



# PREVENTING HARM, PROMOTING RIGHTS: ACHIEVING SAFETY, PROTECTION AND JUSTICE FOR PEOPLE WITH INSECURE RESIDENCE STATUS IN THE EU

 **PICUM**

PLATFORM FOR INTERNATIONAL COOPERATION ON  
UNDOCUMENTED MIGRANTS

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# EXECUTIVE SUMMARY

## Impact of insecure residence status on safety and access to justice

The criminalisation of irregular migration makes people who are undocumented fearful of engaging with public authorities, and especially with the police, because of the risk that they will be detained and ordered to leave the territory as a result. This distrust is worsened by policing and surveillance of migrant and minority communities. The detention and deportation of people who have experienced abuse and mistreatment is a form of secondary victimisation. The systematic failure of the state to recognise, investigate and remedy abuses committed against undocumented victims denies them recognition and accountability.

## Safety and justice for undocumented people under EU law

In this context, it is important to recall that EU law provides protections for undocumented people who have been victimised.

➤ The **EU Victims' Directive**,<sup>1</sup> adopted in 2012, exists alongside other important legislation that bears on the rights of undocumented people who have been victimised,<sup>2</sup> creating common standards across all EU member states<sup>3</sup> for the rights of victims of crimes. For undocumented people, the directive is significant for clearly placing the priority on a person's safety, security and protection ahead of enforcement measures based on their residence status. While not guaranteeing a resolution of an undocumented person's status, it requires states to take the needed steps to ensure that rights do not depend on the victim's residence status

One of the deep-seated challenges to improving the working conditions, safety and protection for people with insecure residence status is countering the normalisation of rights violations. Insecure or irregular status creates an imbalance of power that puts people at greater risk of exploitation in the workplace, in personal relationships, and other settings because the state's perceived prioritisation of status over decent work and safety is used to coerce and control, increasing the likelihood of economic dependence, poverty and abuse.

or their citizenship or nationality. The directive recognises that victims who are not nationals are at "particularly high risk of harm" and might therefore need specialist support and legal protection. It entitles all victims to access free and confidential support services, even if they choose not to file a criminal complaint.

Developments in 2020 have provided a framework to further clarify the rights of undocumented people who are victimised, and to improve their implementation going forward.

➤ The EU's **Strategy on Victims' Rights (2020-2025)**<sup>4</sup> includes a focus on empowering victims by creating "safe environments for victims to report crime". It recognises several categories of "vulnerable victims", among them undocumented people who "may have difficulty to access justice" because of the risk of deportation if they report their mistreatment. Under the strategy, the European Commission reaffirms the Victims' Directive's application to all victims, regardless of residence status, and commits to assessing tools at the EU level to improve reporting of crime and

1 [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ("Victims' Directive").

2 Such as, for those who have been trafficked (Directive 2004/81/EC) or experienced unlawful discrimination (Directive 2000/43/EC) or whose rights have been violated in the context of their work (Directive 2009/52/EC)

3 Except Denmark, the only EU member state that opted out of the directive.

4 [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Strategy on victims' rights \(2020-2025\)](#).

access to support services for migrant victims, independently of their residence status, including through exchange of good practices among the member states and proposed new legislation in 2022.

- The **Gender Equality Strategy (2020-2025)** promises to bring an equality perspective in all EU policy areas<sup>5</sup> and has an important focus on violence against women and girls, a stated priority of the Commission.<sup>6</sup> The Commission aims to unblock negotiations in the EU Council that have prevented the EU from becoming a full party to the Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence), or else to present legislative proposals in 2021 that address shortcomings in existing EU legislation on violence against women and girls. Given the comprehensive nature of the Istanbul Convention – its focus on prevention and empowerment, on addressing stereotypes, and ensuring holistic and non-discriminatory support for women survivors of violence – and its inclusive scope, which includes all women regardless of status, this once again provides an opportunity to lay the groundwork for EU legislation that clarifies and strengthens the rights of undocumented people, in particular those of undocumented women and girls.
- The EU's **Anti-Racism Action Plan**, launched in September 2020, targets racism and racial discrimination in Europe.<sup>7</sup> It recognises and addresses concerns about the relationship between law enforcement bodies and minorities and devotes attention to the problem of discriminatory profiling. The Action Plan notes that the Commission will, in 2021, report on implementation of the EU's Racial Equality Directive (2000/43/EC), which prohibits discrimination on the grounds of racial or ethnic origin in the areas of employment and occupation, education, social protection and public services, including housing, among others. Notably, the Racial

Equality Directive does not address discrimination by law enforcement, and Article 3(2) creates a problematic loophole for discrimination based on nationality. In 2022, the Commission will consider possible legislative proposals to address gaps and to strengthen the role and independences of the national bodies tasked with ensuring rights are effective for victims of discrimination.

