EXECUTIVE SUMMARY

INSECURE JUSTICE? RESIDENCE PERMITS FOR VICTIMS OF CRIME IN EUROPE

PICUM
PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS

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We warmly and gratefully acknowledge the following individuals who provided comments on different parts of the report, while recognising that any errors or omissions remain our own:

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PICUM also thanks Elise Durand, Patrick Hubert, Lena Boucon, Maxence Jonvel, and Amy Grunske at Orrick Rambaud Martel for their pro bono support on relevant EU legislation.

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This publication was made possible with kind support from:

European Commission

This publication has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2014-2020). For further information please consult: http://ec.europa.eu/social/easi

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May 2020

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The current approach to irregular migration, both at the EU- and member state-level, is defined by a criminal justice model that treats a person in an irregular situation first and foremost as an offender. Rather than seeing irregular migration as the result of complex systematic factors, the emphasis is instead on deterring irregular entry and stay by way of various sanctions, including the possibility of criminal penalties such as fines and imprisonment in a number of member states, in addition to immigration detention and return. This criminalisation framework has a direct impact on the safety of migrants, putting them at risk of exploitation and abuse.[1] At the same time, EU law recognises the vulnerability linked to irregular status, and the reluctance of victims of crime to seek help and to report abuse, and provides for special permits for some victims, which is reflected in the legislation of every member state.

This report considers the EU and international legal framework that creates residence permits for some victims of crime; and looks at national legislation in ten European countries (Belgium, France, Germany, Greece, Italy, the Netherlands, Poland, Spain, Switzerland and the UK) that implements such measures – and sometimes goes beyond. .

Residence permits for victims of crime in EU directives and member state legislation

Several EU directives make provision for residence permits for certain victims of crime, namely the Citizens' Rights Directive[2] and Family Reunification Directive[3] (for survivors of conjugal violence with dependent status), the 2004 Anti-Trafficking Directive[4] (for victims of human trafficking), and the Employer Sanctions Directive[5] (for victims of labour exploitation). The Return Directive[6] leaves member states free to grant a residence permit "at any moment" to someone in an irregular situation for compassionate or humanitarian reasons.

In some cases, EU legislation is prescriptive, requiring that permits be available under certain circumstances, such as Art. 15(3) of the Family Reunification Directive and Art. 13(2)(c) of the Citizens' Rights Directive. Others are more permissive, such as Article 13(4) of the Employer Sanctions Directive, which requires member states to establish under national law the rules under which they *may* grant on a *case-by-case basis* a permit for victims of certain crimes.

1 FRA (2015), Criminalisation of migrants in an irregular situation and of persons engaging with them.
2 Directive 2004/58/EC.
3 Directive 2003/86/EC.
4 Directive 2004/81/EC.
5 Directive 2009/52/EC.
6 Directive 2008/115/EC.

All ten countries featured in this report have also ratified the Council of Europe's Anti-Trafficking Convention[7] and, except the UK, are parties to the Council of Europe's Istanbul Convention.[8] Both treaties require state parties to make available permits to victims of human trafficking and gender-based violence, respectively, if this is necessary due to their "personal situation" (i.e., for protection-related reasons) and on the basis of cooperation with law enforcement.[9] All ten countries are also party to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which includes guarantees regarding access to justice for all women regardless of residence status.[10] Some jurisdictions have gone further, creating special permits for victims of a broader set of crimes.

