworks have been established even though states in the Eastern European neighbourhood are, with the exception of Belarus, bound by a great variety of international human rights instruments. Following the line of the EU, the countries in the Eastern neighbourhood adopted rather restrictive immigration schemes emphasising the fight against irregular migration. In all countries examined, these immigration schemes are granting national authorities a rather wide margin of appreciation rendering migrants vulnerable to arbitrary decisions of e.g. border guards. The wide spread corruption further contributes to the vulnerable situation of migrants especially since there are hardly any possibilities for legal redress. Additionally, the practice of the EU to return great numbers of detected irregular migrants to countries in the Eastern neighbourhood under return and readmission agreements remains highly problematically as proven by the example of Ukraine. Once returned to Ukraine, irregular migrants have to fear human rights violations at a broad scale since especially detention facilities are generally substandard. Furthermore, NGOs increasingly reported on cases of torture and ill-treatment of irregular migrants in detention.

– Lack of implementation, lack of financial resources

In all the countries concerned migrants are only protected by national laws, i.e. for instance national labour codes, whereby this protection is rather of a formal nature. Due to lacking financial resources – and in this regard the situation in all countries concerned is very similar – there are no functioning social welfare systems in place, neither for nationals nor migrants. Additionally, lacking

⁸⁹ For more details see Human Rights Watch, *Buffeted in the Borderland*, 2010.

implementation mechanism, the failure to establish effective institutions and the widespread corruption leaves migrants unprotected and vulnerable to abuse. For instance, even though the countries in the Eastern neighbourhood have fairly established formal asylum systems and asylum laws which are in accordance with international human rights standards they are often not functional since they are not implemented properly if at all.

– Criminalisation of irregular migration

It is eye catching that main progress was made with regard to the fight against irregular migration since in all countries observed comprehensive and very restrictive policies and/or laws have been adopted aimed to inhibit the flows of irregular migrants trying to reach the territory of the EU by crossing the region. Thus all the countries in the Eastern neighbourhood foresee disproportionately high criminal penalties for irregular border crossing ranging from high fines and imprisonment to deportation, whereas for other immigration offences, such as over-stay of visas only rather limited and lax administrative penalties are in place. In many cases, people caught crossing the borders irregularly are kept in detention where they have to fear ill-treatment.

– Disproportionate EU engagement

All of the national migration policies have been rather developed under pressure from external actors than in the context of national priorities. Consequently, they are all characterised by external influences and thus rather fragmented than comprehensive. Even though the EU engagement has encouraged the Eastern European neighbourhood countries to become active in the field of migration, it appears that this engagement is rather based on a security centred approach primarily aimed to support the EU's aims with regard to the fight against irregular migration than to support the countries in developing a coherent migration policy being adequate to approach the countries' own migration problems.

5.2.2 Mediterranean countries⁹⁰

1. General remarks⁹¹

Only in the last decade the development of migration policies in the Mediterranean Neighbourhood became a concern for policy makers in the region. Due to changing patterns of migration and considerable incentives by the EU, all the countries concerned have made considerable efforts to establish national legal norms dealing with various aspects of migration. Still, migration policies in the individual countries are at different stages of advancement. In this regard, it has to be kept in mind, that when the laws in force were drafted in several of the countries concerned authoritarian regimes were in place, often misusing the proclaimed states of emergency to adopt a rather repressive approach to migration. All the countries in the region have developed legislation governing the entry, stay and exit of migrants. All these legislations require migrants to comply with various administrative procedures in order to enter the territories (valid visa, travel documents) unless there a bilateral or regional agreements providing for other measures. Generally, between the countries in the region a no-visa movement is common⁹². In all countries, unauthorised entry is generally punished by fines, imprisonment or expulsion. The laws in place describe the different forms of residence permits a foreigner may receive if certain criteria are fulfilled. These laws, however, grant a significant degree of discretionary power to the authorities to determine under which

⁹⁰ Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, The occupied Palestinian Territories, Tunisia and Syria.

⁹¹ For detailed studies on migration and asylum in the Mediterranean countries

see Planes-Boissac, V. et al., *Study on Migration and Asylum in Maghreb Countries: Inadequate Legal and Administrative Frameworks Cannot Guarantee the Protection of Migrants, Refugees and Asylum Seekers*, Euro-Mediterranean Human Rights Network, Copenhagen, July 2010, available at:

<http://www.euromedrights.org/en/publications/enhrnpublications/emhrn-puplications/9148.html>.

⁹² Exceptions: e.g. Morocco-Algeria; Morocco-Tunisia.

circumstances a residence permit can be refused or withdrawn by referring to notions as 'national security' or 'public security'. Since the national laws generally fail to give a definition when there actually is a case of 'national security', migrants face a high risk to become a victim of arbitrary decisions by the authorities in charge.

2. Migrant workers

Generally, there is a lack of specific legislation dealing with the rights of migrant workers in the region, and countries have established rather restrictive conditions for foreign migrant workers mirroring their economic, social and political concerns. From an international point of view it is important to note that Algeria, Egypt, Libya, Morocco and Syria have ratified the 1990 International Convention on the Protection of Migrant Workers, adding some formal legal principles with regard to the protection of migrant workers to the existing national provisions. Still, as subsequent legal action at the national level supporting the Convention is generally lacking, its ratification can be rather understood as a sign of 'good will', than as a real commitment. Even though in none of the countries examined a specific law or policy deals with their rights, in all of them other instruments, such as national Labour Codes and other constitutional guarantees, are in place theoretically offering some protection to migrant workers. Under all immigration and labour laws, migrant workers are required to obtain work permits. Without a valid work permit, migrant workers do not fall under the application of the labour laws granting them some rights. Whereas the requirement of a valid work permit as such is not precarious in itself, the administrative procedures in place in the Maghreb and Mashrek countries seem to be rather discriminatory and arbitrary, putting again a high risk on migrant workers to find themselves in an irregular situation. For example, in Egypt the issuing of a working permit is subject to the condition of reciprocity, where Egypt has labour agreements with other countries hosting Egyptian migrants. In other countries, such as Jordan, work permits are normally reserved by laws for jobs where the required expertise cannot be found within the national labour force. Furthermore, some discriminatory measures have been implemented against migrant workers, such as the mandatory HIV testing for foreign workers in Egypt or Libya. In addition to the weak legal regimes, there is a lack of implementation and enforcement in the field of labour migration making migrant workers vulnerable to exploitation and abuse. Generally, migrant workers in this region of the European Neighbourhood must cope with racism and discrimination on a daily basis, but they hardly have any possibilities of legal redress. In this regard, the governments of the countries concerned have failed on a broad scale to launch awareness raising campaigns or to fight xenophobia and racism.

3. Irregular Migrants

Whereas the national migration policies in this part of the European neighbourhood already fail to protect the rights of regular migrants, as migrant workers, the situation with regard to the human rights of irregular migrants is even more precarious. Generally, the laws regulating the entry, stay and exit of migrants are driven by the fight against irregular immigration and emigration. Of particular concern with regard to the protection of irregular migrants is the fact that national immigration laws in the respective countries all contain very severe penalties for unauthorised entry, residence and even departure. The sanctions - ranging from fines and prison sentences to expulsion - and the criminalisation of irregular migrants in the national laws are generally disproportionate to the violations of the immigration laws and lead to additional human rights abuses especially with regard to ill-treatment in prison⁹³. Especially problematic in this regard is, that the provisions dealing with

⁹³ Compare e.g. the FIDH and EIPR shadow report to the UN Committee on Migrant Workers, International Federation for Human Rights and the Egyptian Initiative for Personal Rights, *Egypt: Protection of the Rights of All Migrant Workers and*

administrative removals and expulsions are generally very vague, leaving the deciding authorities a wide margin of discretion. In each country, the margin of discretion includes the power to detain individuals as required to execute the expulsion, most of the time without an administrative hearing or an opportunity to appeal. In this context it appears especially alarming that the cases of irregular migrants are often dealt with before military courts that do not meet international fair trial standards⁹⁴.

Whereas immigration laws of all countries in the region provide for the penalisation of entry and stay, in some countries these provisions apply as well to their own nationals and not only to foreigners⁹⁵. Furthermore, any form of assistance to irregularly present migrants, is subject of penalisation as well, that makes people highly reluctant to support irregular migration. In all the countries observed, there are laws in place providing for severe penalties against people responsible for smuggling and transporting irregular migrants, and for organising smuggling networks. In this regard, from an international point of view, all the countries in the region have ratified the UN Convention against Transnational *Organized Crime* and most of them as well the two Protocols against the Smuggling of Migrants by Land, Sea and Air and to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children⁹⁶. Still, referring to the Trafficking in Persons Report 2010 of the US Department of State, none of the respective countries is in compliance with the international standards with regard to trafficking of persons⁹⁷.

The criminalisation of irregular migrants is a driving force for the hostile environment against migrants and refugees in the region. The policies of arrest and detention for irregular migrants further promote the negative picture of them in the public opinion. Most significantly, whereas irregular migrants already have the constant fear to be detected, arrested and expelled, this approach makes them even more vulnerable to exploitation, since employers or others may use the threat of penalty against them. The general criminalisation of irregular migrants by national immigration laws in place in the region makes people tend to confuse immigration and asylum with organised crime, drug dealing and terrorism and contributes thus to the further discrimination of migrants.

Members of Their Families: NGO Alternative Report to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, April 2007, available at: http://www2.ohchr.org/english/bodies/cmw/docs/ejpr_fidh.pdf.

⁹⁴ See Human Rights Watch, *Rights on the Line*, December 2010, available at: <http://www.hrw.org/de/node/94813/section/5>.

⁹⁵ In particular in Morocco and Tunisia. In Algeria only the unauthorized departure of Algerian nationals is since 2008 a crime.

⁹⁶ Exceptions: Morocco and Jordan.

⁹⁷ U.S. Department of State, 2010.

4. Refugees

Even though the Maghreb and Mashrek regions have had to cope with mass displacement from conflicts in Palestine/Israel, Sudan and Iraq and hosts a significant percentage of the world's refugee population, in none of the countries in the region formal national asylum systems are in place to respond to the needs of the huge numbers of displaced people. As a consequence of lacking protection regimes and the blurring of immigration categories, refugees are often treated as irregular migrants, without taking into account their special protection needs. From an international point of view, Algeria, Egypt, Morocco, and Tunisia have ratified the 1951 Geneva Convention, whereas Jordan, Lebanon and Libya still prove to be reluctant to ratification. However, despite the ratification of the Geneva Convention by some of the countries, the absence of domestic asylum regimes is the major characteristic for refugee protection in the region. This includes the absence of formal legal frameworks guaranteeing the physical protection of refugees as well as the absence of domestic administrative procedures to deal with asylum claims. As a consequence, refugees are subject to the standard immigration laws as described above, including the provisions on irregular migration. The penalties foreseen for the irregular entry, stay or exit, including expulsion put refugees at risk of being returned to a country where they have to face persecution, torture and fear for their lives. Even though not all states in the region have ratified the Geneva Convention 1951, enshrining the principle of *non-refoulement* in Art 33, they are due to its customary nature and the fact that is as well codified in other international instruments as the UN Convention against Torture (CAT) and the ICCPR, bound by it. However, none of the governments in the region have yet translated it into a national policy. The return of refugees thus rather occurs on a *de facto* and *ad hoc* basis and not because of determined rules of procedures. Since the prospects for refugees to live in security and dignity in the countries of the European Mediterranean Neighbourhood are rather limited, a high percentage of them try to continue their journey to EU transit countries to get recognised as refugees there.

Because of the absence of national asylum procedures UNHCR plays a crucial role with regard to the protection of refugees in the region. The responsibility for refugee status determination has been handed over to UNHCR in all countries in the region and it is thus responsible for the registration of refugees, asylum applications, hearings etc. Besides the fact that access to UNHCR, whose national offices are mainly situated in the capital cities, might be a challenge for refugees being intercepted at border regions far from the capital cities, its work is impeded by its dependence on state involvement. In the end, even though UNHCR is dealing with the asylum applications, it is up to the hosting state to adopt legal measures to grant residency status or work permits. None of the states in the region do systematically give residence or work permits to refugees recognised by UNHCR, so that they find themselves in the same miserable situation as irregular migrants. Even though the presence of refugees holding a UNHCR certificate is tolerated for example in Morocco and Tunisia, they have to be in constant fear of being detained and expelled in Algeria and Libya. To which extent UNHCR is depending on the state willingness to cooperate was best demonstrated by its expulsion from Libya without explanations in 2010.

The recent outburst of violence in Libya urged hundreds of thousands people to leave their country and to look for protection mainly in Tunisia. However, in the aftermath of the "Arab spring" Tunisia itself is still struggling with the development of democratic structures and institutions not being able to deal with the massive influx of people reaching its territory. Even though it is impossible to give reliable prognoses how the refugee situation will develop, it is clear that Tunisia and the refugees arrived there do need international support to overcome the current crisis. In case the Libyan crisis will hold on what is rather probable, special attention has to be drawn to the fact that Tunisia, as the main receiving country of Libyan nationals, does not have a national refugee status determination procedure and no legal provisions exist regarding permits to stay for refugees. Additionally it has to

be kept in mind that Tunisia is one of the main collaborators of the EU with regard to the fight against irregular migration and the Tunisian immigration laws are correspondingly restrictive.

5. EU engagement

Cooperation between the EU and the countries in the region has been taken place under the framework of the ENP and the Union for the Mediterranean. It was *inter alia* the aim of these partnerships to modernise the migration management policies of the Mediterranean countries by adopting corresponding laws encompassing border controls, labour emigration and immigration. Human rights of migrants only played a subordinated role whereas security considerations of the EU have been clearly prioritised. The EU has thus insisted on the strengthening of the abilities of neighbouring countries in the Mediterranean region to control and reduce migration flows into the territories of the EU. This led to a major imbalance in the migration policies of the Mediterranean states being designed in a repressive and not protective way. However, the impact the cooperation agreements had on the human rights of migrants in the countries concerned remained ignored.

For instance, it took till the recent outburst of violence and the atrocities committed by the Gaddafi regime in February this year that the EU suspended negotiations of the EU-Libya framework agreement and the technical cooperation with Libya. Before, the expansion of the cooperation with Libya and the development of a large scale refoulement system with Italy have not been strongly condemned by the EU. On the contrary, even though many observers decried the inhuman detention conditions in Libya and the lacking protection schemes for refugees, the European Commissioner for Justice and Internal Affairs proposed in July 2009 the creation of transit camps in Libya.⁹⁸ The example of Libya, but also the one of Egypt and Tunisia, suggests that the EU's quest for solutions preventing migrants to reach its territories prevails not only over the protection of the rights of migrants but also over considerations of democracy, freedom and fundamental rights of the people in the respective countries. Whereas the EU did not hesitate with repressive regimes to protect its external borders its solidarity with the people fleeing from the uncertain situations is rather limited as it is proofed by the nationalistic arguments on the sharing of refugees arriving at Lampedusa or Malta among Member States.

Currently approximately € 4 billion is available for the funding of the Mediterranean countries for the period to the end of 2013 under the ENPI. Problematically, the largest part of this assistance is delivered through bilateral assistance programmes and is paid into the states' general budget. Therefore the impact of the budget allocations received by the Mashrek and Maghreb countries remains difficult to assess with regard to the rights of migrants.

6. Key findings

– Lack of political will

Migration policies in the Mediterranean European neighbourhood are shaped by the political regimes under which they have been established and can thus be considered as highly restrictive by their very nature. The migration policies in the region are thus shaped by various shortcomings with regard to human rights, the rule of law and the management of migration flows. Furthermore, authorities have been very reluctant to conduct reforms with regard to the development of legal redress and asylum systems, the adoption of administrative procedures respecting the rights of migrants, and the establishment of control mechanism.

– Lack of democracy, lack of human rights

⁹⁸ See ECRE, Barrot wants reception points in Libya for asylum seekers, ECRE Weekly Bulletin – 17 July 2009, available at http://www.ecre.org/files/ECRE_Weekly_Bulletin_17_July_2009.pdf.

In the countries of the Mediterranean region human rights are generally only weakly protected exacerbating the already vulnerable position of migrants, especially of those who are detained or seeking for legal redress. Due to the restrictions of the freedom of association in several countries the work of civil society organisations is very limited as is their ability to give support to migrants..

– Inappropriate laws and lacking implementation

Violations of rights of migrants not only occur on a regular basis but are as well direct results of the legal migration framework in place. International instruments ratified by the countries in the region are not implemented properly. Moreover, migration related laws that have been adopted are restrictive and do hardly provide any rights for migrants. Most problematically: None of the countries in the region have adopted proper asylum procedures and refugees have to rely on the protection by the UNHCR, who is dependent on the cooperation with the host state. Labour legislations and administrative barriers are highly discriminatory constituting de facto obstacles to the employment of migrants. In this regard, legislation that blurs the distinction between refugees and migrants is very problematic.

– Criminalisation of irregular migrants

Irregular entry and/or stay are criminalised by all the countries in the region foreseeing disproportionate high criminal penalties and detected irregular migrants may face detention and/or deportation. Even though assistance to irregular migrants in none of the countries of the region is criminalised directly, immigration laws in most of the cases foresee a reporting duty of people hosting or employing irregular migrants. A breach of this reporting duty is in most of the countries subject to a monetary fine. The general criminalisation of irregular migrants and the placing of responsibilities on nationals hosting or employing them increase the xenophobic and racist attitudes of the autochthon populations towards irregular migrants exposing them even further to human rights violations.

– Disproportionate and incoherent EU engagement

Insofar, the priorities set forth in the cooperation framework between the EU and the Mediterranean Union have had mainly negative impacts on the rights of migrants since most of the repressive legislation in force are a direct result of the partnerships established. The security considerations of the EU prevail not only over the rights of migrants and refugees but also over the protection of fundamental rights and democracy.

5.2.3 Accession and Potential enlargement countries⁹⁹

1. General Remarks

Recent patterns of migration in the Western Balkan countries were mainly shaped by the wars afflicting the region in the 90s. Though all the countries concerned were traditional emigration countries throughout the 20th century, the outburst of violence in the context of the dissolution of the former Yugoslavia led to a mass exodus of people fleeing the atrocities and searching for protection in Europe Member States. Today, because of its approximation to the EU, the Balkan becomes increasingly more attractive to immigrants and the numbers of labour migrants searching for work are rising. Still, the percentage of labour migrants is relatively low and emphasis is put in the attempts to develop migration strategies on war-returnees and their re-integration as well as on the fight against irregular migration. The Western Balkan countries remain an important transit route for

⁹⁹ Albania, Bosnia and Herzegovina, Croatia, Former Yugoslav Republic of Macedonia, Kosovo under UNSC Resolution 1244/99, Montenegro, Serbia and Turkey. Due to their geographic approximation to the EU, the study focuses only on the Western Balkan countries.

irregular migrants being smuggled or trafficked to the EU even though the numbers of trafficked persons are decreasing¹⁰⁰.

The prospect of membership to the EU has proved to be the driving force for the Western Balkan countries to make considerable efforts in developing coherent and comprehensive migration policies. As it does the accession progress, the advancement of migration policies vary between the countries in question. Croatia, the Former Yugoslav Republic of Macedonia and Montenegro are official candidate countries, whereas accession negotiations with the latter two have not started yet. The other countries of the Western Balkans – Albania, Bosnia and Herzegovina, Serbia and Kosovo under UN Security Council Resolution 1244/99 are considered as ‘potential candidates’, i.e. the prospect of EU membership has been promised to them¹⁰¹. To obtain EU membership and candidate status respectively states have to fulfil the so called Copenhagen criteria foreseeing inter alia the establishment of functioning institutions that are able to guarantee democracy, the rule of law, human rights and the respect for and protection of minorities¹⁰². Furthermore, states are urged to align their national policies with the EU acquis and put the EU rules and procedures into effect¹⁰³.

As already mentioned progress made in the development of national migration policies can be attributed to the membership prospect. Even though National Strategies on Migration and corresponding National Action Plans on Migration have been adopted with assistance from the European Commission and the IOM, achievements with regard to coherent migration policies have been modest insofar¹⁰⁴. Migration and asylum are generally still topics of low priority in the political and public sphere of the aforementioned countries and already scarce financial resources are rather used for nationals than for the protection of the rights of foreigners. Only in Croatia sustainable progress in developing migration policies almost fully complying with the EU acquis¹⁰⁵, can be observed. Detailed analyses of the status quo of migration policies in the other countries show that the reasons why only little improvements have been made so far are manifold. For instance, even though considerable efforts have been made, all developments in the field of migration in Bosnia and Herzegovina have generally failed to succeed since the highly complex and overloaded administrative system led to a lack of coordination, cooperation and leadership with regard to migration policy management.

The only issue with regard to migration were the Western Balkan countries actually made progress was the improvement of their border management. Correspondingly countries in the region invest

¹⁰⁰ For detailed information about the Balkan route regarding the smuggling of migrants see FRONTEX, *Determination of High Risk Routes Regarding Illegal Migration in the Western Balkan Countries*, Warsaw, February 2007, available at: http://www.eulex-kosovo.eu/training/police/PoliceTraining/BORDER_BOUNDARY/DOCUMENTS/3.pdf?page=agreements.

¹⁰¹ Further information on the conditions for enlargement is available at:

http://ec.europa.eu/enlargement/thepolicy/conditions-for-enlargement/index_en.htm.

¹⁰² For further information see Conclusions of the Presidency, Copenhagen European Council, 21-22.6.1993, available at: http://ec.europa.eu/bulgaria/documents/abc/72921_en.pdf.

¹⁰³ Conclusions of the Presidency, Madrid European Council, 15-16.12.2.1995, available at:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00400-C.EN5.htm.

¹⁰⁴ For detailed country-based Enlargement Strategy and Progress Reports see

http://ec.europa.eu/enlargement/press_corner/key-documents/reports_nov_2010_en.htm.

¹⁰⁵ See European Commission, Commission Staff Working Document, Croatia 2010 Progress Report accompanying the communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2010-2011, SEC(2010) 1326, Brussels, November 2010, available at:

http://www.mvpei.hr/custompages/static/hrv/files/101110_lzvjesce_o_napretku_HR_za_2010.pdf.

comparably large efforts and funds in the fight against irregular migration and the smuggling and trafficking in human beings¹⁰⁶.

2. Migrant workers

Since the development of migration policies is driven mainly by the efforts to align national policies with the EU acquis, and since labour migration does not play yet a predominant role at the EU level, none of the accession countries has developed specific instruments to protect the rights of migrant workers insofar. Nevertheless, some of the general labour legislation makes special reference to the rights of migrant workers¹⁰⁷.

With regard to the ratification of international instruments in the field of the protection of migrant workers, Albania and Bosnia and Herzegovina have ratified and Montenegro and Serbia have signed the 1990 International Convention on the Protection of Migrant Workers and Their Families¹⁰⁸. Due to the lack of legal action at the national level these ratifications however cannot be regarded as real commitments but rather political statements. At the regional - namely CoE level - only Albania is party to the European Convention on the Legal Status of Migrants.

When examining the national policies with regard to the protection of the rights of migrant workers, it has to be kept in mind, that all of the countries in the region are rather emigration than immigration countries. Because of the high unemployment rates in the respective countries the labour inflow is very small and nationals seek to work abroad. As a consequence all the countries suffer from 'brain drain' and lack qualified workers. Exceptions in this regard are Montenegro and Croatia which unlike other Western Balkan countries are gradually turning from purely emigration into immigration countries. Paradoxically, even though the rate of nationals leaving the countries because of the bad labour market conditions is still very high, the already well proceeding admission process to the EU led to an increase of immigrants, especially from neighbouring countries. With regard to labour inflows, almost all of the countries have developed national labour laws¹⁰⁹ which include a work permit system either based on labour market testing¹¹⁰ or an annual quota system¹¹¹. Generally, the labour legislations in place are rather restrictive and aimed to protect the national labour markets having in particular negative consequences for the regional cooperation and integration of migrant workers from neighbouring countries. In the case of Bosnia and Herzegovina, the development of labour migration policies is divided between the Federation of Bosnia and Herzegovina, the Republic of Srpska and the District of Brčko all having own competences regarding the employment of foreigners¹¹². Since there is a lack of cooperation between the employment institutions of the entities, the individual laws on the employment of foreigners tend to deviate from

¹⁰⁶ E.g.: Croatia, Bosnia and Herzegovina, Montenegro and Serbia. Kosovo has no visa policy, but as regard border management, Kosovo has made some progress.

¹⁰⁷ See e.g. Former Yugoslav Republic of Macedonia, Law on employment and work of foreigners, Official Gazette of RM No. 70/07, available at: http://www.iomskopje.org.mk/Legal/Law_on_Employment_of_Foreigners_ENG.pdf.

¹⁰⁸ As Kosovo is neither a member of the UN nor the CoE yet, it is not in the position to ratify the international instruments with regard to migrants.

¹⁰⁹ Law on Foreigners in Albania; Law on Employment of Foreigners in Bosnia and Herzegovina; Aliens Act in Croatia; Law on Foreigners in the Former Yugoslav Republic of Macedonia; Law on Foreigners in Kosovo; Law on the Employment and Work of Foreigner in Montenegro.

¹¹⁰ E.g. Albania and Serbia.

¹¹¹ E.g. Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia and Montenegro.

¹¹² Employment of foreign nationals in the Federation of Bosnia and Herzegovina is governed by the Law on Employment of Foreigners in the Federation of Bosnia and Herzegovina, in the Republika Srpska it is governed by the Law on Employment of Foreigner Nationals and Stateless Persons and in the Brcko District of Bosnia and Herzegovina by the Law on Employment of Foreigners.

each other foreseeing for instance different sanctions for the employment of foreigners without a work permit¹¹³.

As emigration remains the primary concern of the countries in the region, the protection of the rights of emigrating nationals becomes increasingly important for the respective national authorities. Consequently, efforts are intensified to cooperate bilaterally with receiving countries to establish formal guarantees that the social and economic rights of nationals abroad are respected. However, so far only few bilateral agreements on labour migration have been signed¹¹⁴.

Another inherent problem with regard to coherent and comprehensive migration policies encompassing the protection of migrant workers is the chronic lack of resources, being financial or human ones. Even in countries where special provisions with regard to labour migration are in place corruption and mismanagement hinder their implementation.

3. Irregular migrants

The Western Balkan countries today cannot only be considered as countries of origin, they are important transit routes for people mainly coming from India, Pakistan, Bangladesh and China trying to reach prosperous Europe, whereas the smuggling and trafficking in human beings plays a predominant role¹¹⁵. Only in Croatia the numbers of irregular migrants staying in the country are growing constantly. The reasons for the use of the Balkan Route are manifold. Besides the favourable geographical location, the total lack of or the very generous visa regimes in combination with the lack of data and resources, weak border management¹¹⁶ and the rarely developed enforcement structures attract people trying to reach Europe without appropriate papers. Corruption¹¹⁷ and the engagement of organised crime groups facilitate irregular migration and the smuggling and trafficking of human beings even further. And since good governance, transparency and accountability in the public administration are generally lacking in the Western Balkans, the fight against irregular migration and especially the fight against human trafficking appears to be tilting at windmills. Still, all countries in the region put clear emphasis on this issue within their national migration policies and notably efforts have been made to improve the effectiveness of border police forces, the development of harmonised mechanisms and procedures for exchange of information and the strengthening of cooperation within the region.

From an international perspective, all candidate countries and potential candidates have ratified the UN Convention against Transnational *Organized Crime* and the two Protocols against the Smuggling of Migrants by Land, Sea and Air and to Prevent, Suppress and Punish Trafficking in Persons, especially Woman and Children. Nevertheless, the Trafficking in Persons Report 2010 of the US Department of State figures out that all of the accession countries are making significant efforts to

¹¹³ In the Federation of Bosnia and Herzegovina sanctions are foreseen for workers and employers, whereas in the Republika Srpska sanctions are foreseen only for employers.

¹¹⁴ *Albania*: with Greece and Italy for seasonal employment; *Croatia*: with Germany and Slovenia; *Bosnia and Herzegovina*: with Slovenia and Croatia; *Serbia*: with Belarus, Libya, Algeria and Germany; *The Former Yugoslav Republic of Macedonia*: with Slovenia.

¹¹⁵ All of the countries have never faced constant immigration flows, except during recent war crisis when for example a great number of refugees from Bosnia and Herzegovina and Kosovo came in the former Republic of Macedonia.

¹¹⁶ With regard to Montenegro it has to be mentioned that 92% of the state borders extends over mountainous areas and therefore favourable conditions for illegal crossing are provided. Furthermore the region offers a lot of roads and railway crossings because the borders were initially internal ones within Yugoslavia.

¹¹⁷ The 2010 Corruption Perceptions Index figure out that all countries scored 4.4 or lower on a scale where zero indicates high level and ten indicates low levels of perceived corruption: Turkey 4.4, Croatia 4.1, FYR Macedonia 4.1, Montenegro 3.7, Serbia 3.5, Albania 3.3, Bosnia and Herzegovina 3.2 and Kosovo 2.8. For further information see Transparency International, *Corruption Perceptions Index 2010*, October 2010, available at:

<http://www.transparency.org/content/download/55725/890310>.

bring themselves in compliance with the international standards with regard to trafficking of human beings, but do not yet fully comply with them¹¹⁸. Bosnia and Herzegovina and Croatia fully comply with the international standards for the elimination of trafficking. In both countries governments made clear progress in this filed by imposing stronger penalties for convicted traffickers and improving victims' protection mechanisms. Furthermore, all the Western Balkan countries have ratified the CoE Convention on Action against Trafficking in Human Beings¹¹⁹.

At the national level National Programmes for the fight against human trafficking and irregular migration have been adopted with corresponding National Action Plans aimed to implement these strategies. One major result was that all the countries in the Western Balkans have adopted laws criminalising irregular migration and providing for severe penalties against people responsible for smuggling and transporting irregular migrants. These laws are, however, rather restrictive and reactive and had partly negative consequences on the rights of individuals in need of protection. Particularly problematic is the identification of victims of trafficking at the border controls since effective and particularly victim-sensitive mechanism are still lacking in the Western Balkans. An example of good practice with regard to the protection of victims' rights was the establishment of a referral system in Bosnia and Herzegovina foreseeing that national authorities have to inform the Ministry of Security about victims of trafficking who are subsequently granted accommodation in reception facilities. Even though this mechanism is a step forward, generally the protection of trafficked people in the Western Balkans is far from being comprehensive enough.

4. Refugees

Because of the violent conflicts in the 90s and the beginning of the 21st century in the Western Balkan countries, refugees and IDPs account for a major percentage of migrants in the EU accession countries and potential enlargement countries. The wars in Bosnia and Herzegovina and Kosovo led masses of people fleeing to the EU as well as to neighbouring countries. Even though considerable numbers have returned to their countries of origin, many nationals of the Western countries remained in the EU. Others, even though the region is pacified by now, cannot or do not want to return to their home towns or villages and build thus the large number of IDPs in the Western Balkans. The case study of Kosovo will examine into detail the existing human rights problems with regard to returned and repatriated people.

From an international point of view, all countries in the region have ratified the 1951 Geneva Convention and its 1967 Protocol¹²⁰.

In the field of asylum again the prospect of EU membership was the main incentive for the Western Balkan states to adopt corresponding national laws since one of the conditions for an eventual accession is the establishment of an EU compatible asylum system¹²¹. However, the EU only obliges candidate states and potential candidates to introduce minimum standards entailed in the EU acquis on asylum. Additionally, to the EU the UNHCR played and still plays a remarkable role when it comes to the development of coherent asylum systems in the Western Balkan states. In particular it is the

¹¹⁸ U.S. Department of State, 2010.

¹¹⁹ See the CoE Convention on Action against Trafficking in Human Beings.

¹²⁰ The Socialist Federal Republic of Yugoslavia was one of the original signatories to the Geneva Convention. The successor states of the former Yugoslavia succeeded to the 1951 Convention with retroactive application on the dates of their independence.

¹²¹ The national asylum legislation in *Albania* consists of the Law on Asylum (1998) and the Law on Integration and Family Reunion of Persons Granted Asylum (2003); The legal framework in *Bosnia and Herzegovina* is based on the Law on Movement and Stay of Aliens and Asylum; A new Law on Asylum in *Croatia* entered into force in 2008; The *Macedonian* Law on Asylum and Temporary Protection was revised in 2007; *Montenegro* adopted a Law on Asylum in 2006; The *Serbian* Law on Asylum entered into force in 2008.

UNHCR which promotes the establishment of fair and efficient asylum procedures based on international refugee law and not only on EU minimum standards. The combined efforts of both institutions resulted in relatively well functioning asylum systems in all the countries of the Western Balkans.

In most of the countries of the Western Balkan recognised refugees theoretically enjoy the same rights as citizens regarding the right to work as well as the right to education (except the right to vote and founding and membership in political organisations). However, once again the crux of the matter is the lacking implementation of the laws and bylaws and further administrative and legislative alignments will be needed to guarantee the protection of the rights of refugees.

Today the numbers of recognised refugees and IDPs within the Balkan countries are decreasing. Still, a huge number of IDPs¹²² are dependent on the help of the states. In this regard, living conditions for those in need of protection still give raise to grave concerns. Although accommodation in reception conditions is provided on a general basis, frequently the standard of living in these centres does not meet the requirements foreseen in international and European law. However, the main problem with regard to the introduction of reception conditions compatible with international and European standards is the lack of financial resources¹²³.

5. EU engagement

Cooperation between the EU and the accession and potential enlargement countries has been taken place under the Accession Framework. In particular the Copenhagen criteria contain the basic requirements for accession of new Member States to the EU. In order to assist the Western Balkan countries to meet the Copenhagen criteria the SAP was established, which prescribe *inter alia* the stability of democracy-guaranteeing institutions, the rule of law, human rights, respect for and protection of minorities and the ability to take on the obligations of membership. Furthermore, under the SAP individual SAAs were negotiated and European and Accession Partnerships were established in order to support the countries' efforts to implement the SAP and the Copenhagen criteria. As all of these instruments are aimed at strengthening the abilities of the Western Balkan countries to control and reduce migration flows into the territories of the EU by improving the cooperation in the areas of visa, border control and the fight against irregular migration reflecting thus the security-based approach of the EU. Although human rights of migrants only play a subordinated role, human rights compliance in general is one of the prerequisite for the accession to the EU. Accordingly, all of the countries in the region have improved a lot with regard to the management of migration flows and the legal frameworks in place are generally at least formally in line with the EU *aquis* as well as with international human rights standards.