## Achieving impact: moving from policy to practice

In moving from policy towards achieving genuine safety, protection and justice for undocumented victims, the following must be done:

1. Ensure that all undocumented victims of crime can access support services and protection, consistent with the Victims' Directive's definition of victim, and are not limited by additional conditions not foreseen by the directive, such as having been the victim of a particular type of crime or being willing to cooperate with authorities in a criminal investigation;
2. Establish measures that remove the risk of undocumented victims facing deportation if they interact with law enforcement or other actors within the criminal justice system, including by creating "firewalls" that restrict law enforcement's collaboration with immigration enforcement authorities in connection with victims, and promoting ways for community-based non-governmental organisations to act as mediators; and
3. Adopt an overarching approach to access to justice that promotes accountability and recognition of harm, including through civil processes,<sup>8</sup> equality bodies, restorative justice and community-based strategies that are centred on the interests of the person who has been victimised.

5 European Commission, 5 March 2020, "[Gender Equality Strategy: Striving for a Union of equality](#)"

6 [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Union of Equality: Gender Equality Strategy 2020-2025](#); Ursula von der Leyen, [A Union that strives for more: My agenda for Europe. Political guidelines for the next European Commission 2019-2024](#).

7 [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Union of equality: EU anti-racism action plan 2020-2025](#).

8 This should include civil courts employment tribunals, and non-judicial complaints mechanisms including with labour inspection authorities, where relevant. See PICUM (2020), [A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice](#).

# RECOMMENDATIONS FOR THE EU

The EU's first ever strategies on Victims' Rights, Gender Equality and Anti-Racism Action Plan – all three adopted in 2020 – provide an opportunity to reaffirm the rights of undocumented people to safety, protection and justice, and to clarify the types of policies and practices that are needed to advance these rights in meaningful ways. To do this, we recommend the EU to do the following:

## 1 **Establish a Working Group on strengthened implementation of undocumented victims' rights**

The EU's multi-stakeholder Platform on Victims' Rights should include within its agenda a working group on strengthening implementation of Article 1 of the Victims' Directive, to develop recommendations in support of the Victims' Rights Strategy's commitment to identifying appropriate EU tools, promoting exchange of good practices among member states, and tabling legislative proposals, if necessary, by 2022.

## 2 **Address gaps in EU anti-racism legislation to address discriminatory profiling and conduct by law enforcement**

In the context of the EU's forthcoming assessment of the implementation of the Racial Equality Directive and to identify shortcomings in the EU's legal framework on anti-racism as a basis for proposed new legislation, specific attention should be paid to the role of law enforcement actors in perpetuating systemic discrimination against racial and ethnic minorities. The role played by law enforcement actors in undertaking identity checks and enforcing immigration policies using unlawful profiling and other problematic approaches as well as violence against migrants at member states' borders and within their territory should both be thoroughly examined, and the loopholes to protection under Article 3(2) addressed.

## 3 **Propose EU legislation on violence against women and girls that explicitly includes all women, regardless of status**

Any proposed legislation to strengthen EU action against violence against women and girls should reflect the comprehensive and inclusive approach of the Istanbul Convention, giving due attention to prevention of violence and ensuring access to holistic services and supports for all women, and explicitly requiring its application without discrimination on any ground, including based on residence or migration status. Such proposals should also include, pursuant to Article 59, provisions on residence permits for survivors of violence, based on their personal circumstances and not limited to participation in or cooperation with a criminal procedure.

## **4 Reinforce and support victim-centred approaches to achieving recognition and accountability**

The development of legislative proposals and policies on victims' rights and violence against women should centre on achieving recognition of and accountability for harm suffered through victim-centred approaches (including civil procedures, mediation and other restorative or transformative justice models), rather than on strengthening the criminal justice response to victimisation, recognising that doing so often harms criminalised groups, such as people with insecure status, rather than making them safer.

## **5 Reaffirm the imperative of delinking immigration responses from mechanisms promoting protection, support and justice to ensure victims' rights, which are available unconditionally**

Any proposed legislation on safe reporting and the rights of undocumented victims should reaffirm the prioritisation of safety above immigration control to give effect to the Victims' Directive and ensure an effective remedy for undocumented victims, as guaranteed under the EU Charter of Fundamental Rights. Such proposals should be accompanied by guidelines that support robust and evidence-based implementation. Consistent with the Victims' Directive, member states should be encouraged, with legislation where appropriate, to adopt measures ensuring that undocumented victims of crime can access support services and protection, and are not limited by restrictions limiting support to victims of particular types of crime or their willingness to cooperate with authorities.