- All 10 countries considered in this report have legislation granting special permits for **victims of domestic violence** on spouse-dependent visas (pursuant to the Family Reunification Directive, Citizens' Rights Directive,[11] and consistent with the Istanbul Convention). In *five of these countries* (France, Greece, Italy, the Netherlands and Spain) these protections extend to undocumented survivors who did not enter the country on a spouse-dependent visa.
- All 10 countries have legislation on residence permits for **victims of human trafficking** (pursuant to EU legislation on human trafficking, and the Council of European Anti-Trafficking Convention). Except for France, the Netherlands and Switzerland, in the remaining countries there is also specific legislation making available residence permits for victims of **labour exploitation**. In some cases, this is treated as a component of national anti-trafficking legislation; elsewhere, it is part of separate legislation. Such legislation is consistent with Article 13.4 of the EU's Employer's Sanctions Directive, which requires states to put in place measures "comparable" to those of the EU Anti-Trafficking Directive (2004) for specific crimes, including, among others, employment of an undocumented person in "particularly exploitative labour conditions".
- In **Germany**, three federal states (Brandenburg, Berlin and Thuringia) have introduced decrees concerning residence permits for victims of **racist violence**, aimed at preventing a person who has been victimised from facing deportation because of the violence they suffered. The **Netherlands** has legislation granting permits to victims of **honour-related violence**.
- Three countries (Italy, Spain and Greece) stand out for having in place legislation that makes it possible to obtain a residence permit if one has been the victim of a wider set of crimes.
  - In **Italy**, a special permit available under Art. 18 CLI has as its main scope victims of sexual exploitation and human trafficking – but also covers cases involving a variety of additional crimes (among the most serious covered in Italian criminal law), including modern slavery, labour exploitation, sexual abuse, gang rape, aggravated theft and robbery, crimes concerning weapons, domestic abuse and stalking. While in some respects it is a flexible scheme, and by far the most used among those available in Italy for victims of crime, a major limitation of the law is that the crime must be perpetrated by a criminal organisation, rather than a single individual.
  - **Spain**'s humanitarian residence permit, available under Art 126 Royal Decree, makes protection available on various grounds, including for different forms of labour exploitation including the denial of labour rights established through collective agreements; as well as discrimination in the provision of public services and the context of employment; crimes committed for racist or other bias-related reasons; and violence "in the home environment".
  - In 2015, **Greece** passed Law 4332/2015 that provides for special permits for victims, and in some cases witnesses, of a wide range of "serious crimes" (against life, health, physical integrity, property, etc.).

The expansive scope of crimes covered by the above legislation is consistent with a protection-oriented agenda and moves away from the categorical approach where large numbers of victims fall through the resulting gaps. Existing "traditional" categories generally neglect the forms of mistreatment and exploitation that are much more commonly experienced by people with irregular status, such as theft, domestic violence (as noted above, only France, Greece, Italy, the Netherlands and Spain have provisions for *undocumented* survivors of domestic violence), and other abuses of varying severity endured by people whose lives are defined by economic and social precarity.

7 Council of Europe (16 May 2005), Council of Europe Convention on Action Against Trafficking in Human Beings, CETS 197.

8 Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence , November 2014, ISBN 978-92-871-7990-6.

9 Germany and Switzerland have reservations on Article 59 of the Istanbul Convention; and Poland has stated that it will apply the Convention in conformity with its national constitution.

10 Committee on the Elimination of Discrimination against Women (23 July 2015), General Recommendation on women's access to justice, CEDAW/C/CG/33.

11 This includes Switzerland, which is a party to the Istanbul Convention, but as a non-EU state is not bound by EU legislation.

Existing approaches to special permits for victims

Despite their basis in a protection logic, there are important flaws in both the design and implementation of the legislative schemes considered in this report:

- Obtaining a special residence permit often depends on the police, either to provide key documents or to initiate the process itself. The absence of a "firewall" – i.e., the existence of safeguards ensuring that approaching police as a victim or witness will not lead to immigration control – puts victims who come forward at risk of prosecution themselves.
- There is often insufficient awareness of existing schemes by the people who could benefit from them most, and among criminal justice actors themselves, as well as hospitals, social support persons, victims' rights advocates and other actors who are often instrumental in obtaining them.
- Victims are typically granted short-term residence permits initially. Even where they may also have a right to work, the duration of the permit is often too short to realistically find employment; and in cases where a permit hinges on the criminal proceedings (as is generally the case for human trafficking and, in Spain, for victims of domestic violence), the possibility of converting temporary status to a longer-term or permanent status is extremely limited. So, while a victim may be temporarily shielded from deportation, there is no guarantee of a permanent resolution of their status, which ultimately may not incentivise victims to come forward.
- Special permits for victims of domestic violence and on humanitarian grounds are often decided based on a high degree of discretion by authorities, leading to arbitrariness and regional differences, which creates great uncertainty for victims.
- Organisations who work with victims with precarious status say that the existence of special permits can have the perverse effect of *reducing a victim's credibility*, because law enforcement assumes they are making a complaint to obtain the permit rather than because of genuine mistreatment. For undocumented women, this coincides in some cases with gendered assumptions questioning the veracity about women's claims to have been assaulted.

These problems create layers of uncertainty at every phase of the process for people who are already coping with having been victimised, and who are preoccupied with surviving the best they can, often with limited help in navigating the system. This alone creates a disincentive to engage and indicates a need to re-think existing approaches.

Towards a more effective and comprehensive approach to victims' support and protection

The provision of residence permits for some victims of crime needs to be part of a broader framework of protection, support and empowerment for victims as well as communities. While the granting of permits for victims of crime supports the work of law enforcement in investigating crimes (which itself supports prevention and addresses impunity), it is important that the focus of these schemes is on remedying the harm experienced by the victim.

Although it does not provide for residence permits, the Victims' Directive is the appropriate starting point for understanding the elements of a victim-centered response, including among others:

- the right to be treated with respect, sensitivity and dignity by the authorities, regardless of residence status (Article 1);
- the right to be informed of one's rights in a way that's understandable and to make a complaint with assistance (Articles 3, 4, 5, 6, & 7);
- the right to an individual needs assessment and protection measures as vulnerable victims (Articles 22-24); and
- the right to support services (Article 8).

All these elements are important to ensure a response that addresses the needs of the person who has been victimised. Where does the residence permit fit within this framework?

The residence permit provides a tool for overcoming the reluctance that a victim with precarious status might have about coming forward – reluctance linked to the risk they face of immigration consequences. This tool could be effective because it promotes trust in the authorities and because it provides an incentive to report by offering a remedy to their victimisation: a residence permit, to mitigate the balance of power that the perpetrator exploited to exert control and dominance. A residence permit in this case is not only remedy for prior victimisation but also a tool for the prevention of future victimisation.

Residence permits can be an important measure then to promote safety, and to strengthen the hand of law enforcement in the investigation and prosecution of crimes, but they must be administered fairly and transparently, and be part of a more comprehensive strategy to ensure both responsiveness to the needs of victims, as well as an approach to prevention that includes the essential role of law enforcement as partners with communities that prioritises their safety. Prioritising safety over status is the essence of the "firewall". For the rights of the Victims' Directive to be meaningful, member states should put in place measures that ensure that victims who are undocumented or have dependent residence status do not face immigration consequences for seeking to exercise their rights under the Directive.

The United States provides a useful case study[12] that offers lessons for European countries both in terms of its federal legislation granting special permits for victims of crime, and the practice of local law enforcement in cities like New York that have taken a proactive, long-term approach to working with migrant communities as a way to encourage reporting of crime and to improve public safety. (See Box 1, below.) The EU should support member states' efforts to improve existing legislation and practice, in line with its own commitments to victims' rights and gender equality, including through initiatives that facilitate learning from other jurisdictions that have a positive history of promoting the safety and welfare of their immigration communities.

BOX 1 Case study: U-Visa and T-Visa in the United States and law enforcement's role in supporting access to protection and justice for undocumented victims of crime

In the United States, measures have been adopted by both federal authorities and local governments to promote the reporting of crime by people in an irregular situation. These include federal legislation creating special visas for certain victims of crime; and practices at the local level in cities like New York, which have adopted a proactive strategy of engagement with migrant communities that prioritises public safety over immigration enforcement.

