



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



**OSCE** Organization for Security and  
Co-operation in Europe  
High Commissioner on National Minorities

2<sup>nd</sup> Edition  
October 2010

# Recent Migration of Roma in Europe

A study by

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(10 December 2008)

*The project has been funded by the offices of the OSCE High Commissioner on National Minorities and of the Council of Europe Commissioner for Human Rights. The opinions and recommendations are those of the authors and do not necessarily reflect the opinion or position of the OSCE High Commissioner on National Minorities or of the Council of Europe Commissioner for Human Rights.*



## Preface

We have decided to reissue this study, originally published 8 April 2009, to mark the occasion of International Roma Day, as we consider that it responds to a persisting need in Europe for a constructive approach to Roma migration. Recent events have demonstrated that the Roma situation continues to be of considerable concern. The implementation of a policy to repatriate Roma from France to Romania and Bulgaria over the summer of 2010 and the ensuing debate in the political arena, the media and society at large, is a compelling illustration of this need.

To date, European countries have not managed to effectively integrate Roma into the society in which they reside. Such a situation has given rise to new challenges concerning Roma migrating to other countries. As we have witnessed, some countries have experienced difficulties coping with Roma migrants seeking to remain on their territory. Some have failed to address negative attitudes towards Roma on the part of the general population, often stoked by hostile media reports. Others have themselves encouraged such negative attitudes through inflammatory statements. Ignorance frequently prevails at national or local level regarding the obligations arising as a result of States' commitments to the Council of Europe, the European Union, and the Organization for Security and Co-operation in Europe.

The aim of this study is twofold: to shed light on the causes of Roma migration and the applicable human rights standards, and to clarify the situation of Roma migrants in host States, in particular their access to key services such as education, employment, health and housing. In doing so, the study focuses on the legal framework applying to Roma – and all other EU citizens – who are on the move, crossing borders and seeking to stay in member States of the respective organization.

The study attempts to find a balance between two potentially complementary, but at times ill-harmonized policy objectives: “management of migration flows” and respect for the rights of the persons concerned. It explores how this balance may be achieved by making reference to the standards and commitments on Roma-related issues in Europe developed by the Council of Europe, the European Union and the Organization for Security and Co-operation in Europe.

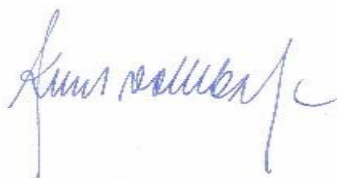
Important policy questions are raised in the study, such as the disparity between efforts to combat racial discrimination and actual policies concerning Roma migration. In particular the urgent need to extend an effective ban on all forms of discrimination based on perceived race or ethnicity. Finally, the authors present a series of practical recommendations for the three organizations concerned and the governments of their member States.

The analysis and recommendations contained in the present study reflect the commitments and responsibilities of European countries and their leaders vis-à-vis the largest and most persistently disadvantaged national minority in Europe, the Roma. We believe that the implementation of these recommendations will assist the OSCE participating States and Council of Europe member States in respecting and accommodating the needs, interests and human rights of Roma migrants as well as those of the wider societies of which they are a part.

It is indeed only through the effective protection of its national minorities that Europe can maintain its inherent pluralism and safeguard long-term peace and security.



Thomas Hammarberg  
Commissioner for Human Rights  
of the Council of Europe



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OSCE High Commissioner  
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## Executive Summary

The issues examined in the present study – reissued in light of recent deportations of Roma individuals - do not relate exclusively to Roma, but concern fundamental human rights and rule of law considerations within the European project. Successful enforcement of human rights norms and acts in the areas detailed in this study are crucial for the dignity of all Europeans, Roma and non-Roma alike.

These issues are situated within the context of international human rights law. In Europe, two regional legal frameworks are particularly relevant to Roma who move to seek to escape violence, discrimination and other forms of exclusion: the treaties of the Council of Europe system – first and foremost the European Convention on Human Rights -- and European Union (EU) law. All Roma in Europe are covered by bans on discrimination flowing from these legal orders. This legal framework is supplemented by the commitments of the participating States (pS) of the Organization for Security and Co-operation in Europe (OSCE).

European States have resorted on a number of occasions to individual and collective expulsion as a means of addressing the arrival of Roma from other States, or for addressing the presence on their territory of extremely excluded Roma from another state. The collective expulsion of aliens is a harm of sufficient gravity to have merited an explicit ban under Article 4 of Protocol No 4 to the European Convention on Human Rights. Key jurisprudence of the European Court of Human Rights in this area has thus far been developed in relation to cases concerning the collective expulsion of Roma. Individual expulsion may also infringe provisions of the European Convention, as well as of other international and regional law.

EU law has changed fundamentally the legal status of citizens of one European Union member State arriving or residing in another, altering the sovereignty traditionally exercised by States in this area. Nevertheless, EU member States have also on repeated occasions expelled Roma from other EU member States. Highly publicized expulsions of Roma have been recently carried out by France, Italy, Germany, Denmark and Sweden. Despite the obvious impact of these actions on the human lives involved, as well as on communities and societies, few European States have resisted applying such measures with respect to Roma at one time or another.

The ability of Roma to access goods and services is limited throughout Europe by factors including lack of educational qualifications among significant segments of the Romani communities, as well as by ethnic or racial discrimination, driven in particular by anti-Gypsyism -- that is, a widespread, deeply rooted prejudice and intolerance directed against Roma in Europe. Denial of access to key goods and services has concrete implications notably for the exercise of the right to freedom of movement in the EU, where the Roma concerned leave one EU member State and arrive in another, as well as for the ability of Roma from outside the EU to arrive in and settle legally in an EU

member State, or another State in the OSCE region. In addition, anti-Romani sentiment has in some cases resulted in an erosion of the right under international law to seek and enjoy asylum from persecution.

In some cases Roma are unable to prove their citizenship of any country, notwithstanding their genuine and effective links to particular European States, because of rigid legal practices, restrictive laws in the context of State succession, or for other reasons. Since 1989, the issue has been particularly pronounced in countries that adopted new citizenship laws in the context of State succession (particularly Croatia, the Czech Republic, the former Yugoslav Republic of Macedonia and Slovenia), as well as where other large-scale transformations of the legal regime governing citizenship and/or personal documents has taken place (Russia).

In addition to the absence of documents and statelessness giving rise to the denial of legal status, certain types of residence or protection status provided in particular European States are of concern. Authorities in some countries have apparently developed practices stopping short of deportation from the country, but which aim at making the lives of the Roma concerned miserable, in the hope that they may leave on their own. In Italy, for example, the authorities have regularly engaged in forced eviction of Romani migrants from their homes, frequently in contravention of international law, as well as involving the destruction of property. In some cases, whole Romani settlements have been summarily destroyed, and the inhabitants simply left on the street.

Accurate and reliable statistical data on Romani migration, as well as on the situation of Roma in key sectors relevant for social inclusion, is largely unavailable. In an atmosphere charged with mistrust about the uses of such data, Roma have shown a distinct reluctance to identify themselves as Roma to census-takers or other public authorities or researchers. In the absence of major efforts to overcome negative legacies in the area of ethnic monitoring of border controls and migration generally, it is difficult to see how progress might be made on this front. Progress on this front is nevertheless crucial for monitoring social inclusion.

Several other major issues of concern, relating to the response of public authorities to Roma migration include: (i) arbitrary surveillance of Romani migrants and the violation of the related right to privacy; (ii) ethnic profiling by police, and (iii) not ensuring basic protection of the security of persons in particularly excluded settlements of Romani migrants and nationals. Recommendations in this regard are provided in Chapter IX of the study.

In conclusion, the study shows that there exists a massive gap between international and European law, standards and commitments to eliminate racial discrimination on the one hand, and national policies concerning Romani migration on the other. Furthermore, this study reveals that there is a need to ensure that the benefits of European integration are enjoyed at all levels, and without regard to ethnic origin. In particular, there is an urgent need to ensure that all Europeans moving from one part of Europe to another have their

human dignity fully respected and protected and are able to access in practice all fundamental human rights, as well as those rights accruing as a result of the relevant European treaties. There is an urgent need to extend an effective ban on all forms of discrimination based on ethnicity, including matters involving border administration, immigration control and related decisions pertaining to non-citizens.



## Acknowledgements

The authors and institutions involved in the preparation of this study are grateful for the assistance and input from the following persons and organizations, many of whom provided their expertise voluntarily and without remuneration. These include: Gwendolyn Albert, Joost van Beek (Open Society Institute), Usnija Buligovic (Romano Centro), Balint Dora (International Organization for Migration), Lucie Fremlova (European Dialogue), Marian Ghita (Organizatia Aur, Craiova, Romania), Sandel Grosu (Alianta Pentru Unitatea Romilor, Braila, Romania), Grupo 484, Michaël Guet (Council of Europe Roma and Travellers Division), Andrea Haerle (Romano Centro, ZARA), Arthur Ivatts, Stephania Kulaeva (ADC Memorial), Isabela Mihalache (Open Society Institute), Larry Olomoofe (European Roma Rights Centre), Stephan Mueller, Cosmina Novacovici, Tatjana Peric (European Roma Rights Centre), Tjaša Plohl, Leonid Raihman (CARA), Maria Raus (Office of the United Nations High Commissioner for Human Rights, Belgrade), Sara Russell (Pavee Point), Marta Schaaf, Sorina Sein, Nando Sigona (osservAzione, Oxford Brookes University), Tove Skotvedt (Norwegian Ministry of Labour and Social Inclusion), Andreas Takis (Deputy Ombudsman of Greece), Judith Tóth (University of Szeged Faculty of Law), and Eleni Tsetsekou (Council of Europe Roma and Travellers Division). All errors are solely those of the authors.

### **I. Foreword**

Heightened attention paid by policymakers, the media and the public at large to issues concerning Romani migration in Europe has brought these matters to the international level. It is evident that policy- and law-makers have often not been in a position to respond appropriately to the wide range of apparent challenges in this area. Some have experienced difficulties coping with the sudden arrival of groups of Roma<sup>1</sup>. In other areas, it has been necessary to face and calm inflamed public anger – sometimes stoked by inflammatory media reports – surrounding Romani migration issues. Ignorance frequently prevails at local level surrounding the legal requirements arising as a result of states’ commitments in the European Union and/or the Council of Europe.

This study has been commissioned by the OSCE High Commissioner on National Minorities and the Council of Europe Commissioner for Human Rights in order to work toward clarification of some of these issues. Two international experts with expertise in migration law and policy, anti-discrimination law and policy, as well as in the factual matters at issue, have been commissioned to examine and present these matters in summary, as well as, where relevant, in detail. The experts have worked under the guidance of an Advisory Group comprised of representatives of the OSCE High

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<sup>1</sup> All reference to the Roma community in this study shall be understood to be in full compliance with the terms used by the respective institutions i.e. the term “Roma and Sinti” as used in official OSCE documents according to the 2003 Action Plan on Improving the Situation of Roma and Sinti within the OSCE area and the term “Roma and Travellers” as used by the Council of Europe.

Commissioner on National Minorities (HCNM), the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Council of Europe Commissioner for Human Rights.

No new documentary field research has been undertaken in the course of this study. Rather, available documentation has been studied carefully and relevant matters at issue have been presented. The experts engaged to undertake this study have extensive prior knowledge of the relevant fields of law and fact, including direct research on Roma, human rights, equality law, migrants rights, migration law and policy, and/or related fields in the European Union and Council of Europe jurisdictions, as well as in countries including Albania, Austria, Bulgaria, the Czech Republic, France, Germany, Hungary, Italy, Poland, Romania, Russia, Slovakia, Sweden, Switzerland, Ukraine and the United Kingdom. Recent research had been carried out particularly in the context of the crisis in Italy.

A background literature survey was undertaken to review the relevant published and official materials on matters of concern in this study. The research project also drafted and circulated three questionnaires among relevant experts, credible and authoritative civil society groups, and relevant government officials and intergovernmental institutions: (i) a general questionnaire concerning matters of fact and law as relates to Romani migration and relevant field of policy and law (included as Appendix 2 to this study); (ii) an abridged version of the general questionnaire; and (iii) a questionnaire focusing in particular on experts and others in countries-of-migrant-origin. These three distinct survey questionnaires have been circulated to persons with particular expertise in specific national contexts, as well as to the Council of Europe's expert MGS-ROM group. Completed questionnaires were assessed by the experts for relevance and quality of data provided.

The research project convened a meeting of experts in Budapest on 9 and 10 September 2008 to assess and evaluate fact, policy and questions of law and materials at issue in the research.<sup>2</sup> These and other experts have further provided supplementary information for the study and, where relevant, have reviewed and commented on draft texts of all or parts of the study.

Regular consultation was undertaken with the relevant contracting and supervisory departments of the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe Commissioner for Human Rights. These further consulted internally with other relevant divisions within the Council of Europe and OSCE.

A draft study was completed and circulated to the project's Advisory Group on 1 November 2008. A final study was produced on 10 December 2008.

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<sup>2</sup> The OSCE High Commissioner on National Minorities and the Council of Europe Commissioner for Human Rights wish to acknowledge that the Roma experts' meeting that was organized in Budapest on 9-10 September 2008 in the context of the present project was kindly supported by a voluntary contribution of the Slovak Republic to the Council of Europe.

The resulting study which follows aims to provide assistance to OSCE participating States, as well as to Council of Europe Member States, in developing effective policies to accommodate the needs, interests and fundamental rights of Romani migrants, as well as of the wider societies of which they are a part. It also aims to provide input into larger-scale research efforts slated to be undertaken in the next period.<sup>3</sup>

The study attempts to find a balance between two potentially complementary, but at times ill-harmonized approaches: on the one hand, a discourse concerning the “management of migration flows”, an approach taken by policymakers, frequently under the influence of public pressure to reduce immigration; on the other hand, the rights of the persons concerned, (i) as citizens of the European Union entering and/or residing in an EU Member State which is not their own; and/or (ii) as citizens of a State Party to the European Social Charter or Revised Charter lawfully resident or regularly working in another State Party to the Charter; and/or (iii) arising from international and European human rights law; and/or (iv) arising from domestic law in the country to which they have gone. The tension existing between these two approaches has not been fully resolved here.

This study covers at least three organizations producing norms and commitments on Roma-related issues in Europe: the OSCE, the Council of Europe and the European Union (EU). The objective is to consider what legal measures exist to provide security for Roma who are on the move, crossing borders and seeking to stay in states in the three overlapping regions. There are very important differences between the legal and policy regimes of the three “Europes” under consideration. That of the OSCE consists of 56 states not just in Europe but also in Central Asia and North America. Its main objectives involve early warning, conflict prevention, crisis management and post-conflict rehabilitation. The OSCE started as a multilateral forum for dialogue and negotiation between East and West in the 1970s. The second Europe is that of the 47 countries that form the Council of Europe. The Council of Europe engages in standard setting through treaty making as well as other activities. The EU, the third regional institution of relevance to this study, is founded on the objective of creating an internal market. There are currently 27 Member States of the EU. There are four fundamental freedoms in the core EU/European Community treaties, all concerning free movement: of goods, persons, services and capital.

Finally, although this is a study concerning movement across borders, insofar as it is about one ethnic group – an ethnic group stigmatized also in a migration context – it must inevitably discuss discrimination and anti-discrimination law, as well as the interface between this legislation and matters concerning the border, establishment, expulsion and access to key services.

This study is organized as follows. First, the section immediately following this one provides a brief summary of the historical context of the stigma attached to Roma and

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<sup>3</sup>[http://fra.europa.eu/fra/index.php?fuseaction=content.dsp\\_cat\\_content&catid=3e4a7c4a74f57&contentid=48ca10fe8e58e](http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=3e4a7c4a74f57&contentid=48ca10fe8e58e)

others regarded as “Gypsies”, particularly in a migration context. The substantive part of the study is then divided into two parts:

Part I looks at (i) the right to cross borders in Europe; (ii) protection of residence and limitations on expulsion; (iii) documents and citizenship issues, particularly as they arise in a cross-border context; and (iv) surveillance of Romani migrants, right to privacy and ethnic profiling of Romani migrants. These distinct areas are each divided into a section summarizing the relevant European law and policy framework, and a section presenting an overview of states’ practices in these areas. The relationship between the ban on racial discrimination, on the one hand, and the law of the border, on the other, is treated in a subsection of section (i).

Part II of the study looks at access by Roma to four key service sectors – education, employment, health care and housing – and examines the interaction between problems of exclusion, on the one hand, and factors influencing migration or expulsion, on the other. These four sectoral areas have been selected first of all because they are repeatedly identified as key for durable Roma inclusion, and also because they are areas explicitly covered by the EU law ban on racial discrimination, as provided in Directive 43/2000. The study concludes with recommendations for action.

## II. Romani Migration, Stigma, Romani Expulsion: The Historical Context

It is now generally accepted by scholars that the Romani people of Europe are descended from groups which left India around 1,000 years ago and began arriving on the territory of today's European Union in or around the 14<sup>th</sup> century.<sup>4</sup> The history of Roma in Europe – and the Romani identity itself – is to a great extent bound up with ideas around migration, “nomadism”, diaspora and exile. Nevertheless, the great majority of the Roma of Europe is sedentary, and the Romani language – notwithstanding its close links to modern Hindi, Urdu and Punjabi<sup>5</sup> – appears to have taken its present form in Byzantine Greece and the Ottoman Empire.<sup>6</sup>

Today, more than ten million Roma live in Europe,<sup>7</sup> a large proportion of them in the EU. The Roma of Europe are an immensely diverse group of individuals and communities. Some speak Romani and their national language. Some speak only their national language, possibly together with second languages. Some may speak as a home language other minority languages such as Beash, Jenisch, Shelta or Pogadi Chib, although there is a dispute as to whether some of these persons should be regarded as Roma.<sup>8</sup> Some may have no affinity with Romani communities; others on the other hand may have been raised and/or now live in traditional communities governed by extensive internal codes. Common unifying features – to the extent that such may exist – include common identification as members of the “communities of fate” regarded as “Gypsies” in Europe and, indeed, the occasional or frequent experience of being “outed” as “Gypsy”, often for negative treatment, or at least suspicion. For the latter reason, many Roma and others identified as “Gypsies” choose to conceal their ethnic identity – particularly when asked by a public authority. In addition to the concerns for dignity this raises, it also has real implications with respect to statistical data about the situation of Roma (see below Part 1, section III.2).

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<sup>4</sup> For a general history of Roma, see Fraser, Sir Angus, *The Gypsies*, Oxford: Blackwell, 1992. See also Council of Europe, *Factsheets on Roma History*, [www.coe.int/education/roma](http://www.coe.int/education/roma) and <http://romafacts.uni-graz.at/>.

<sup>5</sup> On the Romani language, see especially Matras, Yaron, *Romani: A Linguistic Introduction*, Cambridge: Cambridge University Press, 2002.

<sup>6</sup> *Ibid.*

<sup>7</sup> The Council of Europe provides an “average estimate” of Roma in Europe of 11,166,500, with upper estimates of over 16,000,000 (see Council of European Roma and Travellers Division, “Number of Roma and Travellers in Europe, July 2008 Update”, included here as Appendix 1).

<sup>8</sup> A discussion of this issue is found in Margalit, Gilad and Matras, Yaron, “Gypsies in Germany – German Gypsies? Identity and Politics of Sinti and Roma in Germany”, in Stauber, Roni and Vago, Raphael (eds.) *The Roma: A Minority in Europe: Historical, Political and Social Perspectives*, Budapest: Central European University Press, 2007, pp. 103-116. Margalit and Matras refer to “Gypsy I” as “a common term associated with a lifestyle or socio-economic organisational form, irrespective of origin, language or traditions” and “Gypsy II” “for a population which shares a language (albeit split into several dialect groups), traditions and beliefs, and ultimately originating in India” (pp. 102-103). The borders between “Gypsy I” and “Gypsy II” may not in all cases be as fixed as the authors contend, and in any case are not noticed in cases in which persons regarded as “Gypsies” are singled out for negative treatment.

Roma occupy a particular place in the European imagination as “nomads”,<sup>9</sup> a fact many if not most regard as stigmatizing and erroneous. The reasons for the association of Roma with “nomadism” are complex and include the fact that some Romani and related “Gypsy” groups (albeit now a very small number of persons) have remained nomadic or partially nomadic, particularly in Western Europe, Romania and parts of the former Soviet Union. Supplementing this otherwise neutral fact, however, is the fact that “Gypsies” occupy a rich place in the European folk imagination, with a stereotypical idea about “Gypsies” enduring to the present day. Arriving Roma – particularly those Roma continuing to maintain traditions, including traditional dress – have frequently found that there is extensive speculation attached to their arrival; the past 200 years of European history has seen regular and frequent sensationalism of “the arrival of the wild Gypsies”.<sup>10</sup>

After the 14<sup>th</sup> century, Romani migration in Europe is a historical fact of primarily the past century and a half. The abolition of slavery of Roma in Romania,<sup>11</sup> and the subsequent destitution of the freed slaves and their descendents made the end of the 19<sup>th</sup> century and the early part of the 20<sup>th</sup> century a time when many Roma fled South-Eastern Europe for points West and North, in search of a better life, and at times in search simply of food. The Cold War for the most part sealed closed countries with major Romani populations – Albania, Bulgaria, Czechoslovakia, Romania and the former Yugoslavia, among others – before borders began opening with the former Yugoslavia in the mid-1980s.

The end of bipolarity in 1989 saw larger movements of persons across Europe than Western European governments had been accustomed to in the preceding years. The re-emergence and emergence of states in Europe, which followed 1989 was accompanied by new questions about identity and nationality. The lines of belonging and exclusion – the definitions of citizens, foreigners and entitlements based on ethnicity and language – were reformulated in ways that were not always benign for Roma and other groups, which have been the target of discrimination and exclusion in the 20<sup>th</sup> century. Some Roma were excluded from citizenship of new states as the three major Communist federations – Czechoslovakia, Yugoslavia and the Soviet Union – collapsed and new nation-states were formed. Following 1989, old ideas about “Gypsies” have been dramatically reawakened in Western Europe, in part as a result of the return of Romani migration from Central and South-Eastern Europe.

These facts have interacted with policy- and law-making and implementation in the post-1989 period. In the first place, the media has on a number of occasions provoked panic among the public about Roma immigration. Often the metaphors used (“wave”, “deluge”,

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<sup>9</sup> At least one series of government policies – those of Italy – are based on the idea that all Roma are “nomads” and any claim otherwise – for example including requests for mainstream housing, is invalid and to be resisted (see European Roma Rights Centre, *Campland: Racial Segregation of Roma in Italy*, Budapest, 2000).

<sup>10</sup> A useful account of stereotypes about Roma is provided in Hancock, Ian, *The Pariah Syndrome: An Account of Gypsy Slavery and Persecution*, Ann Arbor: Karoma Publishers, 1987.

<sup>11</sup> On the enslavement of Roma in Romania, see Viorel, Achim, *The Roma in Romanian History*, Budapest: Central European University Press, 2004, pp.27-132.

etc.) have considerably distorted the scale of the issue, which frequently involves no more than a few score or several hundred persons. Secondly, the impact of this media attention, as well as other factors, seems to have resulted in the authorities frequently regarding arriving Roma as “fraudulent” when they approach the public authority for legitimate entitlements, including social welfare assistance, access to refugee determination proceedings, etc. Finally, authorities at national level have come under pressure from the media and inflamed public opinion to undertake draconian measures to stop Roma from arriving.

The enlargement of the Council of Europe in the early 1990s, followed by the enlargement and integration of the EU (including the preparatory processes for the enlargement to include first eight and then a further two countries of the former East Block), coinciding with an outbreak of anti-Romani hostility, violence and systemic discrimination – particularly in Central and South-Eastern Europe<sup>12</sup> – has brought the social inclusion of Roma more forcefully into European policy concerns.<sup>13</sup> The pressure created by Romani migration in Europe has generally created conditions for the development of Roma policies by the major regional organizations – the EU,<sup>14</sup> the Council of Europe<sup>15</sup> and the OSCE<sup>16</sup> – and has also brought Roma into focus as a primary concern of the UN human rights machinery.<sup>17</sup> Roma policy as developed for example by the European Commission has come about, among other things, as a result of pressure from the Member States. States have also exercised bilateral influence. For example, Poland’s Roma policy came about as a result of pressure by the United Kingdom Government to stop Roma from migrating to the country. Romani migration has also sometimes threatened to derail EU expansion and/or integration. For example, when scores of Roma from Hungary were granted asylum in France in 2000 in a high-

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<sup>12</sup> European Commission, DG Employment and Social Affairs, *The Situation of Roma in an Enlarged European Union*, European Commission, 2004, pp.9-10.

<sup>13</sup> See *inter alia* Council of Europe Committee of Ministers, *Recommendation CM/Rec(2008)5 on policies for Roma and/or Travellers in Europe*, 20/02/2008, [www.coe.int/t/cm](http://www.coe.int/t/cm).

<sup>14</sup> See European Commission, DG Employment and Social Affairs, *The Situation of Roma in an Enlarged European Union*, 2004; European Commission, “Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament, the Council the European Economic and Social Committee of the Regions; Non-discrimination and equal opportunities: A renewed commitment; Community Instruments and Policies for Roma Inclusion”, {COM(2008) 420}.

<sup>15</sup> See *inter alia* Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, “The situation of Roma in Europe and relevant activities of the Council of Europe, Introductory memorandum”, Rapporteur: Mr József Berényi, Slovak Republic, EPP/CD, AS/Jur (2008) 29 rev 3 September 2008).

<sup>16</sup> See *inter alia* declarations by OSCE participating States, as well as Ministerial Council Decision No. 3/03, “Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area”, 2 December 2003.