## **6 Examine and address the relationship between racial inequalities and EU policies, including through the lens of policing**

The EU's Task Force on Equality should, further to the Action Plan against Racism, lead an examination of the relationship between migration and racism, including how existing EU policies may perpetuate racial discrimination, and generate concrete proposals for integrating the perspectives of racial justice into the creation and evaluation of EU policymaking, particularly in the areas of security and migration.

# INTRODUCTION: THE IMPACT OF INSECURE RESIDENCE STATUS ON SAFETY AND ACCESS TO JUSTICE

The criminalisation of irregular migration is not just a political issue: it affects the safety and wellbeing of millions of people in Europe who have insecure residence status,<sup>9</sup> making them susceptible to mistreatment and exploitation and profoundly limiting their options for support and redress.

In July 2020, following a joint investigation conducted with Lighthouse Reports, Der Spiegel and Mediapart where they interviewed dozens of farmworkers across Europe, many of them undocumented, Euronews reported:

They complained of unpaid hours, working under tremendous pressure with very little water or protection, some fainting and vomiting from the exhaustion. They showed us dire housing conditions and spoke of cases of verbal, physical and even sexual abuse.<sup>10</sup>

People with insecure status who work in other economic sectors besides agriculture are also affected. A 2018 report by the EU Agency for Fundamental Rights (FRA) addresses the systemic abuse experienced by women who do domestic work in homes across Europe, reiterating their finding in an earlier study that “exploitation of migrant women in the domestic sphere is so common that it is often not conceived of as a human rights violation”.<sup>11</sup>

Indeed, one of the deep-seated challenges to improving the working conditions, safety and protection for people with insecure residence status is countering the normalisation of rights violations. Insecure or irregular status<sup>12</sup> creates an imbalance of power that puts people at greater risk of exploitation in the workplace, in personal relationships, and other settings because the state’s perceived prioritisation of status over decent work and safety is used to coerce and control, increasing the likelihood of economic dependence, poverty and abuse.

- 9 In 2009, the Clandestino project produced minimum and maximum estimates of the number of people in an irregular situation, while noting the lack of reliable data and estimates and significant methodological challenges with such a study. The aggregate estimate for the 27 EU member states in 2008 ranged from 1.9 million to 3.8 million undocumented migrants. Data, reports and available updates can be found at <http://irregular-migration.net/>. There are concerns about the reliability of the data in recent effort in 2019 by the Pew Research Center to update these figures, as these newer estimates include asylum seekers and people with various different statuses who are regularly residing and who do not have irregular migration status.
- 10 Anelise Borges and Natalie Huet, 22 July 2020, “Invisible workers: Underpaid, exploited and put at risk on Europe’s farms”, *Euronews*.
- 11 FRA (2018), Out of sight: migrant women exploited in domestic work; citing FRA (2015), Severe labour exploitation: workers moving within or into the European Union.
- 12 In this report, when we refer to a person with “insecure residence status”, we mean someone who has a right to stay or to work in a state’s territory, but whose right is fragile to the extent that it is conditioned on factors like the duration of a particular or limited employment contract, or an ongoing conjugal relationship. Nonetheless, we use the terms “irregular status”, “insecure status” and “undocumented” interchangeably because they correlate with a similar set of hardships. Moreover, these categories are often fluid, and indeed the complexity of immigration rules can be such that people do not always know their status at a given moment.

At the same time, the criminalisation of irregular migration makes people who are undocumented fearful of engaging with public authorities,<sup>13</sup> and especially with the police, because of the risk that they will be detained and ordered to leave the territory as a result. This distrust is compounded by the increased policing and surveillance of migrant and minority communities, worsening the feeling of insecurity and concerns about discriminatory profiling.<sup>14</sup> According to a 2017 report by the European Network Against Racism:

Civil society organisations have highlighted that in many [...] cases [of reported ethnic profiling in border areas] people of colour were checked and controlled by the police because they were perceived as undocumented migrants simply because of their “foreign-looking” appearance, regardless of their actual residence status and/or their nationality. Apart from ethnic profiling in the context of immigration control, profiling practices based on (perceived) race, ethnicity and religion were reported during routine police contacts on the street or in public places in Austria, Belgium, Cyprus, France, Germany, Italy, Spain and the United Kingdom.<sup>15</sup>

In July 2020, seven officers of Italy's national gendarmerie, the *Carabinieri*, in the Levante barracks of Piacenza were arrested and later charged with several crimes, including illegal arrest, torture, grievous bodily harm, abuse of office and fraud. One

of their alleged victims, a young Moroccan man, spoke out against his own unlawful arrest and conviction, which he said were retaliation for his refusal to sell drugs for these officers despite enduring beatings. After serving his sentence, the young man was placed in immigration detention because of his lack of documents, where he languished for months.<sup>16</sup> Among other cases of violence reportedly committed in the Levante barracks<sup>17</sup> is one involving a trans woman who says she was sexually assaulted under threat of blackmail by an officer who told her that if she resisted him she would be sent back to Brazil, never to return to Italy.<sup>18</sup>