The **U-visa** is available to victims of a long list of crimes who cooperate with law enforcement authorities. Victims can obtain status for four years and authorisation to work and apply for permanent residence after three years of regular residence. Unlike many European models, this process is initiated by the victim through an application, and not by law enforcement. Between 2009 and March 2019, 85,000 U visas were granted. Approval rates have been consistently above 80% for the past five years. The **T-visa** is specifically for victims of human trafficking and provides a temporary 4-year status, work authorization with the possibility to obtain permanent status after three years of regular stay in the U.S., or the completion of the investigation or prosecution, whichever comes first. Law enforcement agencies may attest that the applicant is a victim, but compliance with requirements of the legislation can be proven with other evidence, including personal statements.

The **City of New York** is among many U.S. cities that have adopted formal policies to ensure that local police officers and sheriffs do not enforce federal rules on immigration, consistent with a "community policing" approach to law enforcement. It focuses on building bonds of trust with local communities to promote cooperation of residents in crime prevention efforts by:

- Empowering government agencies through information and training so they can support victims in accessing their right to a special permit.
- Doing regular and proactive outreach to migrant communities to build trust and inform them of their rights.
- Building coalitions with community-based organisations and working with them to raise awareness and to connect victims to relevant services.
- Codifying the "firewall" in official police policy.

Source: Oxford University COMPAS project on "safe reporting" of crime for victims and witnesses with irregular status in the USA and Europe (August 2018-October 2019). All reports available at: https://www.compas.ox.ac.uk/project/safe-reporting-of-crime-for-victims-and-witnesses-with-irregular-migration-status-in-the-usa-and-europe/

12 N. Delvino, September 2019, Safe reporting of crime for victims and witnesses with irregular migration status in the United States.

RECOMMENDATIONS

We recommend five ways to promote the safety and protection of victims of crime, with residence permits as part of a broader framework of support and engagement.

1 Special permits for victims of crime must be grounded first and foremost in a protection rationale, built on a professional, respectful and responsive approach to all victims, regardless of residence status.

The European Commission should:

- Evaluate Member States' implementation of the Victims' Directive with respect to their explicit obligation to ensure application *without discrimination of any kind, including based on residence status*, taking into account the existence of specific measures including, but not limited to, special permits for victims of crime and whether implementation of these measures makes effective the rights of the directive for victims with irregular or dependent status.
- As part of a broader longer-term strategy to promote the rights of victims, and to promote gender equality, either through new legislation that complements or goes into more depth on aspects of the Victims' Directive or revised guidelines to the directive, make it clear that achieving the goals of victim protection is incompatible with victims and witnesses of crime facing the possibility of immigration consequences for seeking assistance or justice.

2 Special permits for victims of crime should promote cooperation and engagement between law enforcement and immigrant communities, supported by an outreach strategy involving partnerships with community-based organisations.

The European Commission should:

- Promote analysis and exchange of good practices among Member States, at the national, regional and local levels, on the implementation of measures promoting the rights of victims with irregular or dependent status under the Victims' Directive.
- Promote and financially support local and regional multi-sectoral initiatives involving law enforcement actors and community-based organisations that make effective the rights of the Victims' Directive for people in an irregular situation.
- Foster exchange between authorities in EU Member States (at the national, regional and city levels) and those from other jurisdictions with a history of effective and positive engagement between law enforcement and immigrant communities.

The European Parliament should:

- Ensure that the European Commission is reporting, in a timely way, on Member States' implementation of the Victims' Directive, and that this reporting addresses meaningful implementation of measures safeguarding and promoting the rights of victims with irregular status.
- Consider supporting pilot projects implementing measures that specifically focus on promoting the rights and safety of victims who are undocumented or who have dependent status.