<sup>17</sup> The situation of Roma has been addressed by Charter-based bodies such as the Special Rapporteur on the Right to Adequate Housing, the Special Rapporteur on Racism, the Independent Expert on Minority issues, as well as in the context of the Universal Periodic Review mechanism. The Treaty Bodies have extensively addressed human rights issues facing Roma in the national context. The Committee on the Elimination of Racial Discrimination (CERD) has issued a General Comment on discrimination against Roma, (General Recommendation No. 27: Discrimination against Roma: 16/08/2000. Gen. Rec. No. 27.). An extensive review of approaches by intergovernmental agencies to Roma issues is the subject of Rooker, Marcia, *The International Supervision of Protection of Romani People in Europe*, Nijmegen: Nijmegen University Press, 2002.

profile case, questions were raised as to Hungary's readiness for free movement.<sup>18</sup> Similar discussions took place periodically in a number of EU Member States with respect to Slovakia's then-candidacy for the EU.<sup>19</sup> Roma inclusion issues featured prominently in the European Commission's regular reports in the accession process of the Central European 2004 accession countries, and European funding instruments have focused extensively on projects aiming to secure Roma inclusion.<sup>20</sup>

The transformation of Europe, accompanied by the extension of the role of the OSCE,<sup>21</sup> the doubling of the Council of Europe's membership and the enlargement of the EU has also led to new perspectives on rights. Human rights as entitlements beyond citizenship are at the heart of the OSCE and Council of Europe systems. The OSCE's 1990 Copenhagen Meeting of the Conference on the Human Dimension of the [CSCE] has provided the political framework for this: "the rights of persons belonging to national minorities as part of universally recognized human rights is an essential factor for peace, justice, stability and democracy in the participating States". The duty of states to ensure the protection of human rights for all persons within their jurisdiction is the core of the major Council of Europe human rights treaty, the European Convention on Human Rights (ECHR). The EU establishes a right for individuals to move and reside across state borders and to enjoy non-discrimination on the basis of nationality. In recent decades, the Union has expanded protection against discrimination, first in the field of gender, and then progressively to perceived race or ethnicity, and other grounds. The interchange of the law of free movement and establishment on the one hand, and the ban on discrimination on grounds including nationality, ethnicity and perceived race on the other, forms one key aspect of the legal assessments in this study.

The decade and a half between 1989 and the EU expansions of 2004 and 2007 was a period in which laws governing immigration to Western Europe became considerably more restrictive, particularly concerning non-privileged migrants (in particular persons seeking work, rather than arriving with previously contracted work). It was also a period of significant strain on refugee law and, particularly in Western Europe, the considerable erosion, in practice, of asylum rights. Nevertheless, many Roma fled persecution – particularly from Bosnia, Serbia and Kosovo, but also from now EU Member States including the Czech Republic, Slovakia, Romania, Bulgaria, Poland and the Baltics – and secured refugee status or temporary surrogate protection in Western European and other

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<sup>18</sup> A useful summary of the "Zamoly" episode is provided in Desi, Janos, "In League with the Romas against the Hungarians", in Gero, Andras, Laszlo Varga and Vince Matyas (eds.) *Anti-Semitic Discourse in Hungary in 2001*, B'nai B'rith Budapest Lodge, Budapest, 2002, pp.209-216.

<sup>19</sup> The United Kingdom introduced a visa regime on Slovak citizens in October 1998; Finland followed suit in June 1999, after the arrival of a group of Roma from Slovakia, who were subsequently summarily expelled. During 2001 and 2002, a number of countries, particularly in northern Europe, introduced a visa regime for Slovak citizens as a result of purported "ethno-tourism" by Roma from Slovakia (see Vaseka, Imrich and Michal Vasecka, "Recent Romani Migration from Slovakia to EU Member States: Romani Reaction to Discrimination or Romani Ethno-tourism?", *Nationalities Papers*, Vol. 31, No. 1, 2003).

<sup>20</sup> A report commissioned by the Union institutions to assess the efficacy of measures in the period 2001-2003 was less than praiseworthy in its conclusions (see EMS Consortium, "Review of the European Union Phare Assistance to Roma Minorities, Countries: Bulgaria, Czech Republic, Hungary, Romania, Slovakia", 1 April 2004).

<sup>21</sup> Previously the Commission for Security and Co-operation in Europe (CSCE).



countries during the period. Among the public, and even among relevant policymakers, the distinction between migrants and refugees was often not as clear as was often asserted. In practice, it often splits families down the middle.

Following the expansion of the EU in 2004 and 2007, some of the previous urgency and intensity of debate around Romani migrants in Europe has, in some countries, subsided. However, in a number of European states public insecurity and intolerance vis-à-vis Romani migrants has, if anything worsened.<sup>22</sup> A number of Council of Europe and/or EU Member States have had national policy debates concerning the expulsion of Roma, often carried out in a crude or inflammatory manner.

To make matters even more complex, a number of European states – including EU Member States such as the Czech Republic, Hungary, Slovenia and Poland – have become both countries of migrant origin and countries of emigration for Roma. Roma from the Czech Republic, for example, continue to migrate particularly to the United Kingdom, while Roma from Romania and Slovakia – also EU Member States – migrate to, among other places, the Czech Republic.

Romani migration – and concerns related to the fundamental rights of Romani migrants – has also arisen in the OSCE area outside the EU, on occasion with impact in the EU. Thus, for example:

- Russia is a target country of migration for Roma from Moldova, Ukraine and the countries of Central Asia, as well as possibly from other countries; Ukraine is both a target country of Romani migrants (particularly from Moldova) and a country of Romani migrant origin.
- Canada has provided refugee status to large numbers of Roma from Central and Eastern Europe, particularly from the Czech Republic and Hungary. Canada also re-imposed visa requirements for Hungarian citizens, in order to stop Roma from migrating from Hungary to Canada, and discussions about lifting the visa requirement centred primarily around “seeking guarantees that Roma will not migrate to Canada”. Following the abolition of the visa regime for Czech citizens in Canada in 2007, several hundred Roma from the Czech Republic have again sought asylum in Canada.
- Prior to the events of 11 September 2001 in particular, the United States resettled several thousand Roma from Bosnia, including Roma from Bosnia threatened with forced return to Bosnia by, in particular, the German Government. The United States also resettled several hundred Roma from Kosovo<sup>23</sup> who had secured temporary protection in the former Yugoslav Republic of Macedonia (FYROM).

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<sup>22</sup> See European Commission, Special Eurobarometer 296, *Discrimination in the EU: Perceptions, Experiences and Attitudes*, July 2008, [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_296\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_en.pdf).

<sup>23</sup> All reference to Kosovo, whether to the territory, institutions or population, in this study shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

The accession to the EU of the Czech Republic, Slovakia, Hungary, Poland, the Baltic States and Slovenia in 2004, followed by Bulgaria and Romania in 2007, has altered to a certain extent the nature of legal entitlements due to Roma from these countries. It has also created a situation in which, in countries of immigration, superficially unitary Romani communities may include persons with differing status and potentially differing legal entitlements, particularly as concerns EU rights, as well as rights under the Council of Europe's European Social Charter and Revised Charter. This study attempts to resolve a number of the factual, policy-related and legal questions at issue in this complex matter.

## **PART 1: The Law of the Border: Access to the Territory, Expulsion, Establishment, Status and Policing of Roma in an International Migration Context**

### **III. The Right to Cross Borders**

#### ***III.1.A The European Law and Policy Framework***

Although the Universal Declaration of Human Rights (1948) provides for “everyone’s right to leave any country, including his own”, an absolute right to cross borders and to remain on the territory of a state only exists for the individual who is a national and is seeking to enter his or her home state. International treaties have recognized this as the fundamental right of citizenship – the right to enter the territory of the state of which one is a citizen.<sup>24</sup> Those claiming international protection, i.e. refugees, also have a right to arrive at borders, but international law in Europe only provides a right not to be sent back to a state where the individual fears persecution, torture, inhuman or degrading treatment, while their claim is under determination by the state from which they have sought protection.<sup>25</sup> Once the authorities have assessed the claim for protection, only those recognized as having a well-founded fear of persecution or where there is a substantial risk of torture, inhuman or degrading treatment in the country of origin are entitled to residence.<sup>26</sup> Minority rights as contained in international instruments provide little assistance regarding movement across international borders.<sup>27</sup> Instead, the emphasis is on the right to non-discrimination and the exercise of culture, religion and language.

Beyond the limited international exceptions to the sovereignty of a state over which foreigners it admits to its territory, states govern the crossing of international borders as a matter of national law. This prerogative has been strongly defended by states in the European region. It is a principle which is upheld by the OSCE, which reaffirms the

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<sup>24</sup> Article 12(4) International Covenant on Civil and Political Rights; also found in Protocol 4 European Convention on Human Rights and elsewhere.

<sup>25</sup> UN Convention relating to the status of refugees 1951; UN convention against Torture 1984; Article 3 ECHR.

<sup>26</sup> In respect of persons fearing persecution, there is an exception on national security grounds. However, for those fearing torture there is no exception (see ECtHR, judgment, *Saadi v Italy*, 28 February 2008).

<sup>27</sup> Article 27 International Covenant on Civil and Political Rights; Framework Convention for the Protection of National Minorities.

rights of sovereign states.<sup>28</sup> The Council of Europe, too, has recently reaffirmed the principle of state sovereignty in its report on the Caucasus and Georgia.<sup>29</sup> Nonetheless, some instruments do move in the direction of modifying the sovereign right to control borders, not only as regards refugees and persons fleeing torture but also in the context of family reunification. The European Social Charter 1961 (revised 1996) is an important source of commitments as regards migrant workers. The EU, however, stands out as an exception, having been based on the right of individuals to cross borders for economic purposes. Discussion of each venue in turn follows below, with specific emphasis on the EU.

## OSCE

The engagement of the OSCE in the field of migration begins with the principle in the Helsinki Final Act that borders are inviolable: “[T]he participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.” Further,

*Carmen S. is a 26-year-old Romani woman from a small village in Western Transylvania, Romania. She tried several times to take up employment in the regional capital Timisoara, but was unsuccessful because the wages provided did not cover the cost of rental accommodation. She then emigrated to Tuscany, Italy, where a local priest assisted her in finding work as a live-in minder for an elderly woman, as well as securing her access to health insurance and a local identity card. She never revealed her Romani ethnicity to anyone in Italy. Everyone in the village knew her as a “Romanian”. After six months of this work, however, the elderly woman whom she was taking care of refused to pay her and seized her documents. With the assistance of a local labour union she recovered the documents and the unpaid wages, but returned to Romania.*

*(The names of persons in the accounts in text boxes throughout this study have been fictionalized, although the accounts provided are of real persons.)*

in order to promote contact on the basis of family ties, the Helsinki Final Act calls for a favourable consideration of applications to travel for the purpose of allowing persons to enter or leave their territory temporarily or on a regular basis, in order to visit family members. The Act calls for the procedures of visas and travel documents to be facilitated and for the facilitation of travel for personal or professional reasons; though this is directed at the home state rather than the receiving state. Reference is also made in the Act to the importance of tourism, meetings between young people, sport and expansion of contacts.

Two further concerns of the OSCE deal with the question of border crossing: action against terrorism where the transborder element is present as a reason for common action in respect of the movement of persons across borders and secondly combating trafficking in human beings, where again there is a focus on the crossing of international borders by persons as a measure

<sup>28</sup> Helsinki Final Act 1975 (CSCE).

<sup>29</sup> Report by the Chairman of the Committee of Ministers in view of the Informal Meeting of Ministers for Foreign Affairs of the Council of Europe, New York, 24 September 2008.

which requires states to coordinate their activities. While there are substantial undertakings in respect of the Roma, these are generally not framed in the context of border crossing. The OSCE's Office for Democratic Institutions and Human Rights (ODIHR) highlights the problem of trafficking in children as an issue of importance to some Romani communities. Similarly, it highlights the problem of Roma who are forced by fear of torture, inhuman or degrading treatment, to flee their country and seek asylum elsewhere. The focus is on the treatment of refugees in the states where they are currently living, rather than the legal regime which applies to movement of persons to seek asylum.

### **The Council of Europe**

The Framework Convention on the Protection of National Minorities (1995), a Council of Europe treaty, is particularly important for Roma as regards the rights which groups are entitled to claim. However, as regards the crossing of borders the Convention only includes one relevant provision: Article 17(1)<sup>30</sup> which creates a duty on States Parties not to interfere with cross-border contacts between people who share a common, relevant background. This provision is sufficiently unclear as to represent no obvious obstacle to a state exercising sovereignty in the form of border controls.

The European Social Charter of 1961 (revised 1996) provides more assistance as regards the treatment of migrant workers. Article 19 provides rights on the basis of reciprocity – both the state of nationality and the host state must be party to the Charter for the individual to be entitled to rely on the provisions. The Parties commit themselves to providing information about migration, health services and medical attention as well as good hygienic conditions during the journey and to promoting cooperation among both public and private agencies involved in the migration process. In addition, the Appendix of the Revised Charter extends coverage to certain categories of third-party nationals: “Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.”

The ECHR – the core human rights treaty of the Council of Europe – provides somewhat more assistance on the question of movement across borders. Although the Convention itself does not deal with migration as such, as interpreted by the European Court of

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<sup>30</sup> Article 16: The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention; Article 17: The Parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage. See text at <http://conventions.coe.int>.

Human Rights (ECtHR) in individual cases, it has important consequences for movement of persons across borders. Further, the Protocols to the ECHR provide some protection for foreigners.

The ECHR sets out a number of rights to which individuals are entitled vis-à-vis any state which has jurisdiction over them. After exhausting domestic remedies the individual may bring a complaint before the ECtHR, which has the final word on whether the action of the state is consistent with the human rights contained in the ECHR or not. With respect to the crossing of state borders, the ECHR has no specific provision. The ECtHR has repeatedly stated, “[T]he Court recalls that the Convention does not guarantee the right of an alien to enter or to reside in a particular country. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8 § 1 of the Convention”.<sup>31</sup> However, the right to respect for private and family life provided by Article 8 has been interpreted by the ECtHR as including a right to enter a country in very specific circumstances. For the moment this right has been recognized to only apply to minor children of persons settled in a state where the family is seeking to effect family reunification.<sup>32</sup> However, it is to be expected that other categories may be added as the Court's case law develops. Under current case law, the fact that the child may never have been on the territory of the state where the rest of the family lives is not an insurmountable obstacle to the recognition of the right.

## **The European Union**

### *Freedom of Movement of Persons in Primary EU Legislation*

The right to free movement of persons under EU law means an inversion of the relationship of the state and the individual regarding the crossing of a border. The crossing is a right of the individual against which the state must justify any interference. When seeking to delineate the boundaries of the free movement of persons in the EU, one looks first to the provisions in the Treaty establishing the European Community (TEC), one of the two core EU treaties, which can have direct effect in the Member States. In such cases, the treaty provision does not need to be transposed into national law to be binding, but is rather directly accessible as a source of individual rights to be upheld both in national law and before national courts. All of the provisions on free movement of persons have been held to have such direct effect. To lend substance to the rights in the treaty, secondary legislation is adopted setting out administrative and other measures required for implementation at national level to secure effective exercise of the right. The EU treaties form the basis for strong legal framework with detailed rules on its exercise.

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<sup>31</sup> *Boultif v Switzerland*, 2 August 2001.

<sup>32</sup> *Sen v Netherlands*, 21 December 2001; *Tuquabo-Tekle v Netherlands*, 1 December 2005; *Rodrigues da Silva and Hoogkamer v Netherlands*, 31 January 2006.

The organizing principle of EU law is nationality, not humanity. The individual acquires rights because he or she is a citizen of the Union or a family member of one. Rights flow from the fact that the individual belongs to one of the 27 Member States rather than other identities. However, through agreements with third countries the EU has extended rights almost identical to those of EU citizens to their nationals. Most important are the agreements with Iceland, Norway and Switzerland. The agreement with Turkey provides very important protection for Turkish workers already admitted to the Member States and a standstill provision (i.e., a ban on the introduction of new restrictions) for Turkish nationals seeking to go to the Member States as self-employed persons and service providers. The standstill dates from 1970 but applies to Member States only from the date they join the EU. Thus, the prohibition on new restrictions on self-employment provisions only applies to the 2004 Member States as regards their national legislation on 1 May 2004 when they joined the EU. There is a plethora of third country agreements with states in the neighbourhood of the EU, including provisions on workers and establishment, but these are mostly limited to providing protection against discrimination for workers lawfully admitted under national law and market access for companies based in those countries.

*Esmerelda S. is a Romani woman from Romania who went to Tuscany and secured work as a minder of an elderly and incapacitated woman. She has not revealed her ethnicity to anyone, because she believes negative repercussions would surely follow if she did so. She has been in Italy for around a year and a half. She is currently saving money to be able to buy a house and, ultimately, open a small business. She sends home several hundred Euros per month in remittances.*

The key source of the right of free movement is Article 18 TEC – citizenship of the Union. The concept of citizenship of the EU is somewhat different from the idea of citizenship derived from international human rights law. All nationals of the Member States are citizens of the Union. The key right is the right to move and reside anywhere in the EU (i.e. on the territory of the 27 Member States). Thus, while a citizen has the right to enter, move and reside in his or her state of nationality as a result of international human rights law, in the EU, he or she has – as a citizenship right – the right to leave his or her state of nationality and to cross an international border, enter another EU state and reside there. Thus, EU law provides rights to the migrant in the guise of a citizen.<sup>33</sup>

Article 39 TEC provides the right of free movement of workers. Anyone who is exercising an economic activity subordinate to another person and who receives remuneration for that activity over a period of time is a worker under EU law.<sup>34</sup> Anyone who is seeking work or taking up work has the right to cross EU borders for the purpose of doing so. The activity must not be marginal or ancillary to another purpose. For nationals of eight Central and Eastern European Member States, the right to free movement as workers was delayed for up to five years as of 1 May 2004 (with the exceptional option for an extension of a further two years). In fact, all Member States have lifted the restriction on free movement of workers, completely or almost so, except

<sup>33</sup> C-413/99 *Baumbast*, 17 September 2002; C-291/05 *Eind*, 11 December 2007.

<sup>34</sup> C-213/05 *Geven*, 18 July 2008.

Austria, Germany, Belgium and Luxembourg. The same limitation applies for Bulgaria and Romania, as of 1 January 2007. While all the 2004 Member States did not apply any restriction on free movement of workers among the pre-2004 Member States, among the pre-2004 Member States themselves, only Sweden and Finland immediately allowed free movement of workers to citizens of the 2004 group.

Article 43 TEC sets out a right of establishment. Where an individual is crossing a border to set up as a self-employed person in another Member State, he or she has a right to do so under EU law. Establishment means self-employment, either individually or through a company. While the individual may have to fulfil criteria for regulated professions, he or she has a right to move and to exercise economic activities. For the activity to qualify as establishment, the individual must provide services for remuneration over a period of time but not be subordinate to another person. This is the main difference between the provisions of Article 43 TEC and those for workers as provided under Article 39 TEC, described above. So long as the activity is not prohibited by law, the individual is entitled to engage in it. This includes, for instance, prostitution, which the European Court of Justice has defined as an economic service.<sup>35</sup> There is no option for delay in the right of free movement for self-employment as regards the 2004 or 2007 Member States nationals.

TEC Article 49 concerns services. Persons have a right to move and reside in any Member State if the purpose is to provide or receive services there. The provision of services must be an economic activity, but can include minor activities such as occasional market trading so long as there is remuneration and the individual is not subordinate to any other person. The difference between the establishment provision and the service provision is in the amount of infrastructure the individual acquires and the duration of the service provision.<sup>36</sup> Receipt of services also gives rise to a right to cross borders in EU law. This includes going to another Member State to eat a restaurant meal, stay in a hotel, etc.<sup>37</sup>

Article 12 TEC provides a right to non-discrimination on the basis of nationality. The ground is unusual in international law, as border controls depend on the right of officials to discriminate on the basis of nationality. Article 13 TEC sets out a right to non-discrimination on more traditional grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

### *Secondary EU Legislation*

The EU elaborates the provisions of its two treaties, and makes the laws for the Union institutions and the EU Member States, by adopting secondary rules (Directives and Regulations) that give effect to the fundamental freedoms contained in the relevant EU/EC treaties.

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<sup>35</sup> C-268/99 *Jany*, 20 November 2001.

<sup>36</sup> C-55/94 *Gebhard*, 30 November 1995.

<sup>37</sup> 186/87 *Cowan* 1991.

Directive 2004/38 contains the measures on the right of citizens of the Union to move and reside. All nationals of the 27 Member States have the right to enter the territory of any other state on presentation of a valid ID card or passport. There is no obligation for an EU national to show that he or she has any money to support himself or herself and his or her family in order to exercise the right to cross the border. For residence up to three months, there is also no need to show any further documents, evidence of funds, accommodation, etc., though Member States are not obliged to confer social assistance on these persons for the first three months (Article 24(2)). There is a requirement that EU nationals must not become an unreasonable burden on the social assistance scheme of the particular state, but for this reason to be used to interfere with the right to cross the border and reside, the individuals must have actually sought social assistance (Article 14(4)).

*Silvia L., 30 years-old, is a Romani woman from a village in southern Transylvania, Romania. She is currently living with relatives in rented accommodation in a medium-sized town in southern France. She is seeking work as a cleaner or minder of the elderly. She is Romani and has extensive management experience in Romani NGOs in Romania, but she has studiously deleted all of this experience from her curriculum vitae, because she is sure that if she is suspected of being Romani then she will not find work.*

*Julia P., from the same village in Transylvania, is a 32-year-old Romani woman. She and her husband are separated, and she is raising their two children alone. She has never emigrated, and indeed has never been outside Romania. She makes money primarily by picking through the Timisoara city dump for materials to recycle. In November 2007, while doing so, she was struck and run over by a bulldozer driven by municipal waste collection workers. Both of her legs were broken in the accident. Because she has no health insurance, she was given rudimentary emergency treatment and then sent home, incapacitated.*

Restrictions on entry are only permitted on the grounds of public policy, public security or public health. These grounds must not be invoked to serve economic ends (Article 27). Measures taken on these grounds must be proportionate and based exclusively on the personal conduct of the individual. Previous criminal convictions (let alone suspicion of involvement in criminal activities) shall not in themselves constitute grounds for taking such measures. Further, the personal conduct of the individual must represent a genuine, present and sufficiently serious threat

affecting one of the fundamental interests of society. The state may only justify its actions on the particulars of the individual case and must not act on general preventative grounds.

These rules not only apply to nationals of the Member States but also to their third-country national family members who accompany or join them. Family members are defined as:

- spouses;
- registered partners;
- children under 21 or who are dependent on the EU national or spouse;



- dependent relatives in the ascending line of the EU national or spouse (Article 2(2), Directive 2004/38).

In respect of these family members, the Member State must admit them and if they require visas must issue the visas free of charge. The state cannot apply national rules on family reunification for the issue of visas to these family members.<sup>38</sup>

There is also a duty on the Member States to facilitate the entry and residence of other family members, irrespective of their nationality, not coming within the above group but who, in the country from which they come, are dependents or members of the household of the EU citizen or on serious health grounds require the personal care of the EU national (Article 3(2), Directive 2004/38).

Dependency has been interpreted in EU law as meaning that there is a factual situation which has the following characteristics:

1. Material support (financial or in kind) is provided to the third-country national family member;
2. That material support must be provided by the EU national or his or her spouse;
3. The status of dependent does not presuppose a right to maintenance;
4. There is no need to determine why the family member is dependent;
5. There is no need to determine whether the dependent family member could work;
6. Member States must assess whether the family members are *not* in a position to support themselves having regard to their financial and social conditions;
7. The need for support must arise in the state where the family members have been living (not as a result of their move to the host Member State);
8. Dependency can be proven by any appropriate means;
9. Member States cannot require a document issued by the authorities of the state of residence attesting to the dependency of the family members (this is too onerous);
10. Member States do not need to accept as sufficient evidence a mere undertaking by family members from the European Economic Area that the third-country national is dependent (this is too easy);
11. There must be a situation of real dependence.<sup>39</sup>

Thus, extended family units where some family members may not be citizens of the Union are entitled to remain together when the EU national exercises the right to free movement to go to another Member State. For instance, a Romanian national who seeks to exercise his or her right to self employment (Article 43 TEC) in Italy is entitled to enter the territory accompanied by his or her family members according to EU law.

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<sup>38</sup> C-127/08 *Metock*, 25 July 2008.

<sup>39</sup> C-1/05 *Jia*, 9 January 2007.

### *Third-Country Nationals in the EU*

There is a right of movement across intra-EU borders<sup>40</sup> and residence for third-country nationals who have made the EU their home, provided they can fulfil the necessary conditions. Directive 2003/109 sets out the rights of third-country nationals who have lived for five years or more lawfully in the EU.<sup>41</sup> In order to qualify for the status of “long-term resident third-country nationals” under the Directive, the individual must fulfil three criteria: lawful residence (not including specific groups, such as diplomats, whose status is regulated outside the scope of the directive), stable and regular resources<sup>42</sup> and valid health insurance. Member States can apply an integration condition requirement and refuse the status on the basis of public policy or public security (Articles 5 and 6). Once the individual has such status he or she is entitled to move and reside, including for economic purposes, in any other Member State (Article 14). Only labour market access can be delayed for up to twelve months and made subject to national rules. The definition of public policy and public security is very close to that used for EU nationals.

The Directive requires a high level of integration into the administrative system of the EU state. Thus for instance, a Ukrainian national who has resided in the Netherlands for more than five years and has been economically active there, will have to prove his or her continuous residence on the territory, continuous economic activity to a level of support required by national law and health insurance cover for the full five-year period before he or she will be eligible for the status of long-term resident third-country national and the right to move and reside in another EU state. Further, he or she may, depending on the Member State at issue, have to pass an integration test. In the case of a number of EU Member States with stringent legislation on integration measures (such as in the current example, the Netherlands), an integration test will be required.

Directive 2003/86 provides for a right of family reunification for third-country nationals resident in the EU. The principle of the Directive is that as soon as a third-country national family member fulfils the conditions to join the spouse or parent in the EU, then he or she should be permitted to do so. However, family reunification for third-country nationals resident in the EU is more restrictive than for EU nationals. Third-country nationals must show they can support and accommodate their family members and that they have health insurance before they will qualify for admission. Further integration measures can be required of the family members.

### *Crossing the EU Border*

Entering the territory of the EU is not automatic for third-country nationals. While some third-country nationals, such as United States nationals, rarely encounter difficulties, others are expected to meet various criteria every step of the way – starting with visa

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<sup>40</sup> “Intra-EU borders” are borders between the EU Member States, not including Ireland and the United Kingdom.

<sup>41</sup> Denmark, Ireland and the United Kingdom are not party to this Directive.