The detention and deportation of people who have experienced abuse and mistreatment is a form of secondary victimisation; and the systematic failure of the state to recognise, investigate and remedy abuses committed against people with insecure status is a denial of the right to an effective remedy.<sup>19</sup>

In this context, the 2012 Victims' Rights Directive<sup>20</sup> – which establishes a common set of rights for all victims of crime – is significant. It stands alongside EU legislation on protections for victims of trafficking;<sup>21</sup> and for victims of discrimination based on racial or ethnic origin;<sup>22</sup> and employment-rights violations<sup>23</sup> – but stands out in its explicit application without discrimination of any kind to all victims, “including based on residence status”, in conferring these rights without conditions and in being wholly separate from the EU's immigration enforcement legal framework.

13 For analysis of undocumented workers' access to state judicial and non-judicial complaints mechanisms for violations of labour rights, see PICUM (2020), [A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice](#).

14 Statewatch (2019), [Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status](#).

15 ENAR (2017), [Racism and Discrimination in the Context of Migration in Europe: ENAR Shadow Report 2015-2016](#). In May 2020, France's *Défenseur des Droits* (Defender of Rights) published an opinion finding “systemic discrimination” in the police's abusive and harassing identity checks against youth of North African heritage in a Paris neighbourhood. The decision follows a complaint lodged by a group of youth for violence experienced by police officers between 2013 and 2015. See Fanny Marlier, 2 June 2020, « [Le Défenseur des droit dénonce des violences policières 'discriminatoires systémiques'](#) », *Les inrockuptibles*.

16 “Non ne potevo più dei modi di Montella”, *Le parole del giovane da cui è partita l'Odysseus*, *Libertà*.

17 Raniero Altavilla, 26 July 2020, “Parla il marocchino vittima dei cc di Piacenza: ‘Mi misero la droga in tasca’”, *TGLa7*.

18 26 July 2020, “Caserma Piacenza, una trans brasiliana: ‘Minacciata, costretta a far sesso e picchiata’”, *Sky tg24*.

19 In 1985, the UN General Assembly adopted basic principles on justice for victims of crime and abuse of power [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985](#). The declaration's accompanying handbook draws a direct link between the failure to respect and recognise the harm a victim has suffered with secondary victimisation. See UN Office for Drug Control and Crime Prevention (1999), *Handbook on Justice for Victims*.

20 [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (“Victims' Directive”).

21 Council Directives 2004/81/EC and 2011/36/EU.

22 Council Directive 2000/43/EC (“Racial Equality Directive”).

23 Council Directive 2009/52/EC.

Member states had until November 2015 to transpose the Victims' Directive into national law. According to a 2019 study by Oxford University looking at implementation of the directive in Belgium, the Netherlands, Italy and Spain, only the Netherlands had taken steps to implement the directive in ways that take explicitly account of undocumented victims of crime (see section *The EU Victims' Directive*, below).<sup>24</sup>

Since 2015, and indeed in 2020 alone, there have been several developments in EU policy that are relevant to the rights of undocumented people who have been victimised. These developments do not mean an immediate improvement in their situation, and have not been accompanied by any easing in the hard-line

approach to irregular migration that continues to dominate EU policymaking in this area,<sup>25</sup> but do offer some hope of a growing recognition of rights, under EU law, that increasingly signals the incoherence of this dominant agenda with core European values.

The first part of this report describes these developments and their potential significance for the rights of undocumented people. The second part of the report turns to considerations to guide implementation that aims to achieve meaningful improvements in practice, looking at initiatives from different national contexts. The report also provides several recommendations for action.

24 COMPAS: Oxford (2019), ["Safe reporting" of crime for victims and witnesses with irregular migration status in the USA and Europe](#).

25 PICUM (2020), [More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations](#)

# I. SAFETY AND JUSTICE FOR UNDOCUMENTED VICTIMS UNDER EU LAW

## 1. EU Victims' Directive

The EU Victims' Directive,<sup>26</sup> adopted in 2012, establishes common standards across all EU member states<sup>27</sup> for the rights of victims of crime. Under the directive, *victim* is defined broadly as any "natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence".

According to Article 1: "The rights set out in this directive shall apply to victims in a non-discriminatory manner, *including with respect to their residence status*" (emphasis added). This last phrase makes explicit what was implicit in the requirement for non-discriminatory application: the rights of victims of crime cannot be denied to a person because of their residence status, or lack thereof. For undocumented people in Europe, the Victims' Directive is significant for clearly placing the priority on a person's safety, security and protection ahead of enforcement measures based on their residence status.