6. Key findings

- Lack of implementation and enforcement mechanisms
As human rights compliance is one of the prerequisites for the accession to the EU, all of the Western Balkan states have been very active in ratifying international human rights instruments and the legal frameworks in place are formally in line with international standards. However, human rights of migrants are still violated frequently, because of the limited implementation of the established legal frameworks and the lack of enforcement mechanisms.
- Lack of good governance, transparency and accountability

¹²² Croatia 2.285 (January 2010), Bosnia and Herzegovina 113.365 (December 2010), The former Yugoslav Republic of Macedonia 644 (December 2009), Serbia 210.146 (December 2010), Kosovo 18.258 (December 2010). For further information see <http://www.internal-displacement.org/>.

¹²³ In particular access to translation and interpretation, which is essential to ensure fair processing of asylum applications, is lacking.

Because of the general lack of good governance, transparency and accountability in the public administration sphere, corruption is still widespread, increasing the danger that human rights of migrants are rather protected arbitrarily and incidentally than systematically and the fight against human trafficking appears in some of the countries to be tilting at windmills even though the numbers of people being trafficked in the whole region are decreasing. Furthermore, corruption and mismanagement often hinder the implementation of special provisions with regard to the protection of migrants.

– Lack of financial resources

An inherent problem with regard to coherent and comprehensive migration policies is the chronic lack of resources. For instance, in those Western Balkan states where fairly established asylum systems are in place and refugees at least formally enjoy the same rights as nationals, the protection of refugees and IDPs fails because of lacking financial resources. Additionally, the implementation of migration policies in place is undermined by lacking personal resources and the lack of effective monitoring institutions.

– Criminalisation of irregular migrants

In all of the Western Balkan countries irregular entrance and residence are criminalised and irregular migrants are at risk of being punished, whereas criminal sanctions range from fines and prison sentences and include expulsion. Irregular migrants often face severe human rights violations related to their expulsion, their removal and their preceding detention, because they are often subjects of abuse and ill-treatment. Furthermore they have very limited rights during the administrative hearings and mostly no opportunities to appeal against decisions made.

– Disproportionate and incoherent EU engagement

Although it is the cooperation on migration issues with the EU which has shaped the development of national migration policies and laws, the EU engagement is still imbalanced and one-sided as security considerations trump humanitarian ones. Especially the cooperation with the EU in the field of labour migration in the Western Balkan states has been very limited and up to date has not been on the priority list of the EU. Thus none of the accession and potential enlargement countries has developed specific instruments to protect the rights of migrant workers so far. Under the influence of the EU partnerships and the EU's interest to manage migration flows, all of the countries in the region have established highly restrictive legislation dedicated to fight against irregular migration. Most problematic in this regard is the practice of the EU to return people who were not granted a permanent legal status in the EU to the Western Balkan states, and especially Kosovo, on the basis of readmission and return agreements since the countries concerned are due to financial constraints not able to provide for the basic needs of the returnees rendering them to poverty and discrimination.

5.3 Recommendations on the cooperation with European neighbourhood countries

- Human rights and political reforms must become an utmost priority in all cases within the ENP and the Accession Framework.
- Against the background of the “Arab spring”, the outburst of violence and the following masses of people fleeing the region, the EU has to develop short term solutions to deal with sudden mass influxes of people as it is happening now in the cases of Lampedusa or Malta. After years of struggling the EU is urged to finally find a fair solution with regard to the reception of refugees. “Burden sharing” instead of overrated security considerations must be the guiding motive in the ongoing and future negotiations on reforms concerning the Common European Asylum System. Since the majority of people arriving right now on Lampedusa do not have the status of refugees but are considered as economic migrants, negotiations of short-stay visa facilitation agreements with the countries concerned should be envisaged following a differentiated, evidence-based approach. However besides short term solutions, the EU must as well bethink itself of the Global approach to migration and reinforce the migration-development nexus. As a first step the EU has to support the democratic and constitutional reform processes in the region. In this regard civil society organisations in the countries concerned must be strengthened since a thriving civil society can help uphold human rights and contribute to democracy building and good governance. The restrictive European approach towards legal migration combined with the tightening of border controls inter alia through FRONTEX operations will not hinder people trying to search for a better life in Europe. On the contrary, this approach will drive more and more people in the hands of human smugglers and will increase the numbers of those losing their lives during the dangerous journeys. Possibilities for legal migration must thus be fostered at the European level. To tackle the root causes of migration inclusive economic development must be promoted and supported by the EU since not only the unrest in the Maghreb states but migration as such is clearly linked to economic weakness. Economic assistance includes financial and policy support but also the conclusion of trade liberalisation agreements, notably on agricultural and fisheries products and also of trade in services.
- The EU must ensure that the protection of the rights of migrants and refugees becomes incorporated into all programmes, policies and bilateral agreements concluded with neighbouring countries. Insofar the existing instruments, mainly the ENP and the accession process proved to be rather ineffective regarding the protection of migrants, since they reflect clearly the interests and the restrictive approach of the EU towards migration.
- The chapters of the APs on migration and asylum must ensure that national migration policies respect the basic rights of irregular migrants. Whereas the APs already make reference to the 1951 Geneva Convention, comparable references with regard to the protection of migrants are missing.
- The sections on discrimination and racism in the AP must be expanded further providing for closer cooperation between the EU and its neighbouring countries and the potential accession countries with regard to the integration of migrants.
- The impact the EU’s financial instruments had on the rights of migrants so far remains difficult to assess.

ENPI:

The follow up reports to the ENPI do not provide detailed information on the projects and reforms funded under this instrument. The EU must ensure that in the future all relevant information on the funding is published and assessed. The programmes adopted should thus be clearly identified and have measurable objectives.

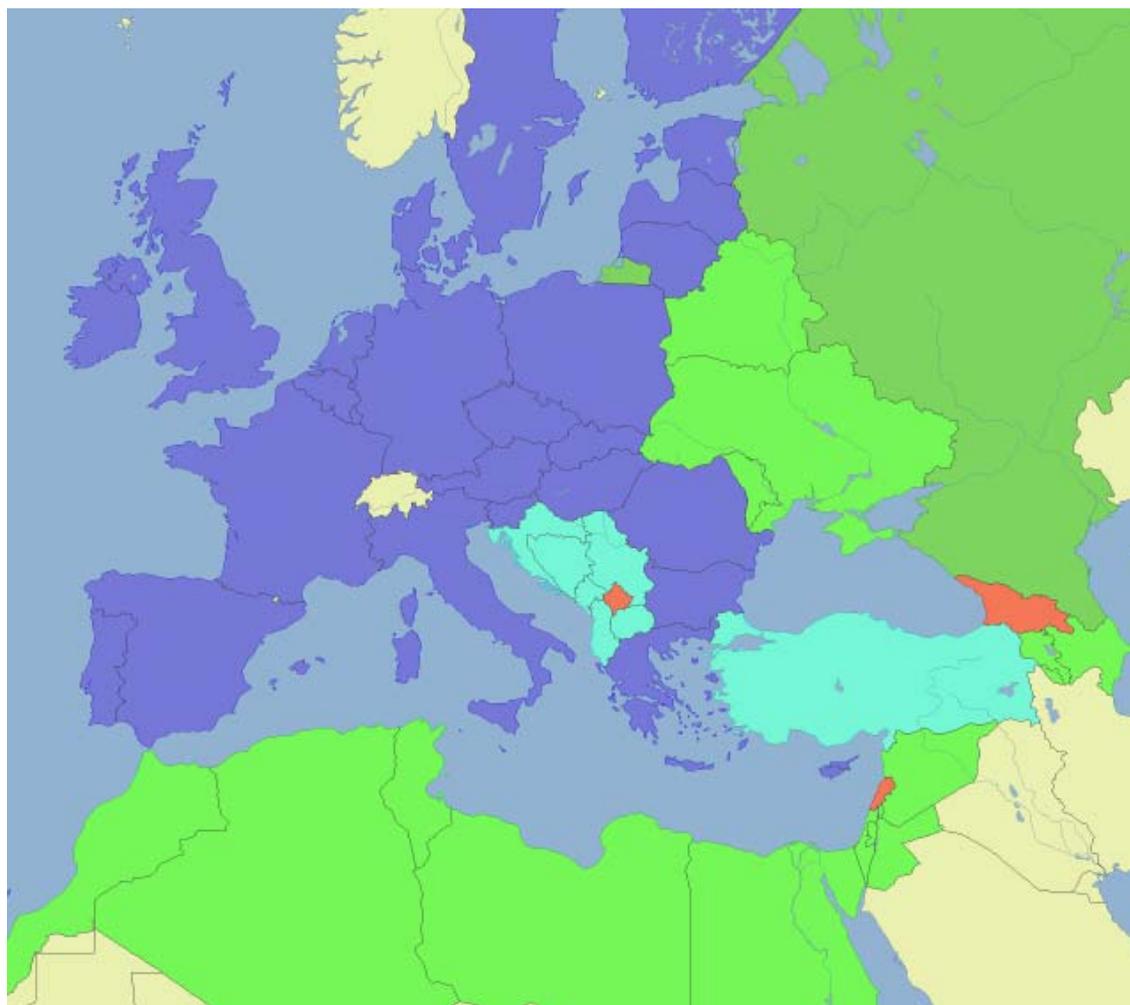
The Migration and Asylum Thematic Programme:

The annual priorities of the Migration and Asylum Thematic Programme did till now not explicitly refer to the protection of the rights of migrants and refugees. The EU should thus better balance its funding for projects aimed at strengthening the position of migrants and refugees.

IPA:

Till now only few projects with regard to the protection of migrants have been funded under the IPA. One positive example is the 2007 project "Return, Reintegration and Cultural Heritage in Kosovo" that was aimed to strengthen municipalities to develop a climate for inter-ethnic tolerance, sustainable multi-ethnicity and the promotion of human and minority rights (including in a gender perspective) conducive to the return and reintegration of refugees and IDPs to Kosovo. Because of this project several initiatives were launched to support returnees to reintegrate at the local level.

Part Two – CASE STUDIES



In this part a synthesis of three different countries in the European Neighbourhood will provide information on the state of the art with regard to the protection of migrants' rights in the respective countries¹²⁴. Furthermore, the effects the cooperation with the EU had on the development of national migration policies will be described and assessed whether this engagement improved or worsened the situation for migrants. The examined countries, Georgia, Kosovo, and Lebanon, have been chosen because of various reasons: Besides the obvious reason, namely their geographical location, all the three countries are struggling with different migration related topics. What they have in common is that they are all rather countries of origin and transit than countries of destination. All of them are however characterised by special country related migration patterns, namely IDPs in Georgia, forcibly returned and repatriated persons in Kosovo, and migrant domestic workers (MDWs) and Palestinian refugees in Lebanon.

The synthesis is, firstly, aimed to allow for a comparison of the problems labour migrants, irregular migrants and refugees have to face with regard to the protection of their human rights in the respective countries. Secondly, the ways how the three countries deal with the country specific migration patterns will be described. And thirdly, each sub-chapter examines the existing cooperation mechanism in place and assesses the positive and/or negative consequences that the engagement with the EU had on the protection of the rights of migrants.

¹²⁴ The case studies at length can be found in the Annex.

6 GEORGIA

6.1 State of the Art – Migrants’ Rights in Georgia

Located at the border between Asia and Europe, Georgia became an important transit route for people trying to reach the territory of the EU. Evaluations of the migration flows from and to Georgia showed that there is still high outward migration motivated by the lack of economic development and missing labour opportunities. According to the latest World Bank statistics, until today, 25.1 % of the Georgian population emigrated and lives currently abroad. Remittances of this Diaspora do play a significant role for the Georgian economy accounting for \$ 834 million in 2010. In comparison, in 2010 only 4 % of the total population were immigrants¹²⁵. Conflicts in the autonomous republics of Abkhazia and South Ossetia in the early 90s resulted in a first wave of IDPs, with almost a quarter million of Georgians seeking for help in other parts of the country. According to the UNHCR around 100,000 people of this first wave of IDPs returned to their regions of origin since 1998¹²⁶. However, the number of IDPs increased again significantly after the conflicts between Georgia and the Federation of Russia on the independence of the two provinces broke out violently in 2008.

By the end of 2010, 258,000 IDPs from Abkhazia and South Ossetia were registered to be living in different parts of Georgia, making 6 % of the total population of Georgia belonging to the group of IDPs¹²⁷. Due to these conflicts 10,020 Georgians applied for asylum abroad in 2010. In comparison, within the same period, only 870 third country nationals tried to seek for asylum in Georgia¹²⁸. Consequently, according to these migration patterns, the main human rights problems in Georgia arise with regard to the huge numbers of IDPs.

From an international perspective Georgia has ratified and/or signed a number of conventions concerning the protection of human rights encompassing as well migrants, *inter alia* the core international human rights treaties ICCPR, ICESCR, CRC and CERD. It has however not ratified or even signed the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families yet. With regard to irregular migration, human trafficking and the smuggling in human beings, Georgia has ratified the 2000 UN Convention against Transnational Crime and its two protocols (Protocol against the Smuggling of Migrants by Land, Sea and Air and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Woman and Children). With regard to refugee rights Georgia has ratified the Geneva Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. As Georgia is a member of the CoE, further regional instruments oblige it to respect and protect the rights of migrants, regular and irregular ones irrespectively, such as the ECHR or the European Convention on Action Against Trafficking in Human Beings. However, as well at the regional level Georgia has been reluctant so far to ratify the Convention on the Legal Status of Migrant Workers, offering this group special protection.

Even though Georgia has been rather active in ratifying international and regional instruments protecting human rights of migrants, encompassing as well irregular migrants and refugees, the protection of the rights of migrants in practice is not yet in accordance with the international obligations it is bound by.

¹²⁵ World Bank, *Georgia Fact Sheet 2010*, available at:

<http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/Georgia.pdf>.

¹²⁶ UNHCR, *Background Note on the Protection of Asylum Seekers and Refugees in Georgia*, September 2005, available at: <http://www.unhcr.org/refworld/type.COUNTRYPOS.UNHCR.GEO.472756782.0.html>.

¹²⁷ For further information see Human Rights Information and Documentation Centre (HRIDC), *Restricted Rights: Annual Human Report for 2010*, Tbilisi, 2010, available at: <http://www.humanrights.ge/admin/editor/uploads/files/RESTRICTED%20RIGHTS%20-%20HRIDC%202011.pdf>.

¹²⁸ For further information see UNHCR, *2009 Global Trends*, June 2009, available at: <http://www.unhcr.org/4c11f0be9.html>.

National legislation in the field of migration is still underdeveloped and lacks implementation increasing the risk that the rights of migrants are violated on a general basis.

In general the development of a coherent migration policy has been a topic of low priority in the political and public spheres in Georgia, as the country was rather concerned with establishing its new statehood after the independence from the USSR. Although considerable progress regarding the development of migration policies has been made in the last decade, it has to be highlighted that national migration policies have been rather developed under pressure from external actors than in the context of national convictions. This had primarily the advantage that for the first time migration as a topic appeared on the agenda of Georgian authorities. For example to ensure that national migration policies were in accordance with the ENP AP concluded with the EU in 2006, the Governmental Commission on Migration has been set up in October 2010. The disadvantage was, however, that the migration policies developed are rather intended to satisfy the needs of the driving external actors than to find sustainable and human rights sensitive solutions with regard to internal migration related problems. Consequently, security issues, such as border control and the fight against irregular migration have been prioritised whereas national concerns such as the protection of the rights of emigrated Georgian in the EU have been subordinated.

Due to the political changes in 2003, Georgia is still in the process of renewing its former migration policies and insofar a written comprehensive migration policy document is missing. Consequently, the legislative framework in place related to migration issues appears to be rather fragmented and not always coherent. Human rights of migrants generally do only play an inferior role with regard to the development of national migration laws. They are mainly protected by the Georgian Constitution granting human rights to both Georgian citizens and non-nationals irrespectively. The only restrictions with regard to migrants concern political rights such as the right to vote or the right to political association that are only conceded to Georgian nationals¹²⁹. Additional rights and duties are granted to migrants residing in Georgia on a temporary or a permanent basis in the Law on the Legal Status of Aliens¹³⁰. Accordingly, migrants enjoy *inter alia* the right to equality, the right to life, the right to personal integrity, the freedom of labour, the right to healthcare, social protection and education.

Even though migrants' rights are at least formally well protected, migrants in Georgia are still very vulnerable since the implementation of existing measures aimed at ensuring their rights remains rather weak. Most problematic in this regard is the protection of social rights of migrants. Whereas the Georgian social system in general is only rudimental and social support for everybody is missing, the situation for migrants is in particular severe. Due to the scarcity of budgetary resources, the Georgian Government fails to provide migrants often with the minimum social and health care protection as well as with employment opportunities. This failure has especially negative implications on the living standards of refugees and IDPs.

The Georgian approach towards migration is generally very liberal and immigration is understood as 'push factors' for the current weak economic situation by attracting foreign investors. This is primarily reflected by the generous labour legislation hardly foreseeing any limitations for people trying to find work in Georgia. For instance, the Law on the Legal Status of Aliens foresees that temporary residence is granted to everybody engaged in the labour market, irrespectively which kind of work he/she is doing including as well free lance activities¹³¹. Even though this liberalist approach could actually foster the economic

¹²⁹ See Georgian Constitution, Art. 26 and 28.

¹³⁰ See Law on Legal Status of Aliens, Chapter V.

¹³¹ According to Art 2 of the Law on Legal Status of Aliens, the legal definition of aliens covers any person who is not a Georgian citizen or any stateless person permanently residing in Georgia, as well as persons staying in Georgia without any documents verifying their citizenship or permanent place of residence.

development of Georgia it also has some down sides with regard to the protection of the rights of migrants. Firstly, whereas employers only face very limited restrictions, the rights of employees and workers are hardly protected. There are for instance no legal norms that regulate the issue of obtaining work permits before starting labour activities. This increases the risk for migrants being employed informally pushing them outside the application of the national Labour Code that provides them at least with some minimum guarantees for workers. Secondly, the liberalist approach also might have negative consequences on the national labour market since there are no labour market tests established verifying whether the employment of a migrant is justifiable vis-à-vis the national work-force. And thirdly, since effective immigration monitoring mechanisms are lacking, there is an inherent risk within this passive approach to migration that trafficking in human beings will increase significantly in the near future.

In opposition to this very liberal labour legislation stands the rather restrictive approach towards the fight against irregular migration. During the last decade Georgia not only became a source of irregular migrants but also an important transit route for people trying to reach the territories of the EU. Emphasis was thus put primarily on the protection of its borders and irregular border crossing is now criminalised by Art 344 of the Georgian Criminal Code. Interestingly, in this regard: For other immigration offences, as for example overstaying a visa, only limited and lax administrative penalties are in place. According to Art 344, irregular border crossing, except for asylum seekers and victims of human trafficking¹³², can be fined or penalised by a prison sentence up to five years. A person detected can furthermore be detained and forcibly expelled as foreseen by the Law on the Legal Status of Aliens¹³³. Special human rights concerns arise related to the administrative detention prior to the expulsion of irregular migrants. Expulsion generally is regulated by Chapter 10 of the Law on the Legal Status of Aliens. Even though the provisions under this Chapter 10 foresee some minimum safeguards, they do not define the maximum duration of the detention and which state agencies are actually responsible for it. This opens the door for severe violations of the right to liberty of migrants that is not only enshrined by the various international instruments Georgia is party to but also by the Georgian Constitution and the Law on the Legal Status of Aliens. Unfortunately, there are no official statistics about the practical application of the provisions of Chapter 10 or how long people are generally detained previous to their expulsion.

Besides illegal border crossings, human trafficking and smuggling in human beings are criminalised. Today, because of the weak development of its economy and the high poverty rate, Georgia can still be considered rather a country of origin than a country of destination for human trafficking. However, as it was already mentioned above, the liberal labour laws will probably have positive effects on the economic development and declining of the poverty rate in Georgia and trafficking will emerge and rapidly increase alongside. Georgia has been insofar very engaged in the fight against human trafficking and smuggling. It has ratified various international and regional instruments and adopted a Law on Counter Trafficking and the Law on Combating Human Trafficking that prioritises the protection of victims of trafficking by foreseeing *inter alia* the creation of a State Fund for the Protection of and Assistance to Victims of Trafficking. In the Report on Trafficking Human Beings 2010 of the US Government, Georgia is placed in Tier One, meaning that legislation and practice fully comply with the international standards in the field of human trafficking¹³⁴.

The fact that Georgia is rather a country of origin and transit is mirrored as well by the fact that only a relatively small number of third country nationals, namely 992, was seeking for asylum in 2009¹³⁵. From an international point of view, Georgia has ratified the 1951 Geneva Convention and its 1967 Protocol. National legislation differentiates between political asylum granted by the Georgian president to foreign citizens and stateless persons as it is foreseen by the Georgian constitution and the granting of a refugee

¹³² Victims of trafficking were released from the criminal liability in 2006. It has to be pointed out that the Criminal Code does not clarify whether also aliens eligible for subsidiary protection are exempted.

¹³³ Chapters 8 and 9 of the *Law on the Legal Status of Aliens* define the cases of forcible expulsion of migrants.

¹³⁴ U.S. State Department, 2010.

¹³⁵ For further information see <http://www.unhcr.org/4c11f0be9.html>.

status by the Ministry of IDPs from Occupied Territories, Accommodation and Refugees (MIDPFOTAR) as it is stipulated by the Law on Refugees. However, insofar the president of Georgia has not granted asylum to a person in a single case and the granting of the refugee status that corresponds to the 1951 Geneva Convention is thus in practice the more relevant form. The Law on Refugees enshrines the fundamental procedural rights, such as the right to appeal against a negative decision by the ministry; it fails however to introduce a complementary form of protection increasing the risk of violating the non-refoulement principle. Refugees are further theoretically granted a broad range of social rights including the right to appropriate accommodation or the right to education for their children provided for by local authorities. Additionally, they are entitled to receive a one-time financial assistance in the amount foreseen by law. Problematically, there are no clear standards regulating the financial assistance to refugees, leaving it to the authorities to decide on the amount of this form of assistance¹³⁶. Whereas the legal framework formally meets all the international standards with regard to the protection of refugees, its lack of implementation has severe negative consequences for the rights of refugees. As already mentioned the financial support for refugees and IDPs irrespectively, is very low and accommodation provided for them is often sub-standard. Furthermore, the whole asylum system is endangered by the widespread corruption and the discretionary powers of the authorities in charge for the application procedures.

Comparable to the situation of the rights of refugees is the situation of IDPs in Georgia even though their number outplays the number of refugees thousandfold. Due to the newly out breaking conflict with the Russian Federation in 2008 on the autonomous republics Abkhazia and South-Ossetia, the number of IDPs increased again and in 2010 258,000 people have been registered as IDPs¹³⁷. The issue of IDPs always gained considerable attention from external actors pushing the national authorities to undertake some measures to solve the problems related to the accommodation and the rights of IDPs. For a long time the main obstacle for IDPs to enjoy their rights was the governmental approach that the integration of IDPs in their new domiciles could undermine the return to their former homes. Granting special social rights, financial assistance¹³⁸ or special employment opportunities to IDPs was considered as stressing the already limited financial resources disproportionately high. Only recently, in 2009, the Georgian government developed a new AP to implement its strategy for IDPs from 2007, aimed at fostering the integration of IDPs by foreseeing special vocational education and training programmes for IDPs to enhance their employment opportunities and to improve their living conditions. However, in practice, in particular the improvement of living conditions went along with severe human rights violations. Thousands of IDPs living close to Tbilisi have been forcibly removed from the collective shelters and transported to new accommodations all around the different provinces in Georgia without being asked whether they want to or not. Furthermore, in the provinces employment and/or education opportunities for the IDPs are even rarer than they are in the surrounding areas of Tbilisi. IDPs remain thus a highly vulnerable group in Georgia and all the formal and legal attempts made to improve their situation, such as the adoption of the Law on Internally Displaced Persons, have failed insofar to guarantee their basic rights, since, once again, their implementation is lacking. The miserable situation of IDPs with regard to employment opportunities, shelter and financial assistance encourages them to emigrate, often in an undocumented way, to the EU endangering the protection of their human rights even further. Positively, in January 2010 the project 'Support to the Office of the Public Defender to enhance its Capacity to Address the Situation of IDPs and Other Conflict-Affected Individuals', aiming to strengthen the capacities

¹³⁶ Actually the social assistance amounts to GEL 22 to 28 (about EUR 9 to 12) per month, as it is stated by the Decree of the Government of Georgia on Social Assistance, July 2006, Nr. 145.

¹³⁷ For further information see International Displacement Monitoring Centre, *Internal Displacement: Global Overview of Trends and Developments in 2010*, March 2010, available at: <http://www.internal-displacement.org/publications/global-overview-2010.pdf>.

¹³⁸ IDPs receive financial assistance in the same amount as refugees.

of the Public Defender's Office to better address problems faced by IDPs, was launched, and the first visible result was a report published on the human rights situation of IDPs¹³⁹.

6.2 EU engagement

The bilateral partnership between the EU and Georgia started in 1992 and reached a first peak in 1999 when the PCA entered into force foreseeing *inter alia* cooperation with regard to the fight against irregular migration. After the Rose Revolution in 2003, bilateral cooperation has intensified and on 14 November 2006 the EU-Georgia European Neighbourhood Policy Action Plan (ENP AP) was endorsed by the EU-Georgia Cooperation under the framework of the ENP aimed to fulfil the provisions of the PCA, to foster the economic integration of Georgia and to cooperate more closely at the political level. The main priorities of the AP for the next five years are democratic development, the rule of law and good governance. In 2009 the EU launched the European Partnership aimed again at a deeper engagement and the gradual integration in the EU's economy that as well would allow for easier travel to the EU through gradual visa liberalisation, accompanied by measures to tackle irregular immigration. Furthermore, in 2009, the EU concluded with Georgia a Mobility Partnership Agreement offering legal migration opportunities in return for Georgia's support with regard to the fight against irregular migration. Additionally the Mobility Partnership aims to promote an efficient readmission and return policy in accordance with human rights and relevant international instruments for the protection of refugees. Two additional agreements were signed between the EU and Georgia in 2010, namely the Agreement on the Facilitation of the Issuance of Visas in June 2010 and the Agreement on Readmission of Persons Residing without Authorization in November 2010. After they have been implemented by Georgia they entered into force in March 2011. Since 2010 negotiations for a future AA are going on.

With regard to the financial cooperation the ENPI¹⁴⁰, the EIDHR¹⁴¹ and the Migration and Asylum thematic programme 2007-2013 are in place to support migration and asylum related projects in Georgia. Under the ENPI financial support to Georgia was extended especially in 2008 and the funds provided were mainly allocated for the resettlement of persons as a result of the war events. Further assistance provided under the national ENPI focuses *inter alia* on the support for human rights¹⁴². The EIDHR pursues similar aims as it is its objective to promote human rights and democratisation in third countries. The thematic programme puts the emphasis on capacity building and the implementation of initiatives targeted to share experience, working methods and best practices with regard to various aspects of migration.

¹³⁹ For further information see the website of Ombudsman Office of Georgia, available at: <http://www.ombudsman.ge/files/downloads/en/njyccudreysvwtqszy.pdf>.

¹⁴⁰ See European Commission, *European Neighbourhood and Partnership Instrument: Georgia- Country Strategic Paper 2007-2013*, available at: http://ec.europa.eu/world/enp/pdf/country/enpi_csp_georgia_en.pdf.

¹⁴¹ The country allocation for Georgia within the EIDHR is € 1.2 million for the year 2010 to be implemented in 2011.

¹⁴² See Priority Area 1.1.

6.3 Effects of EU engagement

The progress made with regard to the development of a coherent migration policy and the adoption of various migration related laws in Georgia is mainly influenced by the bilateral cooperation between the EU and Georgia under the various frameworks as described above.

Before assessing the effects of the EU engagement on the human rights of migrants it has to be clarified that none of the bilateral agreements, neither the ENP AP nor the PCA agreement, includes clear references with regard to the protection of the rights of migrants. Migration is dealt with under the field of Justice, Freedom and Security and the emphasis is clearly put on the enforcement of border control, the fight against irregular migration and the readmission of own nationals. However, the AP makes a general reference to the enhancement of human rights and the fight against discrimination and xenophobia as well as to the necessity to modernise the national refugee system in line with the principles of the Geneva Convention.

Following the ENP AP, Georgia ratified the UN Convention against Transnational Crime and its two Protocols on the Smuggling of Migrants and the Trafficking of Persons and implemented them by adopting the Law on Combating Human Trafficking. Additionally, the Georgian Criminal Code and the Code of Administrative Offences have been revised improving the protection mechanism for victims even further and increasing the sanctions foreseen for people involved in trafficking.

With regard to the fight against irregular migration, Georgia has made a lot of efforts to comply with the conditions set forth in the ENP AP, the PCA and the Mobility Partnership Agreement and indeed progress has been made. However, it is critical in this regard, that very restrictive measures have been put in place with regard to irregular border crossing whereas corresponding protection standards are missing. Especially, the possibility to detain persons without a time limit prescribed by law is very likely to be in violation of human rights. The EU supports the strengthening of the Georgian border management by providing € 6 million for the South Caucasus Integrated Border Management Project (SCIBM) between Georgia, Armenia and Azerbaijan that is implemented by the UNDP and aimed at the facilitation of the legal movement between the three countries and the protection of the borders from irregular migration and/or smuggling. Under the Mobility Partnership Agreement and the Readmission Agreement between the EU and Georgia concluded in 2010 far reaching readmission obligations were posed upon Georgia. Not only that Georgia has obliged itself to readmit its own nationals residing irregularly in one EU Member State, third country nationals that reached the EU's territory by crossing Georgia have to be readmitted as well. Due to the limited financial possibilities of Georgia this practice may endanger the rights of forcibly returned people. Additionally, it will require that Georgia invests more to improve its border management. It is a vicious circle: Whereas more and more of the financial resources are invested to strengthen the security of the Georgian borders the less money is available to provide returned migrants with their basic needs. To dilute the negative impacts of the readmission agreement the EU is funding a new project named 'Support Returned Persons in Georgia on an Operational Level' that is implemented by the MIDPFOTAR together with the Danish Refugee Council (DRC), the **International Centre for Migration Policy Development** (ICMPD) and IOM. It is the objective of the programme to implement activities to support the reintegration and re-socialisation of forcibly returned nationals.

As it is foreseen by point 4.3.2 of the ENP AP, Georgia is about to develop a coherent, comprehensive and balanced national migration policy, since, as it was already mentioned, up to date Georgia is lacking such a written document. In October 2010 the Governmental Commission on Migration was established whose aim it is to define a unified policy of the Georgian Government in the field of migration and improve the state system of managing migration flows. As it was established only recently, no evaluation on its work can be made so far. The aforementioned section of the AP stipulates as well the establishment of an electronic database for the monitoring of the migration flows. Since 2009 Georgia is developing an electronic management system for migration establishing a database about immigrants, emigrants, refugees and IDPs.

Only since 2009 the EU became particularly active with regard to the funding of migration related projects in Georgia. Currently, there are a number of initiatives addressing migration funded by the EU and implemented by Georgian partner institutions, international organisations (e.g. IOM) or NGOs (e.g. Oxfam). However, neither under the ENPI nor the EIDHR, projects specifically related to the protection of the rights of migrants are financed. Projects currently funded under the Thematic Programme on Migration and Asylum, are mainly directed at the support for the implementation of readmission and visa facilitation agreements and the return of migrants. However, a very promising project under the thematic programme is aimed to assess the impacts migration could have on children and elderly left behind. As the situation in Georgia is in particular precarious with regard to IDPs the EU is funding various related projects under the Instrument for Stability. With regard to IDPs, the EU has contributed significantly to improve their situation. Due to EU funding under projects such as the project 'Together we can'¹⁴³ under the ENPI the reintegration of IDPs improved a lot in the last years. Together with the US State Department the EU funded furthermore the establishment of a new Asylum Accommodation Centre 15 km away from Tbilisi that is designed to offer accommodation up to 100 persons. However, both projects were completed in the beginning of 2011 and information about new projects is not available insofar.

Even though the EU engagement has encouraged Georgia to become active in the field of migration it appears that this engagement had a rather 'EUgoistic' background. The security centred approach is rather aimed to support the EU's aims with regard to the fight against irregular migration than to support Georgia in developing a coherent migration policy being adequate to approach Georgia's own migration problems. For instance, emigration combined with the brain drain problem Georgia is confronted with, only plays a subordinated role in the cooperation between Georgia and the EU. The security based approach furthermore endangers the protection of the rights of migrants, irregular and regular ones irrespectively.

7 KOSOVO

7.1 State of the Art – Migrants' Rights in Kosovo

Traditionally, due to the difficult socio-economic conditions and the precarious political situation, Kosovo has been rather a country of emigration than of immigration. With regard to the numbers of emigrants, there are hardly any reliable statistical data available and estimates vary between 300,000 and 800,000 Kosovars living abroad. In 2009 remittances of this Diaspora amounted to € 442.7 million and not only Kosovo's economy relies massively on them but also the remaining families since around 30% of national households receive support from family members living and working abroad. The extreme unemployment rate (around 40 % in 2009) is the main driving force for people to emigrate and surveys showed that 50% of the youth would emigrate if they could¹⁴⁴.

Migratory movements to Kosovo are rather shaped by returning people than by labour immigration or asylum seekers. Return and repatriation of people voluntarily or forcibly returned present today the major challenges for Kosovo's authorities with regard to migration. To compare the numbers: Between 2005 and the beginning of 2011 7,934 foreigners were granted temporary stay for labour purposes; since 2009 there have been 393 applications for asylum whereas in none of the cases asylum was actually granted; and in 2010 5,198 people have been returned and repatriated from the EU.

Besides being a country of origin, Kosovo is an important transit route for people trying to reach the territories of the EU. Human trafficking and human smuggling became thus an important factor with regard to the migration flows developments from, through and to Kosovo.

¹⁴³ See the EU project 'Together we can' on integrating internally displaced persons, available at: <http://www.enpi-info.eu/eastportal/news/delegation/24582/%E2%80%9CTogether-we-can%E2%80%9D-integrating-internally-dispersed-people-in-Georgia>.

¹⁴⁴ UNDP, *Human Development Report 2006: A new generation for a new Kosovo*, 2007, available at: http://www.ks.undp.org/repository/docs/hdr_eng.pdf.