<sup>42</sup> Note this is a different test than applies to EU citizens who are economically inactive where the test is whether their resources are sufficient so that they will not become a burden on the social assistance or security system of the host state. The test for EU nationals can only be applied to the economically inactive and only after three months residence.

requirements. Short-stay visas in the EU are called “Schengen visas” and subject to harmonization.<sup>43</sup> There is a common list of countries whose nationals must have visas (or a document which is recognized as the equivalent such as a long-term resident card) before they can enter the EU. All of the EU’s immediately neighbouring countries, except Croatia, are on the so-called “visa black list”,<sup>44</sup> so their nationals must obtain visas before they can cross the EU border. The system is enforced by EU provisions on carriers. Carriers are fined if they bring third-country nationals to the EU who do not have the required documentation. In conjunction with the negotiation of readmission agreements, whereby the neighbouring states agree to take back their own nationals and third-country nationals who have entered the EU via their territory in certain circumstances, the EU has agreed visa facilitation agreements with Albania, Bosnia, the former Yugoslav Republic of Macedonia, Moldova, Montenegro, Russia, Serbia and Ukraine. The agreement with Russia entered into force in June 2007, the rest on 1 January 2008. The rules for the issue of Schengen visas are subject to substantially different interpretation at the consulates of the Member States.<sup>45</sup> At the time of the publication of this study, a proposal for a new EU regulation on the issue of visas is under consideration.

The Schengen Borders Code (Regulation 562/2006) came into force on 13 October 2006 and sets out the law applying to the crossing of the EU’s external and internal borders.<sup>46</sup> It applies only to non-EU nationals, not to EU nationals and their third-country national family members. The grounds for refusing entry (other than the lack of documents or a visa) are that the individual is a threat to public policy or public health; or an alert on the individual has been entered in the Schengen Information System and is refused admission to the EU or is in a national no-entry database; or that the individual poses a threat to the international relations of any Member State. A person can be refused admission on the basis that he or she has insufficient funds. A foreigner needs to demonstrate that he or she has sufficient means for the given duration of stay on the territory; the amount is established by each Member State individually on the basis of a daily rate. A question arises once the individual has fulfilled the criteria, namely are there any other grounds on which a state can refuse admission; the answer seems to be no.

Article 6 of the Schengen Borders Code requires border guards to carry out their functions with respect for human dignity and in a proportionate manner. Further, officials are explicitly prohibited from discriminating on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Where an individual is

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<sup>43</sup> Ireland and the United Kingdom do not participate in the system. Denmark participates by way of a separate agreement.

<sup>44</sup> The “visa black list” is officially Regulation 539/2001 of 15 March 2001 “listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement” as subsequently amended. The black list in the regulation itself is described as: ANNEX II Common List referred to in Article 1(2).

<sup>45</sup> Beaudu, G., “L’externalisation dans le domaine des visas Schengen”, *Cultures et Conflits*, Hivers 2007, pp. 85-109; Boratynski, J. and A. Szymborska, *Neighbours and Visas: Recommendations for a Friendly European Union Visa Policy*, Warsaw: Stefan Batory Foundation, September 2006.

<sup>46</sup> Denmark participates by way of a separate treaty, Ireland and the United Kingdom do not participate by choice. Bulgaria and Romania have not yet been admitted.

refused admission he or she is entitled to written notification, reasons, a right of appeal and information on how to exercise that right.

The Schengen Borders Code also provides for the abolition of intra-Member State border controls. Under this provision no controls are permitted at EU internal borders (Article 21). Police checks within the territory of a state are permitted but they must:

- not have border control as an objective;
- be based on general police information and experience regarding possible threats to public security; and
- aim to combat cross-border crime.

The checks must be devised and executed in a manner distinct from systematic checks on persons and only be carried out as spot checks. Residence permits and documents issued to non-EU nationals by the Member States are scheduled to indicate which are equivalent to a visa for the purpose of crossing the external border and for the purpose of movement across internal borders.

### *III.1.B. Non-Discrimination and Migration*

With regard to Romani migration, preliminary discussion of the Law of the Border would be incomplete without summary examination of the ban on discrimination – including the particularly serious harm caused by racial discrimination – on the one hand, and border controls and migration, on the other.

The sources of political commitment and legal obligation on states regarding non-discrimination are numerous. The OSCE, both in the Helsinki Final Act and in many subsequent documents, has affirmed and reaffirmed states' political commitment to achieve equal rights and status for all citizens. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and many other instruments engage with the issue of discrimination. Several important aspects of discrimination as regards international human rights commitments are key in this context:

- Proscribed grounds: Human rights instruments prohibit discrimination mainly on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>47</sup> The ECtHR has interpreted the prohibition on discrimination as also covering nationality as a prohibited ground in limited circumstances.<sup>48</sup> EU law prohibits discrimination on the basis of nationality (Articles 12 and 13 TEC).
- Non-discrimination and other rights: Some international and regional instruments limit the non-discrimination obligation to the enjoyment of rights contained in the instrument itself (for instance Article 14 of the ECHR). Protocol No 12 to the

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<sup>47</sup> Article 2 International Covenant on Civil and Political Rights 1966.

<sup>48</sup> *Gaygusuz v Austria*, 16 September 1996.

ECHR, however, provides a wider duty on states to ensure non-discrimination as regards any right set forth by law.

- Legitimate different treatment: some different treatment may not constitute discrimination (and therefore may not be illegal). As the ECtHR has held, “[a] difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.”<sup>49</sup>

In light of the above, the limits of non-discrimination in a migration context are quickly apparent. States are entitled to operate immigration controls and to treat foreigners differently from their own nationals. This is not discrimination for two reasons. First of all, the different treatment is based on the fact that the circumstances are different – citizens have a right to enter the state while foreigners do not. Secondly, the differential treatment of foreigners from different countries – for instance between the treatment of a US national and a Nigerian national – will not normally constitute discrimination so long as it is based on nationality not disguised racial discrimination. Discrimination on the basis of nationality as concerns entry onto the territory is not normally prohibited (except in EU law, but primarily as regards nationals of the Member States). However, as noted below, discrimination based on nationality is banned in a range of sectoral fields outside areas directly concerning access to or expulsion from the territory.

Racial discrimination, i.e. discrimination based on perceived race or ethnicity, is regarded as a particularly serious form of harm under international law. This ban has been applied to decisions concerning border controls in Europe. Most notably, in *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, a case involving Roma from the Czech Republic stopped from travelling to the United Kingdom by UK border officials stationed at Prague Airport. The House of Lords, the highest appeals court in the United Kingdom, ruled that UK Immigration Officers operating under the authority of the Home Secretary at Prague Airport discriminated against Roma who were seeking to travel from that airport to the United Kingdom by treating them less favourably on racial grounds than they treated others who were seeking to travel from that airport to the United Kingdom, in contravention of the law.<sup>50</sup> The ban on racial discrimination in border matters has also been affirmed by the ECtHR.<sup>51</sup> The UN Committee on the Elimination of Racial

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<sup>49</sup> *Stec and Others v United Kingdom*, 12 April 2006.

<sup>50</sup> House of Lords, *Judgments - Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, SESSION 2004-05, [2004] UKHL 55, on appeal from: [2003]EWCA Civ 666.

<sup>51</sup> See former European Commission of Human Rights, *East African Asians v the UK*, Report of the Commission, 14 December 1973, esp. paras 207-208

Discrimination has recently – for the second time – attempted to elaborate where the ban on racial discrimination intersects with the rights of non-citizens.<sup>52</sup> As noted above, Article 6 of the Schengen Borders Code explicitly bans discrimination at the border based on, among other grounds, racial or ethnic origin.

### *OSCE*

There is a strong political commitment to the principle of non-discrimination among the OSCE participating States. The 1990 Copenhagen Conference document states that “[t]he participating States clearly and unequivocally condemn totalitarianism, racial and ethnic hatred, anti-semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds. In this context, they also recognize the particular problems of Roma (gypsies)” (para 40). This commitment was renewed in 1991 in the Geneva Report on National Minorities and again at the Moscow Conference the same year, and “[r]eaffirmed, in this context, the need to develop appropriate programmes addressing problems of their respective nationals belonging to Roma and other groups traditionally identified as Gypsies and to create conditions for them to have equal opportunities to participate fully in the life of society, and will consider how to cooperate to this end.” The 1999 Istanbul Summit document states “[w]e will reinforce our efforts to ensure that Roma and Sinti are able to play a full and equal part in our societies and to eradicate discrimination against them.” The Berlin Declaration of the OSCE Parliamentary Assembly refers to the Istanbul Summit’s commitment to adopt anti-discrimination legislation and urges Member States to promote anti-discrimination. The political will as expressed by the OSCE is unequivocal. The problem is delivery on these commitments.

### *Council of Europe*

The Council of Europe instruments, as well as regular political pronouncements, make clear that combating discrimination is among the most central commitments of the Council of Europe. A general prohibition on discrimination on prohibited grounds is contained in Article 14 of the ECHR. Protocol No 12 to the European Convention, adopted in 2000, provides that “[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. For the moment 17 states have ratified Protocol No 12.<sup>53</sup>

The ECtHR has applied Article 14 in numerous cases concerning migrants. For Article 14 to apply, there must be another ECHR right at stake – for migrants this is often Article 8, the right to respect for private and family life. As discussed above, the ECtHR has found

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<sup>52</sup> United Nations Committee on the Elimination of Racial Discrimination, General Comment 30, ‘Discrimination and Non-Citizens’, CERD/C/64/Misc.11/rev.3.

<sup>53</sup> Albania, Andorra, Armenia, Bosnia, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, the Netherlands, Romania, San Marino, Serbia, Spain, the former Yugoslav Republic of Macedonia and Ukraine.

that prohibition on discrimination can also apply to the ground of nationality. On this basis, it has held that discrimination against migrants in the provision of social benefits breaches Article 14.<sup>54</sup>

The Court has also repeatedly called racial discrimination a “particularly invidious” form of discrimination.<sup>55</sup> In a series of decisions since 2004, the Court has applied the Article 14 ban on discrimination in a number of findings against Council of Europe Member States in cases concerning Roma in the following areas: inadequate investigation of possible racial motivation in police killings;<sup>56</sup> inadequate investigation of racial motive in other police abuse cases;<sup>57</sup> inadequate investigation of racial motive in cases of vigilante “skinhead” violence against Roma;<sup>58</sup> and racial segregation or other racial discrimination in education.<sup>59</sup> The Court has also held that degrading living conditions, combined with evident racism on the part of the public authority, can amount to degrading treatment in the sense of Article 3 ECHR, in cases concerning the failure to remedy extreme community violence against Roma.<sup>60</sup> In addition, the European Committee of Social Rights, the arbiter of Council of Europe law under the European Social Charter and Revised Social Charter, has on a number of occasions found systemic discrimination and related violations in cases against Charter parties in the field of housing of Roma.<sup>61</sup> This jurisprudence includes the finding that, “for the integration of an ethnic minority as Roma into mainstream society measures of positive action are needed”.<sup>62</sup>

### *The European Union*

The EU has prohibited discrimination on the basis of nationality since its inception. Currently, Article 12 TEC contains this general provision which has been upheld by the EU court as directly effective. The prohibition of discrimination on the basis of nationality has been included in most secondary legislation and applies to all citizens of the Union. The comparator is the treatment that a national of the state enjoys. Thus, for instance, if under national law citizens are entitled to benefits, in principle these must be extended also to nationals of the other Member States. The most sensitive area of application of the non-discrimination principle vis-à-vis citizens of the Union has been in respect of social benefits. Here, EU secondary legislation limits equal treatment to workers and the self-employed. Students, pensioners and the economically inactive must reside for five years in the state before they acquire a right to equal access to social benefits (Article 24, Directive 2004/38). So far there has been no answer to the question

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<sup>54</sup> See *Gaygusuz v Austria*, 16 September 1996 and *Okpiz v Germany*, 25 October 2005.

<sup>55</sup> See for example *Timishev v. Russia*, 13 December 2005, para. 56.

<sup>56</sup> *Nachova v Bulgaria*, 26 February 2004.

<sup>57</sup> *Bekos and Koutropoulos v Greece*, 13 December 2005; *Cobzaru v Romania*, 26 July 2007.

<sup>58</sup> *Secic v Croatia*, 31 May 2007.

<sup>59</sup> *D.H. and others v Czech Republic*, 13 November 2007; *Sampanis and others v Greece*, 5 June 2008.

<sup>60</sup> *Moldovan and others v Romania*, 12 July 2005; see also collection of Roma-related case law of the ECtHR at: [http://www.coe.int/t/dg3/romatravellers/jurisprudence/echr\\_en.asp](http://www.coe.int/t/dg3/romatravellers/jurisprudence/echr_en.asp).

<sup>61</sup> See European Committee of Social Rights, decisions on the merits in Collective Complaints 15, 27, 31 and 39 against Greece, Italy, Bulgaria and France respectively.

<sup>62</sup> See European Committee of Social Rights, *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, Report to the Committee of Ministers, Strasbourg, 30 November 2006, [http://www.coe.int/t/e/human\\_rights/esc/4\\_collective\\_complaints/list\\_of\\_collective\\_complaints/default.asp#P121\\_10046](http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/default.asp#P121_10046).

whether Article 12 TEC restricts or limits in any way discrimination on the basis of nationality among those who are not EU nationals. However, the EU has proceeded on the basis that discrimination among foreigners on the basis of nationality is permitted (for instance the establishment of the visa black list).

The EU Charter of Fundamental Rights adopted in 2000 prohibits discrimination. Article 21 provides that “[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

In 1999 the EU introduced a new non-discrimination provision into the EC Treaty – TEC Article 13, which states that “the Council may establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. Under this new power, the EU adopted two directives in 2000. The first, Directive 2000/43, provides for equal treatment on grounds of racial and ethnic origin. There is a common definition of unlawful discrimination, which includes less favourable treatment of a person on the basis of race or ethnic origin or a provision, criterion or practice which appears neutral but is likely to have an unfavourable outcome for a person or a specific group of persons on a prohibited ground. Directive 2000/43 applies to employment, training, working conditions, professional organizations, social protection and social security, as well as social advantages and access to supply of goods and services, including housing. This Directive had to be implemented in all the Member States by 19 July 2003.

The second Directive adopted under the new EC Treaty Article 13, Directive 2000/78, had to be transposed into national law by 2 December 2003. This directive prohibits discrimination on the basis of religion or belief, disability, age or sexual orientation, as regards employment or occupation and membership of organizations. It applies to the field of economic activities, whether employed or self-employed, including promotion, vocational training, working conditions, membership of organizations and applies both to the public and private sectors.

The two Directives ban the following forms of discrimination:

- Direct discrimination, or treating similarly situated persons differently in similar situations, for arbitrary reasons including perceived race or ethnicity;<sup>63</sup>
- Indirect discrimination, meaning where persons are placed at a particular disadvantage as a result of an apparently neutral rule, criterion or practice, provided there is no objective justification for the disadvantage;
- “Harassment”, meaning “unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”;

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<sup>63</sup> The ECtHR, in *Thlimmenos v Greece*, judgment of 6 April 2000, has established the complementary principle that, “[t]he right not to be discriminated against ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”



- An instruction to discriminate against persons on grounds of racial or ethnic origin;
- Adverse treatment or adverse consequences as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

In July 2008, the European Commission proposed a new Directive to implement the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation outside the labour market. This is currently under consideration in the EU institutions. So far the EU institutions have been monitoring the Member States' transposition of the new Directives and taking action in cases of non-transposition or wrongful transposition into domestic law. There has only been one decision by the European Court of Justice – the final arbiter of EU law – on matters concerning one of the anti-discrimination Directives of the new Article 13 TEC. This decision is related to disability. Throughout 2008, the European Commission has been extensively examining how the Member States are handling the transposition into domestic law related to EU gender discrimination bans.

Further discussion of the European law ban on discrimination in the particular sectoral fields of education, employment, health care and housing is provided in the relevant sections of Part II of this study.

### *III.2. Practice: Roma and Border Crossing in Europe*

In practice, like other Europeans, Roma have frequently exercised the EU right of free movement, and have also crossed the external Union borders or other third-country borders in Europe, either (i) temporarily; (ii) as migrants seeking to establish themselves in a country other than their own; or (iii) because they were fleeing persecution. Precise data on this issue is, however, unavailable. Nevertheless, some broad parameters are known and are discussed here.

#### **Data Collection and Protection**

Information on Romani migration has, if anything, been overproduced. The arrival of one hundred or two hundred Roma from another country can trigger front-page news coverage in the yellow press and more serious media for days. However, beyond certain particular micro-scenarios, reliable statistical data on Romani migration is largely unavailable.

In the first place, the misuse of ethnic data – particularly during World War II – throughout the continent, with only a few exceptions, has led to a prevailing suspicion of the official gathering, retention and publication of ethnic data.<sup>64</sup> Some countries enshrine

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<sup>64</sup> See comprehensive report by Patrick Simon, “*Ethnic*” Statistics and Data Protection in the Council of Europe Countries, Council of Europe, European Commission Against Racism and Intolerance (ECRI), 2007,

a ban on state determination of ethnicity in their Constitutions. Even where constitutional restrictions are not in place, data protection laws tend to regard ethnicity as a protected category, subject to particularly stringent control, and establishing individual rights of control, alteration and deletion. In practice, some demographers note that generating aggregate data on ethnicity without first having access to accurate individual data, including ethnicity, is extremely difficult if not impossible.

In the national or home context, gathering statistical data on Roma has been a particularly fraught undertaking, and one which has included a number of particularities not necessarily prevailing among most other ethnic groups. First of all, in an atmosphere charged with mistrust about the uses of such data, Roma have shown a distinct reluctance to tell the census-taker or other public authorities or researchers that they are Romani. Secondly, in some countries, census-takers may be reluctant to allow Roma to self-declare as Romani or to register persons as Romani, for nationalism or other reasons. Third, even where Roma (or “persons regarded as ‘Gypsies’”) live in compact settlements, they may self-declare as members of other ethnic groups. Indeed, the large group of people frequently lumped together as “Gypsies” or “Roma” for the purposes of sociology or policy-making often includes groups not describing themselves as Roma.

As a result of these and other related matters, most if not all of the censuses in Europe are regarded as inaccurate in their count of Roma. Major data-gathering exercises, such as efforts to remedy the data problem in Central and South-Eastern Europe in the context of the Decade of Roma Inclusion, have been plagued by methodological and practical difficulties and criticized on a number of grounds, ultimately producing questionable results. Relevant government officials now frequently speak of official and unofficial estimates of the Romani population. The Roma and Travellers division of the Council of Europe maintains a similar chart of official and unofficial estimates, among other things to determine the weights of national representation in the European Roma and Travellers Forum (ERTF), an NGO affiliated with the Council of Europe which endeavours to provide formal representation of Roma at European level (see Appendix 1).

Ethnic data on Romani migrants and Romani migration therefore adds yet another dimension of complexity. One problem in the field of migration is that it is particularly difficult to demonstrate to the data subject or to community leaders why the gathering of such data can be of any benefit to the person or persons concerned. A major argument in favour of gathering ethnic data has been that, without it, policymakers are powerless to design and monitor the impacts of measures to end discrimination in key sectoral fields. In the field of migration, however, few if any efforts have been made to tackle discrimination. In fact, the opposite is the case.

EU integration has made it less likely that Romani arrivals will be counted, especially if they are coming from another EU Member State. Thus, mirroring similar discussions throughout the EU and elsewhere, on 8 April 2008, Irish parliamentary Deputy Caoimhghín Ó Caoláin requested the then Minister for Justice, Equality and Law Reform,

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available at: [http://www.coe.int/t/e/human\\_rights/ecri/1-ECRI/Ethnic%20statistics%20and%20data%20protection.pdf](http://www.coe.int/t/e/human_rights/ecri/1-ECRI/Ethnic%20statistics%20and%20data%20protection.pdf)

Brian Lenihan, to give “[...] the number of members of the Roma community believed to be legally resident here at present.” Minister Lenihan replied: “It is not possible to provide the Deputy with the information sought since, as the Deputy will appreciate, the Roma community, in this State and elsewhere, is made up principally of persons of Romanian, Hungarian, Polish and Czech Republic origin, all of whom are EU Citizens and, as such, in terms of immigration controls, are covered by the provisions of the European Communities (Free Movement of Persons) (No. 2) Regulations 2006. Such persons are not required to register their presence in the State.”<sup>65</sup>

In the absence of major efforts to overcome negative legacies in the area of ethnic monitoring of border controls and migration generally, it is difficult to see how progress might be made on this front. *Inter alia*, in the public interest of heightening awareness of, and improving data collection on migration matters, governments should implement international and regional law obligations in the field of non-discrimination also in the area of border controls. An effective ban on discrimination should also be implemented in all areas concerning access to and remaining on the territory by migrants and other persons crossing the border onto the territory.

### **Available Data**

The foregoing notwithstanding, it is possible to identify some broad trends concerning numbers of Roma and Romani migrants in Europe, as well the forces and policies shaping Romani migration in individual countries in the OSCE region.

A number of countries in the OSCE region are likely or certain to have Romani or related communities numbering over 100,000. These include Bulgaria, Hungary, Romania, Serbia, Slovakia, the former Yugoslav Republic of Macedonia, the United States, Russia, the Czech Republic, Italy, Spain, France, the United Kingdom, Turkey, Greece, Ukraine, Germany, Albania, Moldova and possibly others. Of these, the following have Romani populations of possibly or certainly more than 5 per cent of the population as a whole: Bulgaria, Hungary, the former Yugoslav Republic of Macedonia, Romania, Serbia and Slovakia. In fact, in Bulgaria, Romania and Slovakia there are Romani communities possibly approaching 10 per cent of the general population.

The countries with recent Romani migrant communities are, for the most part, not demographically similar to the countries named above. Percentage-wise, the countries whose Romani communities are most significantly migrant-dominated are Austria, Germany and Italy, with the Czech Republic constituting an exceptional case.<sup>66</sup> Most autochthonous Austrian, German and Czech Roma were killed in the Holocaust. Today, up to 5/6 of the estimated 20,000 to 30,000 Romani community of Austria is either

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<sup>65</sup> Question no. 391, DÁIL QUESTION addressed to the Minister for Justice, Equality and Law Reform (Mr. Lenihan) tabled by Deputy Caoimhghín Ó Caoláin on Tuesday, 8 April 2008.

<sup>66</sup> Many thousands of Roma in the Czech Republic are Slovak citizens as a result of internal migration in Czechoslovakia, combined with the widespread denial of Czech citizenship to Roma of Slovak origin in the new Czech state, in the context of the break-up of Czechoslovakia on 1 January 1993. Migration of Roma from Slovakia to the Czech Republic has nevertheless continued since 1993.

foreign-born, or the children or grandchildren of persons born elsewhere. The overwhelming majority are from the former Yugoslavia.

The situation is similar, although not as extreme, in Germany and Italy. In Germany, the Romani community is estimated at between 70,000 and 140,000. Here too, there is a very strong presence of foreign-born or foreign-descended Roma, particularly from the former Yugoslavia. One of the only accurate, publicly available, ethnicity-specific pieces of statistical data on Romani migration in Europe sets out one aspect of the issue in Germany: according to the German Federal Office for Migration and Refugees, as of 31 December 2004, there were 24,351 Roma from Serbia and Montenegro (including Kosovo) in the Federal Republic of Germany, who were at that time under orders to leave Germany (*ausreisepflichtiger*). As of the same date, there were 8,197 Ashkalis and 1,883 Egyptians (groups also regarded as “Gypsies”) from Serbia and Montenegro, including Kosovo, who were under similar orders to leave Germany.<sup>67</sup> This makes a total of 34,411 persons. However, some thousands of these persons have now been forcibly expelled from Germany, or have left Germany under pressure. The figure above does not include Romani persons who are citizens, legally resident, recognized refugees or in asylum proceedings in Germany.

In Italy, the Romani community is estimated at between 120,000 and 160,000 persons, with possibly half of the Romani community born elsewhere or directly descended from migrants in recent generations. During 2008, the government of Italy carried out a high-profile campaign in three regions, *inter alia*, to document Roma living in “nomads camps” and other excluded settlements in the country. According to the results of the “census”, made public on 15 October 2008, there was a total of 12,346 Roma people – including 5,436 minors – living in camps around Rome, Naples and Milan. A total of 167 camps was included in the census, which was carried out by the Italian Red Cross under the auspices of the Interior Ministry and the local Prefecture. The action targeted camps including both Italian citizens and non-citizens.

To a certain extent, the recent histories of Roma and migration in Austria, Germany and Italy bear some resemblance to each other. All three began receiving Yugoslav migrant workers in the 1980s, as the cold war thawed and the borders of the former Yugoslavia opened. Among these were many thousands of Roma from throughout the former Yugoslavia. The conflicts generated as Yugoslavia collapsed brought hundreds of thousands of refugees to all three countries, and turned many more thousands of others into refugees *sur place*. In recent years, all three countries – particularly Germany – have tried to assist these persons in returning home and, where this has not worked, they have pressured and in many cases forced them to leave. As many have now left, the refugee populations in Germany of Bosnians and Kosovars in particular have become more and more Romani;<sup>68</sup> non-Roma have managed to go home or secure durable residence status in Germany, while Roma – excluded by the majority communities in their countries of

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<sup>67</sup> Bundesamt für Migration und Flüchtlinge, Informationszentrum Asyl und Migration, “Serbien und Montenegro/Kosovo: Erkenntnisse des Bundesamtes”, März 2005, pp.17-18.

<sup>68</sup> Mihok, Brigitte, *Zurück nach Nirgendwo. Bosnische Romaflüchtlinge in Berlin*, Berlin: Metropol-Verlag, 2001, p. 76.

origin – have in many cases not yet managed to secure conditions conducive to return home with dignity. At the same time, the German authorities have pursued policies largely blocking their integration in Germany (see below). They have undertaken a number of efforts to press for the return of Roma, Ashkalis and Egyptians, and have in fact forcibly or otherwise returned many thousands of Roma (as well as Ashkalis, Egyptians and others regarded as “Gypsies”) to Bosnia, Kosovo, Serbia and the former Yugoslav Republic of Macedonia.

The Romani communities of Italy with foreign links are more heterodox than those of Austria and Germany; in addition to significant Roma communities from the former Yugoslavia, Italy has for the past decade had Romanian Romani communities. Similar to Austria, Germany, Switzerland, the Czech Republic and elsewhere, arriving at an accurate count of who constitutes a “migrant” in Italy is complicated by the fact that access to residents permits, and even more fundamental forms of status, is made particularly difficult due to restrictive practices in this area.<sup>69</sup> Thus, the Council of Europe’s European Commission against Racism and Intolerance has noted: “In its second report, ECRI urged the Italian authorities to address the Roma and Sinti’s lack of documents, including Italian passports and residence permits. ECRI has continued to receive reports of many Roma and Sinti born in Italy or who have lived in Italy most of their lives, and their children, who do not have Italian citizenship. In many cases, these persons only have short-term residence permits and in some cases no residence permits at all. ECRI has also received reports that some hundreds of stateless Roma children currently live in Italy.”<sup>70</sup>

It must be noted that in these three countries (Austria, Germany and Italy), where the Romani community as a whole is shaped significantly by recent immigrants, the representation of Roma in the population at large is miniscule compared with the six

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<sup>69</sup> For example, the third report on Italy by the Council of Europe’s Commission Against Racism and Intolerance (ECRI) notes:

“In its second report, ECRI considered that there was a need for Italian citizenship legislation to grant easier access to Italian citizenship both for children born or raised in Italy and for long-term residents. Since then, a number of proposals for legislation aimed essentially at extending the application of the principle of *jus soli* and reducing the length of residence required of applicants to obtain citizenship, have been introduced. However, none of these proposals has been adopted.