The official guidance note that accompanies the directive emphasises member states' obligation to ensure that the "rights set out in this directive are not made conditional on the victim having legal residence status on their territory or on the victim's citizenship or nationality," highlighting the particular importance of equal application of these rights in the context of racist and xenophobic hate crime, and acts of gender-based violence committed against undocumented migrants.<sup>28</sup> The directive recognises that victims who are not nationals of the

country where they were victimised are "particularly vulnerable" or at "particularly high risk of harm" and might therefore need specialist support and legal protection, which "could include providing shelter and safe accommodation, immediate medical support, referral to medical and forensic examination in the case of rape or sexual assault, short and long-term psychological counselling, trauma care, legal advice, advocacy and specific services for children as direct or indirect victims" (Recital 38).

The directive does not, however, guarantee resolution of an undocumented victim's status. According to Recital 10, the directive "does not address the conditions of the residence of victims of crime in the territory of the Member States". While states should take the needed steps to "ensure that rights set out in this directive are not made conditional on the victim's residence status in their territory or on the victim's citizenship or nationality", reporting a crime or participating in criminal proceedings "do not create any rights regarding the residence status of the victim."

The directive is not only concerned with a victims' rights in the context of a criminal proceeding; it also codifies an obligation to provide victims with access to free and confidential support services, including emotional and psychological support, advice on financial and practical issues arising from the crime and on the risk and prevention of repeat victimisation. Under the Victims' Directive, filing a criminal complaint is *not* a precondition for a victim being able to avail themselves of their right to services

26 [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA ("Victims' Directive").

27 Except Denmark, the only EU member state that opted out of the directive.

28 European Commission, DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, December 2013.

(Article 8(5)). Under Recital 40, the role of the police is nonetheless acknowledged: “Although the provision of support should not be dependent on victims making a complaint with regard to a criminal offence to a competent authority such as the police, such authorities are often best placed to inform victims of the possibility of support.”

The ability of undocumented people to engage without fear of discrimination or threat of detention or deportation with law enforcement, with victim support services, and with other entities that provide the services and support provided for under the directive, is nonetheless implicit and indeed must be assumed as a basis for the rights of the directive to be effective at all for people with irregular status.

The European Commission’s guidance to member states provided examples of states that make available permits for some victims of domestic violence (see section *Residence permits for some victims of crime*, below), giving some level of concreteness to guide member states in their implementation of Article 1. However, the absence of specificity within the text of the directive itself about what implementation means, in practical terms, for undocumented victims may have created an obstacle to achieving adequate national legislation and practice.

It is important to underscore that the Victims’ Rights Directive only addresses forms of victimisation that are the result of *crimes*. Its scope does not therefore reach victims of the many systematic forms of mistreatment experienced by undocumented people that are not

recognised as “crimes” under national law. At the same time, as we have seen and will be discussed further below, even in the case of rights violations that amount to “crimes” – such as severe labour exploitation or domestic violence – the criminal justice system rarely succeeds in making undocumented people safer, in particular due to the criminalisation of irregular status and the role of law enforcement in enforcing immigration rules. Civil procedures and processes grounded in community and worker organising are often better adapted to addressing the broader social context in which harms occur, as well as providing some form of remedy or redress for that harm to victims.

Nonetheless, the Victims’ Directive provides an important framework for reinforcing the rights of undocumented people who have been victimised, by emphasising their unconditional right to protection, support and justice. Moreover, while who is a victim is defined based on whether the harm they suffered was caused by a crime, a victim’s rights to support and to remedies are not limited to what the criminal justice system can offer. As noted above, the right to support and services, for instance, does not depend on filing a criminal complaint (Article 8(5)); and victims have a right to be informed of and to access restorative justice services, such as third-party supported mediation, where appropriate (Articles 4 and 12).<sup>29</sup>

Developments in 2020 have provided a framework to further clarify the rights under the directive for undocumented people who are victimised, and to improve their implementation going forward.

29 According to Recital 46: “Restorative justice services, including for example victim-offender mediation, family group conferencing and sentencing circles, can be of great benefit to the victim, but require safeguards to prevent secondary and repeat victimisation, intimidation and retaliation. Such services should therefore have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm. Factors such as the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of a victim’s physical, sexual, or psychological integrity, power imbalances, and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim’s ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting a restorative justice process. Restorative justice processes should, in principle, be confidential, unless agreed otherwise by the parties, or as required by national law due to an overriding public interest. Factors such as threats made or any forms of violence committed during the process may be considered as requiring disclosure in the public interest.”