National and local law enforcement should:

- Adopt explicit policies, enforceable through disciplinary action, whereby people who come forward to report crime (witnesses and victims) or to seek protection or support:
  - Do not face immigration penalties, including the risk of deportation or return, either directly by the police or as a result of information transferred from the police to immigration authorities other than for exclusively protection reasons (i.e., creation of a "firewall")
  - Are systematically informed of the possibility of applying for a special permit, if they have been victimised
  - Are referred to relevant services (social, health, protection, shelter, legal, etc.) based on their needs, and with their consent
- In partnership with community-based organisations, take a proactive approach to reaching out to immigrant communities to:
  - Inform them about their policies on safe reporting and support to victims
  - Inform them about available special permits for victims of crime

3 Officials (law enforcement, judges, prosecutors) should receive training on the relevant legislation granting special permits to victims of crime, under EU and national law, and establish protocols that prioritise the role of the police in referring undocumented victims into protective frameworks, rather than prioritising implementation of immigration rules.

European Commission should:

- Provide guidance and support on the training of officials in the criminal justice system to inform them about available special permits for victims, and to ensure an appropriate response to the situation and needs of undocumented victims, as required under the Victims' Directive.

Member States should:

- Ensure that training of police recruits includes training on respectful and professional engagement with diverse and immigrant communities, and on relevant procedures granting special permits for victims of crime under national law.

4 If they are initially issued on a temporary basis, special permits for victims of crime should have clear pathways to more stable status after a reasonable period of regular residence. In addition, they should not be contingent on participation in criminal proceedings or conviction and provide access to the labour market. These measures are essential to reduce uncertainty and to achieve the goals of community safety, individual protection and effective remedy for victims.

European Commission should:

- As part of a broader longer-term strategy to promote the rights of victims, as well as its strategy to promote gender equality and to end violence against women, either through new legislation that complements or goes into more depth on aspects of the Victims' Directive or revised guidelines to the directive, clarify the rights of victims who are undocumented, and that their ability to access protection and services should not be made contingent on the outcome of a criminal procedure.

Member States should:

- Reform national legislation on special residence permits for victims of crime to reduce uncertainty and promote protection, including by ensuring that special permits for victims of crime:
    - May be obtained not only on the initiative of law enforcement or social actors, but also upon direct petition by a victim by way of non-burdensome and clear procedure.
    - Provide access to services and the labour market and may be counted as regular residence towards statuses based on accrued residence and be convertible to a more stable status based on clear criteria, as a remedial measure and to prevent repeat victimisation, if a long-term status has not already been provided.
- Encourage the prosecution of crimes committed against people made vulnerable by their irregular or dependent status but *are not made dependent on the conviction of the offender*.
- Prohibit under law any immigration enforcement action against any person who has come forward (witness or victim) to report a crime or to seek protection for having been victimised ("firewall"), and create safeguards to ensure that personal data obtained as a result of their engagement with the criminal justice system as victims or witnesses cannot be repurposed to pursue immigration control.
- Prohibit the issuing of a return decision to any person who has filed a complaint, when they file the complaint or at any time during or upon resolution of the criminal proceeding. This is essential to enable accountability and access to justice, and to disempower perpetrators who would threaten victims with deportation.
- Ensure that people who file criminal complaints are, regardless of status, eligible to apply for residence permits provided for by national law, beyond special permits for victims (e.g. on grounds of work, family, study, protection).

5 To promote protection, special permits for victims of crime should be available for a broad number of crimes to reflect a genuine protection-centred approach.

Member States should:

- Reform national legislation on special residence permits for victims of crime to address existing gaps in protection and avoid a piecemeal approach based on narrowly defined forms of victimisation.
- Ensure that legislation on special permits for victims of crime is not implemented in a way that further victimises victims by imposing onerous and impractical conditions or procedures.

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Original cover image by: Felix Pergande
Printed on 100% recycled, chlorine-free paper using vegetable ink. Design: www.beelzepub.com