Kosovo is neither a member to the UN nor to the CoE yet, still the core international human rights treaties, as the UDHR, the ECHR and its Protocols, the ICCPR, the CoE Framework Convention for the Protection of National Minorities, the CERD, CEDAW and the CAT are directly applicable in the Republic of Kosovo as it is enshrined in Art 22 of its Constitution. Even though none of these instruments foresees special rights with regard to the protection of migrants, they still present a comprehensive framework applicable on non-nationals as well. However, although the formal human rights legislation is rather well developed, human rights violations occur on a regular basis in Kosovo, especially with regard to the protection of minorities.

Only after 1999, Kosovo, first under the auspices of UNMIK and since 2008 as an independent state, has gradually started to develop its own migration policy dealing with immigration as well as with emigration. The laws and policies adopted were all a result of external pressure from mainly Western European countries that showed increased interest for the development of comprehensive migration strategies because of two reasons: Firstly, since most of the emigrants were searching for a better life in Western Europe and possibilities to reside legally there became rather limited over time, the numbers of Kosovars staying irregularly in the EU increased significantly. The EU and European Member States in the context of the fight against irregular migration increased thus their efforts to urge Kosovo to develop comprehensive return strategies and implement the concluded readmission agreements. The second reason was that, as already mentioned, Kosovo became an important transit route and the EU pressed for national strategies to strengthen mainly border control.

One of the main policy documents concerning migration in Kosovo is the *National Strategy and AP on Migration of the Republic of Kosovo 2009-2012*. This strategy addresses issues related to emigration from as well as immigration to the Republic of Kosovo. Throughout the Strategy it is stressed that the legal framework governing migration has to be based on the highest human rights standards and has to be in accordance with the EU *acquis*. Similarly to what was mentioned before, critics observed that, with the exception of formal human rights standards, the current laws are not yet in accordance with the EU standards, pointing out that *'the regulations are at a very early stage of development and far from meeting the EU Acquis'*¹⁴⁵. The main strategic objectives encompass *inter alia* the promotion of circular migration, the prevention and the fights against all forms of irregular migration by developing legal and institutional mechanism, to strengthen border controls and to develop a sustainable system monitoring all forms of migration flows¹⁴⁶.

The basic legal documents governing migration in Kosovo (the Law on Foreigners, the Law on Asylum, the Law on Readmission, the Law on Integrated Management and Control of the State Borders and the Law on Citizenship) were adopted in a great rush, basically all within a day, without being even debated in the Parliament. Due to this promptness the aforementioned laws suffered many shortages and ambiguities and are currently in the process of being revised and amended. However, with regard to human rights they generally fulfil the highest standards. In some fields they are even better developed than comparable laws and policies in some of the EU Member States¹⁴⁷. The shortcomings with regard to the protection of human rights stem thus rather from the insufficient implementation than from the legislation in place *per se*. Additionally, it has to be kept in mind that Kosovo is at a very early stage with regard to the development of comprehensive national migration legislation and the institutions implementing them only recently took on their work. An assessment on a human rights sensitive implementation is insofar difficult to make. Moreover, antiquated data systems complicate the work of migration authorities¹⁴⁸.

¹⁴⁵ See Kupiszewski, M., et al., *Labour Migration Patterns, Policies and Migration Propensity in the Western Balkans*, IOM and The Central European Forum for Migration and Population Research, November 2009, available at:

http://www.migrantservicecentres.org/userfile/labour_migration_patterns_policies_migration_propensity.pdf.

¹⁴⁶ See *National Strategy and Action Plan on Migration 2009-2012*, Prishtina, September 2009, available at: <http://www.mpb-ks.org/repository/docs/National%20Strategy%20on%20Migration-Final.pdf>.

¹⁴⁷ Interviews with Islam Cakaj and Alban Arifi.

¹⁴⁸ Interview with Alban Arifi.

Implementation and subsequent human rights and discrimination problems arise at a first instance with regard to the visa policy of Kosovo. Theoretically, the Law on Foreigners establishes the formal criteria for visa regimes with other countries. However, they have not been established yet and border police forces remain the primarily responsible organs to decide whether a person may enter Kosovo or not. In particular people coming from China, Russia, Pakistan, India and Afghanistan are likely to be discriminated, since Kosovo is applying a 'semi-visa regime' that requires them, and only them, to show *inter-alia* invitations and letters of guarantee, health insurance certificates etc¹⁴⁹.

As already mentioned, the numbers of people immigrating to Kosovo because of labour considerations are rather low. Those coming to Kosovo are either businessmen with investment agendas or migrants seeking for work in mainly restaurants and shops. Being in possession of valid work permits, the rights of migrant workers are equally protected as the rights of national workers and there have no complaints of discrimination by migrant workers been recorded up to date¹⁵⁰. Whereas the protection of the rights of male migrant workers is thus functioning pretty well, especially female migrants remain vulnerable to abuse. Most of the female labour migrants come from the Ukraine, Moldova, Romania or the Russian Federation and are officially employed as dancers or singers in small bars or restaurants. In most of the cases these women are in possession of valid working permissions licensed to the aforementioned professions, however, in reality they are often commercially sexually exploited. Even though there remains always the bad aftertaste of human trafficking it is hardly possible to prove that these women are actual victims of human trafficking since they possess valid working permits and do only randomly report themselves as victims to the police. To deal with human trafficking a specialised unit of the Kosovar police forces has been set up whose task it is to keep an eye on the various bars and restaurants where it is likely that women might be feignedly employed to be exploited¹⁵¹. With regard to human trafficking, IOM statistics proved that since 1999 children as well are increasingly misused for forced labour or begging¹⁵². As already mentioned the number of victims of trafficking identified remains low and does not fully reflect the scale of the phenomenon even though there has been a decrease in the total numbers of trafficked persons across the whole region. Problematically in Kosovo, the judicial follow up to police actions as described above is rather ineffective and perpetrators often are not sentenced appropriately. Additionally, even though formal procedures are in place allowing victims to give testimony anonymously, intimidation and blackmailing of victims and witness protection remains a serious problem¹⁵³.

Labour migrants detected without proper documentation can be fined by a court and be deported to their countries of origin. However, due to the high unemployment rate, one might assume that migrant workers only come to Kosovo if they have an actual prospect for a working place. The fight against irregular migration in Kosovo focuses thus more on irregular migrants trying to reach the EU by crossing Kosovo and returned non-nationals who have to be deported to their countries of origin. With regard to border management, even though Kosovo has made at least some formal progress by adopting the Law on Integrated Border Management, still a lot has to be improved. Once again the lacking implementation, resulting from lacking financial resources and lacking political will, makes Kosovo's border management still inefficient opening the doors for human trafficking but also for drug and/or arms smuggling¹⁵⁴. Special human rights concerns arise with the detention of detected irregular migrants prior to their

¹⁴⁹ In particular for people coming from China, Russia, Pakistan, India and Afghanistan. For further information Interview with Alban Arifi.

¹⁵⁰ Interviews with Islam Cakaj and Alban Arifi.

¹⁵¹ Interview with Islam Cakaj.

¹⁵² See Vathi, Z., Black, R., *Migration and Poverty Reduction in Kosovo*, Development Research Centre on Migration, Globalization and Poverty, February 2007, available at: http://www.migrationdrc.org/publications/working_papers/WP-C12.pdf.

¹⁵³ Compare European Commission, Commission Staff Working Document: Kosovo 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council - Enlargement Strategy and Main Challenges 2010-2011, SEC(2010)1329, Brussels, 9 November 2010, p. 56.

¹⁵⁴ European Commission, Kosovo 2010 Progress Report, p. 51.

expulsion. Even though the Law on Foreigners provides for a legal framework with regard to detention that is in accordance with international human rights standards, its insufficient implementation is the reason for the shortcomings with regard to the protection of the rights of detained irregular migrants. For instance, whereas the law foresees that detected irregular migrants have to be detained in a special detention facility, they are still detained in police detention centres or asylum centres since, due to financial constraints, such a facility has not been built yet. The detention in police centres stigmatises irregular migrants even further and the detention conditions are often substandard.

The improved border management systems and the efforts made with regard to the fight against irregular migration resulted as well in increasing numbers of asylum applications since many detected migrants filed asylum claims in order not to be automatically deported. However, the asylum system remains a weak point in Kosovo since authorities are lacking experience to deal with asylum seekers and adequate accommodation facilities are missing at a broad scale. The Law on Asylum sets forth the provisions governing the reception of asylum seekers, the criteria for being recognised as a refugee, the asylum procedures as well as the rights and obligations of asylum seeker and persons granted complementary or temporary protection¹⁵⁵. From a formal point of view the Law on Asylum meets all the international human rights standards. According to this law, the Ministry of Internal Affairs has issued an Administrative Instruction on Procedures and Standards for the Reception and Initial Treatment of Asylum Seekers aimed at giving further guiding to the authorities dealing with asylum seekers.

Since 2009 there have been 393 applications for asylum, mainly from people coming from Afghanistan, Iran, Iraq, Palestine, Somalia, Tunisia and Syria. However, there has been not a single case in which asylum was granted to a person since none of the applicants fulfilled the criteria as set forth by the Law on Asylum. Theoretically, asylum seekers have the right to appeal against a negative decision; still, in none of the cases an appeal has been filed. The reason for both was that, as already mentioned, the people seeking asylum in Kosovo insofar had no real intentions to remain in Kosovo and filed their asylum applications only to gain more time. After having made the application the majority of them continues their journey to the EU and most of the asylum claims are thus decided *in absentia*. Consequently, no asylum seekers have been deported from Kosovo up to date¹⁵⁶. During the procedure, asylum seekers are accommodated in the Centre for Asylum Seekers that is rather small but offers place for 106 people. Besides asylum seekers as well detected irregular migrants whose identity has to be verified are accommodated there. Due to the financial support by the EU under the IPA - € 1.6 million have been allocated - a new Centre is under construction and about to be opened in June 2011 that will offer space for up to 200 people¹⁵⁷.

UNHCR has criticised the asylum application procedure arguing that there is a need for a more specific organ dealing with it as the current law foresees that in the first instance individual officials of the Asylum Division are responsible for whether asylum will be granted or not, and not the Asylum Division in general¹⁵⁸.

However, as already mentioned the main migratory flows to Kosovo comprise of returned and repatriated people who were not granted a permanent legal status in, primarily, Western Europe¹⁵⁹. Return and repatriation have a profound impact on human rights of people since they might interfere with the right of housing, the right to work, the right to education etc since Kosovo often is not even able to guarantee the basic needs of returnees.

Whereas people voluntarily returning to Kosovo are supported by international organisations, such as IOM (Assisted Voluntary Return and Reintegration Programme), and often receive financial assistance, the

¹⁵⁵ Kosovo Law on Asylum, Law No.03/L-066, 21 May 2008, Art. 1.

¹⁵⁶ Interview with Bujar Reshtani.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ See Vathi, Z., Black, R., 2007, pp. 12-13.

situation of forcibly returned people remains precarious throughout the whole process of return and reintegration since they hardly receive any state support. Human rights problems arising with regard to returnees belonging to a minority, especially Roma, Ashkali and Egyptians (RAE), are in particular severe. For instance, it is very difficult if not even unlikely for people belonging to the RAE to obtain personal documents, to repossess their property or to obtain housing. Additionally, returnees of these minorities often are denied access to education, the healthcare service, the labour market to find employment and to the social welfare system. All these already miserable circumstances are aggravated by the fact that returnees are often separated from their families remaining in the foreign countries, even though Kosovo's authorities are very sensitive with regard to family separation and do not accept cases where this might occur¹⁶⁰. Even though there has been a lot of criticism against the practice to return people belonging to a minority, in particular to the Roma minority, to Kosovo by Human Rights Watch, the CoE Commissioner on Human Rights or the European Parliament, the EU continued to do so¹⁶¹. Between 2003 and 2010, 2,151 people belonging to the RAE minorities have been forcibly returned by the EU.

Due to the precarious situation of returnees at the ground and the increasing European pressure to develop strategies to readmit deported nationals, Kosovo adopted corresponding strategies and laws governing this sensitive issue. For instance, in 2007 the 'Strategy for the Reintegration of Repatriated Persons' was adopted. However, it proved to be dysfunctional since neither proper institutions were established nor funds allocated to implement it. In 2010 the Strategy was revised, a new implementation mechanism was established and € 3.6 million have been provided by the government of Kosovo to implement it properly. The new Strategy foresees long term solutions how returnees can acquire their personal documents, how they can benefit from the health care and social welfare system, or how they obtain access to the labour market and to education (in this regard vocational trainings are emphasised)¹⁶². Furthermore, it specifies some actions the authorities of Kosovo should take in order to protect vulnerable groups, e.g. victims of trafficking, single mother households, children without parental, abandoned children, children without parental care, abused children, children with special needs, elderly persons without family care, persons with mental disabilities and persons without family care¹⁶³. It emphasises that reintegration has to occur at the local level encouraging municipalities to submit project proposals with regard to the reintegration of returnees. Insofar, the local authorities have however been rather reluctant in developing corresponding strategies. Overall, even though Kosovo is making considerable efforts with regard to the protection of the rights of returnees, much has to be improved. However, one has to keep in mind that the resources of Kosovo are very limited. The logical conclusion is thus, that all the efforts made will not be enough if the EU continues to forcibly return people on a broad scale without taking into account the circumstances returnees have to face back in Kosovo.

7.2 EU engagement

The main instruments for the cooperation between the EU and Kosovo are the European Partnership and the SAP. Till 2009 the so called Stabilisation and Association Tracking Mechanism (STM) was the main instrument to strengthen on the one hand the political dialogue between the EU and Kosovo's authorities and to foster technical cooperation in various sectors on the other hand. In November 2009 the Stabilisation and Association Dialogue (SAD) succeeded the Tracking Mechanism as well aimed to monitor and align the progress made by Kosovo to EU standards. Under this Dialogue, committees assigned to

¹⁶⁰ See Vathi, Z., Black, R., pp. 40-74.

¹⁶¹ For this issue see particularly Human Rights Watch, *Rights Displaced: Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo*, October 2010, available at:

http://www.hrw.org/sites/default/files/reports/kosovo1010webwcover_1.pdf. See also Thomas Hammarberg, *European Migration Policies Discriminate against Roma People*, CoE Commissioner for Human Rights, February 2010, available at: http://www.coe.int/t/commissioner/Viewpoints/100222_en.asp. About the view of the European Parliament on this issue see European Parliament Resolution of 8 July 2010 on European Integration Process of Kosovo, para. 28.

¹⁶² Ibid, pp.15-24.

¹⁶³ See European Parliament Resolution of 8 July 2010 on European Integration Process of Kosovo, pp. 24-28.

various topics discuss and assess the efforts made insofar and set up the schedule for further developments. In these meetings visa, border management, asylum and migration have been discussed exhaustively under the Committee for Justice, Freedom and Security. By supporting Kosovo in the drafting of new laws or the revision and amendment of old laws as well as in the drafting of comprehensive strategies and APs the EU became the driving force with regard to the development of a migration policy in Kosovo.

Additionally, EULEX plays a significant role with regard to Kosovo's migration policy, namely at the implementation level. EULEX tries to improve the efficiency of the implementation of the respective laws and policies and plays an important role with regard to the capacity building in the field of migration, in particular when it comes to border police forces¹⁶⁴.

The EU has been always a major source for investment in Kosovo. Its donor function encompassed naturally emergency humanitarian aid after the war in 1999 but by using the existing financial instrument, namely the IPA, the EU supports asylum and migration related projects in Kosovo. In total, under the IPA, in the period 2007-2012 € 565.1 million are allocated to projects conducted in various fields. Migration related projects have been funded as well by the IPA *inter alia* a Twinning project aimed to enhance both the policy making skills in the Department of Citizenship, Asylum and Migration (DCAM) and the practical handling of readmission/asylum cases (duration 2009-2011) or the Strengthening the Rule of Law project 2010-2012 supporting the building of a 'safe house' for victims of human trafficking and strengthening the institutional capacities to tackle human trafficking. Furthermore, various projects have been launched under the IPA to increase the capacities of Kosovo's border police forces including a project aimed at the setting up of a data base allowing for the actual monitoring of migration flows.

In its fight against irregular migration the EU is emphasising the conclusion of return and readmission agreements. With Kosovo such an agreement with the entire EU is under negotiation at this date. Insofar it was not possible to conclude it yet, since five of the EU Member States still do not recognise Kosovo as an independent state. Consequently, readmission agreements have been concluded with various Member States, e.g. Germany, Austria, France, Denmark etc, at a bilateral level.

7.3 Effects of EU engagement

As already mentioned the EU engagement had a major impact on the development of the legal and formal migration framework in place. However, as it was described in the first section, violations of the rights of migrants, refugees, and returned and repatriated persons occur on a regular basis. Insofar, the protection of the rights of migrants has not been a priority of the cooperation between the EU and Kosovo, even though the strengthening of human rights *per se* constitutes a primary objective. At the aforementioned SAD, in the Committee on Justice, Freedom and Security where the migration related issues are dealt with, human rights have not been even mentioned when migration policies and laws have been discussed. The mere focus on Kosovo aligning its migration policy with the EU *acquis* without taking into consideration the actual circumstances in Kosovo is an approach likely to violate human rights.

For instance, the aforementioned continuing practice of the EU Member States to return and repatriate people belonging to the RAE minorities to Kosovo does contribute directly to the violations of their human rights. It is a matter of fact that, to date, in Kosovo these forcibly returned people due to the financial constraints or maybe even the unwillingness of the authorities are highly endangered that their basic human rights, as the right to documentation or the right to shelter, are violated not mentioning the broad scale discrimination they have to face anyway. The EU, even in its fight against irregular migration, has to encourage and support Kosovo in its attempt to respect and protect the human rights of everybody even if that meant that the readmission agreement currently under negotiation now would include a waiver foreseeing that people must not be returned to Kosovo as long as their human rights cannot be

¹⁶⁴ See European Parliament Resolution of 8 July 2010 on European Integration Process of Kosovo.

guaranteed there. For this purpose, it must be enshrined that before a person can be forcibly returned to Kosovo his/her situation has to be examined individually

Due to the engagement of the EU the current migration policies and laws in place are to a large extent consistent with international human rights standards. The frequent human right violations occur since there are no efficient implementation mechanisms in place so far. For instance, due to the cooperation with the EU Kosovo improved without doubt its border control capacities; however, the security based approach may lead to severe human rights violations of detected irregular migrants, especially when it comes to the detention of irregular migrants to verify their identities. Kosovo insofar has no access to the EURODAC database that would allow for quicker identification procedures of irregular migrants as well as of asylum seekers.

Similarly, a lot has improved with regard to the fight against human trafficking and a rather comprehensive and progressive national law with regard to combating human trafficking is in place. Nevertheless, actual victims of human trafficking are only weakly protected and have to fear to report themselves as victims to the authorities since victim intimidation and blackmailing are still par for the course. Still, also because of the EU engagement the numbers of trafficked persons in the whole Western Balkan region have decreased in the last years.

8 LEBANON

8.1 State of the Art – Migrants’ Rights in Lebanon

Lebanon, located in the South-East of the Mediterranean basin, has been traditionally a country of origin even though it increasingly is turning into a country of immigration hosting an important number of Arab and non-Arab migrants. The emigration rate is, due to the lack of economic development and labour opportunities, still very high with approximately 15,000 - 20,000 Lebanese nationals leaving the country every year¹⁶⁵. Most emigrants can be considered as highly-skilled emigrants (more than 10 years of school education), are males (80%) and below 35 years. Today 46.2% of Lebanese families have a member living abroad financially supporting them. These numbers reflect Lebanon’s strategy over the past 35 years to encourage emigration in order to decrease the high national unemployment rates. However, today Lebanon is reconsidering this approach due to the negative effects of ‘brain drain’ and labour shortages in certain sectors. In 2010, 758.000 immigrants have been living in Lebanon what accounts for 17% of the total population. Due to increasing numbers of people residing irregularly in Lebanon, this number does probably not reflect the real figure of immigrants in Lebanon. Out of these 758.000, around 500.000 are Syrians working unregistered in the construction and agricultural sector since there are labour agreements in place between Lebanon and Syria on circular labour migration. The rest of the immigrants are mostly registered migrants from Asia and Africa and work as domestic workers for Lebanese families mostly on short term contracts.

Emigration from and immigration to Lebanon are structurally linked as it is well reflected by the financial flows to and from the country. Currently, inward remittances amount to more than \$ 4.5 billion, i.e. 23% of the GDP, whereas outward remittances account for almost \$ 4 billion¹⁶⁶. Inward and outward remittances influence thus the economic cycle of Lebanon massively.

Furthermore, the number of refugees is also rather high with 462,600 registered refugees in 2010 whereof 450,000 are Palestinian refugees¹⁶⁷. The numbers of people internally displaced due to the 1975-1990 civil war and the related interventions by Israel till 2000 and Syria till 2005, the 33-day war in 2006 between Israel and the Hezbollah as well as the armed conflict leading to the destruction of the Nahr el-Bared camp

¹⁶⁵ According to recent surveys the number of Lebanese emigrants is estimated at 460,000.

¹⁶⁶ Lebanon is amongst the 20 top remittance recipient countries in the world.

¹⁶⁷ See Migration Policy Institute, *Remittances Profile: Lebanon*, available at:

<http://www.migrationpolicy.org/datahub>.

for Palestinian refugees in 2007, are still unclear and estimations range from at least 76,000 to several hundred thousand¹⁶⁸.

In Lebanon, the human rights of migrants and refugees are violated on a regularly basis. Due to the lacking political will, the absence of adequate laws enshrining provisions aimed at the protection of the rights of migrants, administrative barriers and the lack of financial resources migrants are likely to face severe human rights violations as for instance arbitrary detention, ill treatment, deportation and exploitation. Their vulnerable position is further aggravated by the fact that there are hardly any possibilities for legal redress in case of violations of their most basic rights.

From an international perspective Lebanon has ratified the core international human rights treaties (ICCPR, ICESCR, CEDAW, CRC, CAT, CERD). However, it has not ratified the key international instruments dealing with the protection of the rights of migrants or refugees such as the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Their Families or the 1951 Geneva Convention and its 1967 Protocol. With regard to irregular migration, human trafficking and smuggling, Lebanon has ratified the 2000 UN Convention against Transnational *Organized Crime* and the two protocols (Protocol against the Smuggling of Migrants by Land, Sea and Air and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Woman and Children).

The reasons why Lebanon has been reluctant to ratify migration related international instruments is that, firstly, migrants and refugees are regarded as a potential source of instability in the multi-confessional state. Lebanon, considers itself for instance as a no-asylum-country, closing its eyes towards the great mass of refugees within its territory. Secondly, the Lebanese authorities are well aware that due to political and financial circumstances, Lebanon is just not able to live up to the requirements set forth in these international agreements since effective implementation mechanism are missing.

Consequently, the development of a coherent national migration policy has not been a topic of priority in the political and public sphere in Lebanon and neither a domestic asylum law nor a specialised legislation protecting the rights of migrant workers have been adopted so far. In fact the migration related legal framework dates back to the 1960s and the then adopted Law on the Entry, Stay and Exit of Foreigners. The law enshrines *inter alia* that visa are required prior to the entrance to Lebanon and foresees strict penalties in cases somebody is detected while crossing the borders in an irregular way.

As already mentioned migrant workers account for the highest numbers of immigrants in Lebanon. These migrant workers and especially migrant domestic workers (MDWs) remain one of the weakest protected group and are highly vulnerable with regard to violations of their rights. Even though the constitution and some civil and labour laws are at least theoretically applicable to migrant workers, no specialised legislation or national strategies are in place offering special protection to them. MDWs are even explicitly excluded from the application of the Lebanese Labour Code and are thus exposed to the mercy of their employers. Unpaid wages, the confiscation of passports, extensive working hours and heavy workload approximating slavery, limited communication possibilities with fellow workers or families at home as well as psychological, physical or sexual abuse are only some of the violations of rights MDWs have to face regularly. Their situation is even further aggravated since the Lebanese judicial system is not designed to favour their rights. The limited communication possibilities, i.e. the generally restricted access to the legal system but also the lack of translation in the proceedings, as well as the length of judicial processes in comparison with the timely limited employment contracts make it hardly possible for MDWs to claim their rights. The often inhuman working conditions and the restricted judicial possibilities to defend themselves are the main reasons for MDWs to escape their employers by trying to run away or by committing suicide. These escapes moreover often take a tragic end: Escaped MDWs are likely to be convicted for theft or for breaching their working contracts and have to face detention and deportation in cases they were caught.

¹⁶⁸ See Internal Displacement Monitoring Centre, *Internal Displacement in the Middle East*, available at: <http://www.internal-displacement.org/publications/global-overview-2010-middle-east.pdf>.

Even though the Lebanese authorities have been highly criticised for their reluctant approach towards the improvement of the protection of the rights of migrant workers by international and civil society organisations as well as by countries nationals are concerned most, only little progress has been made. In 2009, for instance, a compulsory unified labour contract for the employment of MDWs was introduced by the Lebanese Ministry of Labour aimed to protect the rights of MDWs and to limit the powers of employers. Unfortunately, the standardised contract favours the position of employers making MDWs even more vulnerable to abuse, since it strictly limits the possibilities of MDWs to dissolve existing contracts.

The international commitments made by Lebanon with regard to the protection of human rights are not reflected by the efforts made at the national level and there is still a wide gap between the international standards and the formal realities in Lebanon. Not only that the marginalisation of the rights of migrant workers is in clear violation with the principle of non-discrimination, the lack of a national strategy towards labour migration minimises the impacts of the attempts made by international and civil society organisations to improve the situation of migrant workers. Additionally, the lack of information with regard to labour immigration renders it nearly impossible to get through to labour migrants whose rights have been violated.

The discussions on how the protection of the rights of labour migrants can be improved are intertwined *inter alia* with the lacking asylum system in Lebanon and in particular with the special situation of the great mass of Palestinian refugees there.

Lebanon does not consider itself as a country of temporary or permanent asylum. Consequently, Lebanon has neither ratified the 1951 Geneva Convention nor has it established a domestic legislative framework dealing with asylum and refugees. Asylum seekers and refugees are thus only encompassed by the 1962 Law Regulating the Entry and Stay of Foreigners in Lebanon. Due to the absence of national legislative mechanism regulating asylum and the flows of refugees, the vast majority of them, namely 75% is characterised as irregular migrants.

Generally, Lebanon has established a strict penalty scheme for irregular migration foreseeing a mandatory minimum prison sentence of one month up to three years, fines and expulsion¹⁶⁹. Refugees who enter Lebanon in an undocumented way or who overstay their visa are treated similarly and are thus subject to fines, detention and deportation without having their special status being considered. Asylum seekers and refugees are likely to face arbitrary and lengthy detention, overcrowded cells, harassment, discrimination and ill treatment. Furthermore, deportations of refugees, even of those who possess a transitional visa by UNHCR, occur regularly on the basis of so called 'voluntary return documents' signed by the person concerned while being detained. An irregular migrant has thus to choose between remained detained under the most miserable conditions or to return 'voluntarily' back home. Insofar, only few refugees have challenged their arbitrary detention in front of a court. In cases where the court even ruled that an end has to be put on their arrest, the judgement still has not been executed by the General Security (GS) directorate responsible.

UNHCR plays a crucial role when it comes to the protection of refugees. For instance, it provides them with assistance in the areas of community services, domestic needs and household support, food and cash assistance, education, healthcare and legal support. Furthermore, based on a Memorandum of Understanding signed with Lebanon in 2003, UNHCR issues transitional visa with the maximum duration of one year allowing refugees to remain in Lebanon and try to reach another country where their status might be recognised. After the transitional visa has expired the refugee becomes automatically an irregular migrant being in danger to face the aforementioned violations related to detention and deportation.

¹⁶⁹The Law Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country, Official Journal, No. 28-1962, entered into force 10 July 1962.

The majority of refugees in Lebanon are Palestinian refugees who are distributed to 12 different refugee camps. The United Nations Relief and Work Agency for Palestinian Refugees in the Near-East (UNRWA) provides them with assistance, protection and advocacy. Even though the situation for refugees is in general precarious, Palestinian ones even face further discrimination and can be considered as the most vulnerable group in Lebanon. Besides that living conditions in the refugee camps are sub-standard, the rights of Palestinian refugees are mainly violated with regard to the access to the judicial system, the labour market and to social security. The main reason for the broad scale denial of their rights is that Lebanon strictly applies the principle of reciprocity with regard to the granting of rights. Since there is no recognised state 'Palestine', Palestinian refugees are *a priori* excluded from rights granted to citizens from other states. The official position from the Lebanese authorities why the special status of Palestinian refugees is not recognised and no special rights are granted to them is basically based on three arguments: Firstly, Lebanon does neither have the financial abilities nor the expertise to provide sustainable solutions for the Palestinian refugee problem. Secondly, naturalising Palestinian refugees might have negative political impacts on the sectarian power sharing system. And, thirdly, in case the strict approach towards Palestinian refugees will be lowered and more rights granted to them, uncontrolled arms dealing and military chaos would arise in the refugee camps endangering national security and the lives of Lebanese people. Under the pressure of the international community and civil society organisations Lebanon has amended the Lebanese Labour Law and the Lebanese Social Security Law to improve the living conditions of Palestinian refugees. Even though it was for the first time that a Lebanese law refers explicitly to Palestinian refugees, the amended laws are still far from being in accordance with international human rights standards, in particular with the principles of non-discrimination and the indivisibility of rights.

8.2 EU engagement

In 1995 the EU launched the Barcelona Process (now Union for the Mediterranean) with the countries of the Mediterranean region, including Lebanon. Within this framework an AA¹⁷⁰ was concluded with Lebanon in 2006 representing the legal basis for the cooperation between the EU and Lebanon and setting forth that the respect of human rights and fundamental freedoms is an essential element of the cooperation¹⁷¹. In addition the AA contains specific articles with regard to cooperation in the field of migration. For instance Article 64 foresees a regular dialogue covering issues related to the living and working conditions of migrant communities, migration as well as irregular immigration¹⁷². Special attention was given to the enhancement of the cooperation regarding the prevention and control of irregular migration, and according to Article 68 Lebanon is obliged to readmit any of its nationals illegally present on the territory of a Member State and vice versa. Additionally, parties are requested to conclude bilateral agreements regulating specific obligations for the readmission of their nationals.

Furthermore, an ENP AP has been concluded between the EU and Lebanon, which identifies a set of priorities for cooperation *inter alia* in the field of human rights, on migration issues, including regular and irregular migration, readmission, visa and asylum, border management and the fight against organised crime including trafficking in human beings.

With regard to financial cooperation the EU has allocated funds¹⁷³ for the 'Euromed Migration II', a programme which is mainly addressed to strengthen the cooperation in the management of migration. Several working groups were established dealing with legislative convergence and the need for reform of migration law and its institutional framework, labour migration, institutional responses and national

¹⁷⁰ Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, Official Journal of the European Union, L 143/2, May 2006, available at:

http://eeas.europa.eu/lebanon/docs/euro_mediterranean_agreement_en.pdf.

¹⁷¹ See Article 2 of the AA with Lebanon.

¹⁷² See Article 64 of the AA with Lebanon.

strategies to combat irregular migration and migrant's remittances to their countries of origin. With regard to the protection of migrant workers, and in particular the protection of female domestic workers, funding under the ENPI was granted only in December 2010. The overall aim of the project that is implemented by the ILO is to contribute to improving the situation of female domestic migrant workers ensuring favourable working conditions and a better regulated and monitored environment that protects their rights. Additionally, insofar two projects related to the protection of the rights of migrants have been funded under the EIDHR. Under one project the Caritas Lebanon Migration Centre receives funds for its ongoing support of migrant workers, in particular female domestic workers. The second project is implemented by the NGO Save the Children and benefits Iraqi refugees. Although only these projects have been funded with regard to the protection of migrant workers, it has to be pointed out, that the EU over the past decade has supported a wide variety of civil society actions that do not specifically target migrants and their need but that have generally improved the human rights situation in Lebanon.

8.3 Effects of EU engagement

Although the ENP aspires for democracy and human rights, the operationalisation of the ENP in Lebanon demonstrates how these objectives have been watered down considerably, because of the insufficient incentives offered by the ENP and due to Lebanon's political instability and related human rights problems faced by the country.

Due to the difficult political situation of Lebanon the implementation of the EU-Lebanon ENP AP significantly slowed down as well. However, it contains an agenda for political and economic reform and recommendations aimed at the implementation of primarily interest of the EU namely border control and readmission agreements. The AP reflects the European understanding of what has to be most importantly changed with regard to the Lebanese migration policy without neither taking into account the special migration challenges Lebanon is facing nor the instable political situation. The emphasis on prevention mechanisms to stop the flows of irregular migrants is in line with the observable security shift in the EU migration policy, which in fact does not protect the human rights of migrants or tackle the root causes of migration. With regard to Lebanon it has to be underlined that the EU has to abstain from the security-based approach in order to help the country to manage refugee flows and improve its asylum and migration policy with regard to the development of legal frameworks and institutional capacities. Due to the political crisis no significant changes in the policy framework guiding EU-Lebanon relations have occurred since the adoption of the country Strategy Paper.

Funding of migration related projects in Lebanon occur mainly under the ENPI and the EIDHR. Funds are however used primarily for activities that organisations carry out within the auspices of their overall mission to serve the migrant community in Lebanon. Insofar, no uniquely new or innovative activities are being carried out because of EU funding. Even though the EU's migration policy is primarily based on a security-based approach, the ENPI Indicative Programme for Lebanon foresees that living conditions of Palestinian refugees in Lebanon have to be improved¹⁷⁴. The situation of Palestinian refugees is, according to the EU, one of the main problems Lebanon is facing with regard to migration, and better protection of their rights, in particular the right to education, the access to health services and the labour market as well as the right to property ownership has to be improved by developing an appropriate legal framework. With regard to the improvement of the situation of Palestinian refugees, the EU has acted as one of the main donors for actions in this field. For instance, the EU, through the Humanitarian Aid Department of the European Commission, supported Palestinian refugees by allocating € 12 million in 2010. This funding was primarily used to improve the living conditions in the refugee camps, medical assistance and job opportunities¹⁷⁵. The already aforementioned project with regard to the rights of migrant workers

¹⁷³ The project started in 2008 and the total budget is € 5 million.

¹⁷⁴ See ENPI Indicative Programme Lebanon 2011-2013, priority area number 3, sub-priority 2: Improvement of living conditions of Palestinian refugees in Lebanon. The total allocation for this sub-priority is € 9 million.