## Key Provisions of the EU Victims' Directive

**All victims of crime are entitled to respect, dignity, basic rights and services, irrespective of their residence status:**

- The rights of the Directive apply without discrimination to all victims of crime, irrespective of their residence status (Article 1)
- All victims of crime are entitled to be treated with respect, sensitivity and dignity by authorities (Article 1 and Recital 9)
- Training must be provided for officials, including (but not limited to) police officers and court staff, to deal with victims in a sensitive and appropriate manner (Article 25 and Recital 61)

**Undocumented victims have the right to be informed of their rights and their case in a way they understand and to participate in the criminal proceedings:**

- Victims have the right to be informed of their rights and their case in a way they understand, and to make a complaint in a language they understand or else with assistance (Articles 3-7, and Recitals 26 and 34)
- Victims have the right to be duly informed of their case, its status and any final judgment (Article 6)
- Victims have the right to free interpretation according to their role in the criminal proceeding, and to translations of information essential to the exercise of their rights in criminal proceedings be available, upon request (Article 7)
- Victims have the right to participate in criminal proceedings to the extent permitted by national law (Articles 10, 13, 14, and Recitals 34 and 47)

**Undocumented victims have the right to be informed of and to access free, confidential support services and protection measures, whether or not they reported the crime:**

- Victims have the right to be informed promptly of available support services (Article 4, Recital 21)
- Victims are entitled to individual needs assessments and to specific protection measures for the most vulnerable (Articles 22-24, and Recitals 55-58)
- Victims have the right to access tailored, free and confidential support services before during and after criminal proceedings (Articles 8, 9, and Recital 37)
- Victims are entitled to support services whether or not a formal complaint has been filed (Article 8)
- Victims have the right to protection from secondary or repeat victimization, such as interim injunctions and restraining orders (Article 18-21 and Recitals 52-54)

## Other EU legislation bearing on the rights of undocumented victims: Employer Sanctions Directive, Anti-Trafficking Directive and Return Directive

The Victims' Directive is the centerpiece of EU legislation on victims' rights. However, additional EU directives address or affect the rights of undocumented victims of crime.

The **Employers' Sanctions Directive** 2009/52/EC creates rules governing penalties for employers who employ undocumented workers. It is in this way an extension of the EU's punitive immigration law framework. However, the directive also includes provisions safeguarding the rights of undocumented workers, for example, reiterating their right to a minimum wage. Article 13 establishes that all workers must have access to effective complaints mechanisms: "Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal [sic] employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when provide for by national legislation." Under the Employers' Sanctions Directive, then, all workers who experience labour rights violations, whether or not they rise to level or severe labour exploitation, have the right to effective avenues for redress. Restrictions on access to justice reduce workers' bargaining power with their employers, while the ability to hold accountable employers can prevent the escalation of exploitative practices. The FRA has urged member states to prioritise fundamental rights over questions of immigration management and to enable access to "all justice mechanisms".<sup>30</sup> Article 13 also states that, for certain criminal offenses, "Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, permits of limited duration, linked to the length of the relevant national proceedings, to the third-country nationals involved", comparable to what is available under the EU's anti-trafficking legislation (addressed below).

The **Anti-Trafficking Directive** 2004/81/EC specifically concerns residence permits issued to third-country nationals who are victims of trafficking in human beings or human smuggling. Under Article 8,

## 2. EU Strategy on Victims' Rights

On 24 June 2020, the EU launched its first Strategy on Victims' Rights (2020-2025).<sup>32</sup> An important pillar of the strategy is "empowering victims of crime", including by creating "safe environments for victims to report crime". The Strategy recognises several categories of "vulnerable victims" and includes among them undocumented people:

Irregular migrants who become victims of crime are also often in a situation of vulnerability and may have difficulty to access justice. If they report a crime to the police, they may be ordered to return to their home country. Under the Victims' Rights Directive, victims' rights shall apply to victims in a non-discriminatory manner, independently of their residence status. This shall also apply to unaccompanied minors. Under this strategy, the Commission will assess legal and practical tools at EU level to improve reporting

30 FRA (2019), *Severe Labour Exploitation: Workers' Perspectives*.

31 Ibid.

32 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Strategy on victims' rights (2020-2025).

a victim of trafficking may be issued a residence permit based on certain preconditions (beyond having been victimised), such as their willingness to cooperate with the authorities and to sever all relations with suspected traffickers or smugglers. It is optional for member states to renew the residence permit once a victim's assistance is no longer needed for the criminal procedure. Directive 2011/36/EU is complementary to the anti-trafficking directive 2004/81/EC and provides a common legal framework for preventing and prosecuting human trafficking and protecting victims, according to which (Recital 18) undocumented victims have a right to assistance and support unconditionally at least during a reflection period.