“In its second report, ECRI recommended that the Italian authorities increase transparency and reduce the discretionary element in processing applications for naturalisation, including by standardizing and simplifying the relevant procedures. Since then, however, ECRI has continued to receive reports according to which decisions on applications for naturalisation, notably on the basis of residence, are excessively restrictive and discretionary and often characterised by a lack of transparency as to the reasons for rejection. In addition, although ECRI notes that the Italian authorities have taken measures to speed up the examination of applications and that the law fixes a maximum term of 730 days to this end, it still often takes considerably longer for applicants to receive a response. In this connection, ECRI notes in particular reports of applications concerning minors over 14 years of age, who have reached adulthood before their application has been processed and have therefore been required to re-apply according to more stringent naturalisation procedures.” (Council of Europe, European Commission against Racism and Intolerance (ECRI), *Third Report on Italy*, adopted on 16 December 2005, paras. 5 and 6).”

<sup>70</sup>Ibid., para. 96.

countries mentioned above with Romani populations of over 5 per cent. Roma make up 0.3 per cent, 0.12 per cent and 0.23 per cent of the general population of Austria, Germany and Italy, respectively.

In recent years Romanian Roma have migrated especially, although not only, to those countries with Latinate national languages similar to Romanian: namely Italy, Spain and France. In Spain and France they join Romani communities of several hundreds of thousands – over half a million in the case of Spain – although again not comprising anywhere near the percentage total of the six countries mentioned above. Roma make up around 0.64 per cent of the general population of France and 1.60 per cent of the population of Spain.

Informal estimates of the number of immigrant Roma in Greece, provided in the course of research for this study, put the figure at tens of thousands, probably close to or possibly even more than 100,000. Most of these persons come from Albania, but others come from Bulgaria, Kosovo, the former Yugoslav Republic of Macedonia and Romania. Some of these persons are temporary migrants, performing in particular seasonal agricultural work in Greece, and then returning home. Others are involved in scrap metal recycling.

Beginning in the 1990s and continuing to the present day, many tens of thousands of Roma from the Czech Republic, Slovakia, Poland, the Baltics, Romania and elsewhere have gone to the United Kingdom, first frequently as persons seeking and often receiving refugee status, and currently as persons exercising EU free movement rights. Romani arrivals in Britain have provoked both mobilized racist press coverage<sup>71</sup> and explicitly discriminatory measures by the government, particularly during the Blair premiership.<sup>72</sup> Anti-Romani media was again prevalent in 2006 and 2007 in the run-up to and after Romania and Bulgaria joined the EU.

There is no reliable statistical data on Romani migrants in the United Kingdom. Possible data sources, such as the Worker Registrations Scheme, document nationality, but not ethnicity. The Scheme also records jobs, but not persons, and would not be able to track self-employed persons. A number of other flaws have been identified in the Scheme.<sup>73</sup>

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<sup>71</sup> Casually derogatory headlines have prevailed across the media spectrum and have included “Gypsies Invade Dover, Hoping for a Handout” and “Gyro Czechs Arrive”, playing on stereotypes of “Gypsies out to rip off the system”. An overview of panic-driven media in the United Kingdom is provided in the Open Society Institute’s EU Accession Monitoring Programme’s “Who is Afraid of Migrating Roma?” at <http://www.eumap.org/journal/features/2004/migration/pt2/whoafraid> (accessed 28 September 2008).

<sup>72</sup> The Blair government (i) instructed border officials to subject a number of ethnic groups, including Roma, to more stringent border checks than others; (ii) placed officials at the Prague airport to conduct pre-clearance screening of persons boarding aeroplanes bound for the UK; (iii) pressed for an arrangement whereby German and Czech authorities would identify particular groups of persons travelling in busses over land and subject them to rigorous checks. Item (ii) was held to be discriminatory by the House of Lords. In the course of these proceedings, the government stated that it had withdrawn item (i). Item (iii) was a response to the fact that discriminatory measures at the Prague airport caused Roma to go to Britain by bus.

<sup>73</sup> See <http://www.openeurope.org.uk/research/bulgariaromania.pdf> (accessed 28 September 2008).

There are also reports that, even where Roma are working, they may not be registered under the Scheme.

In the course of our research, the Romanian Embassy in London provided an unofficial estimate of around 100,000 Romanian nationals arriving in the United Kingdom in recent years.<sup>74</sup> Romanian activists and journalists living in the United Kingdom believe that in reality only 50,000 to 60,000 Romanians arrived in the United Kingdom in recent years and that 5 to 10 per cent of them are Romani.<sup>75</sup> The basis for both of these estimates is unknown. If the latter is the case, Romani migrants from Romania may comprise not more than 5,000 to 6,000 people.<sup>76</sup> However, this may be an underestimate. Whatever the case, here again, the numbers of persons at issue is comparatively small: all told – including the much larger native Traveller and Gypsy community – Roma, Gypsies and Travellers make up 0.40 per cent of the general population in the United Kingdom.

Similar to many other countries in this survey, the United Kingdom has seen discourse surrounding Roma migration from Romania become particularly intense and antagonistic in the context of one extended Romani family from Romania in the town of Slough.<sup>77</sup> In Ireland, too, public discourse has been shaped by 2007 events surrounding some one hundred Romanian Roma living rough in several locations in Dublin during the summer months of 2007.<sup>78</sup> Anti-Romani media directed at migrants has been a regular feature of the Greek, Italian and Swiss media.<sup>79</sup>

Negative media attention given to Romani migrants has been extensive in countries of origin as well. The Slovak media, citing high-level government officials, has spoken extensively of “ethno-tourism” by way of stigmatizing Romani migrants and asylum-seekers from Slovakia in Western Europe. Responding especially to French pressure, Romanian authorities have attempted, unsuccessfully, to adopt obstructive measures to hinder Roma from leaving the country. The common theme in both instances is the contention that Roma are “harming our country’s reputation abroad”,<sup>80</sup> with Romani migration a supplementary reason for already existing very high levels of anti-Romani antipathy. As a result of this heightened antipathy, many report increased levels of discrimination in the home country.

Migration and migrant rights issues also shape some countries frequently seen as primarily countries-of-origin. For example, the pre-war Czech Romani community was

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<sup>74</sup> Response to research questionnaire provided in the framework of this project, submitted by Leonid Raihman (CARA), following telephone interview with the Romanian embassy.

<sup>75</sup> Ibid.

<sup>76</sup> Telephone interviews conducted with Mr. Costel Petre, director of NGO “Romanians in 21<sup>st</sup> century”, and Mr. Petre Clej, freelance journalist for the Romanian National Radio, 5 September 2008, London.

<sup>77</sup> See [http://news.bbc.co.uk/2/hi/uk\\_news/england/berkshire/6649049.stm](http://news.bbc.co.uk/2/hi/uk_news/england/berkshire/6649049.stm) (accessed 23 September 2008).

<sup>78</sup> Presentation made by Sara Russell, Pavee Point, at Council of Europe experts meeting on Roma migration, 9 September 2008.

<sup>79</sup> Thus, for example, in the latter case, in the run-up to the Euro 2008 football championships, Geneva media led with the front-page headlines “Police Fear an Influx of Roma” (*Le Matin*, 30 May 2008).

<sup>80</sup> See Mircea Cartarescu, “Notre faute historique”, in *Courrier International*, No. 926-927-928, August 2008, p.29.

almost entirely destroyed during the Holocaust. After the war, there was significant internal migration (both forced and voluntary) from the Slovak part of Czechoslovakia to the Czech half, particularly (although not only) to industrial border areas from which three million ethnic Germans were expelled after World War II. As a result, today's Czech Romani community has extensive family links to Slovakia. Czech lawmakers undertook efforts to force these people to go to Slovakia after the break-up of the state, but these efforts largely failed. However, one legacy of this pressure is that many thousands of Roma in the Czech Republic are today Slovak citizens, following restrictive practices in allocating citizenship in the new Czech state after 1993.<sup>81</sup> Romani migration to the Czech Republic – in particular from Slovakia, but also from elsewhere – has continued to the present day.

Romani migration in the OSCE is not solely a westward phenomenon. Russia in particular is also a target country for Romani migration, particularly within the former Soviet Union, drawing Roma and others regarded as “Gypsies” from Ukraine, Moldova, the Caucasus, Central Asia and the Baltic States. Some of these – particularly “Mugat” from Central Asia and Transcarpathian Roma from Ukraine – live in very extreme conditions on the margins of urban areas in conditions of extreme social exclusion.<sup>82</sup> All Roma in Russia, whether from Russia or migrants from other parts of the former Soviet Union, face high levels of discrimination<sup>83</sup> and frequently have no documents, often because they have been destroyed by the police.<sup>84</sup>

### **Major Groups of Persons at Issue**

Discussion of “waves”, “flows” or “floods” of Romani migrants arriving at Western European ports frequently masks the fact that what is at issue are human beings pursuing their own interests, rights and visions of a good life, acting on personal decisions as to how best to improve their personal circumstances, which are often extremely difficult and also considerably influenced by the fact or the probability of racial discrimination. “Roma migration” frequently conjures up an image of unified masses of people. In fact, the persons and groups at issue could not be more heterodox. Indeed, distinguishing between the needs – and the rights – of the persons at issue is in many ways among the first requirements in any policy approach to addressing issues related to Romani migration and Romani migrants. One or more of the idealized types listed below may be at issue in any particular country or area.

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<sup>81</sup> Comprehensive assessment of the impact on Roma of the 1992 Czech Act on Citizenship, as well as analysis of the relevant ECtHR law as it existed at the time, were provided at the time in The Article 8 Project report “From Exclusion to Expulsion: The Czech Republic’s ‘New Foreigners’”, Prague: Tolerance Foundation, November 1996. Reflections on legacies concerning citizenship law generally and its impact on Roma, which remains considerable, can be found in article by Uhl, Pavel, “Statehood and Citizenship in the Czech Republic”, 18 May 2005, available at: <http://www.migrationonline.cz/e-library/?x=1963622> (accessed 23 September 2008).

<sup>82</sup> Response to project questionnaire by Stephania Kulaeva, ADC Memorial, 10 October 2008, on file with the authors.

<sup>83</sup> Council of Europe, European Commission against Racism and Intolerance (ECRI), *Third Report on the Russian Federation*, adopted on 16 December 2005, paras. 91-99.

<sup>84</sup> See Kulaeva, *supra* n.82.



1. Persons forced to move – within the borders of one country or internationally – as a result of extreme social exclusion (including poverty), combined with repeated forced expulsion from (usually shanty/informal) housing. In the most extreme example, tens of thousands of Roma, Ashkalis and Egyptians have been forced to leave Kosovo or are displaced inside Kosovo’s borders. In its decision on Roma housing in Greece, after evaluating the various facts at issue brought by both the petitioning parties and the Greek Government, the European Committee of Social Rights used the following formulation to describe one category of the persons at issue: “[...] Roma who choose to follow an itinerant lifestyle or who are forced to do so”.<sup>85</sup> This formulation has been repeated in the Committee’s assessment of matters concerning Roma in Italy.<sup>86</sup>
2. Persons who have left Central/South-Eastern Europe during various periods since the 1980s (former Yugoslavia) or elsewhere (the rest of the Balkans), and moved to Western Europe, temporarily or permanently. Some of these are now (a) long-term residents with status in the respective countries (for example many thousands of Yugoslav Roma in Germany); others are (b) living in extremely excluded conditions, often in slums. It is not clear what, if anything, distinguishes people in category (a) from other Central and South-Eastern European migrant workers in Western Europe, such as for example the large number of predominantly non-Romani ethnic Poles in Great Britain. Persons in category (b) may have extreme difficulty in accessing social rights, as a lack of one or more of the following can conspire to render impossible access to others: formal employment; demonstrated income, savings or other tangible monetary goods; health insurance; valid identity or travel documents.
3. Bulgarian and Romanian Roma, who frequently live in close proximity to (2), but who have newly acquired EU rights.
4. Persons and communities constructing a gainful existence and lives around new opportunities for mobility in the EU, by establishing centres of “vital interest” in more than one country. For example, the relatively close proximity of Romania to other countries with native Romance languages (Italy, Spain, France), combined with exclusionary practices in the target countries, as well as other factors, leads to life calculations that include regular travel back-and-forth between Romania and the relevant Western European country, and centres of legitimate vital interest in two or more countries. In this category too, it is often unclear how these persons differ from non-Romani Poles and Czechs in Britain for example, who may similarly now maintain centres of vital interest in two or more countries.
5. Asylum seekers, refugees and persons with subsidiary protection status. The continuing relevance of the asylum regime should be diminishing in the EU for persons from one EU Member State factually present in another, but the asylum regime may have continued salience for the OSCE and Council of Europe regions, as

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<sup>85</sup> European Committee of Social Rights, Decision on the Merits, *European Roma Rights Center v. Greece*, 8 December 2004, para. 17.

<sup>86</sup> European Committee of Social Rights, Decision on the Merits, *European Roma Rights Centre v. Italy*, 7 December 2005, para. 12.

well as for persons from outside the EU factually present in the EU. For example: (i) according to the UNHCR, citizens of some EU Member States have continued to apply for asylum in others; (ii) Czech and Hungarian Roma have claimed and received asylum in Canada; one of the major efforts by the Canadian Government to end this was recently declared by the Canadian Federal Court of Appeals to be evidently biased and therefore illegal.<sup>87</sup> “Preventing Roma migration” has been an explicit factor in the discussions about the Canadian visa regime vis-à-vis Czech and Hungarian nationals; (iii) Serbian and Kosovo Roma, now subject to major expulsion practices, possibly reaching the level of degrading treatment in some cases. The latter live throughout the EU (Germany, Italy and elsewhere) under various protection regimes – some of them, such as the German “*duldung*”, highly questionable from a human rights point of view (see below); are under temporary or other protection schemes in proximate countries such as Bosnia and Herzegovina and the former Yugoslav Republic of Macedonia (both Council of Europe and OSCE states); and some have been brought from one OSCE state to another for protection purposes (for example around 200 Kosovo Roma brought from former Yugoslav Republic of Macedonia to the United States).

6. Nomadic Roma/Gypsies. Countries with Romani communities with nomadic traditions or active practices include certain countries such as France, the United Kingdom and Romania. Some of these persons/groups cross borders during seasonal travel throughout Western Europe. Austria for example often has summer arrivals from France. The European Court of Human Rights has on a number of occasions been called upon to rule in cases in which authorities in the United Kingdom have expelled Travellers, Gypsies and/or Roma from various forms of halting site (including public sites as well as privately-owned land), often with limited or no procedural protections.<sup>88</sup> Evidence brought also included evident racial discrimination in the allocation of planning permission for Gypsies seeking to park on their own land. In these cases, the Court has held that there is “a positive obligation imposed on the Contracting States [...] to facilitate the gypsy way of life”. These persons may have distinct cultural rights arising from the component of their culture pertaining to travel, such as requirements for halting sites, as recognized by the ECtHR jurisprudence,<sup>89</sup> as well as other relevant international and regional laws.

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<sup>87</sup> In the late 1990s, some hundreds of Roma from the Czech Republic went to Canada, sought asylum and, in the vast majority of cases, were recognized as refugees there. When subsequently several hundred Roma from Hungary sought asylum in Canada, the Canadian Government designed the new instrument of the Lead Case in seeking to guide asylum adjudicators by these persons: “The decision to use this concept in dealing with the current influx of Hungarian Roma claimants arose from recent IRB experiences with large influxes of refugee claims from the Czech Republic (also Roma) and Chile.” (see Immigration and Refugee Board of Canada, “Lead Cases Backgrounder”, at: [http://www.cisr-irb.gc.ca/en/media/background/back\\_leadcase\\_e.htm](http://www.cisr-irb.gc.ca/en/media/background/back_leadcase_e.htm), accessed 8 October 2008). The Canadian Federal Court of Appeal subsequently overturned the Hungarian Roma “Lead Cases” because, *inter alia*, “a reasonable person ... would think that the hearing panel was biased and was not acting independently when it rejected the appellants’ claims for refugee status” (Federal Court of Appeal of Canada, Dockets A-419-04 and A-420-04, Heard at Toronto, Ontario, on November 22, 2005, Judgment delivered at Ottawa, Ontario, on March 27, 2006).

<sup>88</sup> European Court of Human Rights judgments *Buckley v United Kingdom*, 26 August 1996; *Chapman and Others v United Kingdom*, 18 January 2001; *Connors v United Kingdom*, 27 May 2004.

<sup>89</sup> *Ibid.*

There are also two other categories of persons directly impacted by Roma migration issues:

7. A number of persons living in very excluded Romani settlements, including those of Romani migrants, who are not in fact ethnic Roma, but may be subject to detrimental treatment as a result of being regarded as, or being closely affiliated with, “Gypsies”.
8. Roma who are the citizens of the country to which other Roma migrate, but frequently subjected to measures aimed nominally at foreign Roma. Thus, in a prominent example, recent Italian Government measures to “survey” foreign Roma, targeted Roma living in isolated settlements, and thereby included a number of Italian Sinte camps; Italian Sinte are Italian citizens.

Any given country may have more than one category of the above, as well as other persons who are Romani. For example, Greece has (a) domestic nomadic Roma (albeit an extremely limited number); (b) very long-term settled distinct Romani communities, very poor and excluded; (c) very long-term settled distinct Romani communities, a number of which are almost entirely unproblematic; (d) recent Romani migrants who are not EU nationals (especially from Albania, but also from Bulgaria, Kosovo, the former Yugoslav Republic of Macedonia and Romania); (e) recent Romani migrants from new EU Member States (mainly Bulgarian Roma); (f) completely integrated/assimilated Roma who may never even identify themselves as Romani; (g) Romani Muslims in Thrace, who benefit from the minority protections available under the peace treaties between Greece and Turkey following World War I; (h) other persons and communities.

In practical terms, each of the aforementioned types of persons will have different legal rights. It is therefore incumbent on national and local authorities to establish quickly what types of categories of persons are at issue, in order to proceed swiftly to determine entitlements, protections and strategies for best securing the public good.<sup>90</sup>

#### **IV. Protection of Residence, Limitations on Expulsion**

There are two sides to the nationality coin: as well as the right to enter one’s state, there is the right not to be expelled. As with entry onto the territory, this right exists in an absolute form only for the national of the state. International law does not prohibit, in principle, the expulsion of any person who is not a national of the state (including

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<sup>90</sup> Although this recommendation would appear to go without saying, in practice, some national authorities have at times claimed that they are powerless to distinguish among Roma. Thus, for example, in the course of proceedings before the European Committee of Social Rights, the Italian Government argued that it is impossible to distinguish between Italian citizen Roma, Roma who are citizens of other Parties to the European Social Charter, and Roma who would not enjoy European Social Charter rights (i.e. who are citizens of a state which is not a party to the European Social Charter) for the purposes of the application of the Charter Article 31 right to housing (see European Committee of Social Rights, Decision on the Merits, *European Roma Rights Centre v. Italy*, 7 December 2005, para. 6.

stateless persons). In Europe, states have defended strenuously their right to expel foreigners although the practices vary greatly across the region. However, a number of other human rights, both referred to in the Helsinki Final Act and contained in the ECHR do entail a right not to be expelled, where certain circumstances prevail.

#### *IV.1. The European Law and Policy Framework*

##### **OSCE**

The Helsinki Final Act does not specifically address the issue of residence. Nor does it include references to expulsion. The reunification of families referred to in the Helsinki Final Act implies some residence right for family members, but this is structured around the question of exit from a state rather than entry and residence in another. The 1990 Copenhagen Conference agreed that the participating States, in their efforts to protect and promote the rights of persons belonging to national minorities, will fully respect their

undertakings under existing human rights conventions and other relevant international instruments and consider adhering to the relevant conventions (para. 38). The protection of residence rights and the limitation of the circumstances in which an individual can be expelled from a state are part of European human rights commitments in particular through the ECHR.

*Sami R. is a 22-year-old Romani man living in a village near Belgrade, Serbia. He went to Germany in 1993, when he was seven years old, together with his family. All of the family's children attended school in Germany. Early in the morning in January 2003, a social worker accompanied by police officers in plain clothes arrived at the flat where Mr R.'s family lived. The officers told the family that they would be expelled to Serbia and that they had to pack their belongings within 30 minutes. After the family packed, they were taken to an airport and expelled from Germany to Belgrade. There were only Romani persons on the flight on which they were expelled. The family now lives in a very old house, together with the grandparents. The family arrived without money, and none of the family members are employed. His two younger sisters were born in Germany and do not possess any personal documents. None of the children of the family continued their education in Serbia, as they did not speak Serbian adequately. Unemployed, he is now considering returning to Germany and has applied for a visa, after being photographed at a shop in a nearby town specializing in visa application photographs, which use high-intensity lights in order to make the applicant look "white".*

##### **Council of Europe**

The Council of Europe's Framework Convention for the Protection of National Minorities<sup>91</sup> includes a prohibition on states from taking measures which alter the composition of the population (Article 16). This could include, though it does not necessarily have to, expulsion from the state territory altogether.

The European Social Charter, as discussed above, includes provisions guaranteeing the protection of migrant workers. In particular, states are committed to non-discrimination between migrant workers and their own nationals as regards remuneration and other employment and working conditions, trade union membership and accommodation.

<sup>91</sup> See text at <http://conventions.coe.int>.

Migrant workers are also entitled to non-discrimination as regards employment taxes, dues or contributions and they are entitled to facilitation of family reunification and protection against expulsion, except on grounds of national security or offences against public interest or morality. The Revised European Social Charter extends, via its Appendix, most of the rights included in the Revised Charter to persons lawfully residing or working regularly on the territory, where both the state of migrant origin and the host state are Charter parties.

The ECHR as interpreted by the ECtHR includes a right to reside and not to be expelled from a state on the basis of a number of the Conventions provisions, including but not necessarily limited to Articles 3 and 8 of the Convention, as well as its Fourth and Seventh Protocols. Other Convention provisions potentially implicated in the course of the expulsion of a foreign national are Article 5 (right to liberty and security of person), Article 13 (right to an effective remedy), as well as Article 14 (ban on discrimination).<sup>92</sup>

Article 3 of the Convention provides an absolute ban on torture, as well as inhuman or degrading treatment or punishment. In now well-established case law, the Court has held that the range of actions banned under Article 3 includes the expulsion of an alien who may be subjected to stipulated “harms” in the country to which he or she is expelled. This includes a range of measures, including return to a place where the individual faces the death penalty. Expulsion of a person to a place where he or she will not receive treatment for certain serious illnesses, including mental illness or trauma, may also be deemed degrading treatment.

Article 8 of the Convention states that “everyone has the right to respect for his private and family life, his home and his correspondence.” However, this is followed by a second section stating: “there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Notwithstanding the scope of the exceptions, the ECtHR has found many Member States in violation of the Convention’s provisions for the attempted expulsion of foreigners, even when they have been convicted of very serious crimes.

The ECtHR has held that there are five steps which must be considered when looking at the protection of family life as required by the Convention:

- Is there family life? It is for the applicant to establish whether he or she in fact has family life in the state concerned – but as long as the individuals are related, there will almost always be family life. For instance, no matter how estranged, parents and children always have some family life which comes within the meaning of Article 8; the question for the foreigner will be whether the bond is sufficiently strong to displace the state’s argument in favour of expulsion;

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<sup>92</sup> See also Council of Europe Committee of Ministers, *Twenty Guidelines on Forced Return*, 2005, available at: [www.coe.int/t/cm](http://www.coe.int/t/cm).

- Has there been an interference with that family life? So long as the state is seeking to expel the individual there will always be an interference with family life;
- Is the interference in accordance with the law? Unless there is a law permitting the state to expel the foreigner, then its action will be unlawful. The principle that the rule of law is central to the delivery of human rights protection is inherent in this requirement;
- Is the interference based on a permitted ground? There is usually a ground available from the list in the second section of the provision on which to justify an expulsion decision;
- Is the interference necessary in a democratic society? This is a question of weighing the interest of the individual against the claim of the state in the context of an expulsion. Are there other less drastic options that the state could follow in respect of the individual other than expulsion? The principle at issue is that democratic societies may only take action detrimental to the human rights of an individual if this is necessary and proportionate to the aim that the state is seeking to achieve.

In accordance with this checklist, the ECtHR has not infrequently found that the expulsion of family members of nationals or resident foreigners to be incompatible with the ECHR. Similarly, the expulsion of persons convicted even of serious crimes, where they have strong family links to the state, has been excluded. Although the ECtHR has not been willing to find a quasi-citizenship right to absolute protection against expulsion for foreigners who have been born on the territory of the state or spent most of their life there, it has been willing to find that where an individual has lived most of his or her life in a state there is a presumption in favour of his or her right to enjoy private life on the territory.

The case of Mr. and Mrs. Boultif is exemplary.<sup>93</sup> Mr. Boultif, an Algerian national, went to Switzerland on a tourist visa in December 1992. In March 1993, he married a Swiss national. In April 1994, he was convicted of unlawful possession of weapons. The day after his conviction he committed a further crime of robbery and damage to property according to the judgment “by attacking a man, together with another person, at 1 a.m., by throwing him to the ground kicking him in the face and taking 1,201 Swiss francs from him.” He was also convicted for this crime, after which the state began expulsion proceedings against him. The national courts agreed with the expulsion decision and Mr. Boultif left Switzerland in 2000. Having exhausted all venues for relief in Switzerland, the couple brought a complaint to the ECtHR that the Swiss authorities had failed to respect their right to family life. The ECtHR went through the criteria to determine whether the expulsion of Mr. Boultif was compatible with the couple’s right to family life under Article 8 and concluded that it was not. Having found a violation (which meant that Mr. Boultif had to be allowed back to Switzerland to live with his wife) the ECtHR also ordered the Swiss authorities to pay him 5,346.70 Swiss francs in costs and expenses.