¹⁷⁵ For further information see ECHO, available at:

launched in December 2010 has yet to begin in earnest and can therefore not yet been assessed. Generally, it can be said that insofar all projects have relegated migrant workers to the position of recipients of aid and more should be done to enhance the social and political agency of migrants, assisting them in the organisation of self-help groups and initiatives. Additionally, with regard to the protection of migrant workers, funding on the international, regional and domestic level should focus on the right to organise in labour unions and bargain collectively.

The slight progress made by Lebanon with regard to the development of migration policies and the adoption of migration related laws cannot be straightforward considered as a result of the EU's engagement under the framework of the ENP. Insofar, the main contribution of the EU with regard to the protection of labour and irregular migrants as well as of refugees has been the support of civil society organisations trying to change the situation through lobbying, advocacy, awareness raising campaigns and the providing of legal assistance and services. Due to the complex political situation, the real impact the cooperation agreements concluded with the EU had on the actual migration situation is rather limited. In order to gain more influence, the EU needs thus to introduce a well founded stand on migration issues and pass this position directly to the Lebanese government in an explicit and clear manner. It should be noted here, that none of the documents surveyed and none of the experts interviewed for this study mentioned that the European policies had an impact on the development and the implementation of migration policies in Lebanon.

Additionally, the European Union has to understand the political and financial restrictions the Lebanese government is facing and it should rather increase its efforts to suggest reasonable alternatives instead of merely highlighting gaps and exerting pressure through critique. It needs to be involved more directly in providing possible and feasible based on the historical experience of the European countries. The EU could serve as a facilitator of synergic relationships between the various NGOs on the ground, the research and policy development community, and governmental actors.

Part Three – KEY FINDINGS AND RECOMMENDATIONS FOR EUROPEAN UNION ACTION

9 KEY FINDINGS

- Today migration plays a significant role in the size and structure of the population of the EU 27 and most of European states rely on immigration to maintain their social welfare systems and social growth since immigrants to EU Member States are on average younger than the population of their country of destination.
- In the last few years the political decisions on migration at the EU level reflected the increasing trend of xenophobic and anti-foreigner discourses of mainstream political parties at the national level. The result was more restrictions for migrants entering the EU with the exception of highly qualified migrants, and a political approach merely centred on security aspects. The restrictive approach chosen and the gradually limited possibilities led to increased numbers of people trying to reach the EU outside legal channels. These irregular migrants became the primary target of the so called migration management policies at EU level.

Human rights of migrants

- Human rights are inalienable and cannot be denied to any human being. Migrants' rights are still violated on a broad scale and daily life basis both with regard to political as well as to economic, social and cultural rights. Especially irregular migrants are, due to their weak position, exposed to human rights violations, since they have hardly any chance to defend themselves against exploitation or abuse.
- In the development of migration policies the EU and its Member States are bound by international and regional human rights standards. Similarly, European neighbouring and potential enlargement countries are bound by various international human rights enshrined in the international human rights instruments they have ratified.
- The human rights of migrants are still violated at a regular basis in the European neighbouring and potential enlargement countries. The main human rights problems identified are related to the very restrictive approach towards irregular migration and the only marginally developed national asylum systems. It has been observed however, that in those countries that actually have developed national migration policies and legal frameworks, they are formally fairly in accordance with international human rights standards. However, they lack implementation and effective monitoring mechanisms are missing as well. Most problematic in this regard: Migrants have in all of the regions examined hardly any possibilities to legal redress.
- The protection of migrant workers' rights and labour immigration have been insofar in none of the regions observed at the political agenda as all countries are generally countries of origin or transit than countries of destination with the exception of Lebanon. State authorities have been rather concerned to cooperate bilaterally with receiving countries to establish formal guarantees for the social and economic rights of their emigrated nationals and to find possibilities to compensate for the negative consequences of 'brain drain'. No special legal regimes or policies on migrant workers rights are thus in place and they are primarily protected under non-discrimination principles and national Labour Codes, only being applicable to migrants with valid working permits. Administrative procedures to receive working permits are in all the three regions observed rather arbitrary and shaped by protective attitudes, corruption and the high level of discretionary powers of the authorities. Even when granted working permits, in all the respective countries migrant workers are highly vulnerable to exploitation and especially their economic and social rights, such as minimum wages or access to the social welfare systems, are violated on a regular basis since they have hardly any possibilities of legal redress. Up to date, cooperation with the EU in the field of labour migration has been limited. Since the protection of labour migrants within the European

- neighbouring or potential enlargement countries has not been on the priority list of the EU, neither positive nor negative impacts on the human rights of migrant workers could be observed insofar.
- The situation of irregular migrants in the Eastern and the Mediterranean as well as in the Western Balkans is indeed very precarious as all the respective countries have, under influence of the EU partnerships and the EU's interest to manage migration flows, established highly restrictive legislation dedicated to the fight against irregular migration. In all the three regions irregular entrance and residence are criminalised and administrative as well as criminal sanctions ranging from fines and prison sentences to expulsion often being disproportionate to the violation are foreseen by national legislations. In all regions examined, severe human rights violations are reported with regard to the expulsion and removal of irregular migrants and their preceding detention. Not only that they often have to face abuse and ill-treatment, they have furthermore very limited rights during the administrative hearings and mostly no opportunities to appeal against the decisions made. Even though the various partnership agreements with the EU stipulate that legislation on irregular migration has to be developed in accordance with international human rights standards, the legislations in place and in particular the way how they are implemented are most likely to be contrary to the basic rights of irregular migrants. Insofar the EU has however not made any attempts to make the compliance with human rights standards in the fight against irregular migration a precondition for cooperation in other fields as trade or development.
 - Refugees and IDPs account for a major percentage of migrants in the three regions examined, still national asylum systems are generally underdeveloped. Whereas the protection of refugees and IDPs in the Eastern Neighbourhood and the Western Balkans fails because of lacking financial resources despite fairly established legal frameworks, in the Mediterranean neighbourhood none of the countries examined has national legislation on asylum in place and the determination and protection of refugees is left to UNHCR. The duty to develop comprehensive and coherent policy frameworks and laws on asylum in accordance with the principles and obligations set forth in the 1951 Geneva Convention and its 1967 Protocol have been insofar only partly fulfilled. Refugees and IDPs can still be considered as one of the most vulnerable groups in all the three regions and their human rights are violated on a broad scale and daily basis. The prioritisation of security issues and the sharpened measures to combat irregular migration had severe negative consequences on the situation of refugees. In cases where special safeguards are theoretically foreseen for refugees in the national legislations they are in practice often disregarded and the fundamental rights of refugees as the right to non-refoulement are violated.

Bilateral Cooperation Framework

- Based on the idea that control measures at the external borders alone might be an insufficient response to the increasing migration pressure from outside, the EU stressed the external dimension of its migration policies and emphasised the need to cooperate with third states on migration issues. The EU acknowledged that measures with regard to migration, in particular those to combat irregular migration, have to be implemented at the beginning of the migration chain, i.e. through the promotion of peace, political stability, human rights, democratic principles and sustainable economic, social and environmental development of the countries of origin and transit. To implement the foreign policy priorities of the EU in the area of migration, asylum and border management, the EU has incorporated them into its general framework for bilateral cooperation.
- This bilateral cooperation takes part through the EU accession process, the ENP, the Union for the Mediterranean (Euro-Mediterranean Partnership, formerly Barcelona Process) or the Eastern Partnership. Furthermore, through intergovernmental dialogues as the Söderköping or the Budapest Process, neighbouring and potential enlargement countries are encouraged to develop national migration policies and laws being consistent with the EU acquis on migration. The EU's fight against irregular migration is further supported by the conclusion of bilateral return and readmission agreements with countries of origin but also with transit countries.

- Even though the bilateral agreements concluded under the aforementioned frameworks reaffirm the necessity to tackle migration from a development approach, they are still imbalanced and one sided. Security considerations trump humanitarian ones as for instance domestic capacity building in areas as border control and the fight against irregular migration are higher prioritised than the protection of human rights of migrants and refugees.
- The cooperation between the EU and neighbouring and potential enlargement countries on migration issues shaped the development of national migration policies and laws. Mainly due to this external pressure considerable progress has been made. Generally, developing coherent migration policies emphasising the protection of migrants' rights has been of low priority in the political and public spheres of the European neighbouring and the potential enlargements countries in the Western Balkans. The prevailing view was and still is that the scarce financial resources should be rather used for nationals than for the protection of the rights of foreigners. It is eye-catching that national migration policies in the examined regions are highly fragmented and the aforementioned progress was mainly made in the field of border management regulations and legislation adopted to fight irregular migration. National migration policies in the European Neighbourhood and potential accession countries vary significantly in their level of advancement and are characterised by different migration flows, patterns, volumes and dynamics in the regions concerned. What they have in common is that even in those countries where fairly developed migration policies are in place their effective implementation is undermined by lacking financial and personal resources as well as by corruption.
- Human rights considerations generally play an inferior role in these developments. All of the bilateral agreements concluded under respective cooperation agreements with the EU foster the ratification of international human rights instruments. As a direct consequence, the ratification rate of international human rights instruments in the countries concerned is very high, with the exception of the 1990 UN Convention on the Protection of Migrant Workers. Nevertheless, due to the lack of implementation and corresponding legal actions at the national level, human rights standards in general are, in particular with regard to the protection of migrants' rights, rather low.
- Even though the bilateral cooperation agreements between the EU and the Eastern and Mediterranean neighbouring countries and the Western Balkans claim to promote the respect and the promotion of human rights in the respective countries, their implementation generally had a negative effect on the protection of human rights of migrants. To comply with the EU's priorities, namely border management and the fight against irregular migration, set forth in the partnership agreements, national authorities have adopted very restrictive and only formally human rights based migration policies. In those countries that have legislation in place including human rights safeguards, the lacking financial resources and institutions as well as the wide spread corruption undermine the attempts made to respect and protect the rights of migrants. The EU seems to be satisfied that restrictive laws are developed and implemented irrespectively if the ways of implementation violate human rights of migrants or not.

Financial Cooperation

- Besides the bilateral cooperation, there are several financial instruments in place at the European level offering funding for migration and asylum related projects in the European neighbourhood and the potential enlargement countries. For the European neighbourhood the ENPI, the Migration and Asylum Thematic Programme 2007-2013 and the EIDHR allow for the funding of projects related to migration and asylum that might improve the situation of migrants with regard to the protection of their human rights. Even though these instruments are not likely to address the root causes of migration per se and do not directly have an impact on national migration policies they can improve the situation of the most vulnerable at least at the regional or local level. So far, they have been rarely used to implement projects with regard to the rights of migrants. Once again the funding was mainly directed to projects related to border management capacities. This applies also

- to the situation regarding the financial assistance instrument for the potential enlargement countries the IPA.
- In the past there have been some very successful projects funded under the EU financing instruments aimed at migration. For instance the projects funded under the instrument for Stability in Georgia aimed at improving the situation of IDPs had very positive impacts on the general situation of IDPs and their socio-economic integration. In large parts, the financial assistance provided by the EU has however not been very effective in particular with regard to long-term improvements. Whereas in Kosovo for instance a project was funded under the IPA related to the sustainable return and reintegration of refugees and IDPs, a comparable project related to the reintegration of forcibly returned people from Western European states is missing even though the issue of repatriated and returned people is one of the most pressing human rights issues in Kosovo. In this context the EU has failed so far to develop corresponding financial assistance even though it is the EU Member States by continuing to return migrants that cause their severe human rights situation. Another example for possible improvement of the EU's financing instruments can be found with regard to projects funded in Lebanon directed at the protection of migrant workers. Even though these projects are well established and are very likely to improve the actual situation of MDWs they relegate migrant workers to the position of recipients of aid without strengthening their overall position. In the case of Lebanon this would encompass inter alia the development of a financial mechanism supporting the self-organisation of migrant workers and the right to organise in labour unions. Such an approach would actually empower them and not only provide for short-term solutions.

Practical Cooperation

- The conclusion of readmission and return agreements is considered, in particular from the side of the EU, as an important and efficient means to fight irregular migration. However, the European neighbouring and potential enlargement countries do not benefit equally from the conclusion of such agreements. Whereas the added value of readmission agreements is clear for the EU, namely having unwanted irregular migrants effectively removed, it is less evident why European neighbouring and potential enlargement countries should conclude such an agreement if not for the pressure from the EU in particular since they are all dependent on the remittances of their expatriates living abroad. From a human rights perspective, the practice to return people to countries that are due to financial and political constraints not able to provide returnees with basic rights is strictly to be refused.

10 RECOMMENDATIONS TO THE EUROPEAN PARLIAMENT

10.1 EU Migration Policy

- At the European level, the EU has to develop further instruments to establish a common European immigration policy, to manage economic migration and to create further possibilities for legal migration. "Burden sharing" instead of overrated security considerations must be the guiding theme in the on-going and future negotiations.
- The EU has to develop a comprehensive approach to legal migration, taking into consideration the European labour market's needs for a labour force and each Member State's capacity to receive and integrate migrants as well as the fact that a common EU policy on legal migration can be a stimulus both for the European economy and for the economies of the countries of origin. The Parliament should thus urge the Council and the Commission to further elaborate strategies with regard to regular migration to the EU.
- In addressing the current humanitarian crises in Northern Africa, the EU has to devise a prompt and coordinated response as part of a coherent, long-term strategy to deal with political transitions and fragile States, thus addressing the root causes of migration flows. The EP and the Commission have

to urge the Council to put in place a burden-sharing action plan to help resettle refugees from the region, based on the solidarity clause set out in Article 80 of the TFEU and to provide support for displaced persons. The EU's newest incentive-based approach based on more differentiation, a "Partnership for Democracy and Shared Prosperity" represents a considerable change in the EU's relationship with those partners that commit themselves to specific, measurable reforms. A closer political co-operation in order to advance towards higher standards of human rights and governance is needed. However, the cooperation should not only specify on the establishment of legal migration arrangements, return arrangements and readmission agreements, but cover initiatives focused on the improvement of the situation of migrants, both regular and irregular ones and refugees.

- The EU has to take action to encourage countries of origin to adopt and implement measures and policies which enable them to develop socially, economically and democratically, so that their nationals are not compelled to migrate. Furthermore the EU should make further efforts with regard to the development and democratisation of countries of origin and to promote the rule of law, in order to tackle the problems associated with migration at their roots.
- Political cooperation with the countries in the European Neighbourhood must be made conditional to advancing towards higher standards of human rights and governance based on a set of minimum benchmarks against which performance will be assessed. These minimum benchmarks should encompass inter alia:

Democratic performance:

Free and fair elections resulting in well-established democracies are the precondition for the enjoyment of human rights. The EU must through financial, technical and practical cooperation ensure that future elections in the neighbouring countries meet international criteria and standards, thus clearing the path for good governance, democracy and human rights

Human Rights

Even though the ratification of international human rights instruments can be interpreted as a commitment to human rights, the EU must ensure as well that these standards are incorporated into national legislations and finally implemented effectively. In this regard EU experts should advise respective national authorities and sufficient financial resources should be targeted at the establishment of effective implementation mechanism. In this regard the EU should further support the fight against corruption in the countries concerned.

Civil Society

Civil society organisations in the countries concerned must be strengthened since a thriving civil society can help uphold human rights and contribute to democracy building and good governance. With regard to the protection of migrants, civil society organisations are trying to change the situation through lobbying, advocacy, awareness raising campaigns and the providing of legal assistance and services and should thus be supported financially but also integrated into the political dialogues.

10.2 On the Bilateral Cooperation Framework

The EU should work towards re-establishing a better balance between security issues and the human rights agenda in the cooperation policies with its neighbouring countries and the future Member States. This balance requires on the one hand that the EU avoids formulating unilateral migration policies and promotes instead a real partnership between countries of origin and transit. That includes that the EU recognises further the beneficial aspect of migration against the background of declining numbers of people of working age in the EU. On the other hand the EU should take account of all the effects migration has on countries of origin and destination most notably with regard to the need of developing countries to retain their highly skilled professionals ('brain drain'). The respect for human rights of migrants and the international commitments of the Member States as well as of the third states in question must not be

only reminders in the partnership agreements, since in practice these principles are often contradicted in particular when it comes to operational measures.

- The Parliament should ensure that the respect for the rights of migrants is part of any agreement related to migration between the EU and a third country, whereas emphasis should be placed at operational measures especially linked to the fight against irregular migration. The safeguarding of the rights of migrants and refugees needs to be given priority over the safeguarding of borders. Most importantly, the EU should restrain itself from concluding cooperation programmes with third countries which in any way may have the effect of endangering the rights of migrants and refugees. Instead, action by the EU to prevent abuses against and to protect migrants, including irregular migrants, and refugees should be stepped up in order to be more effective. Furthermore EU policies should pay particular attention to the most vulnerable migrants, in particular to unaccompanied minors.

The migration relations between the EU and its neighbouring countries are characterised by the priority given to EU interests, i.e. primarily the fight against irregular migration. The so called ‘partnerships’ are thus rather one sided and third countries due to economic considerations often have no choice but to submit to the EU’s interests. In this regard the EU must turn back to the Global Approach to Migration and reconsider the development-migration nexus in its future policies.

- The Parliament should support the numerous initiatives encouraging the EU’s Member States to ratify the 1990 International Convention on the Protection of the Rights of All Migrant Workers and their Families, which has not been signed by a single industrialised country yet, to demonstrate the EU’s willingness to establish actual reciprocal partnerships with countries of origin and transit. Furthermore the EU should encourage its neighbouring countries, the candidate countries and potential candidates to sign all international conventions on human rights.
- The use of the tools of the Global Approach to Migration (mobility partnerships, migratory missions, migration profiles, cooperation platforms) has to be improved and migration policy objectives have to be put at the centre of the political dialogue with countries of origin and of transit as well as the need to enhance policy coherence in this respect, in particular with development policy. Efforts should be stepped up in order to support development projects in countries of origin and transit that raise these countries’ living standards, increase their regulatory and institutional capacities and enhance their infrastructure in order to manage migratory flows effectively, whilst ensuring respect for international protection standards and the application of the principle of non-refoulement.
- Development assistance should be decoupled from migration-flow management and development aid should not be made conditional on return migration schemes. Furthermore the EU development aid should aim to eliminate the reasons for migration, such as violations of human rights, lack of good governance, poverty, climate change and hunger.
- Additional efforts should be made with regard to the promotion of policy coherence for development within the EU’s migration policy and the EU should refrain from using Official Development Assistance for policies aimed at deterring and controlling migration in ways which involve the violation of migrants’ human rights.

The EU must, firstly, enhance its efforts to encourage neighbouring countries and future Member States to develop migration policies and laws that are in accordance with international human rights standards. Secondly, the EU must undertake a collaborative relationship with its neighbouring and the future accession countries so that, once guarantees protecting the rights of migrants are incorporated into domestic legislation, they are implemented more effectively, in particular with regard to the fight against irregular migration. The respect for the rights of migrants and refugees should be thus added to the general provisions with regard to human rights foreseen in the Action Plans.

- The Parliament should use its Annual Report on Human Rights in the World to identify those countries with which the cooperation in the fields of asylum and migration cannot be conducted without the risk that migrants’ rights are jeopardised.

- The Parliament should continue to call on the Council, the Commission and the EEAS to devise for clear benchmarks for monitoring the reforms made in the field of migration policies taking into account the migration specificities of each country. Additionally, in all future cooperation agreements an *ex ante* impact assessment on migrants' rights should be included both in order to avoid unintended adverse effects on human rights and in order to reinforce positive measures aimed at the promotion and protection of the rights of migrants.
- The Parliament should increasingly raise the issue of human rights and migration in the Euro-Mediterranean Assembly and its Committee on Political Affairs, Security, and Human Rights. Similarly, the EP should support the establishment of the EURONEST Parliamentary Assembly of the Eastern Partnership to integrate the issue of migrants' rights in the dialogue at the parliamentary level.
- The Parliament should ensure that the political dialogue becomes more open and transparent and involves the cooperation with associations and stakeholders from migrants' communities by including them in the definition and implementation process of EU policies in national migration frameworks. Consultations with civil society organisations have to be organised systematically and formally as part of the political dialogue between the EU and its neighbouring countries and the future Member States.

10.3 On the Financing Instruments

Even though the EP is not consulted at any stage of the preparation of Action Plans and/or Association Agenda, its extensive budgetary and control powers nevertheless allow it to play a significant role in the ENP, the Union for the Mediterranean and the Eastern Partnership. So far, under the ENPI it is difficult to measure the impact of the budget allocations where migration and asylum policies are concerned, since the funds are given as general budgetary support. With regard to the other financing instruments such as the IPA or the EIDHR the protection of the rights of migrants has not been a priority yet.

- The Parliament should ensure that the follow-up reports on the ENPI entail detailed information on the reforms and the results made through the funding. In this regard an approach should be adopted that only programmes will be funded under the ENPI that allow for measurable outcomes and goals and are directed towards the implementation of the legal framework and capacity building.
- The Parliament must ensure that the EU's approach towards the funding of migration related projects is better balanced by increasing the funds for projects concretely aimed at the protection of migrants and/or refugees. By emphasising the importance of such projects in the annual priorities of the Migration and Asylum Thematic Programme this goal could be achieved.
- Furthermore migration related projects must increasingly address the main human rights problems migrants are facing in a country. Migrants should not be addressed only as recipients of aid but financial mechanism should be developed aimed at empowering them in a long term perspective.

10.4 On Practical Cooperation

The EU must ensure that practical cooperation initiatives undertaken do not lead to an increase in human rights violations. Special emphasis must thus be placed on the qualitative improvement of the management of migration flows in the European neighbouring countries and the future Member States. In particular, substantive changes have to occur with regard to the practice of repatriation and forced return as a prerequisite for further cooperation on migration issues. The EU and its Member States should refrain from strengthening merely the border control capabilities of the respective countries as long as detention and/or repatriation practiced by the national authorities contribute to further violations of human rights by falling under the rubric of inhuman or ill-treatment.

- The Parliament must put an end to the negotiation of readmission and return agreements that allow for the forced return of people to countries where their human rights are not respected and/or protected and where they have to face repatriation to their country of origin even if they fear for their safety or their lives there. Furthermore, the Parliament must ensure that any

readmission agreement signed by the EU and its Member States fully respects human rights and the principle of non-refoulement and does not put at risk any persons in need of international protection.

- Trainings of border and police guards to become more sensitive to the special situations of refugees are crucial for the further cooperation with third countries.
- Any research and analysis of future migration trends and forms of migration such as short-term migration, circular migration and seasonal migration should take into account possible triggers of migration, for example political and economic crises or the impact of climate change in the countries of origin.
- The EU has to foster the establishment of migration information and management centres outside the EU in order to help third countries of origin and transit to define a migration policy in response to the concerns of potential migrants. Furthermore, the EU should offer guidance to legal immigration, as well as on job opportunities and living conditions in countries of destination and help with job training for would-be migrants.

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ANNEX 1: CASE STUDY GEORGIA

I. National migration policies and its impacts on human rights

I.1. Legislation and Practice in Georgia

I.1.1. Migrant workers

Freedom of labour is equally guaranteed for Georgian citizens and aliens¹⁷⁶ by the Constitution of Georgia¹⁷⁷ and ordinary legislation in force. The Labour Code of Georgia is extremely liberal in nature. It sets limited restrictions for employers and workers on the one hand and provides weak protection of workers' rights on the other hand. This conclusion is valid also for the aliens in Georgia: The aliens do not require any special work permit to engage in employment relations in Georgia¹⁷⁸. At the same time, their labour rights, similarly to the labour rights of Georgian citizens, are protected only to a limited extent by the Labour Code.

Such state of affairs is the consequence of liberalist philosophy of the current Georgian government, which believes that the liberal labour legislation will attract foreign investors and labour force to Georgia and ensure rapid economic growth of the country in the most efficient manner¹⁷⁹.

According to the Constitution of Georgia and Law on Labour Unions the aliens have the right to establish and join the labour unions¹⁸⁰. Also the right to strike is guaranteed for aliens by Art 33 of the Constitution and the Labour Code of Georgia.

The Law on Entrepreneurs does not set any restrictions for aliens to establish commercial legal entities or get registered as individual entrepreneurs in Georgia¹⁸¹. Besides, the bureaucratic procedures related to the registration of commercial legal entities and branches of foreign commercial organisations as well as re-domiciliation of foreign companies is very simplified, both, legally and in practice¹⁸².

Aliens are subject of ordinary taxation unless otherwise defined by the Georgian legislation or international agreements¹⁸³. The Tax Code in force does not envisage any differentiated approaches to the taxation of Georgian citizens and aliens.

Overall, the Georgian legislation provides migrants with unrestricted opportunity to engage in labour and entrepreneurial activities in Georgia. However, it should be stressed that the liberal labour legislation might create breeding grounds for the labour trafficking in future. Currently, the low level of economic development of the country and the peculiarities of the immigration process significantly reduce such risk in the Georgian reality.

¹⁷⁶ According to Art. 2 of the Law on Legal Status of Aliens, the legal definition of alien covers any person who is not a Georgian citizen or any stateless person permanently residing in Georgia, as well as the persons staying in Georgia who have no document verifying their citizenship or permanent place of residence. Consequently, this definition covers also the migrant workers residing in Georgia.

¹⁷⁷ See Constitution of Georgia, Art. 30.

¹⁷⁸ See also IOM, *Migration in Georgia: Country Profile 2008*, 2008, p. 13, available at: http://publications.iom.int/bookstore/free/Georgia_Profile2008.pdf.

¹⁷⁹ The Georgian government is proud of the progress that Georgia has achieved in the Doing Business ranking lead by the World Bank. Thanks to the liberalization of the Labour Code and other reform measures Georgia has managed to occupy 12th position in this ranking in 2010.

¹⁸⁰ See Art. 26 of the Constitution of Georgia; Art. 4 of the Law on Labour Unions.

¹⁸¹ The Law on Entrepreneurs was adopted on October 28, 1994.

¹⁸² See The International Bank for Reconstruction and Development, The World Bank, *Doing Business 2011 – Georgia: Making a Difference for Entrepreneurs*, 2011, available at: <http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/profiles/country/db11/geo.pdf>.

¹⁸³ See Art. 42 of the Law on Legal Status of Aliens.

According to the assessment of competent international organisations, Georgia is primarily the source rather than the destination country of trafficking¹⁸⁴. This conclusion is confirmed by the statistical information of the Ministry of Internal Affairs and semi-annual reports of the Public Defender, which do not include any records about trafficking in aliens in Georgia. As widely known, economic distinction between the country of origin and country of destination is one of the important factors affecting trafficking in human beings. In this respect, weak development of the Georgian economy and high poverty rate¹⁸⁵ shall be considered as the main reasons for low relevance of the problem of trafficking within Georgia at present. However, under the liberal labour legislation, there is a risk that the problem of trafficking will emerge and rapidly increase along with development of the country's economy and improvement of the poverty rate in Georgia.

I.1.2. Irregular migrants

Art 22 of the Constitution guarantees the freedom of movement to all individuals, which are legally residing on the territory of Georgia. On the level of ordinary legislation, the freedom of movement of migrants is regulated by the Law on Legal Status of Aliens¹⁸⁶.

According to the law, aliens are eligible to enter Georgia based on one of the following three categories of official permits: (a) visa, (b) residence permit, and (c) refugee ID issued by the Georgian authorities¹⁸⁷. The citizens of more than 70 countries (including almost all European countries, the United States, Canada, Japan, Australia, New Zealand, Turkey, all post-soviet republics (except of Russia), as well as several countries of Asia, Africa, South America and Central America) do not require visas for entering the country. Also the persons who have been granted the residence permits in these countries enjoy the same privilege¹⁸⁸. The law defines four categories of visas: (a) diplomatic, (b) service, (c) ordinary, and (d) educational¹⁸⁹. The Georgian visas are granted for the period of 360 days with multiple entry permit or for the period of 90 days with multiple or single entry permit. Visas are issued by the Georgian diplomatic services and consulates¹⁹⁰. The persons who have legally entered Georgia can be granted visas from the Civil Registry Agency (legal entity of public law under the Ministry of Justice)¹⁹¹. The decision on granting an ordinary or educational visa shall be made within seven days upon submitting the application¹⁹².

An alien who intends to work or study in Georgia shall apply for the temporary residence permit after termination of the visa validity. The residence permits are granted by the Civil Registry Agency for not more than 6 years. The aliens who have legally resided in Georgia during the last 6 years, close relatives of Georgian citizens, highly qualified scientists, sportsmen and artists, or the persons who have lost the Georgian citizenship may be granted a permanent residence permit. The decision on granting a temporary or permanent residence permit shall be made within 30 days upon submitting the application¹⁹³. The statistics shows that the temporary residence permits are granted mostly to Turkish and Chinese applicants for the purpose of employment, whereas the permanent residence

¹⁸⁴ See IOM, *Migration in Georgia: Country Profile 2008*, 2008, p. 37.

¹⁸⁵ According to the IMF estimation, GDP PPP per capita was 5,057,093 and nominal GDP per capita 2,559,692 in 2010. According to the official data of the National Statistics Office of Georgia, the poverty level was estimated as 21.0 % with respect to 60 % of the median consumption.

¹⁸⁶ See Chapters 2, 3, 4 and 7 and Art. 41 of the Law on Legal Status of Aliens.

¹⁸⁷ See Art. 4 Para. 4 of the Law on Legal Status of Aliens.

¹⁸⁸ See Art. 4 of the Law on Legal Status of Aliens.

¹⁸⁹ See Chapter 3 of the Law on Legal Status of Aliens.

¹⁹⁰ See Art. 5 Para. 1 of the Law on Legal Status of Aliens.

¹⁹¹ See Art. 2 of the Law on Legal Status of Aliens.

¹⁹² See Art. 11 Para.7 and 8 of the Constitution of Georgia.

¹⁹³ See Art. 22 Para. 3 of the Law on Legal Status of Aliens.

permits are granted mainly for family reasons to the Georgian nationals with the citizenship of the Russian Federation and other post-soviet states¹⁹⁴.

The aliens who were granted the visa or residence permit are allowed to anytime travel into, inside and out of Georgia¹⁹⁵.

Due to shortcomings in the Law on Registration of the Citizens of Georgia and Aliens Residing in Georgia, Their Personal Identification (Residence) Cards and Passports of Georgian Citizens the refugees were limited in their possibility to travel out of Georgia before 2008. Amendments made to this law in 2008 have solved this problem and provided the refugees with the right to get the travel documents for international travels. The travel documents are valid in any country except of the countries of citizenship or previous permanent residence of refugees, or the countries where their or their family members' stay is not considered safe¹⁹⁶.

Overall, the relevant legislation is very liberal in nature and it provides migrants with extensive freedom of movement. However, the experts and international organisations were quite often emphasising several shortcomings of the legal framework: a) the visa categories do not correspond to the traditional classification applied in other European countries. Besides, the rule of granting visa to the aliens who are already residing in Georgia does not fit with the European practices; b) There were no mechanisms established for evaluating the labour market conditions while granting the visas or residence permits for the purpose of employment; c) Effective monitoring of the immigration process was not provided and comprehensive statistical data on immigration were not collected; d) The legislation failed to provide effective mechanisms to ensure receiving information about changing the status of aliens in Georgia¹⁹⁷. These shortcomings of the legislation and practice resulted in weak coordination and management of immigration flows and lack of effective identification and implementation of the immigration policies in Georgia. Besides, ineffective monitoring and control raised serious concerns with regard to the trafficking risk that might emerge under the state's passive approach to the migration.

In October 2010 the Governmental Commission on Migration has been set up to ensure development of the migration policy in accordance with the ENP AP and facilitate effective management of migration flows¹⁹⁸. The activities of the commission are lead by the Ministry of Justice of Georgia. This task force is expected to fill the current coordination gap in the field of migration. Besides, the Civil Registry Agency plans to implement several projects to provide effective monitoring of the migration process. *Inter alia*, an electronic management system for migration and citizenship is being developed in cooperation with the Danish Refugee Council (DRC)¹⁹⁹. This system shall serve as an effective tool for improving the above shortcomings identified in the current practice.

Liberty of person is guaranteed by Art 18 of the Georgian constitution. This constitutional provision stipulates that arrest or other restriction on personal freedom is prohibited without a court order. The detained individual or otherwise restricted person shall be conveyed to court not later than 48 hours

¹⁹⁴ IOM, *Migration in Georgia: Country Profile 2008*, 2008, pp. 12-13.

¹⁹⁵ See Art.16 Para. 3 and Art. 41 Para. 1 of the Law on Legal Status of Aliens.

¹⁹⁶ Respective amendments to the Law on Registration of the Citizens of Georgia and Aliens Residing in Georgia, Their Personal Identification (Residence) Cards and Passports of Georgian Citizens were adopted on March 21, 2008. See Chapter 3 of the law.

¹⁹⁷ IOM, *Review of Migration Management in Georgia: Report of the Evaluation Mission*, 2008 (in Georgian).

¹⁹⁸ Ordinance of the Government of Georgia on Establishment of the Governmental Commission on Migration and Approval of its Statute, October 2010.

¹⁹⁹ According to the information provided from the Civil Registry Agency, the electronic management system will be fully operational after 2012.

following his/her arrest. If within the next 24 hours the court has not made a decision on the arrest or other kind of restriction, the individual must be released forthwith.

Administrative detention of the persons who shall be subject of forcible expulsion from Georgia is regulated by Chapter 10 of the Law on Legal Status of Aliens. According to this law, the detained alien shall be conveyed to court not later than 48 hours following his/her detention. The court shall meet decision about expediency of detention within 24 hours. If within the next 24 hours the court has not made its decision, the individual shall be immediately released. The law stipulates that the alien shall be detained (a) before identifying his personal identity, citizenship, country of permanent residence or the transit country of travel, or (b) before execution of his expulsion from Georgia.

These regulations raise serious concerns. The law does not define the maximum duration and the state agencies responsible for detention. Also other relevant laws (i.e. Code of Administrative Offences, General Administrative Code, Code of Administrative Procedure, Code of Criminal Procedure, etc.) include no specific regulations on administrative detention of irregular migrants. Considering the above shortcomings, the provisions of the Law on Legal Status of Aliens shall be essentially revised²⁰⁰. The legislation shall provide more effective guarantees for the protection of the liberty of migrants. Unfortunately, there are no official statistical data about the practical application of the procedures related to the detention of irregular migrants available in Georgia.