The **Return Directive** 2008/115/EC sets out common rules on the return, or deportation, of people irregularly present in the EU and has binding force in all member states except the UK and Ireland. Among other things, it establishes procedural rights and creates an obligation on member states to avoid “legal limbo” by either returning an irregularly residing person or granting them a residence permit. Under Article 6(4) of the Return Directive, member states may “at any time” grant a residence permit to an undocumented person for humanitarian or compassionate reasons. Member states are also, under Article 6(5), encouraged to refrain from issuing a return decision in the event of a pending procedure that would grant or renew a permit. Article 6(4) is not specifically concerned with victims of crime; but the rights of victims of crime are relevant to apprehensions and the issuing of a return decision – the subject matter of Article 6. The Return Handbook, published by the European Commission to provide member states with guidance on implementing the Return Directive, is clear that the aims of the directive should be balanced against other legitimate interests, including the “interests of the State to fight crime”. The handbook makes express reference to the FRA's document “Apprehension of migrants in an irregular situation – fundamental rights considerations”, which recommends that states introduce “possibilities for victims and witnesses to report crime without fear of being apprehended.” The Return Directive has been under the scrutiny of EU legislators since September 2018, when the European Commission introduced a proposal for a Recast Return Directive. A draft report by rapporteur MEP Tineke Strik was published in February 2020<sup>31</sup> but as of writing had not yet been voted in plenary because of delays due to COVID-19. Reform of the Return Directive could potentially contribute to safe reporting, for instance in relation to member states' ability to grant a residence permit (Art. 6.4) or to refrain from issuing a return decision (Art. 6.5).

of crime and access to support services for migrant victims, independently of their residence status. In particular, the Commission will promote exchange of good practices among the Member States aimed at disconnecting reporting of crime from the return procedure without jeopardising the effectiveness of such procedures.<sup>33</sup>

The strategy directly addresses a critical dilemma confronting an undocumented person who has been victimised: the problematic dual role law enforcement

have in many member states of enforcing immigration rules against undocumented people found to be on a state's territory, on the one hand, and supporting survivors in accessing services, protection and justice, on the other. The prioritisation of the former leads to a systematic undermining of the latter.

Under the strategy, the European Commission commits to assessing available tools at the EU level to “improve reporting of crime and access to support services for migrant victims of crimes”, independent of

33 It is notable that the strategy also includes victims in detention among “vulnerable” victims: “Another group of victims in a situation of particular vulnerability are victims of crime committed in detention. According to the World Health Organization, 25% of prisoners suffer from violence each year. Their access to justice is often limited. They are isolated, stigmatised and have limited access to information. Under this strategy, the Commission will explore means to provide for effective support and protection of victims in detention such as protocols for the protection of victims in detention and independent detention bodies to investigate crime in detention. The Commission will also promote training for detention staff under the upcoming strategy on European Judicial Training.”

their residence status; and to promote good practices among member states. The EU will also propose new legislation on safe reporting by 2022, if necessary.

The Strategy establishes a coordinator on victims' rights, as well as a multi-stakeholder Victims' Rights Platform to support implementation of the strategy through engagement with relevant national authorities, victims' rights and specialist support organisations and NGOs. It therefore provides an important framework to improve understanding about the rights of undocumented people under the Victims' Directive, and exchange about measures that advance their rights in a way that meaningfully engages civil society organisations with experience working with affected communities. It also potentially provides a basis for proposed new legislation to clarify, and even strengthen, the rights of undocumented people in Europe in a way that promotes their safety, protection and access to justice.

### 3. EU Gender Equality Strategy

On 5 March 2020, the EU adopted a Strategy on Gender Equality that "sets out key actions for the next five years and commits to ensure that the Commission will include an equality perspective in all EU policy areas.<sup>34</sup> Violence against women and girls is an important focus of the strategy, and indeed a priority of the Commission,<sup>35</sup> which commits to achieving progress in this area by, among other things, unblocking the political stalemate in the EU Council that has prevented the EU from becoming a full party to the Istanbul Convention (Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence).

The Istanbul Convention, which came into force on 1 August 2014, is the first comprehensive legal instrument on violence against women and girls. States that choose to join the convention must bring their national laws in line with its provisions, and make sure that it is applied in their countries in a way that benefits all women. By joining the Istanbul Convention, states are agreeing to binding standards on preventing violence against women and protecting survivors; and to guarantee the availability of services

like emergency hotlines, shelters, medical assistance, counselling, and legal aid. As of November 2020, 34 states had ratified the convention (among them 21 EU member states), and an additional 12 had signed.