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<sup>93</sup> *Boultif v Switzerland*, 2 August 2001.

The ECtHR accepted that there was family life (the couple were married), that there was an interference with it (Mr. Boultif was forced to leave Switzerland), and that there was a law in Switzerland sufficient to order the expulsion of Mr. Boultif. Its reasoning was that while (a) the requirement of a legitimate aim was satisfied – the court accepted the assessment of the Swiss authorities that Mr. Boultif's crime was a serious offence, the Swiss authorities had curtailed his residence permit in the interests of public order and security; but (b) the Court did not accept that the interference was necessary in a democratic society and therefore ruled in favour of Mr. and Mrs. Boultif.

The ECtHR has recognized the right of states to control the entry and residence of aliens but has placed limitations on states' right to expel aliens where there is a human right engaged. This is particularly the case, for instance, if the alien were to be returned to a country where he or she fears torture, inhuman or degrading treatment or where the alien has significant family and private life ties with the country of residence. However, to fulfil the requirement that the expulsion of a foreign national is necessary in a democratic society, the action must be justified by a pressing social need and be proportionate to the aim pursued. In Mr. Boultif's case, this requires an assessment of whether a fair balance was struck between his interest to be with his wife in Switzerland, on the one hand, and the prevention of disorder and crime, on the other. Central to the Court's assessment were the obstacles standing in the way of Mrs. Boultif's possible move to Algeria. The criteria the Court used in order to determine the interests are as follows:<sup>94</sup>

- The nature and seriousness of the offence committed by the applicant;
- The length of the applicant's stay in the country from which he or she is to be expelled;
- The time elapsed since the offence was committed and the applicant's conduct during that period;
- The nationalities of the persons concerned;
- The applicants' family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- Whether the spouse knew about the offence at the time he or she entered into a family relationship;
- Whether there are children in the marriage, and if so, their age; and
- The seriousness of the difficulties the spouse is likely to encounter in the applicant's country of origin.

Where a state seeks to expel all members of a family that has been resident on its territory for a long period, there is no obvious interference with the right to respect for family life as everyone is being expelled. Nonetheless, the Court has held that this can be an interference with the right to private life.<sup>95</sup>

The ECtHR has also held that Article 8 together with Article 14 may provide a right to family benefits for non-nationals on the territory of a state. National legislation in Germany provided that child benefits were not payable to foreign nationals resident on

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<sup>94</sup> With the addition of clarification from a later case, *Uner v the Netherlands*, 5 July 2005.

<sup>95</sup> *Sisojeva v Latvia*, 16 June 2005.

the territory with certain types of residence permits. The Court held that by granting child benefits, states are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of that provision and thus they must be provided on a non-discriminatory basis as required by Article 14 of the ECHR, the Convention's non-discrimination provision.<sup>96</sup>

The ECtHR has identified a right to good administration as a core element of the Convention, which – together with the right not to be discriminated against in Article 14, and the independent right to non-discrimination contained in Protocol No 12 – has consequences for how border controls are carried out. In the *Conka* case,<sup>97</sup> a number of Romani families who were present in Belgium on the basis of asylum applications and were still awaiting a decision, were invited to visit the local police station, according to the letters sent to them, in order to complete their files. When the families arrived at the police station, they were first detained and subsequently expelled on a specially chartered flight. The Court found that in respect of the right to liberty, individuals have a right to reliable communications with the state, whether their presence is lawful or not.

Protocol 4 to the ECHR provides a right to move within the territory of a state of which the individual is a citizen (Article 2) and a right to leave one's country (Article 2(2)). However, there is no equivalent right to enter another country. Article 3 of Protocol 4 does though prohibit the expulsion of nationals and requires states to admit them and Article 4 of Protocol 4 prohibits the collective expulsion of foreigners. In the *Conka* decision, the ECtHR held that the Belgian authorities had violated the prohibition on collective expulsion, particularly taking into account the statements of officials regarding Slovak Roma in the country and the plan for collective expulsion. The fact that each individual was given a separate expulsion notice was not sufficient to avoid a violation of Article 4, where there was no consideration of the personal circumstances of each individual separately.

Protocol 7 to the ECHR provides procedural safeguards relating to the expulsion of foreigners and applies to all persons lawfully resident on the territory of a state. In particular, foreigners cannot be expelled without a decision in accordance with the law; a chance to submit reasons against the expulsion; the possibility to have the case reviewed; and the opportunity to be represented for these purposes before the competent authorities. However, in cases of public order or national security, these guarantees can be circumvented.

## **The European Union**

As set out above, the four freedoms – free movement of goods, persons, services and capital – are the core of the EU's objective: the internal market. As regards movement of persons, there are four specific aspects to the right: movement as a citizen, a worker, a self-employed person or a service provider, or the employee of a service provider. All four rights can be countered by the host state on the basis that the individual is a threat to

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<sup>96</sup> *Okpisz v Germany*, 25 October 2005

<sup>97</sup> *Conka v Belgium*, 5 May 2002.



public policy, public security or public health.<sup>98</sup> However, where the state claims a right to interfere with the free movement right of a citizen of the Union (i.e. a national of another Member State) it is required to justify that interference with the fundamental freedom which the individual is exercising. The rule applies whether the individual is a worker, tourist or simply present on the territory as a citizen of the Union.

### *Secondary EU Legislation*

Under the EU Directive on rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38), after an initial period of three months, during which there is a (virtually) unqualified right to enter and reside, between three months and five years the individual needs to qualify as a worker, self-employed person, service provider or recipient, student, pensioner or self-sufficient person. The first three categories have a right to claim social assistance (if they qualify) and are entitled to sickness insurance under the national system. The last three categories can be required to show they have sufficient resources not to be a burden on the social assistance system and to have sickness insurance. The position of family members, whether EU nationals or not, is assimilated to that of the EU citizen (see above).

Direct family members of any nationality are entitled to take employment or self-employment or to study. The children are entitled to the best conditions regarding education (Article 12, Regulation 1612/68). Further, migrant EU nationals who are workers, even if they only work a few hours a week<sup>99</sup> and their income is insufficient to support themselves and their families,<sup>100</sup> are entitled to equal access to housing, including publicly funded housing, and social and tax advantages (Article 7(2), Regulation 1612/68). This heading includes all social benefits, whether work related or not. EU migrant workers are also entitled to equal treatment under trade union rights.

In the event of marriage breakdown, so long as the marriage has lasted three years with at least one year in the host Member State, the third-country national retains a right of residence, though he or she must be self-sufficient until he or she acquires permanent residence (Article 13, Directive 2004/38). Similarly, if the third-country national spouse has custody of the children, has been the victim of domestic violence or has a right of access to minor children, there is a retained right of residence (Article 13, Directive 2004/38). If the EU national leaves the host state, the third-country national family members will retain a right of residence only if there are children who reside with him or her in the host state and are enrolled in education. The right only lasts until the children complete their studies (Article 12(3), Directive 2004/38).

After five years residence, the individual acquires a right of permanent residence (Article 16, Directive 2004/38). At this point, even if the person is not a worker or self-employed, he or she is entitled to all social benefits in the state, regardless of whether he or she has a legitimate right to residence. Further, the possession of a document certifying that the

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<sup>98</sup> C-482/01 *Orfanopoulos*, 29 April 2004; C-348/96 *Calfa*, 19 January 1999 ; 30/77 *Bouchereau* 1977.

<sup>99</sup> See *Geven* above.

<sup>100</sup> 53/81 *Levin* 1981; 139/85 *Kempf* 1986.

person has permanent residence may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by other means (Article 25, Directive 2004/38). This means that the state may never even be aware of the presence of the individual (if this does not require registration) but, nonetheless, the individual acquires a durable residence right, including rights to all social benefits in the state after five years. The state must make the rights available on the presentation of evidence that the individual has fulfilled the five-year residence period on the territory. This evidence cannot be restricted to certain documents only.

From the moment of arrival, the EU national and his or her family members are protected from expulsion except on grounds of public policy, public security and public health. When refusal of admission is being considered, the definition of these three grounds is carefully controlled. After three months presence on the territory, protection against expulsion increases so long as the individual is exercising an EU treaty right. Directive 2004/38 codifies and extends the jurisprudence of the European Court of Justice on the question of expulsion as follows:

- Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health but these grounds shall not be invoked to serve economic ends;
- Measures taken on grounds of public policy or public security must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions cannot in themselves constitute grounds for taking such measures;
- The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

Where a state seeks to expel an EU national or family member on the basis of public policy or public security it must take into account:

- The individual's age;
- State of health;
- Economic situation;
- Social and cultural integration;
- Extent of links with the country of origin.

Once a citizen of the Union has lived in the country for five years and acquired the right of permanent residence he or she can only be expelled on "serious grounds of public policy or public security." There is no definition of what this means, but clearly the threshold is higher for serious grounds. Expulsion is only permissible on imperative grounds of public security – a very high threshold – where the individual has resided for ten years in the host state or where the individual is a minor. For minors the only exception is where expulsion is necessary in the best interests of the child (with reference to the UN Convention on the Rights of the Child 1989).

In respect of public health, this ground of exclusion or expulsion can only be used on the basis of diseases with epidemic potential, as defined by the instruments of the World Health Organization (WHO), and other infectious diseases or contagious parasitic diseases if they are subject to protection provisions applying to nationals of the host Member State (Article 29). A disease which occurs after the initial three-month period cannot constitute grounds for expulsion. Member States can require citizens of the Union to undergo a medical examination, free of charge, but only within three months of arrival (Article 29).

Exclusion from a state on the basis that an individual has been expelled is permitted by the Directive but subject to restrictions. However, the individual may apply to have the exclusion order lifted “after a reasonable period of time” and in any event after three years. The individual may put forward arguments that there has been a material change in the circumstances justifying the original exclusion decision (Article 32). If the underlying expulsion decision is not consistent with EU law then any exclusion order must necessarily also be unlawful. There are important procedural guarantees including notification and a right of appeal, normally with suspensive effect.

Third-country nationals outside the protected group of family members of EU nationals or Turkish workers protected under the EU agreement with Turkey may also enjoy protection against expulsion but under more limited circumstances. If they have acquired a long-term residence card under Directive 2003/109 then they are protected against expulsion to a similar level as that of EU nationals. Expulsion must not be used to achieve economic ends; there must be a consideration of the circumstances of the individual and once the right is acquired, third-country nationals may only be expelled on grounds of public policy and public security.

In June 2008, the European Parliament adopted a controversial directive on “common standards and procedures in Member States for returning illegally staying third-country nationals”,<sup>101</sup> clearing the way for adoption of the Directive, most likely during 2008. The negotiated text provides that third-country nationals who are not regularly present on the territory of a Member State should, in principle, be expelled or given a residence permit. For the purposes of expulsion, the Directive permits detention for up to 18 months and the application for a ban on re-entry.

The EU Charter on Fundamental Rights, adopted in 2000 but not legally binding on the Member States, prohibits the collective expulsion of foreigners (Article 19). It also includes a right to good administration (Article 41).

#### *IV.2. Practice: Expulsion of Roma in Europe*

In practice, European states have resorted on a number of occasions to expulsion – individual and collective – as a mode of addressing the arrival of Roma from other states, or for addressing the presence on the territory of extremely excluded Roma from another

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<sup>101</sup> Denmark, Ireland and the United Kingdom do not participate in this Directive.

state. EU states have also expelled Roma from other EU Member States, a highly questionable act in light of the EU law provisions summarized above.

The most highly publicized of such acts undertaken recently have been those extensively carried out by the Italian Government, which were intensified in November 2007 and then again following the formation of a new government in May 2008. As of the end of December 2007 – and thus prior to the latest intensification of such acts by the new Italian Government – it had been reported that more than 1,000 persons had been expelled from Italy and at least 1,000 Roma homes in Rome alone had been destroyed and the inhabitants evicted by the Italian authorities.<sup>102</sup> A number of legislative acts undertaken by the Italian Government in the period since May 2008 aim to facilitate the expulsion of foreigners, including EU nationals, and appear to be aimed particularly at Roma from Romania.<sup>103</sup> According to the *Christian Science Monitor* of 1 October 2008, citing an Italian parliamentarian, around 12,000 illegal immigrants had been “apprehended” in Italy in 2008.<sup>104</sup> No figures for Romanian citizens were presented. According to the press release of 15 October 2008 by the news agency *Adnkronos*, Interior Minister Roberto Maroni stated that, as of that date, 6,553 people had been expelled in 2008. This constituted a dramatic rise from 2007. Minister Maroni also told a delegation of the European Parliament in September 2008 that 350 EU citizens had been expelled from Italy.<sup>105</sup> Again, in both cases, figures on nationality or ethnicity were not presented, but anecdotal evidence, as well as media reports from Romania, indicates that large numbers of these persons are Romanian Roma.

France was carrying out similar expulsions during the same period. Among other measures, France has developed the category “humanitarian return”,<sup>106</sup> exercised in a number of documented instances with respect to Roma from Bulgaria and Romania. These returns do not appear to meet EU law requirements, as described in the legal section of this study. A number of other expulsion practices by French authorities with respect to Roma from Bulgaria and Romania, similarly, seem not to meet the requirements of EU law and are the subject of legal complaint.<sup>107</sup> The Romanian authorities have raised strong concerns about the treatment of Romanian migrants – including Roma – with their French counterparts.<sup>108</sup>

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<sup>102</sup> See Council of Europe Commissioner for Human Rights, *Memorandum following his visit to Italy on 19-20 June 2008*, CommDH(2008)18, 28 July 2008, para. 38.

<sup>103</sup> See Open Society Institute, “Security a la Italiana: Fingerprinting, Extreme Violence and Harassment of Roma in Italy”, Budapest, July 2008, pp. 6-11.

<sup>104</sup> Momigliano, Anna, “‘Xenophobic climate’ fueling policies, violence in Italy, The recent death of an African immigrant in Milan highlights racial and ethnic tensions”, *The Christian Science Monitor*, October 1, 2008, at <http://www.csmonitor.com/2008/1001/p04s02-woeu.html> (accessed 26 October 2008).

<sup>105</sup> European Parliament, “Draft Report on the LIBE delegation to Italy on September 18-19 (nomads camps emergency)”, Rapporteur: Gérard Deprez, draft circulated for comment in the week of 3 November 2008, on file with the authors, pp.11-12.

<sup>106</sup> GISTI et al, “Plainte contre la France pour violations du droit communautaire en matière de libre circulation des personnes”, *Op. cit.*, pp. 27-29.

<sup>107</sup> *Ibid.*

<sup>108</sup> Communication on file with the authors.

In some cases, the French authorities have coupled expulsion with efforts to promote small businesses and small-scale agricultural operations in the home country (generally Romania) by offering grants of several hundreds or several thousands of Euro to expelled persons who can provide a viable business plan. There is little evidence that such measures have been effective either in providing a viable income for families or in stopping migration. In a number of cases, expelled Roma have reportedly declined offers of such support, fearing that it may jeopardize possibilities for returning to France. The Council of Europe Commissioner on Human Rights has recently presented data received from the French Ministry of Immigration to the effect that in the period June 2007 to May 2008, 8,349 persons left France “voluntarily” as a result of the threat of expulsion combined with financial incentive.<sup>109</sup>

On a number of occasions, the expulsion of Roma from Council of Europe Member States has come before the ECtHR. As noted above, in 2002, Belgium was found to be in violation of the ECHR ban on the collective expulsion of aliens (Article 4 of Protocol No 4) after it first lured a group of Slovak Roma into police detention with misleading information, and then expelled them to Slovakia.<sup>110</sup> In 2002, Italy settled similar cases concerning Bosnian Roma amicably.<sup>111</sup> And comparable cases against the Czech Republic have been dismissed on formal grounds<sup>112</sup> and ultimately also settled in non-adversarial proceedings.

In domestic proceedings, the Council of Europe Commissioner for Human Rights has recently noted, with respect to Italy:

Such expulsions were not an absolutely new phenomenon; they had already occurred in the recent past. The Commissioner has noted that on 19 May 2005 by judgment no 16571/05 the Italian Court of Cassation found against a decision of the Milan court that had annulled the expulsion orders of a number of Romanian Roma. The Court of Cassation recalled that under Article 4 of Protocol N°4 to the European Convention on Human Rights (ratified by Italy on 27/05/1982) the term “collective expulsion” indicated expulsions that target a group of aliens without a reasonable and objective examination of the reasons and of the defence of each of them. It also noted that under Italian law an expulsion may be proscribed on humanitarian grounds or on grounds relating to family cohesion. However, the Court of Cassation struck down the lower court’s decision, noting that the sole fact that the expulsion decrees in question had been adopted at the same time using identical wording and reasoning and against persons of the same ethnic origin was not in itself contrary to Article 4 of Protocol N°4 to the Convention.

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<sup>109</sup> Commissaire aux droits de l’homme du Conseil de l’Europe, *Memorandum faisant suite à sa visite en France du 21 au 23 mai 2008*, CommDH(2008)34 Strasbourg, 20 novembre 2008, p.27.

<sup>110</sup> *Conka v. Belgium*, 5 February 2002.

<sup>111</sup> Cour Européenne des Droits de L’Homme, Arrêt, *Sulejmanovic & Autres et Sejdovic & Sulejmanovic c. Italie*, 8 novembre 2002.

<sup>112</sup> European Commission on Human Rights, Admissibility Decision, *Gejza Cervenak, Margita Cervenakova, Aranka Horvatova, Ondrej Cervenak, Iveta Cervenakova, Peter Mirga and Vojtech Filko v. the Czech Republic*, 28 February 1996.

In this context, the Commissioner is gravely concerned at the case of *Hamidovic v Italy*, a case concerning a Roma citizen of Bosnia and Herzegovina, mother of three children, who was expelled from Italy in September 2005 while her individual application was pending before the European Court of Human Rights, despite the request made by the Court to Italy under its Rule 39 (Interim measures) to suspend the applicant's expulsion while her application was pending before the Court.<sup>113</sup>

Switzerland is among a handful of Council of Europe Member States not to have yet ratified the Fourth Protocol to the European Convention. As a result, apparently there is no effective ban against the collective expulsion of aliens.<sup>114</sup> During recent years, and as recently as autumn 2007, Switzerland has collectively expelled Romanian Roma, with little or no effort to conceal the racial-profiling element of these expulsions. Romanian citizens may enter and remain in Switzerland for three months, generally solely upon presentation of a valid travel document or identity document. Many from the extremely poor segment of the Romanian Roma arriving in Switzerland expect to be expelled after short periods; life calculations centre on repeated expulsion and return. Not surprisingly, the Geneva press began reporting in March 2008 that Roma expelled in autumn 2007 were returning.

As noted above, the government of the Czech Republic has endeavoured to force Roma with ties to Slovakia to go there. After the collapse of the former Yugoslavia, Croatia and Slovenia adopted restrictive measures with respect to persons from Bosnia, Serbia, Montenegro and the former Yugoslav Republic of Macedonia, expelling unwanted "persons from the south" or forcing them to leave, frequently meaning ethnic Albanians and Roma or others regarded as "Gypsies". During the 1990s, it was possible to meet Roma who had left southern Yugoslavia in the 1980s to go to Slovenia; who had been expelled and moved on to Germany; who were then expelled to Slovenia, and subsequently sent back to other former Yugoslav republics in "the south" by the Slovene authorities; whereupon they had returned to Germany. Today, Bosnia, Montenegro and the former Yugoslav Republic of Macedonia shelter *de facto* refugees from Kosovo on their territories.

Serbia has been compelled to conclude readmission agreements with a number of Western European countries, as well as with the EU. Since 2003, Serbian officials have stated that these will result in the expulsion of "tens of thousands" of Serbian citizens, "four fifths" of whom are Romani.<sup>115</sup> Forced expulsions to Serbia have been ongoing for a number of years, particularly from Denmark, Germany, Switzerland and Sweden, and

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<sup>113</sup> "Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy on 19-20 June 2008", CommDH(2008)18, 28 July 2008, paras. 39-40.

<sup>114</sup> According to current plans, as of 1 January 2009 Switzerland will be participating fully in the Schengen system and border controls with EU states will be abolished. This has key implications for Roma EU nationals from all countries, with the exception of Bulgaria and Romania for the time being. Non-EU nationals will however remain unprotected by European law bans on collective expulsion.

<sup>115</sup> Cahn, Claude, "Die Politik der Abschiebung: Europa unter der Versuch einer Lenkung der Roma" in *Jahrbuch zur Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE)*, Baden-Baden: Nomos Verlagsgesellschaft, Band 9, 2003, p.231.

pressure to increase the number of Roma received into the country is steady. A report published in March 2008 by the United Nations Development Programme and the Agency for Human and Minority Rights Government of the Republic of Serbia summarized existing data on expulsions of Roma as of that date as being “fragmentary”, but including the following:

- According to the Ministry of Internal Affairs, the EU countries submitted 23,887 readmission requests from March 2003 to October 2007 with regard to the return of Serbian citizens who no longer have legal grounds for residing in these countries;
- The same source registered 15,560 persons who were forcibly returned to Serbia from March 2004 to October 2007;
- In the course of the year 2006, 1,884 citizens of Serbia were deported from Germany alone;
- As of October 2007, the number of forced returns registered at Belgrade Airport ranged from 100 to 200 per month;
- From 1 January 2008 to 7 February 2008, 52 requests for readmission were sent to Serbian authorities;
- The Council of Europe estimated that the total number of returnees to Serbia in 2003 would range from 50,000 to 100,000 persons;
- Most of the returnees are Roma, with the estimates ranging from 60 to 75 per cent of the total returnee population.<sup>116</sup>

According to an article on 25 October 2003 in the Belgrade daily newspaper *Politika*, more than 4,000 Roma were expelled from Germany during a single month in 2003, and in total 12,000 Roma had been expelled from a number of Western European states as of that date, the overwhelming majority expelled from the Federal Republic of Germany.<sup>117</sup>

Serbia also has tens of thousands of Roma, Ashkalis and Egyptians (RAE) ethnically cleansed from Kosovo since 1999, often living with relatives in exposed settlements or overcrowded housing. Serbia also receives Roma expelled from Western European countries to Kosovo who are unable to remain there, and also has highly exposed and excluded persons and communities expelled from Kosovo. There are several tens of thousands of displaced RAEs from Kosovo in Serbia.

In a document circulated on 1 October 2008, the Government of Kosovo stated the following concerning numbers of persons from Kosovo outside its borders:

Around 45.000 to 50.000 Kosovo Roma, Ashkali and Egyptians live in Serbia (around 23.000 as registered IDP), 35.000 are registered in Germany as rejected asylum seekers and around 10.000 live as refugees in Montenegro, FYROM and

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<sup>116</sup> United Nations Development Programme and the Agency for Human and Minority Rights Government of the Republic of Serbia, “Reintegration of Returnees in Serbia: An Overview of Awareness Raising Activities of the Agency for Human and Minority Rights”, Belgrade, March 2008, pp. 2-3.

<sup>117</sup> Cited in European Roma Rights Centre, “Written Comments of the European Roma Rights Centre Concerning Germany for Consideration by the United Nations Human Rights Committee at its 80<sup>th</sup> Session, March 16, 2003-April 3, 2004”, Budapest, 8 March 2004, p.7.

Bosnia and Herzegovina. An unaccounted number lives as refugees, illegal migrants or migrant workers all over Western Europe. It is expected that in the next future considerable numbers will be returned to Kosovo.

As of October 2007, only 6,899 Roma, Ashkali and Egyptians returned to Kosovo since January 2000 according to UNHCR data. On the other hand, a considerable number are believed to have left Kosovo in this period due to economic reasons.<sup>118</sup>

The Government of Kosovo has also recently sounded the following ominous warning:

Kosovo might see in near future an increased return of Roma, Ashkali and Egyptians from Western Europe, neighbouring countries and probably from Serbia. While organised return of IDP from Serbia is very often facilitated and supported by reconstruction programmes, returnees from Western Europe can in general not profit from such programmes.<sup>119</sup> Only Germany hosts around 35,000 Roma, Ashkali and Egyptians under a toleration status (“Duldung”). In other European countries a few thousand Roma, Ashkali and Egyptians have found temporary refuge. It can be anticipated that most of them will be returned to Kosovo. It is expected that FYROM, Montenegro and Bosnia and Herzegovina will start to return its approximately 10,000 Roma, Ashkali and Egyptian refugees to Kosovo soon.<sup>120</sup>

The vast majority of Roma expulsion cases undertaken in Europe never come to tribunal proceedings, generally due to the difficulty of effectively challenging such acts following expulsion, once the person expelled is no longer in the country concerned, and given the limitations on possibilities for legal aid. As noted above, Germany has expelled literally thousands of Roma to countries of the former Yugoslavia since the early 1990s, and continues to this day. Similar expulsions have taken place to Bulgaria and Romania.

The examples detailed above are particularly extreme. However, even those EU Member States frequently held to have relatively positive policies on Roma have resorted to the forced expulsion of Roma at some point since 1989.<sup>121</sup> In some cases, the arrival of

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<sup>118</sup> Republic of Kosovo, Government, Office of the Prime Minister, “Strategy for the Integration of Roma, Ashkali and Egyptians in Kosovo, First Draft”, circulated for comment 1 October 2008, p.8.

<sup>119</sup> However, it estimate that between 35 per cent and 50 per cent of the Roma, Ashkali and Egyptians originating from Kosovo and now living in Serbia are not registered as IDPs. This would mean that up to 20,000 are not registered and could not profit from reconstruction programmes. For more details on this issue see the chapter on Return and Reintegration. (footnote in the original)

<sup>120</sup> The Draft Kosovo Government Strategy for the Integration of Roma, Ashkalis and Egyptians, circulated for comment on 1 October 2008 states, “It is expected that in the next future, considerable numbers will be (forcefully) returned from Western European, primarily Germany, but also from countries such as Montenegro, FYROM and Bosnia and Herzegovina.” (Republic of Kosovo, Government, Office of the Prime Minister, “Strategy for the Integration of Roma, Ashkali and Egyptians in Kosovo, First Draft”, circulated for comment 1 October 2008, p.39).

<sup>121</sup> To name only one example, following the arrival of around 1,000 Roma from Slovakia to Finland in June 1999, the Finnish Government first imposed a visa regime on Slovak citizens, and then subsequently expelled all or most of the persons concerned to the Czech Republic, a country through which they had come to Finland.



several hundred Roma on the territory has led directly to legal amendments making access to asylum proceedings or to other legal measures more restrictive in order to render it more difficult for them to remain.