According to Art 344 of the Criminal Code of Georgia, illegal crossing of the Georgian border is punishable by a fine or deprivation of liberty for three to five years. However, the asylum-seekers and victims of trafficking²⁰¹ are entirely exempt from the criminal liability for this criminal offence. As the Georgian legislation differentiates between the asylum-seekers and seekers for the refugee status²⁰², the Criminal Code should make clear, whether also the later persons are covered by the above privilege.

208 completed and 562 inchoate offences committed by the aliens with regard to illegal crossing of the Georgian border were registered in 2008 and 2009²⁰³. Unfortunately, the official statistical data about the sanctions applied to these persons are not available. According to the unofficial information, most frequently, the irregular migrants are punished by a fine in the amount from GEL 2,000 to GEL 5,000 (about € 850 to € 2,100).

The rule of forcible expulsion of migrants is defined by the Law on Legal Status of Aliens. According to Chapters 8 and 9 of this law, an alien may be deported from Georgia in cases where – (a) he/she has illegally entered Georgia; (b) there are no longer legal grounds to justify his/her further stay in Georgia; (c) his/her residence in Georgia contradicts the interests of national security and public order; (d) his/her deportation is necessary for the protection of public health, rights and legitimate interests those of Georgian nationals and other persons legally staying in Georgia; (e) he/she regularly violates Georgian laws; (f) he/she obtained legal grounds for entry and staying in Georgia through providing forged or invalid documents; or (g) he/she has committed one or several malicious crimes for which he/she was sentenced to more than one year of imprisonment. In the first two cases the decision regarding the deportation of an alien shall be made by the Ministry of Justice of Georgia. The courts of general jurisdiction are responsible for meeting decisions on the remaining types of cases. The review of the case shall be launched based on the report on expediency of deportation prepared by the Ministry of Justice or Ministry of Internal Affairs of Georgia. The

²⁰⁰ See also IOM, *Review of Migration Management in Georgia: Report of the Evaluation Mission*, 2008 (in Georgian), p. 22.

²⁰¹ Victims of trafficking were released from the criminal liability in 2006.

²⁰² See below.

²⁰³ Ministry of Internal Affairs of Georgia, *Report on Action Against Crime in Georgia of 2009*, 2009, available at: http://police.ge/uploads/statistika/shss_statistika/BIULETENI.saqartvelo.ianvari.14.02.10.pdf.

competent authority shall review the case within seven days after submitting the report. The decision on deportation of an alien from Georgia shall be executed by the National Bureau of Enforcement (legal entity of public law under the Ministry of Justice of Georgia). An alien may be deported to the country of his/her citizenship or permanent residence, the country where he/she entered Georgia from or any other country, which expresses readiness to accept him/her. The deportation of an alien shall not be allowed to the country where he/she is persecuted for political beliefs, protecting human rights and peace, progressive social, political, scientific and other activities or activities not deemed as crime under the legislation of Georgia, or where his/her life and health is under threat. While taking a decision on deportation, the following two aspects have to be taken into consideration by the competent authorities: a) length of legal stay in Georgia, and his/her personal, social, economic and other links; and b) possible consequences of deportation for the person and his/her family. The law provides special protection to the following persons in this respect: a) an alien who has a residence permit in Georgia and has been living in Georgia for last three years without violating laws of Georgia; b) an alien who was born in Georgia and has a residence permit in Georgia and has been living in Georgia for one year without violating the Georgian legislation; c) an alien who is a minor having a residence permit in Georgia and has been living in Georgia for the last one year without violating the Georgian legislation; d) an alien under the custody of guardianship of a Georgian national; and e) an alien of whom is a reasonable assumption that he/she may be a victim of human trafficking as envisaged under contemplation term of the Law of Georgia On Combating Trafficking in Human Beings. These persons may be expelled only in the case where the state security and public order of Georgia can be specifically harmed. All expenditures related to the deportation shall be funded by an alien concerned or his/her host person or legal entity. The state shall partly or fully cover the expenditures only in case, if the reimbursement by the above persons/legal entities is impossible. The decision on deportation may be appealed. An alien who has been deported from Georgia shall not be issued a Georgian visa, a permit to enter Georgia or a residence permit during the next one year. Besides, he/she is obliged to pay fine for the violation of the Georgian legislation. In case of failure to pay, he/she will not be granted a Georgian visa or an entry permit.

I.1.3. Refugees

The refugees have been registered since 1994 in Georgia. Until 1999 their number was quite low. However, following the armed conflict in the Chechen Republic, Russian Federation, several thousands of Chechens moved to Georgia and about 7,000 persons were *prima facie* granted the status of refugee. The Chechens were provided with the accommodation in the Pankisi Valley²⁰⁴. However, the number of refugees has significantly reduced during recent years and their number was only 992 by January 2009²⁰⁵. Majority of Chechens returned to Russia or emigrated to Europe in 2003²⁰⁶.

The Georgian legislation differentiates between the procedures of granting of asylum and that of the refugee status. Asylum is granted by the President of Georgia in exceptional cases, whereas the refugee's status shall be granted by the Ministry of IDPs from Occupied Territories, Accommodation and Refugees (MIDPFOTAR) in any other case when the person is persecuted in the foreign country without justified legal grounds.

²⁰⁴ IOM, *Migration in Georgia: A Country Profile 2008*, 2008, p. 48; Semi-annual reports of the Public Defender of Georgia of II/2006 and I/2009.

²⁰⁵ See the official website of the Ministry of IDPs from Occupied Territories, Accommodation and Refugees of Georgia, available at: <http://mra.gov.ge/#index/154/GEO>.

²⁰⁶ IOM, *Migration in Georgia: Country Profile 2008*, p. 48.

According to the Constitution, the President of Georgia is authorised to grant asylum to foreign citizens and stateless persons²⁰⁷. The law on the Legal Status of Aliens includes only one laconic norm on asylum stipulating that this status shall be granted in accordance with the Constitution of Georgia, international treaties and Georgian legislation²⁰⁸. The meaning of asylum and relevant procedures are defined by the Presidential Decree on Granting of Asylum to Aliens²⁰⁹. According to this decree, asylum shall be granted to those citizens of other states or stateless persons who are persecuted in their home countries for promoting human rights protection and peace, as well as for carrying out progressive socio-political, scientific and other intellectual activities. The Constitution and presidential decree prohibit extradition of a person, who has been granted asylum or who applied for this status referring to the fact that he was pursued in his/her home country on political grounds or for an activity, which is not regarded as a crime by the Georgian legislation. The application on asylum shall be addressed to the President of Georgia and submitted to MIDPFOTAR, or, if the applicant is staying outside of Georgia, to the Georgian diplomatic mission or consulate. The ministry considers the submitted applications and works out its conclusion on the matter. Based on the ministry's conclusion, the President decides upon granting of asylum to the alien. The decision shall be met within four months after registration of the application. The decision of the President shall be substantiated in written. The applicant is free of any fees related to the application. Besides, he/she shall be provided with relevant translation services at the expense of the state. The asylum-seeker has the right to bring appeal against the negative decision of the President to the court. The decision can also become a subject of judgment of the Constitutional Court of Georgia. As long as the decision on granting of asylum has not been made, the applicant cannot be extradited to the home country against his/her will. The person who has been granted asylum enjoys the right to live in Georgia together with his/her family. It should be stressed that there has not been any single case of granting asylum by the President of Georgia so far.

The status of refugee shall be granted to a citizen of other state or stateless person, who was forced to leave his/her home country due to persecuting for his race, religion, nationality, belonging to certain social group or political thoughts and cannot enjoy protection from his/her home country²¹⁰. The rules and procedures for granting the refugee's status are stipulated by the Law on Refugees. According to the law, the application shall be addressed and submitted to the Ministry of IDPs from Occupied Territories, Accommodation and Refugees. The Ministry registers the applicant as a seeker for the refugee's status and issues respective ID card within three months upon submitting the application. The negative decision shall be substantiated in written. Within five days after the registration, the ministry provides the applicant with temporary accommodation and the right to a one-way free travel to the accommodation place. Before meeting the decision on granting of the refugee's status the applicant enjoys (a) the right of free movement on the territory of Georgia; (b) the right to leave at the place of temporary accommodation and get communal services; (c) receive the food products as per the established standard; (d) get the one-time financial or other assistance in the amount provided for by the Georgian legislation; (e) provide his/her child with the pre-school or secondary education²¹¹. On the other hand, the applicant is obliged to travel to the place of temporary residence within 15 days after providing him with the accommodation or select other place of living and immediately provide the ministry with respective information²¹². Nevertheless, it should be mentioned that the legislation does not define any sanctions against the non-fulfilment of

²⁰⁷ See Art. 73 Para. 1 Subparagraph 'm' of the Constitution of Georgia.

²⁰⁸ See Art. 48 of the Law on Legal Status of Aliens.

²⁰⁹ See Decree of the President of Georgia on the Statute on Granting of Asylum to Aliens, #387, June 1998.

²¹⁰ See Art. 1 of the Law on Refugees.

²¹¹ See Art. 3 of the Law on Refugees.

²¹² See Art. 3 Para. 3 of the Law on Refugees.

this obligation. The applicant is free of any fees related to submitting the application. Besides, the applicant is provided with necessary translation services at the expense of the state at all stages of the procedure. The applicant has the right to bring appeal against the negative decision of the ministry to the court. The person who has been granted the status of refugee shall be granted the certificate of temporary residence by the Civil Registry Agency. The certificate is valid on the territory of Georgia for 3 years. The refugees have the right to (a) leave at the place of temporary residence and enjoy the above privileges of applicants for the period of six months; (b) select one of the settlements offered by the ministry for residence or live in the settlement, where his/her relatives are living (in case of their consent); (c) address the Ministry of Justice with the request of granting the Georgian citizenship, return to his/her home country or any other country at any time; (d) enjoy all rights guarantees for aliens by the Law on Legal Status of Aliens²¹³. The decisions concerning the accommodation, employment, education and security of refugees shall be taken by the Ministry of IDPs from Occupied Territories, Accommodation and Refugees. The refugee is obliged to undergo annual registration and inform the ministry about his will to change the place of residence in advance. The central executive authorities and local self-government bodies shall (a) consult the refugees about the living conditions and labour opportunities in the settlements offered by the ministry for the permanent residence; (b) provide the refugee with the accommodation as per the request of the ministry; (c) assist the refugee in finding the job as per his education and profession; (d) if the employment is impossible, register the refugee as an unemployed person and request the Ministry of Healthcare and Social Protection to support him/her in finding the job; (e) assist the children of refugees in taking preschool and secondary education; (f) provide regular financial support in accordance with the legislation in force; (g) assist the refugee in returning to his/her home country. Refugees' rights are protected by the state²¹⁴. It is prohibited to forcibly return the person who has been granted the refugee's status to his/her home country. The person, who has been granted the Georgian or any other state's citizenship or has left Georgia to take permanent residence in any other country, will lose the refugee's status.

Unfortunately, the social guarantees provided to the asylum-seekers and refugees are rather limited in real practice²¹⁵. The quality of the accommodation granted to them is extremely low. According to the State Budget 2011 the refugees will be provided with free electricity supply in the amount of GEL 12.98 to GEL 13.48 (about EUR 5-6) per refugee/per month. For the management of housing and communal services no more than GEL 5 per refugee/per month will be allocated²¹⁶. Unfortunately, there are no fixed legal standards established for the provision of refugees with the food products and one-time financial or other assistances. However, it should be stressed that the refugees are receiving financial assistance in the same amount as IDPs at present. Unfortunately, the volume of this social assistance is very low and it makes only GEL 22 to 28 (about € 9-12) per month²¹⁷.

The refugees are granted free vouchers from the state to get secondary education in the Georgian schools. However, due to the lacking knowledge of the Georgian language, the refugees' children are quite often facing practical problems in the Georgian secondary education institutions²¹⁸. Furthermore, the capacities of central authorities and local self-governments in providing the refugees with adequate job opportunities are extremely limited. To fill this gap, several international

²¹³ See Art. 5 of the Law on Refugees.

²¹⁴ See Art. 7 of the Law on Refugees.

²¹⁵ See Public Defender of Georgia, *Semi-annual reports I/2006, II/2006, I/2007, II/2007 and I/2009*.

²¹⁶ See Art. 32 of the State Budget 2011 of Georgia.

²¹⁷ See Decree of the Government of Georgia on Social Assistance, July 2006, #145.

²¹⁸ See Public Defender of Georgia, *Semi-annual reports of I/2006, I/2007, II/2007 and I/2009*.

institutions (UNHCR, Polish Embassy, Embassy of Netherlands, EU, etc)²¹⁹ are implementing several grant projects to assist refugees in establishing and running small enterprises in the Pankisi Valley.

I.2. Specific Human Rights concerns

The Constitution of Georgia distinguishes between the basic rights of all individuals and those protecting only the citizens of Georgia. The right to political association, right to elections and right of occupying positions in the state civil service are addressed only to Georgian citizens²²⁰. State's positive obligation to support employment of individuals is also thought only for the Georgian citizens²²¹. According to Art 41 of the Constitution, the Georgian citizens are granted the right to access information about themselves as well as official record existing in state institutions. All other basic rights enshrined in Chapter Two of the Georgian Constitution provide equal protection to all individuals – Georgian citizens, citizens of other states and stateless persons. The right of asylum is guaranteed for the aliens by Art 47 of the Georgian Constitution.

According to Art 47 of the Constitution of Georgia, foreign citizens and stateless persons living in Georgia have the rights and obligations equal to the rights and obligations of citizens of Georgia if not otherwise envisaged by the Constitution and legislation. The migrants are protected by the right to equality, right to dignity, right to life, right to honour, right to free development of personality, freedom of communication, inviolability of the place of residence, right to personal integrity, right of inheritance, freedom of intellectual creation, right of marriage, freedom of expression, thought, conscience and religion, freedom of information, right of assembly as well as judicial human rights.

The status and legal guarantees of migrants are basically regulated by the Law on Legal Status of Aliens. This law includes a special chapter with a long list of rights and obligations of aliens in Georgia²²². The law specifies a number of, both, negative and positive human rights. These human rights are: right to equality; right to life; right to personal integrity; freedom of investment and entrepreneurial activities; freedom of labour; right to healthcare; right to social protection; right of inheritance; right of education; right of using cultural heritage; right of association; freedom of engagement in labour unions; right of marriage; freedom of expression, thought, conscience and religion; right of free movement; right of personal inviolability; inviolability of the place of residence; right to dignity; right to honour; freedom of correspondence; right to free development of personality; right of legal protection; and right to fair trial.

Overall, on the more general level the legislation creates breeding grounds for effective protection of migrants' human rights in Georgia. The general provisions on human rights are effectively specified on the level of ordinary legislation in several cases. However, based on the careful analysis of the Georgian legislation and practice significant problems and shortcomings can be identified with regard to, both, negative and positive human rights of migrants.

I.2.1. Right to Property

The Civil Code of Georgia does not provide for any restrictions on the property rights of aliens. The aliens are eligible to buy, own and use movable or immovable property in Georgia without any special restrictions. Besides, the administrative procedures related to the registration of the immovable property by the (Georgian and foreign) legal entities is very simplified in Georgia²²³.

²¹⁹ See Public Defender of Georgia, *Semi-annual reports of I/2009*.

²²⁰ See Art. 26, 28 and 29 of the Constitution of Georgia.

²²¹ See Art. 32 of the Constitution of Georgia.

²²² See Chapter 5 of the Law on Legal Status of Aliens.

²²³ See The International Bank for Reconstruction and Development, The World Bank, *Doing Business 2011 – Georgia: Making a Difference for Entrepreneurs*.

I.2.2. Right to Education

The secondary education is fully financed by the state in Georgia²²⁴. According to the Law on General Education, the relevant financing is carried out based on the voucher system. The value of the voucher is calculated in accordance with the financial normative defined per child/per year. Vouchers are granted to all children of relevant age with Georgian citizenship. Also the stateless persons who have permanent residence in Georgia are granted free vouchers from the state. Besides, the law stipulates that the citizens of other countries or stateless persons can get the voucher in accordance with relevant international treaties or agreements²²⁵. In case there is no relevant international treaty or agreement signed between Georgia and the home country of the non-citizen, the financing can be provided in accordance with the principle of financing exchange. The precondition is that the system of funding in the partner country is similar to the Georgian one. The Ministry of Education and Science, in consultation with the Ministry of Foreign Affairs, publishes the list of countries, the citizens of which are subject of the exchange financing. If there is neither international treaty nor agreement, nor the precondition for exchange financing provided, the aliens can get ordinary voucher from the state at their own expense. The alien shall transfer the payment for the voucher to the account of the State Treasury²²⁶.

Higher education is partially financed by the state. According to the Law on Higher Education the citizens of other countries can receive state financing for the higher education. The total share of such financing shall not exceed 2% per cent of the total annual fund. The conditions for financing are set (a) by the special state programme approved by the Ministry of Education and Science, (b) in accordance with the international treaty or agreement, or (c) on basis of exchange financing²²⁷. For the academic year of 2011-2012 the amount of funds allocated for the financing of higher education of other countries' citizens amounted GEL 195,000. In the academic year the full financing will be provided for 76 students admitted based on the unified national exam. 56 students will be financed for studying at the academic higher education institutions (universities), and 20 persons in the professional higher education institutions (colleges). Additionally, 10 students satisfying particular criteria set by the legislation will be financed without passing the unified national exam²²⁸. Unfortunately, the Decree of the Minister of Education and Science on the Approval of Special State Programme for Issuing Special State Grants to the Citizens of Other States in 2010-2011 does not provide any special privileges to the refugees. The aliens can get higher education at their expense in Georgia. The accredited higher education institutions are authorised to define special admission quota for aliens. Currently, the Tbilisi State Medical University is the education institution with the highest number of foreign students.

I.2.3. Healthcare and Social Protection

The healthcare system is rather underdeveloped in Georgia. This concerns not only the relevant infrastructure, but also the public health insurance system. In 2007 a voucher-based health insurance system for the targeted group of persons has been introduced by the Law on Healthcare. The key beneficiaries of this insurance are the families living under the poverty rate²²⁹. As the law does not

²²⁴ See Art. 35 of the Constitution of Georgia; Art. 22 of the Law on General Education.

²²⁵ There have been no international treaties or agreements signed between the Georgian side and other countries in this area so far.

²²⁶ See Art. 22¹ of the Law on General Education.

²²⁷ See Art. 80 Para.2 and Art. 80¹ Para. 2 of the Law on Higher Education.

²²⁸ See Decree of the Minister of Education and Science of Georgia on Approving the Special State Programme of 2011-2012 of Issuing the State Education Grants to Citizens of Foreign Countries, October 2010, #107.

²²⁹ See Art. 2 of the Decree of the Government of Georgia on Measures to be Taken for the Health Insurance of Population in the Framework of the State Programme and Definition of Conditions for the Insurance Voucher.

differentiate between the citizens of Georgia and non-citizens in this respect, also the aliens (incl. refugees) are in the position to benefit from this system. Besides, it should be stressed that the package of medical services to be provided in the framework of this insurance model is very limited and it does not cover numerous medical interventions of existential importance²³⁰. Generally, due to the scarcity of budgetary resources allocated by the state in this area, the Georgian citizens and migrants are equally weakly protected by the current health insurance systems in Georgia.

The same goes for the social protection system introduced by the Law on Social Protection. According to the Law on Legal Status of Aliens, the Georgian citizens and aliens enjoy the equal right to receive social assistance, pension and other social benefits. However, the social insurance system is non-existent in Georgia. The state is providing assistance to the extremely poor segments of the population. Unfortunately, in most of the cases this assistance is not sufficient to cover even the minimum wage of poor families. The Law on Social Protection opens assistance opportunities for any relevant family in Georgia. However, a reliable statistics about the coverage of migrants by the social assistance system is unfortunately absent at this moment.

The Law on State Pensions provides pensions to all citizens of Georgia. Besides, the pensions are granted to the citizens of foreign countries and stateless persons, who have been legally residing in Georgia during the last 10 years²³¹. The ordinary pension age is 65 years for, both, women and men²³². Nevertheless, it should be stressed that the ordinary pension rate, which is GEL 80²³³ (about € 35) covers the official minimum living wage only by about 50 per cent²³⁴.

I.2.4. Access to the Court and Right to Fair Trial

The aliens are provided with unrestricted access to the courts of general jurisdiction in Georgia. All administrative decisions affecting the rights and interests of migrants can be challenged in the ordinary courts. The aliens are provided with free translation services at all stages of the court procedures²³⁵. Besides, according to Art 89 of the Constitution of Georgia, any individual and legal entity can apply to the Constitutional Court to consider the constitutionality of the normative acts with regard to the human rights guaranteed by Chapter Two of the Constitution of Georgia²³⁶. Unfortunately, the statistical data about the practical application of these provisions are not available.

I.2.5. Others

Political rights of immigrants are rather limited in Georgia. Art 27 of the Georgian Constitution explicitly states that the legislation can establish special restrictions on the political activity of the citizens of foreign countries and stateless persons. This general constitutional clause is reflected in several other constitutional provisions as well as ordinary legislative acts regulating the political issues and rights.

²³⁰ Ibid, Art.3.

²³¹ See Art. 1 Para. 2 of the Law on State Pension.

²³² See Art. 5 of the Law on State Pension.

²³³ See Art. 33 Para. 6 of the State Budget 2011 of Georgia.

²³⁴ The current official minimum living wage is GEL 158.7 in Georgia. See the official website of the National Statistics Office of Georgia, available at: http://geostat.ge/index.php?action=page&p_id=179&lang=eng.

²³⁵ See Art. 39 Para. 8 of the Criminal Procedure Code; Art. 9 Para. 4 of the Code of Civil Procedure.

²³⁶ See Art. 39 Para. 1 of the Organic Law on the Constitutional Court of Georgia. Until 2010, only the aliens residing in Georgia and resident legal entities were eligible to apply to the Constitutional Court of Georgia. However, based on the Decision of the Constitutional Court proclaimed on June 28, 2010 all natural persons and legal entities have been entitled to bring constitutional appeals.

The Constitution grants the right to vote only to the Georgian citizens. This restriction is valid not only on national level, but also for local self-government elections²³⁷. Also the Organic Law on Referendum stipulates that only the Georgian citizens are eligible to vote in referenda and plebiscites²³⁸.

The non-citizens are not eligible to be founders or members of political parties²³⁹. Besides, the Law on Political Associations of Citizens sets restrictions for party financing: Foreign citizens and stateless persons are not allowed to provide financing of Georgian political associations²⁴⁰. The same restriction is provided for by the Elections Code for the financing of election entities (parties and party 'blocks' created for elections) and election candidates²⁴¹.

The legal status and rule of activities of non-commercial associations is regulated by the Civil Code of Georgia. This legislative act does not provide for any restrictions for aliens to establish non-governmental organisations or get involved in their activities. It means that the migrants are not restricted in their engagement to ensure human rights protection, carry out monitoring of democratic developments and run other activities, which are indirectly linked with the Georgian politics. In fact, many non-resident legal entities funded by international organisations and partner states are implementing such activities since early nineties in Georgia. The Georgian legislation does not set any restriction for the financing of such NGOs by aliens.

I.3. State actions, NGO engagement

The Public Defender (Ombudsman) of Georgia is assigned active role in protecting migrants' human rights. The parliamentary reports published by the Public Defender have always placed particular emphasis on the legal status and practical problems of refugees in Georgia²⁴². These reports highlight the practical problems standing in the way of effective implementation of the relevant legislation. Particular attention was paid to the weak protection of refugees by the positive human rights. It was clearly stressed that even though the legislation provides the refugees with general guarantees regarding the healthcare, education, social protection and employment, the government is rather ineffective in providing refugees with adequate assistance and services. Unfortunately, the Public Defender's reports are less informative with regard to the state of human rights' protection of migrants in general. Only few reports include references on the trafficking victims who were trafficked to the neighbouring countries through Georgia²⁴³.

Currently, several non-governmental organisations are created to ensure protection of migrants' rights. Several NGOs, such as the Center for Protection of Migrants' Rights and Migrants' Integration as well as the Civil Coalition on Migration Issues are specifically dealing with migration issues in Georgia. Besides, several other prominent civil society organisations are implementing different projects aiming to ensure effective protection of migrants' human rights.

II. Internationals obligations with regard to human rights

From an international perspective Georgia has ratified and/or signed a number of conventions concerning the protection of human rights encompassing as well migrants, *inter alia* the core international human rights treaties ICCPR, ICESCR, CRC and CERD. It has however not ratified or even

²³⁷ See Art. 28 and Art. 101¹ Para. 2 of the Constitution of Georgia. See also Election Code of Georgia.

²³⁸ See Art. 2 and 8¹ of the Organic Law on Referendum.

²³⁹ See Art. 26 of the Constitution of Georgia; Art. 8 of the Organic Law on Political Association of Citizens.

²⁴⁰ See Art. 26 Para. 1 of the Organic Law on Political Association of Citizens.

²⁴¹ See Art. 47 Para. 5 of the Election Code of Georgia.

²⁴² See Public Defender of Georgia, *Semi-annual reports I/2006, II/2006, I/2007, II/2007, I/2008, II/2008 and I/2009*.

²⁴³ See Public Defender of Georgia, *Semi-annual reports I/2008 and II/2008*.

signed the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families yet. With regard to irregular migration, human trafficking and the smuggling in human beings, Georgia has ratified the 2000 UN Convention against Transnational Crime and the two protocols (Protocol against the Smuggling of Migrants by Land, Sea and Air and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Woman and Children). With regard to refugee rights Georgia has ratified the Geneva Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. As Georgia is a member of the CoE, further regional instruments oblige it to respect and protect the rights of migrants, regular and irregular ones irrespectively, such as the ECHR or the European Convention on Action against Trafficking in Human Beings. However, as well at the regional level Georgia has been reluctant so far to ratify the Convention on the Legal Status of Migrant Workers, offering this group special protection.

III. Country specific problems

The problem of IDPs has gained particular significance since the early nineties in Georgia. Conflicts in Abkhazia (1992-1993) and Tskhinvali region (1989-1992) resulted in the internal displacement of about 250,000 persons within the country²⁴⁴. According to the statistical data of 2008, majority of IDPs were residing in Samegrelo, the bordering region of Abkhazia (46.4%), whereas the capital of Georgia – Tbilisi had the second largest IDP population (29.6%). Overall, IDPs made about 6% of the Georgian population. After the war of August 2008, additional 26,000 persons were displaced from Abkhazia (Kodori valley) and Tskhinvali region. Thanks to the financial assistance of international donors, majority of the new IDPs were provided with the houses in the newly built compact settlements or granted alternative financial assistance by the state. Considering the current state of political affairs, it is not expected that the IDPs will be able to return to their home regions in the near future.

In 1998, a special governmental agency – Ministry of Refugees and Accommodation²⁴⁵ was set up to implement the state policy in this field. The status of IDPs is defined by the Law on Internally Displaced Persons adopted in June 1996. The law envisages several important privileges for the IDPs: IDPs are entitled to keep the temporary accommodation that they have occupied after the displacement; IDPs living in the collective shelters are exempt of regular communal (electricity, gas, etc) charges; IDPs are granted the right to receive monthly financial assistance from the state; Agricultural land under the temporary ownership of IDPs is tax exempt; etc.

As of June 2009, about 42% of IDPs were living in 1,600²⁴⁶ collective shelters provided by the Georgian government²⁴⁷. The living conditions of IDPs in the shelters are far from being satisfactory. Besides, IDPs are facing significant social problems²⁴⁸. The volume of the social assistance is extremely low. The state fails to provide IDPs with adequate healthcare opportunities. The unemployment rate among IDPs is also extremely high. Due to the lack of appropriate living and employment conditions, thousands of IDPs migrated abroad some years after their initial displacement within Georgia.

²⁴⁴ UNHCR, *Statistical Yearbook: 2006 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, 2006. See also IOM, *Migration in Georgia: A Country Profile 2008*, 2008, p. 15; See also the official website of the Ministry of IDPs from Occupied Territories, Accommodation and Refugees of Georgia.

²⁴⁵ This ministry was renamed after the war of August 2008. Currently, the official name of this governmental agency is Ministry of IDPs from Occupied Territories, Refugees and Accommodation.

²⁴⁶ See Government of Georgia, *The Ordinance on Approval of the State Strategy on IDPs*, February 2007, #47.

²⁴⁷ IOM, *Migration in Georgia: Country Profile 2008*, p. 15.

²⁴⁸ See Public Defender of Georgia, *Semi-annual reports of 2004, I/2005, II/2005, I/2006, II/2006, I/2007, II/2007, I/2008, II/2008, I/2009 and II/2009*.

To solve the above social problems of IDPs, the State Strategy on IDPs was approved in 2007²⁴⁹. The document was elaborated by a special Governmental Commission²⁵⁰ in cooperation with UNHCR and other international organisations. The strategy provides for several solutions for better integration of the IDP population. The document envisages implementation of special vocational education and training programmes for IDPs to enhance their employment opportunities. It highlights the importance of intensification of the social assistance programmes for IDPs. Besides, the strategy sets as its one of the main goals to provide all IDPs living in the collective shelters with an alternative accommodation.

After official endorsement of the AP for 2009-2012 by the Government of Georgia²⁵¹, the process of intensive implementation of the state strategy has been launched. In the framework of this process, thousands of IDPs living in Tbilisi were forcibly removed from the collective shelters and transported to the places of the new accommodation provided by the state in different provinces of Georgia. This process became the subject of dissatisfaction and criticism of many IDPs, NGOs and opposition parties. The opponents claimed that quite often the quality of the new accommodation as well as the level of infrastructure development in respective settlements **was** not satisfactory. Besides, the places of alternative accommodation quite often failed to offer adequate employment and education opportunities to IDPs.

Finally, majority of IDPs are still facing serious social problems in Georgia. These problems call for careful approach of the government and efficient use of its resources for effective integration of IDPs and providing them with adequate accommodation and employment opportunities, as well as effective social protection.

IV. Effects of the European Union engagement

IV.1. The European Neighbourhood Policy

Within the frames of the ENP, strategic objectives of the cooperation between Georgia and the EU are defined by the EU-Georgia AP adopted in 2006. Besides, the AP specifies certain actions to be implemented by the EU and Georgia.

The issues that are relevant for the migration policy are listed in that part of the AP which concerns with *justice and interior affairs*²⁵². Particularly, it is defined as an objective of the partners' cooperation to develop and enhance dialogue on migration issues including prevention and control of illegal migration and readmission of own nationals, stateless persons and third country nationals; take steps to modernise the national refugee system in line with international standards, as well as establish an IDP protection system that is self-sustainable and offers integration opportunities; and facilitate free movement of persons.

Particular guidelines for the protection of migrants' rights are specified neither in objectives, nor in particular actions to be implemented in the field of migration. Though in the part of AP, which describes priority area 1, a general objective is stipulated to '*Strengthen democratic institutions and respect for human rights and fundamental freedoms in compliance with international commitments of Georgia (PCA, CoE, OSCE, UN)*'.

²⁴⁹ See Government of Georgia, 2007.

²⁵⁰ The State Commission was established in 2006. See Government of Georgia, *Ordinance on Establishment of the Governmental Commission for the Elaboration of the State Strategy on IDPs*, February 2006, #80.

²⁵¹ See Government of Georgia, *Ordinance of the on Approval of the Action Plan for 2009-2012 to the State Strategy on IDPs*, May 2009, #403.

²⁵² EU-Georgia Action Plan, Priority area 4, available at: http://ec.europa.eu/world/enp/pdf/action_plans/georgia_enp_ap_final_en.pdf.

Though, all efforts made by the partner countries in support of democracy, human right' protection, as well as with regard to reforms in the judiciary system, have positive influence on the overall protection of migrants' rights. Therefore, it is important to focus on these issues within the frames of cooperation and apply them as the criteria for its further development.

In the part of the AP titled as '*Trade-related issues, market and regulatory reform*', certain indication about migrants' rights can be identified. Namely, according to the 4.5.4 section of the AP, parties '*Ensure full application of the best endeavour clause by abolishing all discriminatory measures based on nationality which affect migrant workers, as regards working conditions, remuneration or dismissal*'.

IV.2. Mobility Partnership

On November 30, 2009, representatives of Georgia and those 16 countries of the European Commission, who are involved in the Mobility Partnership initiative with Georgia, signed the joint declaration of the Mobility Partnership. The purpose of this initiative is to develop close relations with the EU on migration issues, especially improve management of migration flows and opportunities of legal movements and increase fight against illegal migration. Besides, the Mobility Partnership aims to promote an effective readmission and return policy along with respecting human rights and the relevant international instruments for the protection of refugees as well as taking into account the situation of individual migrants and the socio-economic development of the Signatories.

Nowadays, within the frames of the Mobility Partnership, Georgia and France are working on a bilateral agreement on Circular Migration and Residence of Professional Workers. For the purpose of developing cooperation and dialogue in the field of migration, the EU-Georgia cooperation Sub-committee on Justice, Freedom and Security issues (on the level of department directors) was established. Nowadays, already 3 meetings of the sub-committee have been held. In the framework of the Mobility Partnership several projects are being implemented²⁵³.

IV.3. Agreement on the Facilitation of the Issuance of Visas and Readmission Agreements

In June 2010 the Agreement on the Facilitation of the Issuance of Visas was signed between the EU and Georgia, and in November 2010 the parties signed the Agreement on the Readmission of Persons Residing without Authorization. In December 2010 all national procedures related to the implementation of these agreements have been accomplished in Georgia. On January 18, 2011 the Council of the EU has approved both documents. The agreements entered into force on March 1, 2011.

Except the preamble and Art 17 of the Agreement on the Readmission of Persons Residing without Authorization, according to which '*this agreement shall be without prejudice to the rights, obligations and responsibilities of the Union, its Member States and Georgia arising from international law and, in particular, from the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms and the Convention of 28 July 1951 on the Status of Refugees as amended by the Protocol of 31 January 1967*', the agreement does not envisage implementation of concrete operational measures for migrants' rights.

²⁵³ 'Spreading information through JCRSs and information booklet currently on www.cizinci.cz, seminars on custom duties, taxes and remittances' (Implementation period: 2009-2012); 'Livelihood Support to Conflict Affected Population in Gali District' (Implementation period: 2009-2011); 'Support Reintegration of Georgian Returning Migrants and implementation of the EU-GEO readmission agreement' (Implementation period: 2010-2013); Support to the Georgian Civil Registry Agency (Implementation period: 2010-2013); 'Post Arrival Assistance to forced returnees' (Implementation period: 2010-2011); 'Support for the Authorities of Georgia to Implement the Readmission Agreement with the European Union' (Implementation period: 2010-2011).