The extent of the expulsions has given rise to acts of dissidence. Among the most noteworthy of these have been the acts of Mr. Marin Mogos and his family, arrested at their home in Germany on 7 March 2002, at approximately 4.30 a.m., and expelled by force by the German authorities to Romania from Munich Airport, despite pending domestic appeals, as well as a pending application before the ECtHR. The family had been in Germany continuously since 1990. In 1990 they had given up their Romanian passports and declared themselves stateless. From 1997 onwards they had the status of "tolerated" (*geduldet*). Upon arrival at Bucharest's Otopeni Airport, they refused to re-accept their Romanian citizenship and thus were not readmitted to Romania. They lived in the transit zone of Bucharest Airport for the next five years. Mr. Mogos committed suicide on 17 March 2007, still at Bucharest Airport.

Long-term displacement, the failure of integration and the opposition of policy- and lawmakers to design policies to bring non-citizen Roma into the community have lasting, socially degrading effects. This also exacerbates pressure on pan-European institutions to design and implement solutions that should in principle be undertaken locally or nationally. Perhaps no episode better illustrates this problem than the events that took place on the Medzitlija border-crossing between the former Yugoslav Republic of Macedonia and Greece in May 2003, concerning several hundred Roma from Kosovo.

Following their expulsion by ethnic Albanians from Kosovo in 1999, they spent the subsequent years in isolated camps on the outskirts of Skopje managed by the UNHCR. They were provided with collective temporary protection status, periodically renewed just prior to expiry by the government of the former Yugoslav Republic of Macedonia. Shortly after their expulsion, the United States resettled some hundreds of these persons in the United States. However, after September 2001, this option was no longer available.

In May 2003, evidently in distress at their long-term suspension from any form of involvement with wider society, they went as a group to the Greek border. Asylum requests lodged with the Greek authorities were summarily dismissed. They then petitioned that "the European Union take up their case". After a number of weeks at the border, they were persuaded to return to Skopje.

The government indicated that, the small number of persons at issue notwithstanding, it would not provide them with any form of durable residence permits. It apparently feared that they would become welfare dependants, and regarded the state responsible, if not Kosovo, then Serbia.

In discussion with the UNHCR, the government brought to an end the collective protection status, adopted an asylum law and began requiring each person to apply for

refugee status. Very few of these applications have been successful.<sup>122</sup> At least two persons rejected at final appeal have been forcibly expelled from former Yugoslav Republic of Macedonia,<sup>123</sup> although the government has recently reportedly promised that it will not expel others in the short-term.<sup>124</sup> However, as noted above, there are indications that expulsions may soon be undertaken.

Formally speaking, the persons at issue have a right to return to Kosovo and to resume their lives with dignity there. The Kosovo Government cannot be absolved of the responsibility to ensure that these conditions are created without delay. However, in the interim, the public good requires measures to open up possibilities for integration in former Yugoslav Republic of Macedonia, should other countries not be able or willing to resettle these persons.

Despite an extensive presence by international institutions, opposition by the government of former Yugoslav Republic of Macedonia to the integration of a numerically small group of persons has not yet been overcome. The impact has been the perpetuation of their long-term insecurity and exclusion, the possibility of further flight and with it a potential passing on of responsibilities to other OSCE participating States.

This scenario plays out, in various administrative forms, repeatedly throughout Europe. Having identified a particular group of Roma as “unintegrable”, public authorities reach for the levers of expulsion as the only possible policy response. Although EU law has made this considerably complicated when persons who have acquired rights as EU citizens are involved, recent events in France in particular indicate that expulsion of Roma is not impossible; where there is sufficient determination by the public authority, even where these acts are apparently contrary to law.

## **V. Issues relating to Documents, Citizenship and Asylum**

In order to understand migration in its legal context, it is necessary to start by identifying the citizen. Only after the state has determined its citizenship laws – who is entitled to citizenship and who is not – can the question of migration arise. The end of bipolarity led

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<sup>122</sup> The Council of Europe Human Rights Commissioner, in his September 2008 report on former Yugoslav Republic of Macedonia, notes: “According to the UNHCR, some 1,800 Kosovo refugees remained in the country as of 1 January 2008. The majority are ethnic Roma and other minorities who were forcibly displaced from Kosovo during the 1999 crises. Until now, only 28 have been recognised as refugees; 1,115 persons are under humanitarian protection and 454 are persons whose cases were rejected. The vast majority of these people are living in the Skopje district of Suto Orizari. [...] The Commissioner urges the authorities to remain firm in upholding this policy of no forced returns irrespective of Kosovo’s status and indeed given the passage of time among other factors, he would urge the authorities to reassess the fundamental ‘returnability’ of these persons as they are now long-term residents.” (Report by the Council of Europe Commissioner for Human Rights on his visit to “the former Yugoslav Republic of Macedonia” 25-29 February 2008, 11 September, para. 156).

<sup>123</sup> See ECtHR, Decision, *Dzavit Berisha and Baljic Haljit v. the former Yugoslav Republic of Macedonia*, Application no. 18670/03, 10 April 2007.

<sup>124</sup> See Council of Europe Commissioner for Human Rights Report on former Yugoslav Republic of Macedonia, *Op. Cit.*

to the establishment and re-establishment of states in Europe with the power to determine who their citizens are. Citizenship rights depend not only on the laws of the state to which an individual has a claim to nationality but also on the administration. The mechanisms of identification of the individual as a citizen are also critical to the enjoyment of rights. If the individual cannot access the documents proving his or her entitlement to citizenship then his or her claim to equality may remain unfulfilled. Further, there is no question of mobility for those who have no documents other than through irregularity and clandestine border crossing.

The citizen/foreigner divide provides the traditional mechanism to determine who has the right to assert rights as members of a political community, including an unalienable right to reside on the territory and whose presence on the territory is subject to the negotiation with the state: the foreigner. This is not to underestimate the laudable moves to protect minority rights, in particular the OSCE's 1990 affirmation in respect of persons belonging to national minorities, the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM). However, these frameworks are directed towards discrimination issues rather than movement of persons or citizenship.

The ability of Roma to exercise fundamental rights on an equal footing with other Europeans – particularly where EU free movement rights and the fundamental rights of migrants are at issue – can never be fully assessed without some attention being given to the problem of a lack of documents among Roma, particularly personal documents required for the access to goods and services and the exercise of fundamental rights, as well as related status matters. In the most extreme cases, and particularly in the context of the break-up of states, Roma have been denied citizenship of countries to which they otherwise have extensive and legitimate ties.

In some cases, persons concerned may be unable to demonstrate the citizenship of any country, notwithstanding formal ties to one or more OSCE participating or other states, because of rigid legal practice, restrictive laws in the context of state succession, or for other reasons.<sup>125</sup> Since 1989, the issue has been particularly pronounced in countries that adopted new citizenship laws in the context of state succession (particularly Croatia, the Czech Republic, the former Yugoslav Republic of Macedonia and Slovenia), as well as where other large-scale transformation of the legal regime governing citizenship and/or personal documents has taken place (Russia).<sup>126</sup>

Cross-border problems in this area have directly impacted Roma in certain scenarios. Roma who left former Yugoslavia in the 1980s and 1990s and went to Italy, Germany and elsewhere experienced particular challenges when their passports expired. In the case of persons from Serbia during the 1990s, men might not be able to approach the Serbian

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<sup>125</sup> An overview of status and citizenship issues concerning Roma in Europe is provided in Cahn, Claude and Sebihana Skenderovska, "Roma, Citizenship, Statelessness and Related Status Issues in Europe", paper presented at meeting on citizenship and minorities convened by the UN Independent Expert on Minority Issues Gay McDougall, December 2007, available at: <http://www.nationalromacentrum.org/en/category/reports/>.

<sup>126</sup> Response to project questionnaire by Stephania Kulaeva, ADC Memorial, 10 October 2008, on file with the authors.

embassy for passport renewal if they had not served in the military. In cases concerning persons from other former Yugoslav republics, they might be unable to demonstrate citizenship of the country concerned. This was particularly true of persons from Croatia, former Yugoslav Republic of Macedonia and Slovenia, all of which adopted restrictive citizenship laws during the break-up of the former Yugoslavia.<sup>127</sup> The lack of a valid passport has rendered it difficult to nigh impossible to secure valid residence permits in countries of migration, such as Italy; particularly in cases where they reside in informal settlements without a valid address. Thus, even in cases where there may be a formal entitlement to citizenship, such as the result of birth on the territory, administrative obstacles in many cases preclude access to citizenship. Many of the persons concerned now have children and grandchildren, who may be formally stateless.<sup>128</sup> Their exclusion

is being handed down through the generations.

*24-year-old Romulus L., also Romani and also from a village in Transylvania, Romania, has no administrative existence. His mother was unable to pay for her stay in the maternity ward and, without health insurance, she fled with her baby. Because of this, her son has never had a birth certificate. Without a birth certificate, he has never been able secure an identity card. Several years ago, a local charity organization tried to assist him in rectifying his situation by attempting to locate his birth certificate in the official registry. However, he does not know his precise date of birth, and also a number of the hospital's records have been destroyed through water damage. He has never emigrated and survives by doing casual unskilled manual labour.*

Excluded sections of the Romani community are also on an unequal footing in migration-related matters in situations in which extreme poverty, combined with exclusionary practices, may conspire to preclude Roma from having access to documents such as birth certificates. In one scenario, persons unable to pay for maternity care may flee hospital with their newborn children before receiving a birth certificate for the infant. Alternately, some children are born at home. After a short period of time, it may be impossible to procure a birth certificate because

of administrative costs or fines. A person without a birth certificate will then be unable to access personal identity cards, health insurance documents, internal passports and other documents, and later will be effectively excluded from items such as a driving license. They may be unable to enrol in school, gain access to health care, or secure social assistance benefits to which they may be otherwise entitled, including social housing. Such persons effectively have no administrative existence. This problem affects many

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<sup>127</sup> These specific circumstances provided the context in which the Council of Europe adopted, first the European Convention on Nationality (1997), including a specific Chapter (VI) on nationality in the context of state succession, followed by a specific treaty on the latter matter. However, both treaties were adopted after the collapse of the three major post-Communist Federations (Czechoslovakia, the Soviet Union, and Yugoslavia), and thus have to date had only limited impact on the citizenship laws of successor states.

<sup>128</sup> Council of Europe, European Commission against Racism and Intolerance (ECRI), *Third Report on Italy*, adopted on 16 December 2005, para. 96. See also Council of Europe Commissioner for Human Rights, Viewpoint, "No-one should have to be stateless in today's Europe", 09/06/2008, [www.coe.int/commissioner](http://www.coe.int/commissioner).

thousands of people, particularly in Romania and the countries of former Yugoslavia.<sup>129</sup> Persons affected are frequently adults with children and grandchildren, thus again intergenerational exclusion. In recent years, several UNHCR and EU-supported projects have been created to begin to make inroads into this problem.<sup>130</sup> However, without major state-level commitments to ameliorate conditions for currently excluded persons to have access to documents, for example via “amnesties” for persons with no birth certificates or similar measures, there is little indication that these pilot or otherwise piecemeal projects are having any major impact.

The ECtHR has ruled on cases concerning the denial of documents. In the Court’s assessment, denial of key personal documents, such as, in one case, the Russian “internal passport”, could give rise to a denial of private and family life in the sense of Convention Article 8.<sup>131</sup>

In an international migration context, persons without documents may be unable to secure a passport, or a valid visa. Such persons may also be particularly vulnerable to trafficking. In a EU context, the Treaty confers European citizenship on persons who are the citizens of a Member State.<sup>132</sup> Persons without a birth certificate or similar documents may be unable to prove that they are a citizen of a Member State, even if they have the requisite ties and affiliations, which are the genuine requisites for citizenship. Such persons are at a formal, structural disadvantage compared with other EU citizens, when they seek to exercise EU free movement rights.

In addition to the absence of documents and statelessness giving rise to the absolute denial of status, certain types of status provided in particular OSCE participating States give rise for concern. Cases of statelessness among Sinti and Roma were still reported in

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<sup>129</sup> Concerning Romania, “Eligibility for non-contributory health insurance is conditional on access to social support, the eligibility criteria for which can be affected by various administrative practices, potential exclusion errors, possible discriminatory denials, and insufficient information. [...] Romania’s social security system also creates ‘hidden impediments’ to supplying social services. Access to social support is conditioned on the apparently neutral requirements of permanent residence and possession of appropriate identity documents. Large parts of the Roma population however do not have identity documents and consequently cannot be registered as permanent residents. Some government employees refuse to consider the temporary structures in which Roma often live as habitable dwellings and deny Roma permanent resident status on these grounds.” United Nations Development Programme (UNDP), *The Roma in Central and Eastern Europe: Avoiding the Dependency Trap*. Bratislava: UNDP.

<sup>130</sup> See for example United Nations High Commission for Refugees (UNHCR) “UNHCR launches free legal aid project for Roma in Serbia”, press release, 6 May 2008.

<sup>131</sup> *Smirnova v. Russia*, 24 October 2003. “The Court has a number of times ruled that private life is a broad term not susceptible to exhaustive definition [...] It has nevertheless been outlined that it protects the moral and physical integrity of the individual, [...] including the right to live privately, away from unwanted attention. It also secures to the individual a sphere within which he or she can freely pursue the development and fulfilment of his personality. [...] The internal passport is [...] required for more crucial needs, for example, finding employment or receiving medical care. The deprivation of the passport therefore represented a continuing interference with the applicant’s private life.” (paras. 95-97)

<sup>132</sup> Treaty establishing the European Community (Articles 17- 22 and 255), as per 1992 amendments following the Treaty of Maastricht.

Germany and Greece until recently.<sup>133</sup> Of much more pressing relevance today, however, are forms of protection against expulsion provided in Germany, Austria and the former Yugoslav Republic of Macedonia, which do not confer residence status or any progressive accrual of rights. An exemplary example is the status called “duldung” or “geduldet” (“tolerated”) provided in Germany to persons who originally enjoyed temporary protection. In the case of Roma, this concerns persons from primarily Bosnia and Herzegovina or Kosovo.

"Duldung" status does not bring with it a residence permit – it is merely a stop on expulsion and it must be renewed at very frequent intervals, in some instances every few weeks.<sup>134</sup> Members of the same family are often awarded "duldung" status at different times, meaning that the head of a household may be almost constantly queuing to renew the status of various members of family. "Duldung" status frequently includes restrictions on freedom of movement, access to employment and various forms of social and health protection,<sup>135</sup> although provisions vary from state to state within the Federal Republic of Germany. Numerous Romani individuals have had no administrative status in Germany other than "duldung" for periods sometimes exceeding ten years.<sup>136</sup>

There are no publicly available figures on the total number of Roma who are in possession of the "tolerated" status in Germany, but it is currently estimated that there are around 200,000 persons with “tolerated” status in Germany. At the end of 2006, there were still 10,795 persons in Germany with “tolerated” status from Serbia alone (i.e. not including people from any other former Yugoslav republics, or anywhere else in the

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<sup>133</sup> Citizenship laws in Germany were until 1999, based solely on descent and included no provision for the acquisition of citizenship through birth on German territory and cases of statelessness were reported regularly.

<sup>134</sup> A number of international monitoring bodies have expressed concerns at the treatment of non-citizens in Germany. For example, the UN Committee against Elimination of Racial Discrimination has expressed concerns about the absence of any protection accorded to populous *de facto* minority groups resident in Germany for longer periods of time (see CERD/C/338/Add.14, 10 August 2000). The Council of Europe's European Commission against Racism and Intolerance (ECRI) noted that around nine per cent of the entire population (c. 7,000,000 persons) do not have German citizenship and called for regularization of status of long-term foreign residents (see Council of Europe's European Commission against Racism and Intolerance, *Second Report on Germany*, adopted on 15 December 2000 and made public on 3 July 2001, para. 9). See also ECRI's *Third Report on Germany*, 8 June 2004, para. 53).

<sup>135</sup> Insured persons in the Federal Republic of Germany enjoy equal access to the benefits of statutory health insurance, irrespective of their nationality or origin. The legislation governing the statutory health insurance scheme contains no restrictions on benefit based on the nationality of the claimant. In the case of asylum seekers and persons facing deportation, however, protection available is limited, as a general rule, to the treatment of acute illnesses and pain. Other health care benefits may be granted on a discretionary basis. Medical care is provided outside the statutory health insurance scheme. Persons in such situations, including persons possibly traumatized by war and ethnic conflict, may have health insurance limited to treatment only in cases of acute illness.

<sup>136</sup> Here again there appears to be no public data by ethnicity. However, out of a total of around 282,100 persons from Serbia and Montenegro in Germany at the end of 2006, around 194,400 had been in Germany for periods of ten years or longer (see <http://www.bundesregierung.de/Content/DE/Publikation/IB/Anlagen/auslaenderbericht-7-tabellenanhang-barrierefrei.property=publicationFile.pdf>, accessed 22 September 2008, p. 214).

world).<sup>137</sup> In November 2006, the German Interior Ministers decided that persons currently in Germany with “tolerated” status for more than six years could have access to a durable residence permit if they could demonstrate legitimate employment by 2009.<sup>138</sup> The impact of this reform is as yet unclear. The provisions of a similar regime in Austria have been the subject of a recent Constitutional Court challenge.<sup>139</sup>

The repeated provision of extremely short-term "duldung" status and similar non-status provisions elsewhere has effectively prevented tens of thousands of third-country national Roma in Germany and elsewhere from integrating into host societies, although such persons may have given birth to children on the territory (and those children may be enrolled in and regularly attending schools) and may have formed extensive real and factual ties to the host country.

In addition, persons provided with "duldung" status and their children may labour under conditions of great stress due both to the ever-present threat of expulsion and very frequent interaction with public officials responsible for the allocation of "duldung" status who are very often hostile. There are also widespread and plausible allegations that Roma are more likely to be provided with "duldung" status (rather than a more durable status, including the progressive accrual of rights) compared with non-Romani third-country nationals, which raises concerns of racial discrimination with respect to but not limited to the International Convention on All Forms of Racial Discrimination (ICERD).<sup>140</sup>

## **VI. Other Elements of Problematic Practice Concerning the Policing of Romani Migrants, including Romani Citizens of the European Union Crossing EU Internal Borders**

Several other types of practice undertaken by States at present as a response to Roma migration deserve comment here. Brief summaries follow below of (i) arbitrary surveillance of Romani migrants and related right to privacy issues; and (ii) ethnic profiling by police. The section concludes with a summary, by no means exhaustive, of concerns regarding basic protection of the security of persons.

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<sup>137</sup> <http://www.bundesregierung.de/Content/DE/Publikation/IB/Anlagen/auslaenderbericht-7-tabellenanhang-barrierefrei.property=publicationFile.pdf>, accessed 22 September 2008, p.223.

<sup>138</sup> See <http://www.bundesregierung.de/Content/DE/Publikation/IB/Anlagen/auslaenderbericht-7-barrierefrei.property=publicationFile.pdf>, accessed 22 September 2008.

<sup>139</sup> Ruling in June 2008, the Court set a time limit of nine months, i.e. to March 2009 to amend Austrian law to provide a right to apply ("Antragsrecht") for a permit for humanitarian reasons. Details are available at: <http://www.oe24.at/zeitung/oesterreich/politik/article323890.ece> (accessed 8 October 2008).

<sup>140</sup> The UN Committee on the Elimination of Racial Discrimination (CERD) has explicitly instructed States Parties to the ICERD "to take all necessary measures in order to avoid any form of discrimination against immigrants or asylum-seekers of Roma origin." (CERD, *Discrimination against Roma*: 16/08/2000, General Recommendation 27, article 1, para 5).

### ***VI.1. Arbitrary Surveillance of Romani Migrants and Related Right to Privacy Concerns***

There are important European human rights law guarantees in the area of the right to privacy, home, family and correspondence, in particular as a result of Article 8 of the ECHR<sup>141</sup> and the very extensive jurisprudence of the ECtHR under Article 8. While the guarantees set out under Article 8(1) are subjected to a balancing test<sup>142</sup> similar to the one summarized above in Section IV, racial discrimination, whether explicit or pre-textual, is not and cannot be among the permissible grounds for an Article 8(1) intrusion.

Certain States' practices with respect to Romani migrants call seriously into question compliance with this strong series of norms. The practices in particular of the Italian Government, with respect to so-called "camps for nomads" established for Roma and Sinti with Italian citizenship, Roma from EU Member States such as Romania, and Roma from outside the EU, in particular from Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia and Serbia, do not appear to be in conformity with European human rights law in this area. Practices problematic in light of Article 8 include: (i) the stationing of guards at the gates of such camps and the screening of visitors entering; (ii) the lack of individuation regarding addresses in such camps and the range of detrimental effects on persons following on from the practice of having just one address for the whole camp; (iii) surveillance of the camp area by video camera, including in areas which could constitute private space; (iv) regular, invasive controls of home and person by police, without sufficient protection of privacy; (v) forced evictions from housing by police without adequate procedure; as well as (vi) other practices. Similar concerns have been expressed with respect to France.<sup>143</sup>

### ***VI.2 Ethnic Profiling by Police***

Within the EU, following the dismantling of the internal borders, a number of police services appear to have resorted to profiling practices as a surrogate to powers lost at the border. There is widespread evidence of number-plate profiling: controls based on the nationality of the automobile, particularly, but not only, in the vicinity of the border, and especially on major highways. In addition, there are anecdotal indications of police targeting cars with "Gypsy-looking" people in them for additional checks, on the basis of no other indicators giving rise to legitimate suspicion.<sup>144</sup> Media in Switzerland have

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<sup>141</sup> European Convention Article 8(1) states: "Everyone has the right to respect for his private and family life, his home and his correspondence."

<sup>142</sup> European Convention Article 8(2) states: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

<sup>143</sup> Le Centre Européen pour les Droits des Roms, *Hors d'ici! Anti-tsiganisme en France*, Série des rapports pays, N° 15, Novembre 2005, pp.199-204.

<sup>144</sup> For a detailed study of ethnic profiling in Europe, see Open Society Justice Initiative, *Justice Initiatives: Ethnic Profiling by Police in Europe*, Open Society Institute, June 2005, available at: [http://www.soros.org/initiatives/osji/articles\\_publications/publications/juticeinit\\_20050610](http://www.soros.org/initiatives/osji/articles_publications/publications/juticeinit_20050610) (accessed 8 October 2008).



reported that police systematically target Romani beggars for street searches, based on stringent new laws banning begging. One source in Geneva reported 2,200 searches of 20 to 60 persons during the course of one year.<sup>145</sup> Council of Europe bodies have expressed strong concerns with respect to ethnic profiling by police and other officials in Russia.<sup>146</sup>

In addition, some EU Member States have reported that they are undertaking systematic ethnic profiling of migrant Roma. For example, as noted above, the government of the United Kingdom designed and implemented policies explicitly racially discriminating against Roma from among Czech citizens and others attempting to go to the United Kingdom; policies and practices ultimately rejected by the House of Lords.<sup>147</sup>

Some policies of ethnic profiling of Roma moving inside the EU or immigrating to it or to States outside its borders, appear to be ongoing or have been until very recently. For example, according to the Czech Republic's 5<sup>th</sup> and 6<sup>th</sup> periodic report to the UN Committee on the Elimination of Racial Discrimination (CERD), submitted in 2006, "The police headquarters of the Police of the Czech Republic monitors the migration of Roma from Slovakia. The chief aim of the monitoring is to obtain prompt information on increased attempts by members of the Roma community in Slovakia to settle in the Czech Republic and to prevent this happening in an uncontrolled fashion."<sup>148</sup> The "prevention" mechanism is not described further. This monitoring is reportedly carried out in accordance with Government Resolution No. 1160 (19 November 2003), which instructed the Interior Ministry to create an "early warning system" to cover the scenario of a sudden increase in the number of migrants from the Slovak Republic to the Czech Republic and to arrange for the monitoring of localities in Eastern Slovakia with significant migration rates of Roma community members to the Czech Republic.<sup>149</sup> On 28 April 2004 Association Romea (a non-governmental organisation) reported that the Czech Government had discussed coordinating the state administration to "prevent" the migration of members of the Roma community from Slovakia into the country. Interior Minister Stanislav Gross reportedly stated at a press conference that his ministry wanted to be "ready to eliminate any eventual impacts of attempts to abuse the Czech welfare system after both countries join the EU."<sup>150</sup>

In 2007, during the CERD Committee's review of the Czech Republic's 5<sup>th</sup> and 6<sup>th</sup> periodic report, Country Rapporteur Mr. Yutzis remarked on this information and other references to immigration as a phenomenon in the report, saying "it would be unwise to treat the situation of minorities and migrants as a national security issue."<sup>151</sup> In response,

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<sup>145</sup> Le Matin, "Roms: des saisies à coups de 90 ct.," [http://www.lematin.ch/fr/actu/suisse/roms-des-saisies-a-coups-de-90-ct\\_9-305554](http://www.lematin.ch/fr/actu/suisse/roms-des-saisies-a-coups-de-90-ct_9-305554), accessed 9 November 2008.

<sup>146</sup> Council of Europe, European Commission against Racism and Intolerance (ECRI), *Third Report on the Russian Federation*, adopted on 16 December 2005.

<sup>147</sup> House of Lords, *Judgments - Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, SESSION 2004-05, [2004] UKHL 55, on appeal from: [2003]EWCA Civ 666.

<sup>148</sup> CERD/C/CZE/7, page 7, para. 12.

<sup>149</sup> [http://racek.vlada.cz/usneseni/usneseni\\_webtest.nsf/0/D7005E2DB55DD8FDC12571B6006F863D](http://racek.vlada.cz/usneseni/usneseni_webtest.nsf/0/D7005E2DB55DD8FDC12571B6006F863D)

<sup>150</sup> [http://www.romea.cz/index.php?id=servis/z2004\\_0128](http://www.romea.cz/index.php?id=servis/z2004_0128)

<sup>151</sup> CERD/C/SR.1804, page 7, para. 35.

the government said the monitoring of the Slovak Roma was being conducted in tandem with the International Organization for Migration (IOM). An IOM publication describing this monitoring says it is intended to inform the Czech Government as to the “status of Slovak Roma immigration”.<sup>152</sup>

Perhaps most famously, during the summer months of 2008 and concluding in October 2008, the Italian Government carried out a high-profile campaign to fingerprint and document Roma living in “nomads camps”, including migrants and Italian citizens and other EU citizens, in three regions in Italy. The measure drew widespread criticism from domestic civil society as well as a range of institutions in other countries.