In the process of implementation of the readmission agreement, it is possible that some problems with regard to protection of migrants' rights will arise. First of all, considering the fact that the readmission agreement implies return of those illegal migrants to Georgia, who are citizens of a third country and who got to the EU through Georgia, many foreigners will have to return to Georgia from the EU, which may complicate their situation due to limited opportunities in Georgia. Secondly, implementation of the readmission agreement may cause necessity of improvement of the border management. However, improvement of the border management and enforcement of the migration policy may happen at the expense of migrants' rights. For now, it is difficult to judge about this problem, as the readmission agreement came into force since March 1. Besides, no changes to the migration policy have been made in Georgia so far.

IV.4. Impact of the ENP on the development of migration policy

The activities implemented during the past years regarding the migration policy in Georgia are directly linked with the cooperation in the framework of the ENP. The EU is actively supporting the reform efforts of the Georgian governmental agencies in this field.

Under the ENP AP Georgia took a responsibility to ratify and implement the UN Convention against Transnational Organized Crime as well as its three protocols ('Palermo Protocols') on Smuggling of Migrants and Trafficking of Persons²⁵⁴. This convention was ratified by the Parliament of Georgia on June 7, 2006. The Georgian government implemented number of activities concerning the action against trafficking, both, on the legislative and implementation level. In 2006, according to the amendments made to the Criminal Code and the Code of Administrative Offences of Georgia, the sanctions against persons involved in trafficking and the protection mechanisms for victims have been improved. Georgian legislation on prevention and combating trafficking completely came into force in 2008. The Law of Georgia on Combating Trafficking in Human Beings includes institutional and legislative mechanisms. Within the frames of implementation of the ENP AP, the electronic management system of migration and citizenship is being developed since 2009, which creates a general database about migrants and citizens and supports better service quality. The working group under the Ministry of Justice worked out the draft law on personal data protection aimed to implement the CoE Convention of 1981 on the Protection of Individuals with regard to Automatic Processing of Personal Data. However, it is not yet adopted by the Parliament of Georgia.

On October 13, 2010, the Government of Georgian issued the decree N314 on Establishing Governmental Commission on Migration Issues and Approval of its Statute. The commission was formed for the purpose of defining a unified policy of the Georgian government in the field of migration and improving the state system of management of the migration processes in Georgia. The commission consists of representatives of the State Minister's Office on Diaspora Issues, Ministry of Internal Affairs, Ministry of Foreign Affairs, Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees, Ministry of Economy and Sustainable Development, Ministry of Labour, Health and Social Affairs, and Ministry of Finance. According to Art 2 of the decree, the functions and tasks of the functions are as follows: preparing proposals and recommendations in the field of internal and external migration for the purpose of defining unified policy of the Georgian government and improving the state system of management of the migration processes in Georgia; preparing proposals for creating proper socio-economic conditions for the citizens of Georgia who returned from emigration; preparing proper proposals about activities to be implemented in the field of migration in accordance with the ENP AP.

²⁵⁴ EU-Georgia Action Plan, Point 3, Priority Area 4.

In the process of establishment and implementation of the migration policy, certain uncertainty is caused by the fact that Georgia has not yet adopted the migration policy document. Though, it should also be mentioned that the Ministry of IDPs from the Occupied Territories, Accommodation and Refugees of Georgia cooperates with experts of the International Center on Migration Policy Development (ICMPD) to update the Draft Strategy on Migration and Asylum for incorporating new challenges and developments.

In March 2010, the United Nations Development Programme (UNDP) and ICMPD have launched implementation of '*South Caucasus Integrated Border Management*' (SCIBM) project, which is funded by the EU. Duration of the project is 30 months and will end in September 2012.

Within the frames of the joint project of the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia and the UNHCR, an Asylum Seekers Reception and Accommodation Center was established in village Martkopi of Gardabani municipality, 15 km far from Tbilisi international airport, funded by US state department and the EU and designed for 60 persons (in case of necessity the center can host up to 100 persons).

Since January 2010, Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia started implementation of the new project 'Support Returned Persons in Georgia on Operational Level' funded by EU. Implementation of this project is provided by Danish Refugee Council (DRC), also by ICMPD and International Organization of Migration (IOM). Objective of the project is to implement activities of reintegration and re-socialisation of Georgian returnees and it encompasses *inter alia*: establishing the network of practitioners from Georgia and EU Member States; developing the practical manual on return, and ensuring the protection of returnee rights by providing 50 assistance packages; develop a Mobility Centre at MIDPFOTAR.

V. Conclusion

The analysis of the legislation and practice revealed a number of shortcomings and problems negatively affecting protection of migrants' human rights in Georgia. It should be stressed again that the Georgian legislation is very liberal in nature. This trend can be easily identified in several fields of legislation, such as labour law, law on entrepreneurship, civil law, etc. Although the liberalist nature of the legal framework can be considered as an implication of government's positive approach towards migrants, it should be noted that this state of affairs can cause problems with regard to trafficking in future. Consequently, international donors should carefully observe the future development of labour relations in this respect.

Furthermore, it is important to ensure effective management and coordination of the migration flows by the Georgian government. Establishment of the State Commission on Migration and active efforts of the Civil Registry Agency create breeding grounds for successful implementation of governmental reforms in this area. International organisations, including the EU, are expected to provide effective assistance to the government and civil society organisations in this respect.

As demonstrated above, the migrants are extremely weakly protected by the social human rights in Georgia. Due to the scarcity of budgetary resources, the Georgian government fails to provide the migrants with adequate social protection and employment opportunities. Thus, financial intervention of international organisations is particularly important in these areas. Special attention should be paid to the employment of refugees and IDPs, which can play a crucial role with regard to their effective integration.

As the study has revealed, the legislation should be improved to provide the migrants with adequate protection of their human rights in the criminal and administrative procedure.

Furthermore, the international organisations, especially the EU, are expected to carry out effective monitoring of the implementation of the State Strategy on IDPs to ensure effective protection of human rights of the IDPs in Georgia.

Participation in the Neighbourhood Policy of the EU, along with other factors, became one of the main motivators for reforms in the field of migration policy for Georgia. In the field of migration, while defining the policy the interest towards fighting against illegal migration is dominant, whereas protection of migrants' rights is moving back. Besides, despite the fact that references on obligations concerning protection of migrants' rights, with different strength of formulation, are included, both, in bilateral documents of the EU and Georgia and in the Georgian legislation, under the absence of concrete operational measures their implementation is quite difficult.

In the activities and statements of the EU not only prevention of illegal migration, but also protection of migrants' rights should be treated as a priority. Any type of cooperation in the field of migration policy should be based on protection of migrants' rights and this objective should not be moved back. If the partner country has an impression that prevention of illegal migration is of the higher priority for the EU as compared to the protection of migrants' rights, there is a threat that it will be motivated to meet the main expectation of European partners.

Outcomes of activation of the readmission agreement with regard to migrants' rights should become subject of regular estimation, and in case of negative trend, the EU should take proper measures by means of implementation of different programmes.

It is important that EU preserves its role as safeguard and implementer of values. Activities that are based purely on pragmatic policies will make EU important partner, but its influence on the political orientation of the partner countries will be rather limited. Under such approach, even those internal reforms, which rely on European orientation and are being implemented or will be implemented unilaterally, and not on the basis of bilateral agreements, will be affected negatively.

Generally, it is important to make focus on human rights protection within the frames of cooperation between EU and Georgia, and emphasise this issue as one of the main criteria for development of the cooperation.

ANNEX 2: CASE STUDY KOSOVO

I. National migration policies and its impacts on human rights

I.1. Introduction

Traditionally, Kosovo has been rather a country of emigration than of immigration. The reasons for the large flows of people leaving the country are manifold but all closely related to the socio-economic conditions and the political situation in Kosovo. Especially between 1989 when the Kosovo autonomy was abrogated by Belgrade and the end of the war in 1999 emigration rates to Europe and the US reached their peak. Over the last 30 – 40 years a large Kosovo Diaspora was built, with the majority of them working and living in Western Europe and the USA. Today many families in Kosovo are dependent on the support of family members living abroad and foreign remittances constitute an important pillar for Kosovo's economy in particular with regard to the closure of its huge trade deficit²⁵⁵.

Because of the character of Kosovo as a country of emigration, migration policies comprised of state strategies, reports, and other studies, are rather oriented towards emigration than immigration. They are thus mainly aimed to strengthen the existing Diaspora and fostering emigration further to guarantee that the remittances facilitate the economic development of Kosovo. Consequently, the underlying objective of this migration policy is to support the creation of venues for legal emigration to the EU²⁵⁶.

Only after 1999, Kosovo, first under the auspices of UNMIK and since 2008 as an independent state, has started gradually to develop its own migration policy dealing as well with immigration. The laws and policies adopted were as well a result of the external pressure from mainly Western European countries urging Kosovo to develop comprehensive migration strategies. The reasons for this were, firstly, that most of the Kosovo Diaspora is living in these European countries and secondly, that Kosovo increasingly is used as a transitory state for those trying to reach the EU in an irregular way.

This case study will provide a description of current situation with particularly emphasis on the three following fields: the situation of migrant workers, of asylum-seekers and on the process of readmission and repatriation. For this purpose Kosovo's immigration policy and laws will be examined and the findings made supported by various interviews conducted with the relevant stake holders. Finally, recommendations will be made how current obstacles can be overcome and how a more effective legal framework with regard to the protection of human rights can be developed.

Legislation and practice in Kosovo with regard to migrants

The basic legal documents governing migration in Kosovo are the Law on Foreigners, the Law on Asylum, the Law on Readmission, the Law on Integrated Management and Control of the State Borders and the Law on Citizenship. All these documents were basically adopted within a single day without any debate in the Parliament as part of the 41 laws stemming from the Ahtisaari Plan. Due to the speediness of their drafting and the process of approval these laws suffer many shortages and ambiguities and are at this point in the process of amending.

However, insofar no serious objections were made with regard to human rights standards envisaged on these laws and their implementation. EU experts, through a Twining project that was supported by the European Commission Liaison Office in Prishtina (hereinafter ECLO) have already evaluated

²⁵⁵See *National Strategy and Action Plan on Migration of Republic of Kosovo 2009-2012*, pp. 10-11. See also Vathi, Z. and Black, R., 2007, pp. 18-21; Kupiszewski, M., et al., 2009, pp. 26-27.

²⁵⁶ See *National Strategy and Action Plan on Migration of Republic of Kosovo 2009-2012*, pp. 10-11. See also Vathi, Z. and Black, R., 2007, pp. 18-21; Kupiszewski, M., et al., 2009, pp. 26-27.

the current laws and support Kosovo's authorities on how they shall be amended²⁵⁷. Accordingly, the laws dealing with migration in Kosovo fulfil generally highest standards also with regard to human rights. In some fields they are even better developed than comparable laws and policies in some of the EU Member States. The main shortcomings are thus from a more practical nature and arise with regard to the implementation of the legislation in place. However, the institutions dealing with migration are very focused and a lot of progress has been made so far even though all these institutions are rather young. Especially officials from the Ministry of Internal Affairs (MIA) are very sensitive with regard to human rights issues and consider the reports by international actors as Amnesty International, Human Rights Watch and the EU Commission when doing their work²⁵⁸. As the laws in place still are in an early stage of implementation it is nevertheless still difficult to assess if human rights standards are seriously applied²⁵⁹.

Giving credence to the latest EU Progress Report on Kosovo there has already been made considerable progress in the field of migration policies²⁶⁰.

One of the main policy documents concerning migration in Kosovo is the *National Strategy and AP on Migration of the Republic of Kosovo 2009-2012*. This strategy addresses issues related to emigration from as well as immigration to the Republic of Kosovo. Throughout the Strategy it is stressed that the legal framework governing migration is based on the highest human rights standards and is in accordance with the *Acquis Communitaire*. Similarly to what was mentioned before, critics observed that the current laws are not yet in accordance with the EU standards, pointing out that '*the regulations are at a very early stage of development and far from meeting the EU Acquis*'²⁶¹.

The main strategic objectives of the aforementioned National Strategy are:

1. The promotion of legal and circular migration to and from the Republic of Kosovo.
2. The prevention and the fight against all forms of illegal migration as well as illegal stay by developing/implementing legal and institutional mechanisms, Integrated Border Management and regional cooperation.
3. The development of a sustainable system of evaluation, authorisation and monitoring of the stay and deportation of asylum-seekers and foreigners from the Republic of Kosovo²⁶².

I.1.1. Foreigners (general)

The Law on Foreigners is the main legal framework regulating the entry, residence and work permission of foreigners in Kosovo. It has been approved on 16th of December 2008 and is currently under the revision of the Ministry of the Interior jointly with a Twining project trying to identify shortages and gaps that should be amended.

According to the Law on Foreigners a foreigner may enter the Republic of Kosovo and stay in its territory only with a valid visa or a recorded permission to stay. In cases a foreigner does not possess a valid travel document, he/she may still enter the Republic of Kosovo if the state is obliged to admit him/her according to an international agreement²⁶³.

²⁵⁷ Interviews with Islam Cakaj and Alban Arifi.

²⁵⁸ Interview with Johann Wagner.

²⁵⁹ Interview with Emmanuel Cohen-Hadria.

²⁶⁰ See *Kosovo 2010 Progress Report*, p. 51.

²⁶¹ See Kupiszewski, M., et al., 2009, p. 96.

²⁶² See *National Strategy and Action Plan on Migration*, p. 4.

²⁶³ See Art. 4 of the Law on Foreigners, No.03/L-126, 16 December 2008.

The law guarantees foreigners residing in Kosovo basic human rights. Hence, everyone who legally entered the state has the right to move freely within the territory of the Republic of Kosovo and the freedom to choose where to reside. The free movement of foreigners may only be restricted by law to the extent necessary to protect democratic society (threat to national interests and public safety, prevention of serious crimes etc)²⁶⁴. Furthermore, foreigners are free to establish associations in accordance with Kosovo's laws; however, they are not permitted to establish political parties²⁶⁵. The Law on Foreigners further recognises the right to work of every foreigner fulfilling the legal criteria prescribed by it²⁶⁶.

A major problem arises with regard to the visa policy in place. Even though the Law on Foreigners establishes the formal criteria for visa regimes with other countries²⁶⁷, these regimes have not been implemented yet. The latest EU Commission Progress Report on Kosovo clearly stated that '*Kosovo has no visa policy. The Law on Foreigners regulating the entry and residence of foreigners is not fully implemented*'²⁶⁸.

Today it is still the duty of border police to check documentation of foreign citizens entering Kosovo and to decide whether they allow them entry or not. Instead of visa, the Division of Foreigners issues special permissions, in particular for people coming from China, Russia, Pakistan, India, Afghanistan etc who have to apply for it prior to their arrival in Kosovo. Upon that permission border police makes the decision whether these people are allowed to enter Kosovo or not. Insofar border police has rarely denied somebody entry to Kosovo²⁶⁹. However, the evident shortages with regard to the implementation of the rules on visa regimes enshrined in the Law on Foreigners lead to the application of different standards depending from where people trying to enter Kosovo come from. With regard to the aforementioned countries Kosovo is applying consequently a 'semi-visa regime' since their citizens have to show *inter alia* invitations and letters of guarantee, the health insurance certificates and confirmations that they have a place to stay etc²⁷⁰. The non-implementation of the foreseen visa regimes is in clear violation of the rules enshrined in the Law on Foreigners. Furthermore, this practice is likely to be in breach of human rights standards and weakens the rule of law in Kosovo.

Foreigners granted entry to Kosovo can stay in Kosovo up to 90 days. Those willing to stay longer than 90 days are required to obtain either a temporary residence permit or a permanent residence permit²⁷¹. Permission for temporary stay may be issued to a foreigner who intends to stay in Kosovo for longer than 30 days and is engaged in a category of employment specified in legal acts regulating the employment of foreigners in the Republic of Kosovo. Also parts of this article that deals with the situations when a visa regime is required should be excluded²⁷².

The permit for temporary stay may be granted on the grounds of employment, education and/or research, family reunification and other reasonable purposes as provided by the Law or by international agreements²⁷³. Foreigners may apply for temporary stay at a diplomatic mission,

²⁶⁴ Ibid, Art. 7.

²⁶⁵ Ibid, Art. 8.

²⁶⁶ Ibid, Art. 40, Para.1.1 and Art. 41.

²⁶⁷ Ibid, Chapter 3, Art. 14-25

²⁶⁸ See *Kosovo 2010 Progress Report*, p. 49.

²⁶⁹ Interviews with Islam Caka and Alban Arifi.

²⁷⁰ Interview with Alban Arifi.

²⁷¹ See Art. 33 of the Law on Foreigners.

²⁷² Ibid, Art. 33

²⁷³ Ibid, Art. 37.

consular office or another body authorised by the government of the Republic of Kosovo²⁷⁴, e.g. department for foreigners at the Ministry of Internal Affairs. The first temporary stay may be granted for up to one year and this permit shall be noted in the travel document of a foreigner²⁷⁵. The foreigner may be permitted temporary stay if he/she possesses sufficient means for living, has access to appropriate housing, has health insurance, and has presented reasonable arguments for a temporary stay²⁷⁶. A temporary stay on the ground of employment may be granted to a foreigner who possesses a working permit²⁷⁷.

Furthermore, the law foresees a right to appeal against a negative decision with regard to a temporary stay within eight working days of receiving the decision²⁷⁸.

Permanent stay may be granted to a foreigner who has resided on the territory of the Republic of Kosovo for 4 consecutive years on the basis of a temporary stay permit; to a foreigner who has been married to a citizen of the Republic of Kosovo; or to a foreigner with permanent stay permit in the Republic of Kosovo, for 3 consecutive years. Also juveniles may be granted permanent stay if both parents give their consent and if one of them or the guardian has at least a permanent residence in Kosovo. Permanent stay permits can further be granted because of humanitarian reasons²⁷⁹. In all cases the applications for permanent stay have to be submitted to a competent body in the place of residence of the foreigner. In case the permission for permanent stay is refused, the law does not foresee the possibility of an administrative appeal against this decision; however, it establishes the possibility of a judicial review²⁸⁰. Up to date, there has not been a single case of a permanent stay permit since the authorities are still working with an old data system allowing only for the issuance of permits up to 1 year. Currently, Kosovo's authorities are working to establish a new data system which will allow issuance of permanent stay permits. Practically this means that foreigners have can only obtain temporary permits and they are obliged to renew their permits every year²⁸¹.

I.1.2. Migrant workers

Available data shows that the number of people entering and working in Kosovo is rather low. Between 2005 and the first months of 2011 7,934 foreigners were granted temporary stay in Kosovo. Applicants come from 129 states, most of them coming from Turkey (897), followed by Albania (630), Macedonia (581), Bulgaria (457), USA (424)²⁸². People coming to Kosovo for working purposes can be roughly divided in two groups. The first one encompasses businessmen investing in Kosovo. The second category comprises of other workers. Both categories have to obtain work permits from the Ministry of Labour and Social Welfare (MLSW) and can only apply afterwards for a residence permit at the Ministry of Internal Affairs. The majority of people working in Kosovo come from India, China, Moldova, Ukraine and Russia. In this context it is interesting to notice that especially Chinese and Indians nationals are mostly working in small businesses as restaurants and shops, while the vast majority of female workers coming from Moldova, Ukraine and Russia are employed in Kosovo as singers and dancers²⁸³.

²⁷⁴ Ibid, Art. 36.

²⁷⁵ Ibid, Art. 35, Para.1 and 2.

²⁷⁶ Ibid, Art. 38, Para.1.

²⁷⁷ Ibid, Art. 40, Para.1.1.

²⁷⁸ Ibid, Art. 38, Para.4.

²⁷⁹ Ibid, Art. 48.

²⁸⁰ Ibid, Art. 49.

²⁸¹ Interview with Alban Arifi.

²⁸² Interview with Alban Arifi. These figures are official figures of the division for foreigners.

²⁸³ Interview with Islam Cakaj.

Especially concerning the latter questions arise with regard to human trafficking. Even if female singers and dancers possess valid working permits, there remains the bad aftertaste that those women in fact are sexually exploited. However, it is hard to identify them as victims of human trafficking since they officially hold valid working papers and only randomly report themselves as victims. The Kosovo police forces already have reacted to this new phenomenon and set up a specialised unit dealing with human trafficking whose task it is to control the various areas and restaurants in Kosovo where those females might be feignedly employed²⁸⁴. If police discovers that one of these females, who was granted a working permit as a singer or dancer, in reality is working as a prostitute the police automatically revokes the temporary stay permit and departs her according to the procedures (either immediately after the police issues the order to leave or afterwards with the decision of the competent court)²⁸⁵.

Generally, with regard to the discrimination of foreign workers, the laws of Kosovo do not differentiate between migrant and national workers and enshrine the principle of non-discrimination on the grounds of citizenship. However, especially in the beginning when the laws when the laws have only been created, there have been complaints from non-citizens of being discriminated. These complaints were though mainly the result of the common habit to work previously in Kosovo without proper documentation since there was no need for valid papers. Today these critical voices have fallen silent and no more complaints by migrant workers with regard to discrimination by the Kosovo institutions has been recorded²⁸⁶.

I.1.3. Irregular migrants

Today, following various reports of international organisations and officials of the Ministry of Internal Affairs dealing with migrants and asylum seekers, Kosovo can be considered as an important transit country for people trying to reach the EU.

The National Strategy and Action Plan on Migration of Republic of Kosovo 2009-2012 recognises thus the fight against and the prevention of illegal migration as one of the most important priorities of the Republic of Kosovo²⁸⁷. Various laws on migration issues and border control set the legal framework for the fight against illegal migration.

The most sensitive human rights issues arising with regard to the fight against illegal migration concern the detention and deportation of people detected without proper documentation and human trafficking.

Kosovo was first a transit route for traffickers, but since 1999 it became as well a destination country for victims of trafficking. There are no accurate statistical data on human trafficking in Kosovo; however, human trafficking is mainly related to sexual exploitation of adult females and children. Since 1999 victims are increasingly misused for forced labour and begging. According to IOM data in 2005 most of the victims came from Moldova (45%), followed by Rumania (19%) and Ukraine (12%)²⁸⁸.

The deportation of illegal migrants is regulated in the Law on Foreigners. According to this law somebody may only be deported (with or without a ban of re-entry) upon a decision of a competent court, if he/she fails to comply with an official order to leave the country. The competent authorities have to comply with the judgment and deport a migrant who stays illegally in the Republic of Kosovo

²⁸⁴ Ibid.

²⁸⁵ Interview with Alban Arifi.

²⁸⁶ Interviews with Islam Caka and Alban Arifi.

²⁸⁷ See *National Strategy and Action Plan on Migration*, p. 6.

²⁸⁸ See Vathi, Z. and Black, R., 2007, pp. 11-12.

and is not willing to leave the country voluntarily²⁸⁹. The law enshrines however that no one must be expelled and returned to his/her country of origin if his/her life or freedom would be threatened on grounds of his/her race, religion, nationality, membership to a particular social group or political opinion²⁹⁰.

A foreigner may be denied entry to the Republic of Kosovo by the border police for reasons of public security. In order to ensure that he/she will leave the territory of the state the migrant may be held in detention for no longer than 12 hours. In case the identity of a migrant cannot be verified nor can he/she be deported on basis of a prior deportation order, the law foresees that he/she shall be detained at a Reception Centre for Foreigners. Detention in such this Centre shall be assigned by a written decision of a competent court²⁹¹. All relevant organisations dealing with human rights, such as the ICRC, the UNHCR and the European Committee for the Prevention of Torture, have unhindered access to this Centre²⁹². A migrant may be initially detained up to 90 days before he/she might be deported. On request of the responsible authorities and after a formal decision of the responsible court, he/she might be kept another 90 days at the Reception Centre if the procedure for the determination of his/her identity is not accomplished yet and a request for his/her personal documents is in process or if security reasons require the extension of the detention. However, under no circumstances a migrant might be detained for longer than 180 days²⁹³. With regard to juveniles the Law on Foreigners foresees special safeguards. For instance, a minor migrant shall be placed in such a Centre together with his/her family and/or his/her guardian. Only exceptionally and only if appropriate a minor migrant may be placed in alternative accommodation facilities²⁹⁴.

However, insofar no Reception Centre for Foreigners has been build and detected illegal migrants are still detained either in the Centre for Asylum or in police detention centres²⁹⁵.

I.1.4. Refugees

Due to the large numbers of refugees, the lack of experience of national authorities and missing accommodation facilities, issues related to refugees in Kosovo are far more complex than those related to other migrants. However, serious problems arose only in 2010, when the numbers of asylum seekers suddenly mounted significantly²⁹⁶. That only limited progress was made in the area of asylum was confirmed by the latest Report progress by the EU Commission on Kosovo²⁹⁷.

The Law on Asylum enshrines all the relevant provisions related to refugees and asylum seekers. As already mentioned, it was passed as part of the Ahtisaari Package within a day and without any debate in the parliament and is now under process of being revised and amended. From a formal point of view the Law on asylum meets international human rights standards. Also with regard to its implementation, according to officials, human rights standards are generally fulfilled. Asylum seekers reported for instance regularly that they have nowhere been treated better than in Kosovo. Some of them, especially ones coming from Greece, pointed out that Kosovo is the only country where they have not be beaten by state officials²⁹⁸. Also the UNHCR confirmed that the treatment of asylum seekers by the national authorities in charge (border police, DCAM) is very professional and human,

²⁸⁹ See Art. 58, Para.1 and 2 of the Law on Foreigners.

²⁹⁰ Ibid, Art. 59, Para.1.

²⁹¹ See Art. 63 of the Law on Foreigners.

²⁹² Ibid, Art. 60.

²⁹³ Ibid, Art. 61.

²⁹⁴ Ibid, Art. 68, Para.1.

²⁹⁵ Interview with Alban Arifi.

²⁹⁶ Of the same opinion were ECLC, UHNCR and MIA officials interviewed.

²⁹⁷ See European Commission, *Kosovo 2010 Progress Report*, 2010, p. 51.

²⁹⁸ Interview with Sadik Makolli.

even though the legislation in place still suffers from various shortages, is not compatible with the actual context in Kosovo and capacities as well as coordination between the various institutions is still lacking²⁹⁹. Still, it is probably too early to assess the implementation of human rights standards during the asylum procedures³⁰⁰.

The Law on Asylum governs the conditions and procedures for the recognition, termination, status, rights and obligations of asylum seeker as well as of persons granted complementary protection or temporary protection³⁰¹. Furthermore it specifies that recognised close family members of the asylum seeker shall be as well granted asylum and complementary protection³⁰².

In compliance with the provisions of the Geneva 1951 Convention, asylum is granted to people meeting the criteria of the refugee-definition. According to the Law on Asylum a 'refugee' is a person who, owing to a well-founded fear or persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable, or owing to such fear, is unwilling to avail himself of herself of the protection of that country, or who, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, is unwilling to return to it³⁰³. If an asylum seeker does not meet the criteria set forth in the aforementioned definition, he/she might get complementary protection if he/she meets the criteria set forth in the definition of complementary protection. Complementary protection is granted to a person seriously being in danger to fear serious harm (death sentence or threat to execution, torture, inhuman or degrading treatment etc.) in his/her home country and can thus not be returned to this country³⁰⁴.

Asylum will be denied if there are reasonable grounds to believe that the asylum seeker has committed a crime against peace, a war crime or a crime against humanity, a serious non political crime outside Kosovo or has been proved guilty for acts contradicting the purposes and principles of the UN. Furthermore asylum shall not be granted to persons who are already receiving protection or assistance from organs or agencies of the UN (other than the UNHCR)³⁰⁵.

According to the Law on Asylum the Ministry of Internal Affairs has issued an Administrative Instruction on Procedures and Standards for the Reception and Initial Treatment of Asylum Seekers.

These instructions foresee that Kosovo's police and border police forces as well as the officials working at the Department for Citizenship, Asylum and Migration are obliged to ask foreigners about the reason for their entry to Kosovo. If a person articulates fear to return to his/her country of origin, he/she have to be further interviewed, eventually several times, before a decision on her status can be made. In case the person seeks for asylum he/she is required to provide all available documents in order to verify his/her identity (or documents to verify his/her family members' identity if a person is accompanied by his/her family). With regard to the identification of asylum seekers, Kosovo still faces severe difficulties since it still has no access to the EURODAC system as five EU Member States still have not recognised it. However, even though the discussion on the political status of Kosovo might still be hindering Kosovo access to EURODAC it is very likely that Kosovo because of its pre-accession status has no access to the database³⁰⁶. The political status of Kosovo is nevertheless the reason why

²⁹⁹ Interview with Bujar Reshtani.

³⁰⁰ Interview with Emmanuel Cohen-Hadria.

³⁰¹ Law on Asylum, Law No.03/L-066, 21 May 2008, Art. 1.

³⁰² Ibid, Art. 3.

³⁰³ See Art. 4.1 and 2.8 of the Law on Asylum.

³⁰⁴ Ibid, Art. 4.2 and 2.7.

³⁰⁵ Ibid, Art. 5.

³⁰⁶ Interview with Emmanuel Cohen-Hadria.

Kosovo cannot participate neither in regional nor international initiatives and forums dealing with asylum³⁰⁷. Additionally, the lack of communication with countries of origin aggravates the identification process. There are some cases reported that asylum seekers stayed in Kosovo for years without being deported but also without being granted asylum since their identity could not be verified³⁰⁸.

During their asylum procedure, asylum seekers have the right to be informed by the responsible authorities about the proceedings and the rights they enjoy at all its stages, such as the right to contact UNHCR or other NGOs providing assistance to asylum seekers or the right to a translator³⁰⁹. Especially with regard to the latter problems arise, since often adequate translators for the respective languages are not available. However, asylum seekers usually arrive in groups and generally there is always somebody speaking English³¹⁰.

Asylum applications can be submitted in oral or in written form already when entering Kosovo or at any police station or offices of the DCAM³¹¹. The law on asylum foresees that female asylum seekers are entitled, if possible, to be interrogated by a female officer³¹². After having made an asylum claim, people are entitled to receive identity cards within 7 days from the national authorities³¹³.

If an asylum-seeker approaches the Kosovo Police or Kosovo Border Police they are responsible to transfer him/her to the DCAM. It is the subsequent responsibility of DCAM to transfer the asylum seekers to the Centre for the Admission of Asylum Seekers or any other secure location as determined by DCAM³¹⁴. The regulations and procedures concerning the organisation and work of the Centre for Asylum Seekers as well as the rights and obligations of asylum seekers being accommodated there are set forth in the Standard Procedures of Work for Functioning of the Centre for Asylum Seekers³¹⁵. Although the Centre is rather small it fulfils all the conditions necessary for such a centre and it is one of the best in the region. Today this facility accommodates 106 people who are in the process of verification. Families have the right to be accommodated in one room. Problematically in this regard remains that there is still no possibility for children to go to kindergartens or schools since is no memorandum of cooperation between MIA and the Municipality of Prishtina³¹⁶. Further problems arise with regard to the health care since the Municipality of Prishtina refuses to take the whole responsibility for it arguing that the accommodation of asylum seekers is rather a national issue than a local one³¹⁷.

To date a new centre is under construction which will be opened in June 2011. It is located near to the International Airport of Prishtina and designed to accommodate up to 200 asylum seekers under very good conditions. The EU Commission supported the building of this new Centre under the IPA with an amount of € 1.6 million whereas the government of Kosovo contributed with € 400,000³¹⁸.

³⁰⁷ Interview with Bujar Reshtani.

³⁰⁸ Interview with Sadik Makolli.

³⁰⁹ See Art. 3 of the Administrative Instruction No.04/2010 – MIA, On Procedures and Standards for the Reception and Initial Treatment of Asylum Seekers.

³¹⁰ Interview with Sadik Makolli.

³¹¹ See Art. 16.1. of the Law on Asylum.

³¹² Ibid, Art. 19.

³¹³ Ibid, Art. 50.

³¹⁴ See Administrative Instruction No.04/2010, Art. 6.

³¹⁵ See Ministry of Internal Affairs, *Standard Procedures of Work for Functioning of the Centre for Asylum Seekers*.

³¹⁶ Interview with Sadik Makolli.

³¹⁷ Interview with Bujar Reshtani.

³¹⁸ Ibid.

The rights and duties of asylum seekers as provided by the Law on Asylum are further specified in the Administrative Instruction on the Rights and Obligations of Asylum Seekers. According to this legal framework asylum seekers have the right to reside in the Republic of Kosovo until their asylum procedure is decided. Generally asylum seekers are free to move within the territory of Kosovo. This right to free movement can only be restricted by an official decision if the identity of the asylum seeker still has to be determined, or to prevent the spread of infectious diseases or if there are reasonable grounds to believe that the asylum seeker is a threat to national security or the public order³¹⁹.

Asylum seekers are also entitled to decent living conditions, basic health care, basic social assistance, unpaid legal assistance, and humanitarian assistance as well as to the right to education and right to work³²⁰. Furthermore personal data collected during the asylum procedures are protected by the Law on the Protection of Personal Data strictly forbidding that the information gathered are forwarded to the state of origin of the asylum-seeker, the persons already granted asylum or person granted complementary or temporary protection³²¹. Special emphasis is put on the protection of minor asylum seekers whose applications have priority status³²².

Officials of the Division on Asylum decide in the first instance³²³ whether asylum will be granted, whereas they have to base their decision on all the information gathered throughout the interviews conducted. The UNHCR has criticised this procedure arguing that there is a need for a more specific organ dealing with asylum applications in the first instance since this responsibility shall not be assigned to individual officials³²⁴. In case asylum is denied the asylum seeker has the right to appeal against it at the National Commission for Refugees. Depending on the findings, the Commission can annul the decision and return it to the first instance for reconsideration or it can decide on its own. In any case it has to decide within 30 days³²⁵. In case asylum or complementary protection is granted identity cards and travel documents have to be issued by the national authorities within 7 days³²⁶.

In the whole asylum procedure the UNHCR plays a crucial role since authorities are obliged to cooperate closely with UNHCR and to notify it the commencement of an asylum procedure without any delay³²⁷. UNHCR supports asylum seekers in Kosovo through the NGO 'Civil Rights Program Kosovo' (CRPK) offering legal assistance to them, provides the officials of the Division for Asylum with country of origin information (eligibility guidance) and promotes the rights of refugees based on the highest international and European standards. UNHCR played furthermore an important role with regard to the drafting of the Law on asylum ensuring that the aforementioned standards on the rights of refugees were included and that the Kosovo legislation is aligned to the *Acquis Communautaire*³²⁸.