### ***VI.3 Fundamental Security of Person Concerns***

Finally, some countries appear to have not yet succeeded in providing basic protection to Romani migrants from physical attack, either on themselves, or on their homes and property, carried out by vigilante elements including mobs and/or racist skinheads, and in some cases reportedly by police themselves.

On 13 May 2008, assailants burned the Ponticelli Romani camp in Naples, Italy, to the ground, causing the approximately 800 residents to flee, while Italians stood by and cheered.<sup>153</sup> The incident occurred after an Italian woman claimed that a Roma girl had broken into her apartment to steal her baby. This alleged act and the intense media scrutiny of the alleged kidnapping which followed, playing on deeply imbedded anti-Romani stereotypes, sparked public hysteria, and in the days following the alleged attempted kidnapping there were signs on public display actively inciting hatred against Roma, which police neglected to dismantle.<sup>154</sup> On the day of the first attack on the Ponticelli settlement, a programme on RAI television showed locals in the area shouting “Roma out”.<sup>155</sup> Two weeks later, on 28 May, the same camp was set on fire for a second time by unknown perpetrators.<sup>156</sup> Interior Minister Maroni told a group of European Parliamentarians in September 2008 that a judicial inquiry was still ongoing in connection with the attacks.<sup>157</sup> It is unclear what is preventing the Italian authorities from identifying and prosecuting perpetrators of the attacks.

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<sup>152</sup> [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Migrants\\_and\\_Host\\_Society\\_12130706/seminar%20docs/integration\\_projects\\_0706\\_en.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/Migrants_and_Host_Society_12130706/seminar%20docs/integration_projects_0706_en.pdf)

<sup>153</sup> Popham, Peter, “Italian Tolerance Goes Up in Smoke as Gypsy Camp is Burnt to Ground”, *The Independent*, 16 May 2008, <http://www.independent.co.uk/news/europe/italian-tolerance-goes-up-in-smoke-as-gypsy-camp-is-burnt-to-ground-829318.html> (accessed 8 August 2008).

<sup>154</sup> Correspondence from osservaZione to the Centre on Housing Rights and Evictions (COHRE), 16 May 2008, on file with the authors.

<sup>155</sup> *Ibid.*

<sup>156</sup> 28 May 2008 report by Adnkronos International at: <http://www.adnkronos.com/AKI/English/Security/?id=1.0.2203930746>, accessed 12 July 2008. Extensive information on the Ponticelli attacks is included in European Union Agency for Fundamental Rights, “Incident Report: Violent attacks against Roma in the Ponticelli district of Naples, Italy”, FRA 2008, 5 August 2008, available at: [http://www.fra.europa.eu/fraWebsite/products/publications\\_reports/incident\\_report\\_en.htm](http://www.fra.europa.eu/fraWebsite/products/publications_reports/incident_report_en.htm)

<sup>157</sup> European Parliament, “Draft Report on the LIBE delegation to Italy on September 18-19 (nomads camps emergency)”, Rapporteur Gérard Deprez, draft circulated for comment in the week of 3 November 2008, pp. 37-41, on file with the authors.

Other attacks taking place on Romani migrants in the immediate wake of the election of the current Italian Government include four Molotov cocktails thrown into a Romani camps in Milan and Novara in early May;<sup>158</sup> on 9 June independent sources reported that a settlement of around 100 Romanian Roma in Catania, Sicily, had been attacked and burned to the ground.<sup>159</sup> The annex to a draft report by a Committee of the European Parliament, sent to investigate human rights issues in Italy arising as a result of the ongoing crisis, includes a non-exhaustive list of 24 incidents taking place during 2008 alone, which it classifies as “human rights violations” against Roma, including racist attacks by vigilantes, assaults by law enforcement officials, forced evictions and other acts.<sup>160</sup> High-ranking Italian officials have not spoken out to unequivocally condemn any of the recent attacks on Roma taking place in the country.

The crisis in Italy has received widespread media attention and has been commented on with concern by a number of international and regional monitoring bodies. By contrast, similar incidents in Russia have received far less comment. During the period since January to October 2008, 254 attacks were recorded based upon xenophobia, involving 340 victims, of whom 113 had reportedly been killed.<sup>161</sup> Included in this data are two Romani persons reportedly killed by vigilantes.<sup>162</sup> Recent attacks on Romani migrants have also been reported in France.<sup>163</sup>

The protection of persons is one of the most fundamental duties of the state, as repeatedly affirmed in the jurisprudence of the ECtHR. Where such protection has failed, the state has a positive obligation to prosecute all culpable parties, as well as to provide due legal remedy to victims. The Court has in recent years emphasized in particular the importance of determining the existence of racial animus in such acts, in providing recognition of the racial motivation of acts and in factoring racial motivation into sentencing, in order, *inter alia*, to underline the particular gravity of violent crime based on racial motivation. It is incumbent upon all states in the OSCE region to ensure that migrants – who frequently constitute a particularly exposed category of visible minorities – are effectively protected from arbitrary acts of violence and that they have effective access to justice where basic protection measures have failed.

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<sup>158</sup> ANSA, 11 May 2008.

<sup>159</sup> Email communication from Mr. Fulvio Vassallo Paleologo, dated 9 June 2008. On file with the authors.

<sup>160</sup> European Parliament, “Draft Report on the LIBE delegation to Italy on September 18-19 (nomads camps emergency)”, Rapporteur Gérard Deprez, draft circulated for comment in the week of 3 November 2008, pp.11-12, on file with the authors.

<sup>161</sup> Moscow Bureau for Human Rights, “Statistics of Attacks based upon Aggressive Xenophobia, (January-October 2008)”, distributed electronically 6 November 2008.

<sup>162</sup> *Ibid.*

<sup>163</sup> <http://www.20minutes.fr/article/239040/Marseille-Marseille-une-rumeur-contre-les-Roms-entraîne-deux-agressions.php>, accessed 16 November 2008.

**PART II: Matters Affecting Establishment and Integration by Romani Migrants and/or Acting as Push Factors for International Migration by Roma**

**VII. Access to Goods and Services in Countries of Origin and Countries of Immigration**

The ability of Roma to access goods and services is limited throughout Europe by factors including lower educational qualifications among significant segments of the Romani communities, as well as by racial discrimination, driven in particular by high degrees of antipathy towards Roma, and/or mistrust of Roma.<sup>164</sup> Denial of access to key goods and services has concrete implications for the exercise of EU freedom of movement rights, where the Roma concerned leave one EU Member State and arrive in another, as well as for the ability of Roma from outside the EU to arrive in and settle legally in an EU Member State, or another Council of Europe or OSCE participating State.

Following a summary of relevant EU law, the subsequent sections look in cursory fashion at four key areas: education, employment, health care and housing. These are areas

covered by EU Directives to the Member States setting out the scope, content and nature of required domestic law bans on discrimination.<sup>165</sup> They are also areas in which access by Roma is limited in a number of European states. Finally, limitations on access to these rights can have compounding impact in a cross-border context, and in some cases can have unexpected impacts.

*Stevo P., a 33-year-old Romani man, lives in a village in Romania. Six years ago, at the initiative of a local Romani woman, an international donor agency established a small communal animal husbandry project, involving a small herd of cows, targeting extremely excluded Romani families. Six local Romani families currently benefit from the project by working a number of hours per week tending the animals, and sharing the proceeds from the sale of the milk. Stevo is the manager of the project and has been given accommodation in the rudimentary farm building. The project is currently under threat because the grazing land, which was donated by the municipality, is slated for reclassification and sale, apparently because of pressure arising from EU processes to clarify land ownership and tenure.*

<sup>164</sup> A comprehensive summary of Romani access to employment, education, health care and housing, as well as of governmental efforts to improve the situation of Roma in these areas, is provided in Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights "Implementation of the Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area", Status Report 2008, OSCE/ODIHR 2008, pp.29-43.

<sup>165</sup> Particularly as set out under the Council of the European Union Directive 2000/43/EC "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin".

### ***VII.1. EU Law and the Ban on Discrimination in Education, Employment, Health Care and Housing***

A summary of Council of Europe law and OSCE commitments in the field of non-discrimination has been provided above in Section III.1.A., as has a general discussion of the role of EU law in banning discrimination. However, a discussion of the EU law ban on discrimination as it pertains to the particular sectoral fields of education, employment, health care and housing is reserved for the present section.

EU law protects individuals differently depending on whether they are within their State of nationality or in a host Member State. As such, the two groups must be considered differently. Ironically, the EU has much more experience in protecting these equality rights in respect of migrants or persons exercising EU free movement rights than it does with respect to citizens of the Union who have not used a free movement right. Nevertheless, the discrimination ban under EU law has been going through a period of dramatic expansion in recent years.

Equality of treatment for the children of migrants as regards access to education was an early concern of the EU. Already in the 1960s the implementing legislation regarding free movement of workers included specific provisions to address access to education. Article 12 of Regulation 1612/68 provides that the children of an EU migrant worker who is or has been employed on the territory of a state, shall be admitted to that state's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that state, if such children are residing in its territory. This right has been interpreted widely by the European Court of Justice to include the right to access to education even after the workers have departed from the host state and the children are left behind.<sup>166</sup>

The right to equal access to education for EU migrant students has been a source of some controversy with some Member States regarding access to student maintenance grants and loans. Here some EU governments made access dependent on whether the student has settled immigration status, which is determined as at least four or five years residence on the territory. The European Court of Justice found that the exclusion of students who are nationals of other Member States from the student maintenance system available to national students was not compatible with the right to equality of EU citizens, though it did accept that a qualification that the student had to have some link with the society was acceptable.<sup>167</sup>

As regards access to employment, once again EU law is very specific about the right to equal treatment that Member States must apply to their own nationals. Regulation 1612/68 is a key source. This states, in Article 7, that a worker who is a national of a Member State may not, on the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he

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<sup>166</sup> 389 & 390/87 *Echternach & Morritz* [1989] 723.

<sup>167</sup> C-209/03 *Bidar*, 15 March 2005.

become unemployed, reinstatement or re-employment. Further, the worker is entitled to all social and tax advantages available to the national. In the cases that have come before the European Court of Justice on social and tax advantages, such benefits as in-work income support, reduced train fares for large families, etc., have been found to be the right of migrant workers.

Trade union rights are also guaranteed in Article 8 of Regulation 1612/68, which provides that a worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote. Furthermore, he or she shall have the right of eligibility for workers' representative bodies. He or she may, however, be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law.

As regards housing, the same EU Regulation provides important guarantees for EU migrant workers as regards access to housing. Article 9 states that a worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he or she needs. Such a worker may, under the same right as nationals, put his or her name down on the housing lists in the region in which he or she is employed, where such lists exist, and enjoy the resultant benefits and priorities. If the worker's family has remained in the country where he or she came from, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption. One of the benefits of such clear provisions is that they guide national authorities on exactly what treatment must be accorded. Instead of leaving the matter as a general statement that workers must not be discriminated against, the daily practices of administrations in which there are often problems are targeted for specific provisions.

### *People within the Member States*

The anti-discrimination directives, referred to above, provide an important source of legal protection against discrimination but take a somewhat different approach. They apply to everyone on the territory. Thus they are not limited to EU nationals and their family members. Directive 2000/43 prohibits discrimination on the grounds of race or ethnic origin and thus is of major significance in the legal protection of Roma. The Directive prohibits discrimination on the ground of ethnic origin in:

- Conditions for access to employment, self-recruitment and to occupation including selection criteria and recruitment conditions and promotion;
- Access to all types and all levels of vocational guidance, training and work experience;
- Membership and involvement in workers associations and trade unions;
- Social protection including social security and health care;
- Social advantages;

- Education;
- Access to the supply of goods and services, including housing.

This is a very wide range of fields. The burden of proof which the directive establishes is deliberately low: once the individual presents the facts on the basis of which the claim is made, it is for the respondent to prove that there has been no breach of the principle of equal treatment. This lowering of the burden of proof barrier to help the individual who claims he or she has been discriminated against was quite controversial when the draft Directive was under negotiation. However, the argument prevailed that individuals who suffer ethnic discrimination are often in a position of social exclusion or lack of power such that they are vulnerable to exclusion from the legal system and access to their rights through procedural rules designed for parties where there is greater equality of arms.

Directive 2000/78 applies to the field of work specifically. It protects individuals from discrimination on the basis of religion, belief, disability, age or sexual orientation as regards employment and occupation. These protections are important for those Roma who may face discrimination for reasons other than – or in addition to – their ethnicity. For example, Muslim Roma – a sizable population in South-Eastern Europe – or non-Orthodox Christian Roma in predominantly Orthodox countries may benefit from such protection. Similarly, Roma who may face discrimination on grounds of age, sexual orientation or on other grounds protected under Directive 2000/78 may now rely on these provisions of law.

## ***VII.2. Practice***

### **VII.2.A Education**

Extensive studies of the education of Roma in Central and South-Eastern Europe indicate (i) severe under-attainment by Roma at school<sup>168</sup> and (ii) the perpetuation of inter-generational under-attainment in schooling, via practices such as the provision of racially segregated educational facilities, arbitrary refusals to enrol Romani children and other, similar, practices.<sup>169</sup> Although the field is significantly less studied in Western Europe, there are periodic reports of over-representation of Romani children in special school facilities, as well as indications of denial of education rights in matters such as high rates of illiteracy and very low school attainment.<sup>170</sup>

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<sup>168</sup> See for example European Commission, DG Employment and Social Affairs, *The Situation of Roma in an Enlarged European Union*, 2004, p.20; see also relevant thematic documentation at [http://www.coe.int/t/dg3/romatravellers/documentation/Education/default\\_en.asp](http://www.coe.int/t/dg3/romatravellers/documentation/Education/default_en.asp).

<sup>169</sup> *Ibid.*, pp. 17-20.

<sup>170</sup> Fremlova, Lucie, “Romani Migration from A8 and A2 Countries to England”, presentation, OSCE HCNM and Council of Europe Commissioner for Human Rights experts’ meeting on Roma Migration, Budapest, 9 September 2008.

Segregated schooling in Central and South-Eastern Europe<sup>171</sup> has as actually been a factor promoting the movement of Roma to Western Europe. Particularly when Roma in countries of origin receive reports from Roma who have successfully moved to countries such as Canada and the United Kingdom, that their children are not humiliated in school in the same way in the host country as they are at home. A positive educational environment for their children in countries outside Central and South-Eastern Europe is one in a range of factors cited by successful Romani migrants for not wanting to return.

There is insufficient research on the situation of Romani migrants and/or their children in terms of access to education in the country of immigration. A number of OSCE participating States require school enrolment, regardless of citizenship or other status, provided the person concerned can demonstrate an address. In some OSCE countries, concern for the situation of Romani migrant children living in slum housing (including slum housing without a formal address) has triggered proactive attention to encouraging school enrolment for such Romani children. In some areas, this has in fact meant successful school enrolment and attendance for even those Roma living in the most marginal of housing circumstances. However, it is evident that many thousands of children of Romani migrants throughout the OSCE region are not attending school regularly, and in some cases not at all. As noted above, in many cases, Romani migrants report that emigration was the key to securing a dignified educational environment for their children.

A further area of concern in this context relates to the children of Roma who have previously spent time abroad and who have then been expelled or otherwise returned to countries of origin in Central and South-Eastern Europe. There are persistent reports in such situations of non-enrolment by schools in the home country or of enrolment in segregated schooling arrangements. In some cases, where persons have been forcibly expelled, expulsions may have taken place in the middle of the night without the provision of adequate opportunities to bring documents required for demonstrating school attainment. Romani children without such documents may not be enrolled in schools in the country of origin. In some cases, schools in the country of origin may exploit lack of school documents from the country of immigration to deny enrolment outright, or to place Romani children in humiliating circumstances, such as requiring children with 7<sup>th</sup> or 8<sup>th</sup> grade attainment to return to kindergarten.

Elsewhere, schools in the country of origin may use limited knowledge of the national language or the language of instruction as a pretext for similarly refusing admission, or offering Romani children humiliating school placement such as the kind described above.

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<sup>171</sup> See *inter alia* judgments of the European Court of Human Rights in *D.H. and others v Czech Republic* 13 November 2007; *Sampanis and others v Greece*, 5 June 2008; Advisory Committee on the Framework Convention for the Protection of National Minorities, *Commentary on Education under the Framework Convention for the Protection of National Minorities*, 2 March 2006, ACFC/25DOC(2006)002, [http://www.coe.int/t/dghl/monitorings/minorities/3\\_FCNMdocs/PDF\\_CommentaryEducation\\_en.pdf](http://www.coe.int/t/dghl/monitorings/minorities/3_FCNMdocs/PDF_CommentaryEducation_en.pdf)



Although there are ample and extensive European-level commitments to improve the education of Roma,<sup>172</sup> as well as regular affirmations by States of the priority of efforts in this area, States' practices have often been inconsistent with these commitments. For example, Roma expelled from Germany to Serbia have failed to secure school records from schools in Germany, which children attended for years, despite the involvement of NGOs to try to assist in this process.<sup>173</sup> At a minimum, European- and State-level attention is needed to ensure that, in the extreme event of expulsion from a country, no negative effects flow to children in the field of education.

In addition, inadequate knowledge of the national language is sometimes used as a pretext for racial segregation. There are genuine challenges to the mainstreaming of children in educational settings where there are divergent language competences. However, there is also compelling evidence from many sources that temporary separate education frequently becomes entrenched, resulting in racial segregation and long-term pernicious social impact on both children and communities. School programmes designed to get the children of Romani migrants into schooling must place particular emphasis on making sure that children are brought into mainstream education as swiftly as possible. Where possible, additional classes to enhance knowledge of the language of instruction or otherwise assist children from socially excluded backgrounds should supplement mainstream enrolment.

Finally, Romani girls from traditional communities are frequently removed from schooling during puberty, because parents fear that continuing in school could lead to them becoming sexually active, or otherwise threaten their or their family's honour. OSCE participating States should undertake programmes designed to ensure successful primary, secondary and tertiary education for Romani girls and women, while promoting an understanding of Romani culture and values among Roma and non-Roma alike.

## **VII.2.B. Employment**

The right to enter the territory of the EU and settle legally for periods longer than several months is very frequently dependent upon the ability to demonstrate lawful, gainful employment in the country of immigration. During the 1990s, a number of Member States amended the law in this area to make requirements considerably more stringent,

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<sup>172</sup> The OSCE Action Plan on Improving the Situation of Roma and Sinti in the OSCE Region includes an entire subsection on education, which begins with the following: "Education is a prerequisite to the participation of Roma and Sinti people in the political, social and economic life of their respective countries on a footing of equality with others. Strong immediate measures in this field, particularly those that foster school attendance and combat illiteracy, should be assigned the highest priority both by decision-makers and by Roma and Sinti communities. Educational policies should aim to integrate Roma and Sinti people into mainstream education by providing full and equal access at all levels, while remaining sensitive to cultural differences" (Organization for Security and Co-operation in Europe, Ministerial Council Decision No. 3/03, "Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area", 2 December 2003, Chapter V, "Improving access to education").

<sup>173</sup> Ecumenical Humanitarian Organization (EHO), "Violations of the Rights of Roma Returned to Serbia under Readmission Agreements", Novi Sad, April 2007, p.27.

for example requiring that a person demonstrate having secured employment prior to entry onto the territory.

For citizens of one EU Member State arriving in another, demonstrating employment is not required, except in cases where transitional arrangements continue to apply. However, at present, it is evident that, in practice, an inability to demonstrate employment or other means of support is in some countries used as a determining factor in arriving at decisions to expel, possibly not in compliance with the relevant EU directives. This is particularly the case where the persons concerned may be living in exposed or slum-like housing. For example, when French authorities recently dismantled the long-term Romani

*34-year-old Dorin P. makes a living assisting other people from his village in going to Italy. He has good relations with border officials. In Italy, he manages construction work teams, usually comprised of ethnic Romanians and Roma from his local area in Romania. They live with him, are fed by him, and their transport costs are deducted from their wages. Most of the people working for him spend some time of the year in Italy or France and some time of the year in Romania, as does Dorin.*

*Giovanni L. is from Italy. He is not Romani. He has just purchased a large pond in a Transylvanian village. This supplements the extensive purchases of agricultural holdings he has already made in the village in recent years. He is one of a number of Italians and Germans who have purchased primarily agricultural holdings in the village. He intends to develop the area around the pond into a swimming facility. He is also involved in a scheme to promote snail farming locally.*

slum in the Paris suburb of St. Ouen, around 80 persons were provided with alternate accommodation, while around 220 persons were sent to Romania on planes organized by the same French authorities.<sup>174</sup> Thus, despite being EU citizens enjoying free movement rights, in practice French authorities have “engineered” the removal of these persons to their country of origin. On 31 July 2008, a coalition of NGOs in France lodged a petition with the European Commission urging that it open infringement proceedings against France concerning non-implementation of Directive 38/2004.<sup>175</sup> The complaint details extensively practices divergent from the requirements of EU law.

Experts approached in the course of this study were agreed that many Roma who have moved from one EU Member State to another and successfully established themselves, have done so through self-employment or service provision or in places where there is a high degree of general tolerance for employment in the grey economy. While the latter raises serious concerns about threats of exploitation, the former merits serious policy scrutiny. It appears that many Roma have successfully and legitimately established in

<sup>174</sup> Caulcutt, Clea and Thomas Dudzinski, “Last Goodbyes in a Roma Slum”, France 24, 2 September 2008, <http://www.france24.com/en/20080902-roma-gypsies-community-paris-suburb-new-housing-saint-ouen&navi=FRANCE> (accessed 2 September 2008).

<sup>175</sup> “Plainte contre la France pour violations du droit communautaire en matière de libre circulation des personnes” brought by the organisation GISTI, also on behalf of the civil society organisations and networks.

those EU Member States where a relatively less stringent application of administrative regulation and control has enabled the effective realization of EU rights of establishment through self-employment or service provision (see Section III.1. of this study).<sup>176</sup>

Nevertheless, the positive consequences of emigration, which make it possible to break out of the trap of race-based extreme social exclusion, cannot be underestimated. In a frequently cited example, very excluded French nationals of North African background from tenement housing in suburban Paris went to the United Kingdom and secured highly paid service industry jobs as “French” citizens, whereas in France they would be unable to secure employment. Similarly, Roma have gone abroad and secured gainful employment throughout the EU and elsewhere as “Hungarians”, “Romanians”, “Slovaks” or other dominant ethnic groups of their home countries. Roma as nationals of the Member States are entitled to exercise rights based on nationality in EU law, which in some cases appears to provide opportunities, through migration, to escape from discrimination on the basis of ethnicity. The cost of this escape, however, may be high – the denial of identity.

The recommendations arising from these facts are Janus-faced. On the one hand, despite the EU anti-discrimination law framework, widespread racial discrimination goes unchallenged. In the area of employment new anti-discrimination laws have yet to demonstrate their effectiveness because discrimination may be difficult to prove, legal aid is unavailable, proceedings are inadequate and ultimately ineffective and there are many other reasons that can be cited.<sup>177</sup> At present, in many if not most states, and particularly in EU Member States, sanctions for discrimination as they currently exist are not dissuasive, despite an EU law requirement that they be so. On the other hand, the stigma on migration itself needs to be challenged, and the EU’s original idea of a right to the free movement of goods, services and people reinvigorated, because migration is often a ticket to social mobility whereas remaining at home means condemnation to life as a second-class citizen or even pariah.

### **VII.2.C Health Care**

Health care is one area where data on Roma – including Romani migrants – has in some circumstances been gathered, stored and transmitted because Roma have at times been seen as a public-health threat, and because data concerning health has at times arbitrarily escaped or avoided data protection regimes.<sup>178</sup> One particular driver of this issue has been serial and systemic non-vaccination of Romani children – particularly in Romania – against a number of diseases including measles. As a result, this has become a matter for WHO in its efforts to meet European targets for the eradication of measles and other immunization eradicable diseases. In general, very specific data is gathered about Romani

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<sup>176</sup> European Court of Justice, C-268/99 *Jany*, 20 November 2001.

<sup>177</sup> See European Union Fundamental Rights Agency, Annual Report 2008, which focuses in particular on the efficacy of, as well as weaknesses of, European Union anti-discrimination law, as applied in the Member States: [http://fra.europa.eu/fra/material/pub/ar08/ar08\\_en.pdf](http://fra.europa.eu/fra/material/pub/ar08/ar08_en.pdf) (accessed 27 October 2008).

<sup>178</sup> See, *inter alia*, Council of Europe, EUMC (eds.), *Breaking the Barriers-Romani Women and Access to Public Health Care*, Luxembourg, 2003.

health – namely birth rates and communicable diseases, at least in part, because of what is in many cases unhealthy interest in the concomitant subtexts: “They have too many children”; “They may infect us.”

Thus, for example, a number of national experts provided a WHO meeting on measles in Europe, in 2007, with information that recent outbreaks of measles in Italy, Greece and Germany could be traced to one apparently non-vaccinated Romani community in Romania:<sup>179</sup> none of the Italian Sinti or non-citizen Romani patients had been vaccinated. Among other actions taken in Italy in response to the issue, “the media had been informed”.<sup>180</sup> Other data presented at the same WHO meeting on measles included:

- 2004-2006: Romania; more than 8,000 cases;
- 2005-2006: Greece; 171 cases, 55 per cent among Roma;
- 2006-2007: Spain; 207 cases; the first case concerned a girl “from eastern Europe”, living in a caravan; “she attended a funeral in Italy”;
- 2007: Serbia; as of 12 March 2007, 121 cases, 99 per cent among Roma.<sup>181</sup>

Of similar concern, although not yet as prominent in data discussions, is the resurgence of tuberculosis in Europe, and the prevalence of tuberculosis in a number of excluded Romani communities in both Western and Eastern Europe.<sup>182</sup>

It should be noted here that in many circumstances, Roma are not at all the cause of outbreaks of immunization-eradicable diseases. For example, Switzerland has recently had repeated measles outbreaks, arising primarily in (non-Romani) communities participating in anti-immunization campaigns and refusing to undergo immunization. Non-vaccination or only partial (and thereby ineffective) vaccination of Roma arises for a combination of reasons, including lack of access to preventative care, a climate of quasi-punitive public health campaigns and physical removal from health care facilities, as well as other reasons. In some countries, in particular Romania, but also elsewhere,

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<sup>179</sup> “Measles in Romania Report of Joint Investigation by WHO and European Centre for Prevention and Disease Control, May-June 2006: Outbreak Investigation and Study Report”, Dr. John S. Spika (ed.), World Health Organization Regional Office for Europe.