Since 2009 there have been 393 applications for asylum. Asylum seekers mainly are coming from Afghanistan, Iran, Iraq, Palestine, Somalia, Tunisia, Syria etc. Till now however, there has been not a single case in which asylum was granted to a person since none of the applicants fulfilled the criteria

³¹⁹ See Law on Asylum, Art. 11.1 and 11.2.

³²⁰ See Law on Asylum, Art. 36. For more comprehensive treatment of this rights see *Administrative Instruction on the Rights and Obligations of Asylum Seekers*, No.5/2010.

³²¹ *Ibid*, Art. 13.

³²² See Art. 20 of the Law on Asylum.

³²³ *Ibid*, Art. 24-26.

³²⁴ Interview with Bujar Reshtani.

³²⁵ Art. 30-32 of the Law on Asylum.

³²⁶ *Ibid*, Art. 50.

³²⁷ *Ibid*, Art. 22.

³²⁸ Interview with Bujar Reshtani.

for a positive asylum decision. Even though most of the applicants firstly indicate that they were political refugees, in all the cases it turned out that the socio-economic situation in their countries of origin was the driving reason for filling an asylum application. Even though it appears rather strange that not a single application was decided positively one has to keep in mind that Kosovo is mainly used as a transit country³²⁹, whereas most of the people come from Greece and try to reach Hungary³³⁰. Since most of the asylum seekers continue their way to Europe undocumented³³¹, without awaiting the final decision on their asylum applications, most of the asylum proceedings are decided in absentia. Only in 11 cases the asylum seeker has been still present in Kosovo. In these cases UNHCR through the CRPK tried to support the asylum seekers to appeal against the negative decisions at the National Commission for Refugees. However, in the meantime when UNHCR tried to convince the asylum seekers to appeal, four of them left Kosovo illegally. Therefore, till now no case has been brought before the Commission³³².

After their asylum claims have been decided negatively, asylum seekers have 15 days to appeal or to leave the country voluntarily. As already mentioned, most of the asylum seekers continue their journey to the EU in an undocumented way. Consequently, the numbers of people being actually deported by the authorities of Kosovo are rather small³³³. For those who have been repatriated after their asylum claim has been decided negatively, no cases of mistreatment in their countries of origin have been reported³³⁴.

Once asylum is been granted, people with asylum status have the right to move and reside freely in Kosovo, to receive social assistance, basic accommodation, basic health care, and assistance to integrate them into society. Furthermore, like nationals, they enjoy *inter alia* the right to education, the freedom of thought and belief, the right to work, the right to family re-unification, the right to free access to courts and legal assistance, the right to property and the right of association. Consequently, all people with asylum status or who enjoy complementary protection are protected the same way as the citizens of Kosovo³³⁵.

Country specific problems – Readmission and repatriation

After the war ended in 1999, migratory movements in Kosovo were mainly shaped by return and repatriation. Even though some progress has been made already, the latest EU Progress Report on Kosovo points out that capacities dealing with forced returnees need to be strengthened further³³⁶.

The return and repatriation movements includes people who returned voluntarily (especially in the aftermath of the war) and people who were forced to return, for instance if they have been deported from Western European countries since they were not granted asylum or other forms of a permanent legal status³³⁷. Even though problems may arise as well with people voluntarily returning to Kosovo, they cannot be compared with the problems related to forced return. Today, one of the most discussed issue also with regard to human rights, is the issue of deported returnees from Western Europe. Between 2007 and 2009 6,912 people, out of it 5,877 Kosovo Albanians and 1,035 belonging to one of the minorities in Kosovo have been returned forcibly from Western Europe countries. With regard to readmission, Kosovo has not yet concluded a readmission with the EU per se since five of its

³²⁹ Interview with Bujar Reshtani.

³³⁰ Ibid.

³³¹ Interview with Sadik Makolli.

³³² Interview with Bujar Reshtani.

³³³ Ibid.

³³⁴ Interview with Islam Cakaj.

³³⁵ See Law on Asylum, Art. 40. For more detailed explanation of all these rights see Art. 41-49.

³³⁶ See *Kosovo 2010 Progress Report*, p. 51.

³³⁷ See Vathi, Z. and Black, R., 2007, p. 12-13.

members are still not recognising Kosovo as a state. However, bilateral readmission agreements have been signed with Germany, Switzerland, France, Denmark, Austria, and Albania and are negotiated with Norway, Belgium, Netherlands, and Luxembourg³³⁸.

Even though there is no general EU readmission agreement there is an oral agreement between the authorities in Kosovo and the EU in place foreseeing that not more than 5,000 people can be returned or repatriated per year³³⁹. This agreement has been at least to a certain extent fulfilled by the EU. As official numbers of the MIA show, in 2010 5,198 people have been returned and repatriated from the EU. However, out of this number 2,103 people have returned voluntarily and 'only' 3,095 have been returned forcibly³⁴⁰. Out of the 5,198 returned persons 4,017 were Albanians, 269 Serbs, 448 Roma, 216 Ashkali, 66 Bosniaks, 96 Gorani, and 13 Turks and 4,013 were males and 1,095 females³⁴¹. Germany ranks number one when it comes to the return of nationals of Kosovo in 2010 with 935 deported people, closely followed by Austria with 898, Sweden with 793, Swiss with 736, France with 377, Hungary with 328, Norway with 274, Belgium with 220, Finland with 213, etc³⁴².

Forced return and repatriation have a profound impact on basic human rights of persons since they might interfere with the right of housing, right to work, right to education, right to health care and right to family life since Kosovo often is not able to guarantee returnees even their basic needs. Furthermore, reintegrating returnees, in particular those belonging to a minority, is a very challenging process requiring the cooperation of various national authorities³⁴³. However, human rights violations do not only occur once people are returned but also already before. For instance, special problems arise with regard to the treatment of nationals of Kosovo in Hungary. Since Hungary is used as a transit country to reach the really prosperous European states many nationals from Kosovo are caught and held in detention centres there. Many of those finally returned to Kosovo reported about the miserable conditions of the detention facilities and that they had to face physical abuse by Hungarian officials³⁴⁴.

As already mentioned, all deported returnees face obstacles; however, the problems arising with regard to returnees belonging to a minority are even more severe. In particular Roma, Ashkali and Egyptians (RAE) find themselves in a very difficult position once returned to Kosovo since their human rights, enshrined at the national as well as at the international level, are violated on a regular basis. For instance, it is very difficult if not even unlikely for people belonging to the RAE to obtain personal documents, to repossess their property or to obtain housing. Additionally, returnees of these minorities often are denied access to education, the healthcare service, the labour market to find employment and to have social welfare. All these already miserable circumstances are aggravated by the fact that returnees are often separated from their families remaining in the foreign countries, even though Kosovo's authorities are very sensitive with regard to family separation and do not accept cases where this might occur.

Figures from Human Rights Watch and UNHCR show that between January 2003 and April 2010 2,151 RAE citizens of Kosovo have been forcibly returned by European states. In the same time 8,160

³³⁸ Interview with Kreshnike Shatri.

³³⁹ Interview with Kemajl Shariqi.

³⁴⁰ MIA and DCAM, Division for Migration, *Statistics January-December 2010*, 2010, p. 1.

³⁴¹ *Ibid*, pp. 4-6.

³⁴² MIA and DCAM, 2010, pp. 8, 9.

³⁴³ Interview with Kreshnike Shatri.

³⁴⁴ Interview with Kreshnike Shatri.

people returned voluntarily receiving financial support by the government from the country they are leaving or by various organisations such as IOM, URA etc³⁴⁵.

IOM conducts a programme called Assisted Voluntary Return and Reintegration Programme which is mainly focused on voluntarily returned and is mainly financed by hosting countries. IOM already supports the returnee before his/her departure in the hosting country with pre-departure and counseling assistance and transportation. After the arrival in the country of origin, IOM organises the reception, the onward transportation to the final destination and, if necessary, first medical assistance. With regard to the reintegration of the returnee IOM's support includes the setting up of small businesses, job trainings, employment opportunities through referrals, vocational training courses, business trainings and educational support, social care, housing, medical support, school fees for children, etc³⁴⁶. The IOM programmes are thus mainly oriented towards the economic start for voluntarily returned people. Till now France was the most generous donor giving up to € 4,000 for the creation of a business whereas Germany only supports returnees by paying them € 450-700 cash by using IOM as disbursing institution. According to IOM officials, start-up businesses are a quite success story and support the social reintegration of returnees profoundly. Furthermore they point out because of the financial assistance, there were no indications or reported discriminations of voluntarily returned people upon their accommodation to their places of origin³⁴⁷.

Generally, the process of return is monitored by UNHCR, through the Kosovo NGO Advocacy and Training Research Centre (ATRC), at the Prishtina International Airport. With regard to the reintegration of returnees UNHCR is not really involved in the socio-economic support for returnees. However, if needed it supports them with legal aid through the Kosovo NGO CRPK³⁴⁸.

Both the practice of the EU to forcibly return people to Kosovo and the inability of the authorities of Kosovo to provide returnees with proper accommodation and to implement the strategies and laws adopted dealing with return and repatriation have been widely criticised by the CoE Commissioner on Human Rights, Human Rights Watch, and the European Parliament. Special emphasis was put again on the vulnerability of people belonging to the RAE minorities³⁴⁹.

For instance, the European Parliament expressed its concerns about the impacts of deportations in its Resolution of 8 July 2010 on the European Integration process of Kosovo urging the Commission to step up with *ad hoc* assistance programmes for forced returnees³⁵⁰. However, insofar the EU has not funded any project related to deported and returned people from the EU Member States to Kosovo. In April 2010 a motion on the aforementioned resolution was prepared by Ulrike Lunacek, the current Kosovo Rapporteur on behalf of the Parliament's Committee on Foreign Affairs, which stated that 'Kosovo is not yet in position to provide proper conditions to reintegrate forcefully repatriated Roma and urges the Member States to stop carrying out this practice'³⁵¹.

³⁴⁵ See Human Rights Watch, *Rights Displaced*, pp. 23-39. See also interview with Kreshnike Shatri.

³⁴⁶ IOM, *Assisted Voluntarily Return and Reintegration Programmes*, for further information see <http://www.iom.int/jahia/Jahia/activities/by-theme/regulating-migration/assisted-voluntary-return-and-reintegration/cache/offonce/georgian-migrants>.

³⁴⁷ Interview with Sheremet Kukaj and Habib Habibi.

³⁴⁸ Interview with Bujar Reshtani.

³⁴⁹ For this issue see particularly Human Rights Watch, *Rights Displaced: Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo*, 2010; See also Thomas Hammarberg, *European Migration Policies Discriminate against Roma People*, 2010, Para. 28.

³⁵⁰ See Resolution of 8 July 2010, Para.28.

³⁵¹ See European Parliament and the Committee on Foreign Affairs, Motion for a Resolution to Wind up the Debate on Statements by the Council and Commission Pursuant to Rule 110(2) of the Rules of Procedure on the European Integration Process of Kosovo, Ulrike Lunacek on behalf of the Committee on Foreign Affairs, B7-000/2010, 27 April 2010.

Furthermore, the UNHCR called in its last Eligibility Guidelines 2009 upon states not to deport people belonging to a minority to Kosovo³⁵². It stated more precisely that Roma, but also Albanians and Serbs living in areas where they are considered as a minority, 'continue to face serious restrictions to their freedom of movement and the exercise of fundamental human rights, including serious societal and sometimes administrative discrimination that would limit in particular their ability to exercise their political, social and economic rights'³⁵³. For Ashkali and Egyptians it states that their claims should be assessed carefully in order to evaluate whether there is a need for international protection³⁵⁴. According to this Eligibility Guidelines other groups that are considered at risk are persons of ethnically mixed marriages and of mixed ethnicities, persons perceived to have been associated with the Serbian authorities after 1990, victims of trafficking, victims of domestic violence and persons whose claims are based on sexual orientation³⁵⁵. While in principle UNHCR is not putting pressure on states not to return people who do not fulfil the required criteria for getting asylum or a permission to stay in the respective state, its policy stresses that at least each case has to be evaluated individually³⁵⁶.

However, European states continued to forcibly deport people belonging to a minority to Kosovo. When UNMIK was still in charge, returns of Roma have sometimes been refused on the basis of the UNHCR Guidelines. Today, Kosovo's authorities do not follow anymore the screening process foreseen by the UNHCR, and do not object to deportations of Roma from Western Europe states. Whereas, for instance, Human Rights Watch explains this behaviour by the efforts of Kosovo to establish good relationships with Western Europe³⁵⁷, Kosovo authorities argue that they cannot apply different rules for one group of people. A differentiation would divide the citizens of Kosovo because of their ethnicity. Furthermore they state that minority issues are generally treated in a very sensitive way and that never somebody has been send to a place where his/her life was in danger. Up to date there is only one reported case that a person belonging to the Roma minority was in fear of being returned to his birth place³⁵⁸. In this regard it has to be mentioned however that UNMIK due to its complex mandate and its appearance as a government and a UN mission at the same time, had nearly unlimited possibilities to receive confident information about each individual from the requesting states. It therefore could assess whether the security of a person or of his/her family was at risk because of ethnic and racial grounds and was therefore in the position to refuse to accept return requests. Kosovo cannot obtain the same information, since this would be considered as a breach of confidentiality according to international law.

Due to the precarious situation of returnees at the ground and the increasing European pressure to develop strategies to readmit deported nationals, Kosovo adopted corresponding strategies and laws governing this sensitive issue. For instance, in 2007 'Strategy for the Reintegration of Repatriated Persons' was adopted. However, it proved to be dysfunctional a no organisations were foreseen to implement it. Furthermore, there were no funds allocated to implement it and coordination between the local and the national level did not exist. The OSCE pointed out that many municipalities were not even aware about the Strategy and lacked general knowledge about their own responsibilities with

³⁵² See UNHCR, *UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Individuals from Kosovo*, HCR/EG/09/01, 9 November 2009.

³⁵³ See UNHCR, *UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Individuals from Kosovo*, 9 November 2009, HCR/EG/09/01, pp. 17-18.

³⁵⁴ Ibid.

³⁵⁵ UNHCR, 2009B, pp. 18-20.

³⁵⁶ Interview with Bujar Reshtani.

³⁵⁷ See Human Rights Watch, *Rights Displaced*, pp. 32-37.

³⁵⁸ Interview with Kemajl Shaqiri and Kreshnike Shatri.

regard to returnees and repatriated people³⁵⁹. UNHCR and ECLC pushed thus for a revision of the Strategy aimed to make it Implementable. In May 2010 it has been finally revised with a new established mechanism and € 3.6 million provided by the government of Kosovo³⁶⁰.

The Strategy entails a plan which steps Kosovo institutions should undertake in a short term period in order to accommodate returnees. As a first step the authorities shall provide the arriving returnees with assistance, including medical checks, the issuance of temporary documents and information, preferably fact sheets, which further procedures the returnees can expect. The MSWL is obliged to guarantee and provide for transportation of the returnees to the places they want to go. If it is needed the MSWL has to organise temporary accommodation facilities up to seven days. In this regard the strategy foresees the improvement of the cooperation and coordination between the MSWL and municipalities in order to facilitate the process of return and the integration of returnees³⁶¹.

The Strategy further foresees deals with long term solutions how returnees can acquire their personal documents, how they can benefit from the health care and social welfare system, or how they can have access to the labour market and to education (in this regard vocational trainings are emphasised)³⁶². Furthermore it specifies some actions the authorities of Kosovo should take in order to protect vulnerable groups, e.g. victims of trafficking, single mother households, children without parental, abandoned children, children without parental care, abused children, children with special needs, elderly persons without family care, persons with mental disabilities and persons without family care³⁶³.

To accomplish the aims set forth, the Strategy provides for a clear organisational structure with clearly divided competences and duties of the ministries in charge. Additionally, a board, the Inter-ministerial Coordination Board, was set up to coordinate the implementation of the strategy³⁶⁴. For this purpose the government provided the aforementioned € 3.6 million for 2011 and € 500,000 for the year 2010³⁶⁵. The Board decides how this money will be distributed among the municipalities based on projects they submit. The money insofar is mainly spent for food items as well as on shelter and accommodation (up to 6 months). Still, municipalities are very reluctant to submit projects. Till today only 14 projects have been submitted and out of this 12 came from a single municipality, namely Gjakova. This proves that the communication between the municipalities and the central government still has to be improved³⁶⁶.

However, there are some small signs of improvement with regard to the coordination between different institutions that work in the field of return and repatriation. All returned and repatriated people are for instance registered at the Office for Reintegration located at the Prishtina Airport. This office immediately informs DCAM, the Secretariat of the Board and also the Officers for Return and Communities of the municipalities about the newly arriving returnees. Comparing to the past the communication on this line has been improved significantly³⁶⁷.

In April 2010 the established mechanisms for the reintegration of repatriated persons have been assessed by the government and recommendations have been made how to improve them further.

³⁵⁹ See OSCE, *Implementation of the Strategy*, pp. 4-7.

³⁶⁰ Interview with Bujar Reshtani.

³⁶¹ See *Revised Strategy for Reintegration of Repatriated Persons*, 2010, pp. 9-14.

³⁶² *Ibid*, pp. 15-24.

³⁶³ *Ibid*, pp. 24-28.

³⁶⁴ *Ibid*, pp. 32-35.

³⁶⁵ Interviews with Kemajl Shaqiri and Kreshnike Shatri and with Bujar Reshtani.

³⁶⁶ Interview with Sheremet Kukaj and Habib Habibi.

³⁶⁷ *Ibid*.

As a consequence of these recommendations the Law on Readmission has been adopted, the Strategy on Reintegration of Repatriated Persons has been revised, a fund for reintegration or repatriated persons has been established and bilateral readmission agreements with several EU Member States have been concluded. The recommendation of the government to conclude a readmission agreement with the EU per se have, due to the already described reluctance of five Member States to recognise Kosovo as a state, could not be fulfilled insofar. Furthermore, there is still a need to build capacities at the state and the local level to address in a more efficient way the process of repatriation, to improve the communication and coordination between local and central institutions, and to improve the communication with requesting states especially with regard to the exchange of information on potential challenges or shortages of returning people forcibly³⁶⁸.

Besides the Strategy on the Reintegration of Repatriated Persons a new Law on Readmission has been adopted on 25 June 2010 that makes Kosovo the only state in the world having a law on readmission in place³⁶⁹.

The Law on Readmission sets out the rules and procedures for readmitting a person who is either a citizen of the Republic of Kosovo or a foreigner and who does not has an appropriate legal status to remain on the territory of the requesting state³⁷⁰.

After receiving a readmission request by a requesting state, the DCAM has to confirm whether the person who is subject to this request is already a citizen of Republic of Kosovo or might acquire citizenship because he/she fulfils the eligibility criteria for citizenship set forth in the Law on Kosovo Citizenship³⁷¹. Furthermore, foreigners have to be readmitted in cases they have a valid visa and/or another official document allowing him/her to reside legally on the territory of the Republic of Kosovo if they do not possess a valid visa and/or any other document that would allow him/her to enter and/or stay in the territory of the requesting state³⁷². Within 30 working days upon receiving the request, the DCAM has to take a decision on the readmission and has to inform the requesting state in written form about it³⁷³. In cases the DCAM does not meet this deadline, the readmission will be considered as being granted. When a person who is subject to the readmission is in a possession of a valid travel document, the DCAM shall inform the requesting State of its decision within 3 working days after receiving the request. The readmission of returnees is conducted at official border crossings of the Republic of Kosovo³⁷⁴.

II. The EU and Kosovo's Migration Policies

The role of the EU in supporting the development of migration policies in Kosovo is twofold.

The first component is that through supporting Kosovo in the drafting of laws and strategies in the field of migration through twinning projects located at the Ministry of Internal Affairs, the EU ensures that these laws and policies are aligned to the *Acquis Communautaire*. Since many laws dealing with migration are right now in the process of being amended EU experts continue to support the government of Kosovo with their advice and expertise. However, even though the EU has a strong

³⁶⁸ See MIA of the Government of the Republic of Kosovo, *Assessment of the mechanism for reintegration of repatriated persons*, April 2010, p. 5.

³⁶⁹ Interview with Kemajl Shaqiri.

³⁷⁰ See Art. 1 of the Law on Readmission, No.03/L-208, June 2010.

³⁷¹ See Art. 5 of the Law on Citizenship of Kosovo, No.03/L-034, February 2008.

³⁷² *Ibid*, Art. 7.1.

³⁷³ *Ibid*, Art. 7.

³⁷⁴ *Ibid*, Art. 9.

interest that the laws are already drafted in accordance with the EU *acquis* it remains rather flexible since Kosovo is still in the early stages of the pre-accession process³⁷⁵.

Since the Republic of Kosovo is not recognised as a state by all EU Member States, the EU has set up a specific stabilisation-association process for it named the Stabilisation Association Process Dialogue (SADP). Within a year there have been six sectoral SADP meetings between the EU and Kosovo institutions, whereas developments in the field of migration have been discussed within the Justice, Freedom and Security Committee. However, till now human rights issues have not been addressed during the examinations of the migration policies during these meetings. From the side of Kosovo it was urged that it would be very useful to include a human dimension in the migration debates³⁷⁶.

Secondly, the EU is able to engage in the development of migration policies of Kosovo through the EULEX mission. Whereas the above mentioned engagement is rather focused on the development of policies and laws, EULEX tries to improve the efficiency of the implementation of the respective laws and policies. EULEX officials support thus their colleagues from the DCAM when it comes to apply and respect the procedures set forth in legal framework dealing with migration policies. In this regard EULEX has an important role with regard to the capacity building in the field of migration³⁷⁷.

The EU is however still very keen to continue the cooperation with Kosovo in the field of return and readmission which became a precondition for the visa liberalisation process between the EU and Kosovo³⁷⁸. Because there are still considerable problems arising related to the political status of Kosovo, the prospect of the process of visa liberalisation is quite blurred. After visa liberalisations were put in place for Serbia and Macedonia the number of Kosovo citizens entering EU and asking for asylum status not only based on political but rather on personal grounds (family violence, vendetta, etc.) increased. This process has alarmed many EU Member States, which sent attaches and delegations to verify these allegations³⁷⁹. The EU and its Member States remain very sensitive with regard to illegal migration from Kosovo to the EU. Consequently, it is not the only priority for the EU that Kosovo develops a comprehensive framework with regard to migration but it also emphasises the need that Kosovo develop functioning mechanisms that will stop the flows of migrants aiming to reach the territory of the EU.

III. Conclusion

Only in the last years Kosovo has been confronted increasingly with immigration and emigration issues and its migration policy and the migration legislative in place is rather in its early stages. Since Kosovo today presents a transit route to the EU the numbers of labour migrants coming to Kosovo increased since 1999 whereas an increase of asylum applications was only observed after 2009.

Kosovo only recently has developed a comprehensive legal framework encompassing the laws on foreigners, asylum-seekers, returnees, border-management, citizenship etc dealing with the most sensitive issues of migration. The general perception is that this legal framework is quite good and modern however, lots have still to be improved. Particularly the fact that all the laws have been drafted and approved under a rush without a proper debate in the parliament makes their revision necessary. Currently, most of them are now being amended.

The legal framework formally is totally in compliance with international human rights standards. However, due to the lack of experience and the lack of capacities there are still shortcomings when it

³⁷⁵ Interview with Emmanuel Cohen-Hadria.

³⁷⁶ Ibid.

³⁷⁷ Interview with Emmanuel Cohen-Hadria.

³⁷⁸ Ibid.

³⁷⁹ Interview with Emmanuel Cohen-Hadria.

comes to the implementation of the laws in place. Nevertheless, it seems Kosovo's officials are very cautious when it comes to the respect for human rights envisaged by the laws in place. Insofar have been no major complaints that Kosovo's authorities are breaching human rights standards while applying these laws and policies.

In the context of the development of migration policies, the issue of readmission and the forced return of people from Western European countries to Kosovo are highly disputed. Even though Kosovo has developed a legal framework to deal with readmission, the integration of forcibly returned person is falling behind and major human rights violations occur in this regard. Human rights organisations as Human Rights Watch but also the CoE have assailed one the one hand EU Member States for not abstaining from returning people to Kosovo. On the other hand Kosovo's institutions have been criticised for not being prepared to properly integrate returned persons. Still, the EU and its Member States continue to consider readmission and return as a precondition for the visa liberalisation process.

The EU engagement with regard to the development of migration policies is mainly focused on drafting laws and policies tending to align the legal framework to the EU *acquis*. Furthermore, EULEX is supporting the implementation of these laws emphasising the compliance of human rights standards envisaged. Problematically in this regard, the various EU missions (EULEX, ELCO and EUSR) and the other international missions in Kosovo are often overlapping in their work leading to a confusion of the institutions of Kosovo and they consequently lack efficiency and the EU loses its influence.

ANNEX 3: CASE STUDY LEBANON

I. National migration policies and its impacts on human rights

I.1. Legislation and Practice in Lebanon

Lebanon is a dynamic country with respect to outward and inward migration trends. While the former is intertwined with past inter-communal strife and ongoing socio-economic and political crises, the latter is mainly composed of refugees, asylum seekers, and of temporary labour migrants. In fact, the country has such established temporary labour schemes with neighbouring countries (i.e.: Syria), non-Asian as well as non-African and African countries (i.e.: Egyptian, Syrians, Iraqis, Sudanese, etc.). According to the country migration profile produced by the Consortium for Applied Research on International Migration (CARIM) in January 2010, '*Lebanon remains an important destination country for migrant workers*'.

The key governmental agencies managing migration are the Ministry of Interior (also General Security), the Ministry of Labour, and the Ministry of Social Affairs. These three authorities are in charge to implement the national strategy for immigration, which revolves around the following principles:

- Regulate immigration with regard to the admission, residency and work permits of foreign nationals and migrant workers;
- develop actions with international organisations so as to mitigate irregular and transit immigration;
- reduce the number of undocumented workers by apprehending, regularising and deportation procedures;
- identify refugees; devise action plans with regard to their presence and stay in Lebanon or with regard to their resettlement; coordinate with international organisations in respect to Palestinian and Iraqi refugees'³⁸⁰.

It is worth mentioning at this stage that the drafting of this case study started in the second week of January 2011, which was marked by the collapse of the coalition government on January 12, 2011. The events resulted in an atmosphere of insecurity across the country, namely within and around governmental agencies and official institutions, which made the interviewing process very challenging³⁸¹. Field reports recorded, *inter alia*, a series of challenges in terms of this insecurity, a varied level of cooperation among the concerned parties (embassies, organisations etc...), as well as difficulties in accessing official statistical data.

I.2. Migrant workers

I.2.1. General remarks

Despite the richness of the country in temporary migrant workers schemes, the regulatory frameworks remains poorly developed and tailored to the continuously changing governmental policies. CARIM's Lebanon profile informs that the country 'has come under fire in the last decade for undermining immigrants' rights (encompassing migrant workers and refugees)' ³⁸². Lebanon is still behind in terms of codifying key legal instruments such as the United Nations International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families and falls thus outside the realm of international responsibility towards the protection of migrant workers' rights. Furthermore, the

³⁸⁰ L'Ethiopie pour un protocole réglementant le travail des employés de maison, L'Orient Le Jour, 5 October 2010.

³⁸¹ One of our field researchers struggled to travel across Bechara El Khoury due to the mass gatherings of opposition constituencies in Beirut neighborhoods of Tayyouneh, Zaraq al-Blat, Ras al-Nabeh and Bechara al-Khoury for instance.

³⁸² See http://www.carim.org/public/migrationprofiles/MP_Lebanon_EN.pdf.

country's bouncing political priorities and the tight association of the issue of labour migrants with sensitive matters such as that of the Palestinian refugees, delay legislative reforms from taking place.

In fact, the Lebanese legislative framework pertaining to the entry and exit of foreign nationals as well as to the access to nationality goes back to the 1960s (1962 and a 1960 amendment to the 1925 regulation respectively). Both issues have been since then topics of ongoing political discussions and executive actions due to their sensitivity and their potential effects on the fragile stability of the multi-confessional state.

The Law governing the entry of foreigners, their stay and their exit from Lebanon, issued on July 10, 1962, requires the approval of the Ministry of Labour and Social Affairs prior to foreigners' entry for employment³⁸³. It also provides for the freedom of mobility of all foreigners legally residing in Lebanon. It specifies one-entry or multiple-entry authorisations for a six-month period, extendable to one year, while the residency card is issued for one year, extendable for three years. Foreigners shall be deported in case the Lebanese authorities consider them as a danger to national security. The law also provides for penalties on illegal entries while it grants a two-month grace period to legalise residence.

The implementation of the above-mentioned Law is specified in two additional legislative documents: the legislative decree No.10188 of 28 July 1962³⁸⁴ as well as the Minister of the Interior's Decision n°320, 2 August 1962, on the control of entry and exit from Lebanese border posts³⁸⁵. General provisions for the entry/exit and circulation of foreigners in Lebanon include no visa requirements for Jordanians and the Gulf Cooperation Council³⁸⁶. Women from Indonesia, Guinea and Sierra Leone are not allowed to work as servants. The entry of artists is submitted to the authorisation by the General Security Direction.

Such restrictions seem to be discriminatory against specific groups of foreign domestic workers. In fact, visas are not granted to females from Indonesia, Ghana and Sierra Leone to work as maids due to some domestic legislation in their home countries, forbidding them to work in this field. To receive a tourist visa, they need approval from the general directorate of the General Security prior to their travel. The Lebanese General Security website informs about the existence of decrees in both Indonesia and Sierra Leone which do not allow the women to emigrate to Lebanon to work as servants there³⁸⁷. The in principle discriminatory measure could be thus regarded as rather protective mechanism against the well advertised violations of the rights of foreign domestic workers in the country.

The chart below presents the number of labour visas granted by the Ministry of Labour in 2009, according to Adel Doubian, Chief of the Legal Unit at the Lebanese Ministry of Labour

³⁸³ See <http://www.carim.org/public/legaltexts/LEB00241.pdf>.

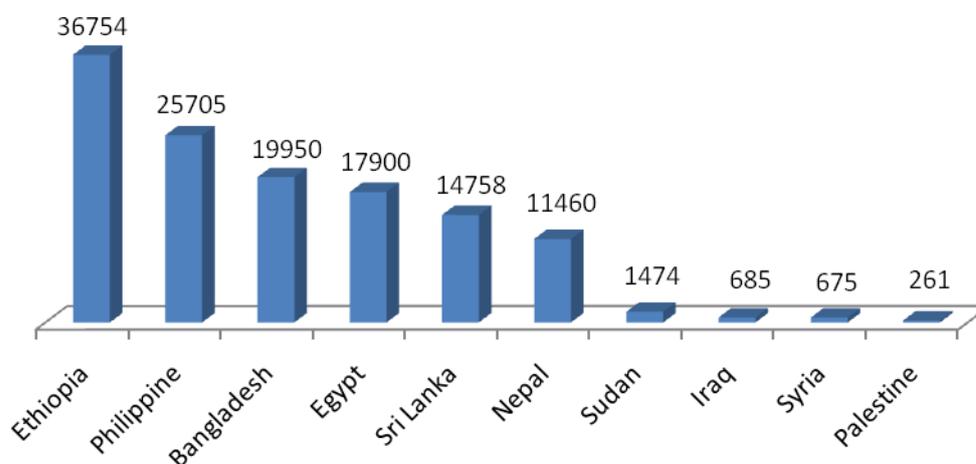
³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ For further specifications see *ibid.* 'A free one-month visa is issued at airports and frontier posts to nationals from 80 non-Arab countries and only at airports to nationals from 11 Arab states and 3 African states. 6 to 11 months visas are delivered to some categories of foreign nationals (company leader, investors, etc). Workers Entry submitted to an authorization of the Ministry of Labour and of the General Security Direction. List of countries whose nationals have easier access to Lebanon. Syrian nationals enter with their identity card.'

³⁸⁷ See www.general-security.gov.lb/English/Entrance%20Visas/Pages/workvisa.aspx.

Figure 3. Number of Work Visas Granted by MoL according to Nationalities (2009)



I.2.2. Policies on migrant workers

In the more specific case of Migrant Domestic Workers (MDWs), the Lebanese Labour Code of 1964 equally excludes Lebanese and migrant domestic workers from its terms. This implicates that domestic workers do not enjoy the basic rights of other types of workers such as minimum wage, maximum daily working hours, fair rest and leaves etc. This leaves migrant domestic workers under the mercy of contractual arrangements, if such exist, generally administered between the employer and the worker.

Lebanon has been pressured by international organisations, embassies of the countries of origin and others as well as by other actors such as civil society organisations to reform to its labour laws, and in particular the legal provisions governing migrant labour³⁸⁸. Jureidini³⁸⁹ outlines five measures through which the Lebanese government attempted to improve the existing framework of labour migration. The first measure was banning the process of 'releasing' a foreign worker from one Kafel³⁹⁰ to the other in 1998. As a second step the costs for a visa were reduced from \$ 250 to \$ 24. The third step was to establish a complaint procedure for migrant workers, while the fourth comprised of the development of a computer data base saving the names of all immigrants in Lebanon as well as their addresses. The fifth measure was an amnesty from 2000 till 2001 allowing all illegal residents in Lebanon to apply for residency or depart the country without consequences.

In 2007, Lebanon signed the International Convention on Labour Law. The recently collapsed cabinet had been working on drafting a new labour law implementing the standards foreseen by the ILO Convention. Together with the governmental collapse, the hopes of migrant workers have collapsed, as have those of the Lebanese people entrusting the government to create enough working places for both nationals and migrant workers.

³⁸⁸ The Universal Periodic Review report shows that the countries of origin like Bangladesh and Sri Lanka and other concerned countries like Canada, Norway and Brazil have requested Lebanon to improve the working conditions of migrant workers and include them in the jurisdiction of Labour law.

For further information see <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/102/11/PDF/G1110211.pdf?OpenElement>.

³⁸⁹ Jureidini, R., *International Migration Papers 48: Women Migrant Domestic Workers in Lebanon*, International Labour Office, Geneva, 2002; Jureidini, R., *In the Shadows of Family life: Toward a History For Domestic Service in Lebanon*, Journal of Middle East Women's Studies, Vol. 5, No. 3, Fall 2009, pp. 74-101.

³⁹⁰ System of sponsorship originally aimed to control entrance into a country.