<sup>180</sup> In Italy, according to information made available at the same meeting, during recent years, measles outbreaks reportedly comprised:

South-Tyrol, June-August 2006: 17 cases, 13 in Sinti (i.e., Italian citizens) individuals nosocomial transmission;

Tuscany, January-May 2006: 40 cases, Index case imported from India, nosocomial transmission, D4 strain;

Lazio, June-November 2006, 263 cases, “97 in Romani individuals” (i.e. persons not from Italy), nosocomial transmission, D4 and B3 strains;

Sardina, August-September 2006, “8 cases in Romani individuals” (i.e., persons not from Italy), “imported from Lazio”, D4 strain;

Apulia, November 2006-January 2007, 18 cases, B3 strain.

See Atti, Marta Ciofi degli, “Measles Outbreaks in Roma/Sinti Population in Italy”, Istituto Superiore di Sanità, Italy, presentation at World Health Organization, Immunization Programme Managers’ Meeting, Dubrovnik, Croatia, 23-25 April 2007.

<sup>181</sup> Ibid.

<sup>182</sup> See Schaaf, Marta, “Confronting a Hidden Disease: TB in Roma Communities”, Open Society Institute and the World Lung Foundation, January 2007.

vaccination coverage, where it has previously existed, has apparently broken down in recent years either generally, or in certain areas.

In addition to vaccination issues, there are extensive concerns related to the exclusion of Roma from health care in Central and South-Eastern Europe. These include significant numbers of persons excluded from basic health insurance coverage as a result of being neither employed nor formally included in registries of the unemployed (Bulgaria); physical removal from health care infrastructure (Hungary, Romania, Poland and elsewhere); racially discriminatory refusals to provide emergency care (Bosnia and Herzegovina, Bulgaria, Croatia and elsewhere); and other issues of serious concern.<sup>183</sup> Health care providers in the Czech Republic, Hungary and Slovakia have been implicated in extreme human rights abuses, namely the coercive sterilization of Romani women. Throughout the region, extensive empirical evidence indicates that major segments of the Romani community access a medical practitioner only in cases of emergency care, lacking on a massive scale access to preventative or primary general health care. Also throughout the region, very disproportionate numbers of Roma lack health insurance, even in those countries which normally have comprehensive health insurance coverage. Also, intensive care programmes, such as those required for tuberculosis, may not be functioning in practice in situations of extreme exclusion: in excluded settlements in which Roma may be living.<sup>184</sup>

This systemic exclusion means that Roma carry their lack of health care with them when crossing borders. Inside the European Union, EU citizens may use the European Health Insurance Card,<sup>185</sup> which ensures that, if ensured via a national health scheme or other health insurance plan in their country of origin, they will be insured in the country of immigration. Some non-EU countries, such as Switzerland, also participate in this mechanism. However, where persons lack health insurance in the EU country of origin, this otherwise positive mechanism is of no assistance in securing effective access to health care.

In a migration context, there are complaints from health care providers that immunization records are not sufficiently developed to allow them to know what immunization a given migrant has received, and which he or she may be lacking. On the other hand, health data may be used to heighten popular panic and anti-Romani sentiment, as in certain circumstances when health care providers release information about the health status of Roma to the local media.

It is incumbent upon policymakers in countries of origin and countries of migration alike to address both concerns: the systemic exclusion of Roma from mainstream health care, including preventative health care; and the use of health data to drive anti-Romani sentiment and, ultimately, to bring about the expulsion of Romani migrants. Examination of policy is also merited in the case of persons who may exercise EU free movement

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<sup>183</sup> See European Roma Rights Centre, *Ambulance not on the Way: The Disgrace of Health Care for Roma in Europe*, Budapest, September 2006.

<sup>184</sup> Ibid.

<sup>185</sup> [http://ec.europa.eu/employment\\_social/healthcard/index\\_en.htm](http://ec.europa.eu/employment_social/healthcard/index_en.htm)

rights to move and settle in another EU Member State, but who may not have health insurance in their country of origin, and so may not benefit from EU-level systems for facilitating cross-border health insurance.

## VII.2.D Housing

Extreme housing conditions among Romani migrants are very frequently the trigger for concern – benign or otherwise – about the situation of Romani migrants. Exposing this challenge to perceived community standards and norms can often give rise to public pressure “to do something”. In some cases, this pressure results in positive integration measures.<sup>186</sup> In others, it results in forced expulsion from housing and/or country.

Research for this study indicates that the housing situation of Romani migrants differs significantly between target countries of migration. For example, for the most part, with some exceptions, Romani migrants in the United Kingdom and Ireland live in rental accommodation. There are concerns in these countries about overcrowding and possible exploitation by landlords. However, Roma have managed to surmount obstacles on the rental market to secure mainstream housing. This situation could not contrast more starkly with certain segments of Romani migrant groups in Italy and France. In Italy, a very exposed segment of the foreign Romani community lives in officially authorized “camps for nomads”; similar officially tolerated sites, generally with less available infrastructure; or in exposed settlements with little or no tenure, security or infrastructure provision. In at least one case, recent efforts by the previous Italian Government to improve the housing of Romanian Roma have broken down as a result of failure to tackle racial discrimination on the rental market.<sup>187</sup> The situation is similar in Greece, with a number of extremely vulnerable and excluded settlements of Roma from Greece and Albania existing on the outskirts of Athens and throughout other parts of Greece.<sup>188</sup>

In the Italian case, public concern, driven by sensationalist media coverage focusing on several crimes, has compelled governments of both left and right to adopt draconian measures concerning Roma. The most widespread measure undertaken by Italian authorities is forced eviction from housing, frequently undertaken in contravention of international law guidelines<sup>189</sup> and involving arbitrary destruction of property. Spanish authorities have previously undertaken similar acts.<sup>190</sup>

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<sup>186</sup> See for example Richard, Jérôme, “Situation and problems of Roma immigrants in the Nantes Metropolitan Area”. Document prepared by Mr. Richard following on from the request of the Committee of Experts on Roma and Travellers (MG-S-ROM) at its 25<sup>th</sup> meeting (Strasbourg, 3-4 April 2008), 30 June 2008.

<sup>187</sup> Centre on Housing Rights and Evictions (COHRE) field research, Turin, Italy, May 2008.

<sup>188</sup> Greece has been found in violation of three aspects of European Social Charter Article 16 by the European Committee of Social Rights, as a result of inadequate housing conditions prevailing among Roma in Greece (European Committee of Social Rights, Decision on the Merits, *European Roma Rights Center v. Greece*, 8 December 2004). Forced evictions and the arbitrary destruction of housing also implicates a number of provisions of the ECHR, including but not necessarily limited to Articles 2, 3, 6, 8, 13, 14 and Article 1 of Protocol 1.

<sup>189</sup> See in particular United Nations Committee on Economic, Social and Cultural Rights General Comments 4 and 7, elaborating the international law requirements of the right to adequate housing as

Since 2007, the Italian legislature has supplemented this approach with legal measures to undertake particular security measures concerning Roma. The Berlusconi government formed in Spring 2008 has undertaken such measures, including defining the presence of Roma in three regions as a public emergency. It has also adopted a stance of general tolerance of racially motivated acts against Roma, and undertaken a compulsory fingerprinting programme among persons in settlements of both foreign Roma and Italian Sinte.<sup>191</sup>

The crisis in Italy has produced effects outside its borders as well; the Geneva canton of Switzerland detained and collectively expelled scores of Roma from Romania, at least partially as a result of a debate about “taking proactive measures before a situation develops similar to Italy”.

Exclusionary housing practices in countries of origin can constitute a push factor triggering migration. Thus, for example, a group of Roma threatened with eviction from their accommodation in Novy Jicin, the Czech Republic, in 2008, emigrated to the United Kingdom, as have a number of Roma targeted by forced eviction practices in the town of Vsetin, also in the Czech Republic.<sup>192</sup>

Housing is also a field in which restrictive practices in some countries can hinder the ability of Roma to arrive from outside the EU and establish within it. For example, Austria requires that a person seeking to settle in Austria from outside the EU has and can demonstrate “housing in conformity with the standards of the community” (*ortsublichen unterkunft*).

Housing – or rather homelessness – among non-citizen Roma appears to play a specific role in amplifying a social policy challenge into a media-driven crisis. A proactive approach to tackling racial discrimination on the housing market is one element needed to ensure that conditions do not develop that have brought about the type of breakdown currently witnessed in Italy and elsewhere.

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derived in particular from Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>190</sup> See European Roma Rights Centre, “Forced Eviction of 1000 Roma in Spain”, at: <http://www.errc.org/cikk.php?cikk=990&archiv=1> (accessed 8 October 2008).

<sup>191</sup> The European Commission has stated that it was, as of 23 September 2008, in discussion with the Italian Government as to the legality of these acts (see “Declaration du Viceprésident Jacques Barrot sur le “paquet sécurité” Italien”, Press Release of 23 September 2008). A July 2008 report by the Council of Europe’s Human Rights Commissioner set out a range of concerns in connection with ongoing events concerning Roma and Sinte in Italy, see Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Italy on 19-20 June 2008, 28 July 2008.

<sup>192</sup> For a comprehensive overview of the events at Vsetin, in which local authorities summarily expelled a number of Roma from their accommodation and from the municipality, moving them to isolated areas several hundred kilometres away, see Centre on Housing Rights and Evictions (COHRE) and Peacework Development Fund, Vzájemne Souziti, “Communication to the United Nations Special Rapporteur on the Right to Adequate Housing Concerning Violations of the Right to Adequate Housing in the Czech Republic”, February 2008, on file with the authors.

## **VIII. Conclusion**

The intensification of EU integration from the mid-1980s onward has brought about unprecedented changes to the real and potential mobility of Europeans. Europe's most powerful regional entity – the European Union – as a matter of original purpose acts to facilitate the movement of Europeans within the greater EU space. The end of Communism and the changes following 1989, combined with the rapid pace of technological change globally, has further fundamentally altered the demography of European societies. Today, with some exceptions, most European societies are more multicultural than they ever have been. Migration has never been a more significant fact for the public and policymaker alike in Europe.

At the same time, the three European regional organizations – the Organization for Security and Co-operation in Europe, the Council of Europe and the European Union – have acted as leaders for the development of new laws and policies banning discrimination based on perceived race or ethnicity. This undertaking is not yet even partially complete, and is in a current state of dynamic growth. All three organizations have separate roles in securing peace, respect for and protection of human rights and economic prosperity in Europe. However, they are all committed to combating racial, religious and ethnic origin discrimination and ensuring that everyone in Europe has an equal chance of personal fulfilment within their community and the wider society. As outlined in this study, there are numerous sources for this commitment and the obligations undertaken by all the states in the region towards this goal.

Nevertheless, it is apparent that a massive gap exists between European efforts to challenge racial discrimination, on the one hand, and policies concerning Romani migration, on the other. Within Europe, major efforts have been made to force Roma to go to or to stay in the East, away from the economically dynamic parts of Europe. Where this has not proven possible, certain public authorities' action or inaction has led to a worsening of the situation of Romani migrants or to a neglect of their plight, even when living conditions may be degrading.

There is a need to reinvigorate the European project, to ensure that the benefits of European integration are enjoyed at all levels, and without regard to ethnic origin. In particular, there is an urgent need to ensure that all Europeans moving from one part of Europe to another have their human dignity respected and protected and are able to access in practice all fundamental human rights, as well as those rights accruing as a result of the relevant European treaties. As this study has also endeavoured to show, there is an urgent need to extend an effective ban on all forms of discrimination based on perceived race or ethnicity, including matters involving border administration, immigration control and related decisions pertaining to the treatment of non-citizens. Specific recommendations for action follow below.



## **IX. Recommendations**

On the basis of the findings of the research, the authors of this study have made the following recommendations for action:

### *To OSCE participating States:*

Without delay, ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Ensure that a comprehensive and effective ban on racial discrimination extends to all areas secured by law. Ensure that the ban on the particularly serious harm of racial discrimination extends, *inter alia*, to decisions concerning access to and expulsion from the territory, including decisions on such key matters as visa allocation, where such are required.

Ensure that all decisions concerning personal status – including immigration status – are based on the personal circumstances of the person concerned; ensure that decisions at all levels on matters concerning status, as well as decisions concerning related integration measures, are individual and not collective.

Ensure that international law requirements on the treatment of non-citizens, particularly those set out under General Recommendation 30 of the United Nations Committee on the Elimination of Racial Discrimination concerning discrimination against non-citizens<sup>193</sup> are adequately and effectively secured under domestic law.

Take proactive measures to resolve the immigration status of persons who would otherwise benefit from measures of inclusion, were it not for their belonging or perceived belonging to excluded Romani or related groups. Persons factually on the territory for periods of five years should enjoy a residence status leading progressively and without undue delay to permanent residence and/or citizenship, where the latter status is sought.

Take proactive measures to ensure that the physical integrity and security of migrants is ensured; in those states where attacks on migrants have occurred, ensure that all perpetrators are brought swiftly to justice; undertake public campaigns to ensure understanding of the value of multicultural societies.

Ensure equal and effective access to all persons, regardless of ethnicity or perceived race, to key services required for the realization of fundamental rights, including but not limited to education, employment, health care and housing. Where necessary, undertake proactive, positive measures to assist persons from marginalized groups in exercising fundamental rights.

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<sup>193</sup> [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument).

Take steps, without delay, to extend social assistance and welfare measures to groups currently falling outside these protections, including excluded migrants. Ensure that Roma suffer no direct or indirect discrimination in access to social assistance and/or welfare benefits.

End practices of racial profiling of migrants and related groups.

Ensure that, where expulsion from the territory is absolutely unavoidable, expulsion measures do not result in human rights violations for any person affected by the expulsion, including family members of the person expelled. Ensure that, in all cases where minors in particular are expelled from the territory, complete education and health records travel with the person concerned.

To Council of Europe Member States:

Ratify, without delay, the First, Fourth, Seventh and Twelfth Protocols to the ECHR, where this has not yet been done.

Ratify, without delay, all elements of the Revised European Social Charter, including the mechanism providing for a system of collective complaints.

Ratify, without delay, the FCNM and the European Charter for Regional or Minority Languages, and provide explicit recognition of Roma and, depending on the facts of demography in the state at issue, other relevant groups regarded as “Gypsies”.

Ratify and integrate into domestic law all aspects of the European Convention on Nationality, the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, the Council of Europe Convention on Action against Trafficking in Human Beings and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

Ratify the European Convention on the Legal Status of Migrant Workers as well as the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and provide training to officials at all levels, as well as other relevant parties, on the requirements of Council of Europe law as it relates to migrants, migrant workers and other non-citizens on the territory.

Disseminate at national, regional and local level and ensure effective implementation notably of the Council of Europe Committee of Ministers’ Recommendation CM/Rec(2008)5 *on policies for Roma and/or Travellers in Europe* and of the FCNM Advisory Committee guidelines contained in its 2008 Commentary on the Effective Participation of Persons Belong to National Minorities in Cultural, Social and Economic Life and in Public Affairs.

To Member States of the European Union:

Cease immediately – and at the same time adopt effective measures to prevent – all efforts to expel EU citizens in contravention of EU law, as well as other measures aimed at hindering access to the territory for certain groups, where these are undertaken.

Provide training to officials at all levels on the requirements of EU law as concerns the rights of entry to the territory and establishment of citizens of other EU Member States.

Prioritize effective implementation of the EU anti-discrimination legislation and contribute to the efforts under way aimed at its further strengthening.

To the OSCE Institutions:

Develop inter-State mechanisms to ensure that no person legally expelled from the territory lacks any relevant documents – including relevant education, employment, health and other records – to ensure speedy establishment and reintegration.

Establish regular and systematic monitoring, jointly or together with the Council of Europe and/or relevant EU institutions, of expulsions carried out to Serbia, Montenegro and Kosovo, with a view to ending race-based expulsions of Roma and other persons regarded as “Gypsies”.

To the Council of Europe:

With a mind, *inter alia*, to strengthening the legal protection of migrants in the Council of Europe Member States, reinvigorate efforts to promote ratification of the First, Fourth, Seventh and Twelfth Protocols to the European Convention, as well as ratification of the Revised European Social Charter, including the mechanism establishing a system for collective complaints, as well as of the European Convention on the Legal Status of Migrant Workers.

To the European Union:

Establish a Roma Unit in the European Commission to provide particular policy focus to matters concerning the inclusion of Roma and others regarded as “Gypsies”, and ensure this unit’s continued function until such time as systemic, racially discriminatory exclusion of Roma is overcome in Europe.

With a view to ensuring the implementation of best practice in all relevant areas, continue effective collaboration with the OSCE and the Council of Europe and prioritize monitoring of the situation of Roma and others regarded as “Gypsies” in (i) the work of the Fundamental Rights Agency; (ii) the reports toward accession of candidate countries to the EU; (iii) other relevant mechanisms.

Review current EU policies and rules with a view to strengthening policies at Union level to assist EU citizens without health insurance to get access to health insurance, with a particular focus on those EU citizens factually resident in an EU Member State other than their own.

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## APPENDIX 1

### Romani Population in Council of Europe Member States

Source: Council of Europe Roma and Travellers Division, September 2010

(updated: 14/09/2010)	Total country population	Official number	Minimum estimate	Maximum estimate	Average estimate	% of total population
European countries	(July 2009)	(last census)				(from average figure)
<i>Turkey</i>	71 892 807	4 656 (1945)	500 000	5 000 000	2 750 000	3,83%
<i>Romania</i>	22 246 862	535 140 (2002)	1 200 000	2 500 000	1 850 000	8,32%
<i>Russian Federation</i>	140 702 094	182 617 (2002)	450 000	1 200 000	825 000	0,59%
<i>Bulgaria</i>	7 262 675	370 908 (2001)	700 000	800 000	750 000	10,33%
<i>Spain</i>	46 157 822	No data available	650 000	800 000	725 000	1,57%
<i>Hungary</i>	9 930 915	190 046 (2001)	400 000	1 000 000	700 000	7,05%
<i>Serbia (excl. Kosovo<sup>194</sup>)</i>	7 334 935	108 193 (2002)	400 000	800 000	600 000	8,18%
<i>Slovak Republic</i>	5 455 407	89 920 (2001)	400 000	600 000	500 000	9,17%
<i>France</i>	64 057 790	No data available	300 000	500 000	400 000	0,62%
<i>Greece</i>	10 722 816	No data available	180 000	350 000	265 000	2,47%
<i>Ukraine</i>	45 994 287	47 917 (2001)	120 000	400 000	260 000	0,57%
<i>United Kingdom</i>	60 943 912	No data available	150 000	300 000	225 000	0,37%
<i>Czech Republic</i>	10 220 911	11 718 (2001)	150 000	250 000	200 000	1,96%
<i>"The former Yugoslav Republic of Macedonia"</i>	2 061 315	53 879 (2002)	135 500	260 000	197 750	9,59%
<i>Italy</i>	59 619 290	No data available	110 000	170 000	140 000	0,23%
<i>Albania</i>	3 619 778	1261 (2001)	80 000	150 000	115 000	3,18%
<i>Moldova</i>	4 324 450	12 280 (2004)	15 000	200 000	107 500	2,49%
<i>Germany</i>	82 400 996	No data available	70 000	140 000	105 000	0,13%
<i>Portugal</i>	10 676 910	No data available	40 000	70 000	55 000	0,52%
<i>Bosnia and Herzegovina</i>	4 590 310	8 864 (1991)	40 000	60 000	50 000	1,09%
<i>Sweden</i>	9 276 509	No data available	35 000	50 000	42 500	0,46%
<i>Belarus</i>	9 685 768	No data available	10 000	70 000	40 000	0,41%

<sup>194</sup> All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

<i>the Netherlands</i>	16 645 313	No data available	32 000	48 000	40 000	0,24%
<i>Kosovo</i>	2 542 711	45 745 (1991)	25 000	50 000	37 500	1,47%
<i>Poland</i>	38 500 696	12 731(2002)	15 000	60 000	37 500	0,10%
<i>Ireland</i>	4 156 119	22 435 (2006)	32 000	43 000	37 500	0,90%
<i>Croatia</i>	4 491 543	9 463 (2001)	30 000	40 000	35 000	0,78%
<i>Switzerland</i>	7 581 520	No data available	25 000	35 000	30 000	0,40%
<i>Belgium</i>	10 414 336	No data available	20 000	40 000	30 000	0,29%
<i>Austria</i>	8 205 533	No data available	20 000	30 000	25 000	0,30%
<i>Montenegro</i>	678 177	2 826 (2003)	15 000	25 000	20 000	2,95%
<b>European countries (updated: 03/08/2009)</b>	<b>Total country population (July 2009)</b>	<b>Official number (last census)</b>	<b>Minimum estimate</b>	<b>Maximum estimate</b>	<b>Average estimate</b>	<b>% of total population (from average figure)</b>
<i>Latvia</i>	2 245 423	8 205 (2000)	13 000	16 000	14 500	0,65%
<i>Finland</i>	5 244 749	No data available	10 000	12 000	11 000	0,21%
<i>Norway</i>	4 644 457	No data available	4 500	15 700	10 100	0,22%
<i>Slovenia</i>	2 007 711	3 246 (2002)	7 000	10 000	8 500	0,42%
<i>Denmark</i>	5 484 723	No data available	1 000	10 000	5 500	0,10%
<i>Lithuania</i>	3 565 205	2 571 (2001)	2 000	4 000	3 000	0,08%
<i>Georgia</i>	4 630 841	1 744 (1989)	2 000	2 500	2 250	0,05%
<i>Azerbaijan</i>	8 177 717	No data available	2 000	2 000	2 000	0,02%
<i>Armenia</i>	2 968 586	No data available	2 000	2 000	2 000	0,07%
<i>Cyprus</i>	792 604	560 (1960)	1 000	1 500	1 250	0,16%
<i>Estonia</i>	1 307 605	584 (2009)	1 000	1 500	1 250	0,10%
<i>Luxembourg</i>	486 006	No data available	100	500	300	0,06%
<i>Andorra</i>	72 413	No data available	0	0	0	0,00%
<i>Iceland</i>	304 367	No data available	0	0	0	0,00%
<i>Liechtenstein</i>	34 498	No data available	0	0	0	0,00%
<i>Malta</i>	403 532	No data available	0	0	0	0,00%
<i>Monaco</i>	32 796	No data available	0	0	0	0,00%
<i>San Marino</i>	29 973	No data available	0	0	0	0,00%
<b>Total in Europe</b>	<b>824 827 713</b>		<b>6 395 100</b>	<b>16 118 700</b>	<b>11 256 900</b>	<b>1,36%</b>
<b>European Union area</b>			<b>4 359 100</b>	<b>7 456 500</b>	<b>5 907 800</b>	<b>1,18%</b>
<b>Council of Europe area</b>			<b>6 360 100</b>	<b>15 998 700</b>	<b>11 179 400</b>	<b>1,37%</b>



## **APPENDIX 2**

### **Questionnaire for Study on Roma Migration in Europe 2008**

#### **OSCE High Commissioner for National Minorities/Council of Europe Commissioner for Human Rights**

1. Country at issue:
2. Is the country at issue a target or source country for (Romani) migrants? Or both?
3. Country/countries of origin for Romani migrants in the country at issue:
4. What data – if any – exists on the numbers of Romani migrants coming to the country, particularly from (i) 2004 accession countries, (ii) Romania and/or Bulgaria; or (iii) other countries, since 2004? Please provide such data existing, with sources.
5. What data exists generally on non-citizen Roma arriving as migrants in/based in the country, including persons factually based in the country for longer periods of time? Please provide such data existing, with sources.
6. What data exists on Roma leaving the country at issue? Since 2004? Generally?
7. How does Romani migration form (or not form) part of larger migration issues in the country at issue?
8. Have there been any anti-Romani media action or episodes surrounding the arrival or existence of Romani migrants in the country? Please be as detailed as possible.
9. What policies exist on the reception of migrants, generally, and on Romani migrants, in particular?
10. Are public goods such as health care (emergency and general), housing (including social housing), employment and education accessible for non-citizens? What barriers exist to accessing these goods? Do any supplementary barriers exist for Romani migrants? What policies, laws or programmes are in place to overcome these barriers? How effective are they? Please provide details.
11. What work do Romani migrants undertake? Is there any statistical data on Romani migrants in employment? Please provide.
12. Where do Romani migrants live? What type of housing or various types of housing or other accommodation prevails among Romani migrants.

13. Are the children of Romani migrants in school? In what form of schools? Please provide details.
14. What health issues exist among Romani migrants, if any, which are distinct from other members of the public?
15. What health care access issues exist for Romani migrants? Are these distinct from the public at large? Does the public health care system also provide for effective access for non-citizens/non-communitarians?
16. Are there any concerns related to a possible nexus between Romani migration and the trafficking of persons for sex slavery or other forms of degrading treatment? Please provide details.
17. Do bans on discrimination in law apply to non-citizens? Are these bans effective in practice? Please provide examples of effective application and/or non-application of anti-discrimination law in the case of Romani migrants.
18. Are there any issues concerning the domestic law transposition and/or application of: (i) EU, regional and/or international law on discrimination; (ii) if relevant, EU freedom of movement law; (iii) EU directives on the protection of trafficked persons or other relevant international or regional law in this area; (iv) EU data protection rules, particularly as concerns the gathering, storage, transmission or use of sensitive categories such as ethnicity?
19. If this country is an EU Member State, are there any issues of questionable law and/or practice concerning the implementation of EU freedom of movement requirements? Please provide details. How do these issues affect Romani migrants?
20. Where relevant, are there any obstacles to Romani migrants obtaining residence permits, and ultimately (where sought) citizenship on an equal footing with other migrants?
21. Have any laws or policies in this country been amended as a result of negative or positive public or other pressure around the issue of Romani migration? Please provide details.
22. Have Roma been forcibly expelled in recent years? To which countries? Have there been any collective expulsion cases? Have expulsions been domestically or internationally challenged? With what result? Please provide details.
23. Have there been any other efforts by the authorities concerned to stop Romani migration? Please provide details.

24. Would you say Romani migrants are treated worse or better than other migrants? Please provide support for views. Comparison with (i) other EU communitarians; (ii) non-communitarians; (iii) “privileged” migrants such as Americans, Canadians or Australians would be welcome, with details.

25. Is there any other information arising from this country, which you feel is relevant for an assessment of the situation of Romani migrants in Europe?





**Council of Europe Commissioner for Human Rights**

Website: [www.commissioner.coe.int](http://www.commissioner.coe.int)

**OSCE High Commissioner on National Minorities**

Website: [www.osce.org/hcnm/](http://www.osce.org/hcnm/)