However, some efforts have been made to improve the situation of migrant workers and in particular the situation of Migrant Domestic Workers (MDW). In 2009, the Lebanese Ministry of Labour introduced a compulsory unified labour contract clarifying certain areas and terms of recruitment for MDWs. According to Human Rights Watch the unified labour contract constitutes:

'A step forwards in protecting MDWs because it outlines the responsibility of the employer to: pay the full salary on a monthly basis with receipts of payment; provide a 24-hour rest period each week and paid sick leave; buy health insurance for employees, and allow workers to correspond with their family. It also restricts the maximum number of daily working hours, and prevents employers from compelling MDWs to work in more than one house.' (Human Rights Watch 2010 report)³⁹¹.

Unfortunately, the newly standardised contract is neither ideal in content nor in practice. On the one hand, it maintains the right of the MDW to leave the house pending the approval of the employer; it neither does forbid the employer from taking possession of the MDW's passport. Further, it explicitly favours the employer in cases of breaching the contract making the MDW's position even more vulnerable. In fact Articles 16 and 17 provide for wide opportunities of the employer to terminate the contract while the possibilities of migrant workers are strictly limited with regard to the dissolution of a working contract. Furthermore, the unified labour contract does not foresee an institutionalised mechanism ensuring the proper implementation of the contract and a penalty scheme facilitating legal redress for the violation of the rights enshrined.

The Human Rights Watch 2010 report 'Without Protection'³⁹² outlines further problems MDWs have to face. The main problems and abuses encompass: unpaid and/or underpaid wages; confiscation of passports; compulsory confinement and restricted communication with fellow workers or families in their home countries; heavy workload (working hours can reach beyond 60 hours per week); food deprivation and inadequate living and working conditions; psychological, physical, and sexual abuse; as well as abuses by recruitment agencies mainly through the monopoly of salaries in particular in the first couple of months³⁹³. These problems were also highlighted by the representatives of the migrant workers' embassies during interviews. According to them, the aforementioned atrocities that present a clear violation of international human rights instruments, such as the ICCPR, the ICESCR or the CAT, are the main reasons for many MDWs to 'run away'. However, their escape often ends in the conviction as thefts or as having breached their employment contract illegally, deportation, or even death. In fact, between January 2007 and August 2008, 'at least 95 migrant domestic workers have died in Lebanon [...]: 40 deaths are classified as suicides; 24 migrant workers fell from high buildings in an attempt to flee their employers, and 14 domestic workers died because of diseases or health issues'³⁹⁴.

The vulnerable position of migrant workers is aggravated by the fact that the Lebanese judicial system is not in favour of their rights. In fact, the quasi or sometimes total absence of access to communication facilities prohibits them from contacting relevant authorities to report violations against them. Moreover, the timely limited employment of migrant workers compared to lengthy judicial processes, in addition to the sponsored or 'kafeel' system in the case of MDWs, makes them reluctant to file a complaint against their employer and since they have to fear expatriation. In case MDWs are expatriated, they have to pay their flights back home themselves, or they will be detained by the General Security. In case they file a complaint, they still have to face further obstacles such as the

³⁹¹ See Human Rights Watch, available at: <http://www.hrw.org/en/reports/2010/09/16/without-protection?print>.

³⁹² Available online at: <http://www.hrw.org/en/reports/2010/09/16/without-protection?print>.

³⁹³ See <http://www.hrw.org/en/node/93004/section/6>.

³⁹⁴ See Human Rights Watch, *Lebanon: Migrant Domestic Workers Dying Every Week*, News Release, August 24, 2008, available at: <http://www.hrw.org/en/news/2008/08/24/lebanon-migrant-domestic-workers-dying-every-week>.

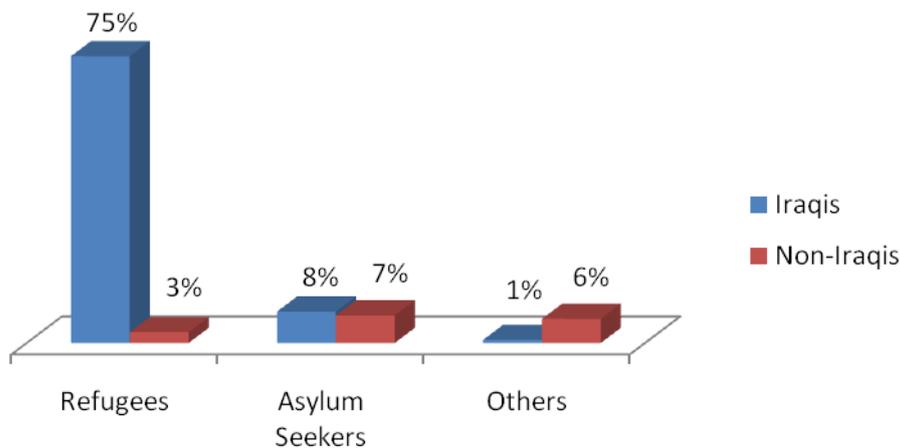
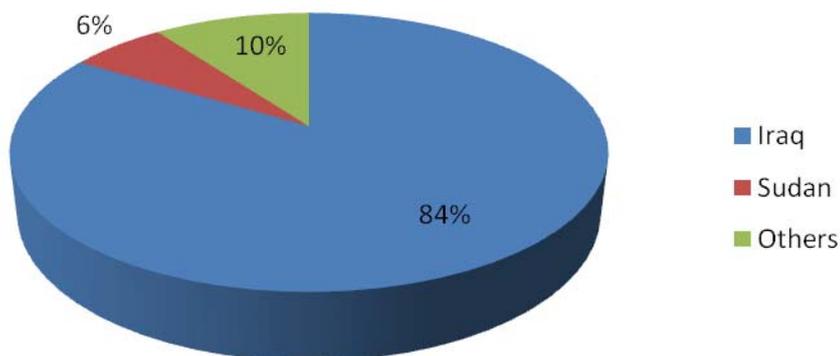
absence of translators when filing the complaint, the frequent abusive practices during interrogation, as well as the lack of defensive lawyers and the high cost of their services.

Until now, the Lebanese government has only made slow progress with regard to the protection of temporary migrant and the efforts made have not been aligned to international guidelines. There is a clear gap between the international guidelines provided for in international conventions and multilateral frameworks for the regulation of labour migration schemes and the formal realities in Lebanon. In their majority, international conventions and legally binding instruments call for the formulation of adequate domestic rules and regulations, which aim to regulate labour migration schemes and monitor violations against migrant workers. The Lebanese practice to marginalise the rights of migrant workers is in direct violation to the right to fair and equal treatment of migrants compared to nationals before the law. Further, the lack of a national strategy offering a comprehensive plan to manage labour migration in Lebanon minimises the impact of the attempts made by non-governmental or international organisations to improve the situation of this particularly vulnerable group.

Other major problems are related to the lack of proper information and data with regard to labour migration in Lebanon. The challenges we faced in accessing accurate information addressing temporary foreign workers in Lebanon mirror the countries failure to collect, integrate, and disseminate such information. The ILO conventions ratified by Lebanon call upon increased coordination between the different stakeholders in order to exchange information and formulate accordingly adequate educational programmes to increase the knowledge of migrant workers, employers and other relevant players on their respective rights, obligations and the tools established to monitor them. In addition, the Multilateral Framework set by the ILO, although non-binding constitutes a political and ethical obligation on governmental and non-governmental actors, and is clearly undermined by the existing practices in Lebanon. In fact, evidence collected from the various interviews conducted for the purpose of this research proves the intentional withhold of valuable information by employers' organisations vis-à-vis their employees since this would empower them and strengthen their position. Recruitment agencies for instance prefer to omit the rights of the migrant workers they are arranging work contracts for whereas they insist that their migrant workers fulfil their duties towards their employers.

1.2.3. Refugees and Illegal Migrants

According to an interview conducted with Dana Sleiman, Public Information Officer at UNHCR-Lebanon, there are 10532 non-Palestinian refugees and asylum seekers registered in Lebanon. A breakdown of this category of migrants can be found in the subsequent charts:

Figure 1. Total Registered with UNHCR (Feb 2011)**Figure 2. Country of Origin of Total Registered with UNHCR (Feb 2011)**

Refugees in Lebanon suffer from various problems and have different needs which the Lebanese authorities mostly fail to address. Iraqi refugees for instance are mostly in critical medical conditions, are often suffering disabilities or have been facing torture at home. Furthermore, the group of Iraqi refugees comprise of a lot of single parent, children or adolescents at risk, unaccompanied or separated children, or older person³⁹⁵. The reason why refugees are likely to face human rights abuses by the Lebanese authorities is that Lebanon is neither a state party to the 1951 Geneva Convention (Status of Refugees) nor to its 1967 Protocol. Despite the lack of international protection mechanism in place, the chief of the Legal Unit at the Lebanese Ministry of Labour, Adel Doubian, confirmed in an interview that refugees because of the nonexistence of specific national legislation and the lack of special administrative practices are subject to the same provisions in domestic law that apply to other foreigners namely the 1962 Law Regulating the Entry and Stay of Foreigners in Lebanon³⁹⁶. This law, *inter alia*, enshrines the provisions dealing with the detention and repatriation of persons entering or residing in Lebanon without authorisation.

³⁹⁵ Interview with Dana Sleiman.

³⁹⁶ UNHCR proposed to the GoL a number of amendments to the 1962 Law. However, and due to the lack of political consensus, the unique legal way of collaboration is through MoUs.

Because there are no formal regulatory mechanism dealing with the flows of refugees, the vast majority of them, namely 75%, is characterised as irregular migrants, due to the unauthorised entry or the overstay of their visa. Consequently, refugees and asylum seekers are likely to be fined, detained or deported. Especially arbitrary detention is a very real risk. The majority of irregular migrants are detained because of their status or for working without a permit. The length of detention ranges from weeks to several years. They suffer furthermore under the harsh conditions of overcrowded cells, harassment and discrimination. According to UNHCR, there are currently 27 persons who have been detained beyond the length of their sentence. Furthermore, deportations of refugees occur regularly, even in cases the refugees/asylum seekers are in possession of refugee certificates by UNHCR. In the majority of the cases, refugees/asylum seekers are urged to sign a 'voluntary return document'. In most of the cases these refoulement documents are signed while the person concerned is in detention; he/she has thus to choose between remaining detained under miserable circumstances or to return 'voluntarily' back home³⁹⁷.

Since Lebanon does not have an asylum system in place, responsibilities with regard to refugees and asylum seekers relies on UNHCR. Refugees/asylum seekers in Lebanon will be issued a transitional visa by UNHCR with the maximum duration of one year. Within this year he/she has to hope to get the possibility to travel into another country where his/her status as refugee is recognised and he/she is granted asylum. After the transitional visa has expired the refugee/asylum seeker becomes automatically an irregular migrant and he/she is likely to face arbitrary detention, prolonged imprisonment or deportation.

Persons detected entering Lebanon in an undocumented way automatically have to face the same consequences. The General Security directorate is in charge of the cases of irregular migrant and its record with regard to the protection of human rights remains very poor. Detention conditions in the GS facilities are often described as cruel, inhuman and degrading treatment and have lead in the past to numerous acts of despair like suicide attempts, rebellions and hunger strikes. Actual physical torture cases seem to have decreased significantly, however they still occur.

Only recently a few refugees have challenged their prolonged arbitrary detention and the court decided in their favour ruling that an end has to be put on their arrest. However, the GS remained reluctant to execute the sentence although the Lebanese law, in theory, punishes the illegal detention of people and detention beyond judicial sentences. With regard to the procedures, the GS restricted the detainees' right to assign lawyers and to see their lawyers in a systematic way³⁹⁸.

In April 2010, an Inter-Ministerial Committee was created to examine the situation of foreigners' detention including refugees. The committee's recommendations were adopted by the Council of Ministers as a decree later in September. The decree sets out the following 5 principles:

1. Lebanon is not a country of temporary or permanent asylum
2. The law on entry and exit of foreigners must be implemented and necessary decrees should be issued
3. Refugee Status should be determined by UNHCR on fixed and objective criteria that justify the request for asylum

³⁹⁷ See Frontiers, Submission on the occasion of the ninth session of the universal periodic review 2010, *Human Rights of Refugees, Asylum Seekers, Migrants and Stateless in Lebanon*, 12 April 2010, p.2, section 11.

³⁹⁸ See Frontiers, Submission on the occasion of the ninth session of the universal periodic review 2010, *Human Rights of Refugees, Asylum Seekers, Migrants and Stateless in Lebanon*, 12 April 2010, p.2, section 11.

4. The deportation of asylum applicants will be suspended for a maximum two-month period from the time of application and all rejected asylum seekers will be deported
5. Recognised refugees are provided with an exceptional residence permit for three months, renewable thereafter to a maximum of 12 months in order to allow UNHCR to seek entry visas for third countries

Besides the 1962 law regulating the Entry, Stay and Exit of Foreigners³⁹⁹, the 2003 memorandum of understanding between the UNHCR and Lebanon seems to be the only legal document regulating the status of non-Palestinian refugees in Lebanon and both documents have been criticised as inadequate by human rights NGOs. A recent proposal (June 2010) by Interior Minister Ziad Baroud to resolve the problem of refugees detained beyond their sentences was approved by the council of ministers but its content has not been made public.

Violations of fundamental human rights affecting stateless persons and refugees – most notably the right to seek asylum and the freedom of liberty and security – occur regularly and systematically at all levels in Lebanon. The legal gaps in combination with the weak legal system and the lacking execution of court sentences has severe negative impacts on the right to personal liberty and denial of effective remedy for foreigners⁴⁰⁰.

I.2.4. Palestinian Refugees

The discussions on how a higher level of respect for human rights of labour in Lebanon is intertwined with various factors including the long debated Palestinian Refugees' issue. Palestinian Refugees in Lebanon, who account for the vast majority of refugees, are divided in three different categories: registered refugees by the United Nations Relief and Works Agency (UNRWA) and the Lebanese authorities (425,000 refugees); refugees registered by the Lebanese authorities but not by UNRWA (250,000 refugees), and those without official identification documents (5,000 refugees). These refugees are distributed to 12 different camps across the Lebanese territory, with varying socio-economic conditions⁴⁰¹. Generally, the situation of Palestinian refugees remains precarious in Lebanon since they are deprived of their basic rights at a daily basis including civil and political rights as well as social and economic rights.

For instance, the Lebanese law foresees that a person who cannot afford the tribunal's financial weights is exempted to pay the fees until the court reaches a decision. However, Palestinian refugees do not benefit from this provision since they are not citizens of a recognised state and do subsequently not adhere to the concept of reciprocity which is the precondition for all the rights granted in Lebanon. This undermines the possibilities of Palestinian refugees to proceed against violations of their rights and is thus in clear violation of the right to access to court and the fair trial principle making them even more vulnerable to abuse⁴⁰². Through a legal support programme the Palestinian Human Rights Organisation (PHRO)⁴⁰³ tries to account for the discrimination Palestinian refugees have to face with regard to the access to justice.

³⁹⁹ Available online at: <http://www.unhcr.org/refworld/pdfid/4c3c630f2.pdf>.

⁴⁰⁰ See Frontiers, Submission on the occasion of the ninth session of the universal periodic review 2010, *Human Rights of Refugees, Asylum Seekers, Migrants and Stateless in Lebanon*, 12 April 2010.

⁴⁰¹ NGO report, *Lebanon: Submission to the UN Universal Periodic Review: Ninth session of the UPR Working Group of the Human Rights Council*, December 2010, available at:

http://lib.ohchr.org/HRBodies/UPR/Documents/Session9/LB/JS2_PCI_PaxChristiInternational.pdf.

⁴⁰² Ibid.

⁴⁰³ The Palestinian Human Rights Organization (PHRO) is an independent non-governmental organisation founded in 1997 aiming to advertise, protect and advocate for the rights of Palestinian Refugees in Lebanon. The PHRO aims to reach its

Besides that living conditions in the refugee camps remain mostly sub-standard, Palestinian refugees' rights are mainly violated with regard to the access to the labour market and social security. Because of the precarious situation, Lebanon has been pressured by the international community⁴⁰⁴ and civil society actors to improve their living conditions by amending the laws in place accordingly⁴⁰⁵. However, even though it was for the first time that a Lebanese law refers explicitly to Palestinian refugees, these amendments did only change their situation marginally. Palestinian organisations considered these amendments far from being in accordance with international standards such as the principles of non-discrimination and the indivisibility of rights. Despite of the amendment Palestinian refugees do not have access to liberal professions regulated by syndicates (or mandatory self-governing professional associations). Furthermore, they are now required to get work permits and employer guarantees whereas Syrian nationals are not. This creates huge employment disadvantages, in particular in the construction and agricultural sector where no work permits were required before. The new amendment grants Palestinian refugees at least some social security even though only at the level of 'end of service'. They still do not have access to social security funds related to sickness, maternity or family allowances⁴⁰⁶.

Even though Lebanon is criticised from various sides for its inhuman approach towards Palestinian refugees it remains reluctant to grant them further rights. It is the official position that Lebanon does neither have the financial abilities nor the expertise to provide solutions for the Palestinian refugee problem. Lebanon rather considers the strengthening of UNRWA as the better approach than taking up responsibilities itself. Accordingly, the Lebanon's head of delegation to the UPR called '[...] on all delegations to consider the possibility to strengthen their support to UNRWA and recalled that the fundamental objective was the return of the Palestinian refugees to their homeland'⁴⁰⁷. Additionally, the fragile demographic balance is used as an argument to neglect the question of naturalising Palestinian refugees as this might have political implications on the sectarian power sharing system. The third argument used as justification for the strict approach towards Palestinian refugees is that in case of lowering the controls and the granting of more rights uncontrolled arms dealing and military chaos would arise in the refugee camps and threaten the Lebanese sovereignty and the lives of many Lebanese as it was proved by the violent incidents in the war of Nahr el Bared in 2007.

It cannot be denied, despite the validity of the Lebanese arguments and the small steps already made forwards that the severe situation in the Palestinian refugee camps remain a trouble spot for the social peace in Lebanon and has, in the last instance, negative effects on both Lebanese nationals and Palestinian refugees.

mission through implementing the six following strategic programs: observing and recording of violations, education and raising awareness to human rights, advocacy, dialogue, and legal support. See <http://www.palhumanrights.org>.

⁴⁰⁴ France, UK, Netherlands, Belgium, Finland, USA, Russia, Brazil, Malaysia, Thailand as well as Iran, Egypt, Yemen, Algeria and Palestine have expressed their concern with the situation of Palestinian refugees in Lebanon in the Universal Periodic Review and many other occasions.

⁴⁰⁵ On August 17, 2010 the Lebanese Parliament amended article 59 of the Lebanese Labour Law of 23 September 1946 and paragraph 3 of Article 9 of the Lebanese Social Security Law issued on 26 September, 1963

⁴⁰⁶ PHRO, *Position Paper on: Law adopted by Lebanese Parliament on 17 August 2010 regarding Palestinian Refugees' Right to Work and Social Security*, Revised Version, 1 October 2010, available at: <http://www.palhumanrights.org/var/Position%20Paper%20RTW%20and%20Social%20Security%20Amended%20Laws.pdf>.

⁴⁰⁷ NGO report, 2010.

I.3. NGO engagement

By and large, NGOs have been the main actor working on the improvement of the situation of refugees and migrant workers. Benefiting from international (mainly the European Union Institutions and single European countries embassies) training and both financial and technical support, NGOs operating in Lebanon have managed to achieve some improvements with regard to providing services and legal assistance to migrants/refugees as well as on the level of lobbying the concerned government agencies and political parties, with the exception of Palestinian refugees, whose issue has significant political repercussions.

Social partners in Lebanon and civil society organisations in Lebanon are mainly concerned with improving the socio-economic status of migrant groups, namely illegal workers and domestic servants whose dignity is widely abused, who are generally poor and highly dependent on their employers, and who suffer lacking solidarity from the Lebanese social and legislative system⁴⁰⁸. The Pastoral Afro-Asian Migrant Center, the Council of Middle Eastern Churches and Najdeh are very active in this respect. With regard to the involvement of non-state actors and the protection of human rights of migrant workers, Caritas plays an important role in Lebanon. Caritas is known for helping migrants to return home whenever it is possible, or to mediate their settlements in a third country when official arrangements are made. It also offers a prison aid programme to assist detained migrants who have been caught with no or invalid working documents. It furthermore provides free medication and insurance services to migrant workers under its care, as well as advice and trainings for the setting up of small businesses or handicrafts. Within the national steering committee on migration, Caritas tries to push the reforms of temporary migration schemes and the development of legislation on trafficking, sexual abuse and irregular pay of migrant workers. An example on the engagement of Caritas with regard to the protection of migrant workers was the establishment of a so called 'safe house together with the General Security. As already mentioned, the General Security, a general directorate under the Ministry of Interior, is responsible for many issues related to migration, *inter alia*, for security issues, media censorship and other technical topics⁴⁰⁹. In this function the General Security is as well responsible for the protection of the rights of migrant workers. In 2005, the General Security signed an agreement with Caritas on the issue of human trafficking, providing for a 'house of security' for formerly exploited and abused migrant workers. Existing records and literature account for the establishment of this 'safe house' without critically assessing its actual functions but only emphasising its added value. In this respect, interviews conducted with key players proved that, even though the building of this 'safe house' is sold by the General Security as a protective human rights measure, its effects were rather twofold. In fact, Maitre Hasna Reda, a lawyer and activist, massively criticised the concept of a safe house as a place where migrants are 'locked inside' and 'cannot go anywhere' with 'no access to the outside'⁴¹⁰. Simel Esim, a gender and women workers' specialist in the ILO Regional Office for Arab States, holds a more optimistic view believing that the 'safe house' of Caritas and the General Security is the only solution for abused migrants to get the protection they need. Insofar, the Lebanese government and Caritas have no other equitation with regard to the protection of abused migrants; the 'safe house' remains thus the only possibility for exploited migrants to seek for protection⁴¹¹. Still, it remains the project of a governmental agency and not the one of a NGO. The high security standards justified with the argument that abused migrants need to be protected together with the limited experience and the

⁴⁰⁸ See Di Bartolomeo, A., et al., *Migration Profile Lebanon*, CARIM, January 2010, available at: http://www.carim.org/public/migrationprofiles/MP_Lebanon_EN.pdf.

⁴⁰⁹ See <http://www.general-security.gov.lb/English/History/GSFunction/Pages/ehist2.aspx>.

⁴¹⁰ Interview with Maitre Hasna Reda.

⁴¹¹ Interview with Simel Esim and Gudrun Jevne.

high potential of the abuse of discretionary powers by the Lebanese authorities' lead to the general perception that the house is rather a prison than a 'safe house'.

Further efforts with regard to the protection of migrants' rights encompass their better access to information. Early in 2010, the Minister of Labour, Boutros Harb, established a hotline for MDWs to receive their complaints with regard to violations of their rights by their employers. Until July 2010, the hotline has not been used to file a complaint yet, probably because MDWs are just not aware of this new possibility⁴¹².

II. Relevant International Conventions Ratified by Lebanon

From an international perspective Lebanon has ratified the core international human rights treaties (ICCPR, ICESCR, CEDAW, CRC, CAT, CERD). However, it has not ratified the key international instruments dealing with the protection of the rights of migrants or refugees such as the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Their Families or the 1951 Geneva Convention and its 1967 Protocol. With regard to irregular migration, human trafficking and smuggling, Lebanon has ratified the 2000 UN Convention against Transnational *Organized Crime* and the two protocols (Protocol against the Smuggling of Migrants by Land, Sea and Air and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Woman and Children).

III. Bilateral Agreements

Additional important sources with regard to the protection of migrants are bilateral agreements concluded between Lebanon and countries of origin. Lebanon hosts foreign workers from a number of countries, in particular from Sri Lanka, the Philippines, Nepal, Ethiopia, Bangladesh, and other African and Arab countries such as Egypt and Syria. With respect to bilateral agreements between the government of Lebanon and countries of migration, neither Sri Lanka nor the Philippines has signed a bilateral agreement with the Ministry of Labour pertaining to the rights and working conditions of their nationals in Lebanon⁴¹³. The latter had in fact signed a bilateral agreement in the past, yet ruled it out after an incident of death of one of the Filipino domestic workers.

According to Maitre Hasna Reda⁴¹⁴, the Lebanese government has so far only established a bilateral agreement with Egypt; she added that labour agreements with, *inter alia*, Ethiopian, Filipino, or Indian economic migrants are established between employment offices and the respective embassies. Further, representatives of Indyact⁴¹⁵ informed us that the Philippines and Ethiopia bar their citizens to immigrate to Lebanon after the many abuses reported. According to them, '*Lebanon did sign a bilateral agreement with Ethiopia and Philippines; however, due to the working conditions in Lebanon and due to the widespread racism against the workers, abuses and huge numbers of death (ranging from one to two incidents per week according to the Human Rights Watch report (2008)), these countries ban their citizens to come to Lebanon. Therefore, migrant workers travel to another country at the first instance in order to get to Lebanon*'.

On the other hand however, the ILO mentioned some pending bilateral agreements with Ethiopia and Sri Lanka⁴¹⁶.

⁴¹² Interview with Mr. Ziad Sayegh.

⁴¹³ Interview with the Ambassador of the Philippines in Lebanon and the Consular of Sri Lanka WM Premarathna.

⁴¹⁴ Interview with Maitre Hasna Reda.

⁴¹⁵ Interview with Farah Salka and Ali Fakhry.

⁴¹⁶ L'Ethiopie pour un protocole réglementant le travail des employés de maison, L'Orient Le Jour, 5 October 2010.

IV. Effects of the European Union engagement

The 2009 ENP Lebanon Progress Report highlighted the effect the Neighbourhood policy had on migrants including both Palestinian refugees and MDWs. Although the enforcement is still weak, a positive step has been taken in January 2009 when a decree was adopted regulating the practices of employment agencies recruiting women from various countries to work as domestic workers in Lebanon. The progress report underlines as well the unified contract of February 2009 establishing specific rights for female migrant domestic workers in Lebanon⁴¹⁷. However, it was criticised that insofar no progress has been made with regard to developing legislation dealing with the issue of Palestinian refugees, it was acknowledged however that after the elections in 2009, 'the declaration of policy of the new government sets as a priority the improvement of their social and economic rights and acknowledges the need to improve the living conditions in refugee camps'⁴¹⁸.

The ENP report seems to raise the not really substantiated claim, that the slight improvements in the area of migration policy in Lebanon are the result of EU policy. The changes have taken place indeed, however there is no straightforward analysis why they have occurred and to which extent the EU involvement has contributed to the reforms.

V. Conclusion

It is clear by now that still major gaps still between the ideal protective guidelines regulating the protection of migrant workers at the international level and the realities on the Lebanese ground and further reforms are necessary to ensure that a minimum of protection with regard to the human rights of migrants is obtained.

First, neither the laws nor the practice differentiates between refugees and migrants⁴¹⁹. Such a distinction must however be drawn and migrant workers explicitly integrated as key targets in the Lebanese national labour policies and the national labour laws. It is a key step to acknowledge that migrant workers are treated equally as national workers with regard to their rights, obligations, and their legal status. Legal reform has always been controversial in Lebanon since reforms insofar have not occurred based on the realities at the grounds due to the country's well instilled culture of impunity. A law without appropriate enforcement mechanisms is as good as no law; thus the implementation of international and national guidelines has to become a main priority in Lebanon. The implementation strategies must however involve national governmental authorities, international governmental and non-governmental institutions, social partners and faith-based organisations active in the field of migration, and most importantly, migrant workers themselves, who – as it has been made clear through this study – have a very little if any voice in determining their status in their hosting country. For this purpose, the regulation and management of temporary labour migration issues shall no longer be restricted to the Ministry of Labour, Interior and Social Affairs alone, but have to integrate as well the Lebanese Ministry of Justice, the Judiciary and the Lebanese Parliament and Cabinet as a whole. Insofar, the Parliament and the Cabinet of Ministers do not play a substantial role in the protection of the rights of migrant workers, and should become more active in the formulation and implementation of laws pertaining to these rights, the monitoring of the enforcement of these laws and the providing for an equally fair justice system which resolves tripartite disputes between workers, employers and recruitment agencies. In addition, legislative efforts shall not be narrowed to national regulations but

⁴¹⁷ See

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/180&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴¹⁸ Ibid.

⁴¹⁹ Interview with Adel Doubian.

also to the ratification of key international obligations which guide migration schemes and provide for a wide forum of best practices and benchmarks.

Second, although the Palestinian nationalisation is a serious threat to most of the Lebanese population, a lot can still be done at the level of providing social and economic rights to Palestinian refugees and efforts in this regard have to be increased. And although Lebanon may not change its status of a non-asylum country any time soon, several reforming measures can still be introduced in terms of providing longer transition visa and proper human treatment, health care, education and working opportunities for refugees.

VI. Recommendations

Regarding the slow reform process with regard to the improvement of the situation of migrant workers in Lebanon as well as with regard to the complexity of the sectors involved in temporary labour migration schemes the following recommendations can be made. Although each of these recommendations would constitute a step forward, they should all be integrated in a comprehensive national strategy for the regulation and the management of temporary labour migration. The strategy thus would include (yet does not consist only of):

VI.1. International Legislation

Lebanon's Parliament shall ratify all International Conventions pertaining to the rights of migrant workers. The reluctance of the Lebanese authority to commit to further international obligations has reflected badly on its human rights records generally. Although the country has ratified some UN and ILO conventions related to migration, it has failed to properly implement the terms of these international instrument within a comprehensive national policy. As it is the case in the interpretation and implementation of any international instrument, it is very critical however to apply 'universal' norms in a manner that 'culturally fits'.

VI.2. National Legislation and Judiciary

It is not enough for Lebanon to adhere to international guidelines which the authorities do not embody in their practices. The role of the Lebanese government shall be enhanced to tackle the complex body of issues related to temporary migrant labour namely at the level of policy formulation, policy implementation, monitoring and the punishment of non-compliance. Further, the judiciary shall enforce its authority in cases of conflicts and provide equal opportunities to both national workers and migrant workers. The 'Without Protection' report by Human Rights Watch touches upon the lack of judicial support to migrant domestic workers:

'Lebanon's judiciary has both the potential and obligation to play an important role in protecting the basic rights of MDWs. However, this potential has so far remained unfulfilled, and the judicial system remains, albeit with exceptions, largely inaccessible and unresponsive. Such problems are not limited to MDWs: many Lebanese also suffer from lengthy pre-trial detentions, extended trials, and overloaded courts. However, MDWs face particular obstacles in accessing the justice system'⁴²⁰.

With regards to the rights of refugees, we refer to the series of recommendations presented by the PHRO related to the ministerial declaration of 2009 that foresee the improvement of the situation of Palestinian refugees through the suspension of the reciprocity criteria, lifting the condition that Palestinian refugees have to be registered at the Ministry of Interior to obtain work permits from the Ministry of Labour, and granting equal treatment to Palestinian Refugees with regard to benefits and

⁴²⁰ See <http://www.hrw.org/en/reports/2010/09/16/without-protection?print>.

social security⁴²¹. Further, the government should advance clear and non-confusion decrees lifting administrative and financial burdens of Palestinian Refugees which are currently restricting their access to official (administrative, social, legal and economic) processes.

VI.3. Social Partners and Civil Society

The dearth of formalised information and data available about the Lebanese social partners is in stark contrast to the wealth of the initiatives conducted by civil society movements to address problems of migrant workers. Further investigations shall be conducted mainly in the area of labour unions and employers organisations. 'Research and science are necessary tools. They give further advantages to the trade union movement for it to address youth, women, intellectuals, economic immigrants whose entering trade unions will revive the labour movement. It is essential that new trade union members have a higher educational, cultural and intellectual level'⁴²².

The social partners (organised labour and the so called 'syndicates' or employers and industrialists organisations) play no constructive role in the processes related to labour migration insofar. This policy gap is probably one of the most understudied and underappreciated issue in the field of migration and human rights because it denies migrant workers, immigrants and refugees the human agency to participate in decision making processes and make their own voices heard in Lebanese society.

VI.4. Developmental perspective

In her February 2007 article on 'Linking Temporary Worker Schemes with Development' Dovelyné Agunias from the Migration Policy Institute reflects on the lack of consideration to the developmental approach to temporary migration schemes. It informs of a policy brief from the Organisation for Economic Cooperation and Development (OECD) which proposes that 'development-friendly temporary programmes should be associated with more flexible and open working arrangements' because current trends characterised by 'fixed duration of stay, uncertain prospects for return and tying of workers to specific employers' do not contribute to development. In this perspective, both countries of origin and countries of destination are concerned with attempting a different approach to this issue, mainly by considering this category of labourers as a substantial corner stone of their economic development and prosperity.

VI.5. role of the EU

The main contribution of the European Union so far with regards to the issue of labour migrants, refugees and irregular migrants has been the support for civil society organisations trying to change the situation through lobbying, advocacy, awareness raising campaigns and providing services and legal assistance.

A wide variety of agreements have been signed with the Lebanese government. However, the real effects of these agreements with regard to changing the situation remain very limited in particular because of the very complex political situation prevailing in Lebanon since 2005. In order to gain more influence, the European Union needs thus to introduce a well founded stand on migration issues and pass this position directly to the Lebanese government in an explicit and clear manner. It should be noted here, that none of the documents surveyed and none of the experts interviewed for this study mentioned that the European policies had an impact on the development and the implementation of migration policies in Lebanon.

⁴²¹ PHRO, 2010.

⁴²² World Federation of Trade Unions, *The International Labour and Trade Union Movement in the 21st century*, retrieved online on 28 February 2011, available at: http://www.wftucentral.org/?page_id=40&language=en.

Additionally, the European Union has to understand the political and financial restrictions the Lebanese government is facing and it should rather increase its efforts to suggest reasonable alternatives instead of merely highlighting gaps and exerting pressure through critique. It needs to be involved more directly in providing possible and feasible based on the historical experience of the European countries. The EU could serve as a facilitator of synergic relationships between the various NGOs at the ground, the research and policy development community, and governmental actors.

VI.6. Funding Requirements

Increasing the funding for the UNRWA and UNHCR, assisting in finding host countries for Iraqi refugees, funding the construction and equipment of new detention facilities, and increase funding for legal aid are some practical steps that the EU can venture in. In parallel, the EU is recommended to continue its pressure on the Lebanese government to bring Lebanese laws and regulations in conformity with international standards of human rights and subsequently create the needed legal institutions and framework to address migration issues in a comprehensive manner.

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