The Istanbul Convention is significant for undocumented women and women with precarious status because it expressly requires implementation without discrimination based on migration status (Article 4) and requires states to make it possible for women whose status is dependent on a violent partner or spouse to obtain an independent residence status, and issue a renewable residence permits to victims where this is necessary "owing to their personal situation" (Article 59).

On 4 March 2016, the European Commission proposed<sup>36</sup> that the EU become a party to the Istanbul Convention, to provide a mandate for better data collection at the European level on the extent and nature of violence against women, and to bring greater accountability to the EU at the international level. The EU published a roadmap<sup>37</sup> setting out the argument for accession. On 13 June 2017, the European Union signed the Istanbul Convention,<sup>38</sup> based on decisions by the Council of the EU adopted on 11 May 2017 on articles related to asylum, refugees and refoulement, and cooperation in criminal matters. However, the accession process has been blocked at the level of the Council of the EU because of disputes among member states.

If this political impasse cannot be overcome, the European Commission will present legislative proposals in 2021 that address shortcomings in existing EU legislation on violence against women and girls, effectively seeking to codify some of the provisions of the Istanbul Convention. Given the comprehensive nature of the Istanbul Convention – its focus on prevention and empowerment, on addressing stereotypes, and ensuring holistic and non-discriminatory support for women survivors of violence – and its inclusive scope, which includes all women regardless of status, this once again provides an opportunity to lay the groundwork for EU legislation that clarifies and strengthens the rights of undocumented people, in particular those of undocumented women and girls.

34 European Commission, 5 March 2020, "[Gender Equality Strategy: Striving for a Union of equality](#)"

35 [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Union of Equality: Gender Equality Strategy 2020-2025](#); Ursula von der Leyen, [A Union that strives for more: My agenda for Europe. Political guidelines for the next European Commission 2019-2024](#).

36 Press Release, 4 March 2016, [Commission proposes EU accession to international Convention to fight violence against women](#).

37 DG JUST (October 2015), [Roadmap: \(A possible\) EU Accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence \(Istanbul Convention\)](#).

38 Press Release, 13 June 2017, "[EU signs the Istanbul Convention](#)."

## Key Provisions of the Council of Europe Istanbul Convention

- It is a **fundamental right** for everyone to live a life free from violence in the public and private spheres (Article 4)
- The Convention must be implemented **without discrimination** on any ground, including migrant or refugee status (Article 4)
- Provision of services is **not dependent on the victim's willingness to press charges or testify** against the perpetrator (Article 18)
- States must ensure that women are aware, and can avail themselves, of regional and international **mechanisms to complain, individually and collectively, about violence they have experienced** (Article 21)
- Women have the right to civil remedies (Article 29) and to **compensation** (Article 30) from perpetrators, including state compensation when necessary
- Women whose residence status depends on that of a spouse or partner should have access to an **autonomous residence permit** and suspension of deportation proceedings initiated in relation to the loss of spouse-dependent visa status (Article 59)
- States have a broad obligation to **prevent violence** with measures that eradicate prejudices, stereotypes and customs linked to violence against women through public awareness campaigns, education and training of professionals who are in contact with victims or perpetrators (Article 12-17).
- States are obliged to regularly **collect comparable, disaggregated data** on the nature and extent of violence against women to guide policy and monitor implementation of measures to address violence against women (Article 11)
- Recognising the critical role of non-governmental organisations (NGOs) and civil society organisations (CSOs) in providing support and services for victims, states must implement **policies for effective multi-agency cooperation** to ensure an integrated, holistic approach (Article 7 and 9) and to engage and support the work of NGOs (Article 9); and allocate **appropriate financial and human resources** for activities carried out by public authorities and relevant NGOs and CSOs (Article 8)
- States must provide women with **information about available support services** and measures in a language they understand (Article 19)
- Women have a **right to general support**, including free and confidential legal and psychological counselling, financial assistance, housing, education, training, health care and social services (Article 20)
- Women have a **right to specialist services**, as well as access to shelters, 24/7 hotlines to provide confidential advice (Article 22, 23, 24, 26)
- States must ensure that **shelters are accessible in sufficient numbers** and adequately distributed across the country (Article 23)
- States must ensure **effective investigation and prosecution** without delay and the availability of restraining or protection orders for victims (Articles 50 and 53)

## 4. EU Anti-Racism Action Plan

On 18 September 2020, the EU launched an Anti-Racism Action Plan for the period 2020-2025, announcing that it “is time to acknowledge and act against the prevalence of racism and racial discrimination” in Europe.<sup>39</sup> The Action Plan recognises and addresses concerns about the “relationship between law enforcement bodies and minorities” and devotes specific attention to the problem of unlawful and discriminatory profiling.<sup>40</sup>

The EU’s Racial Equality Directive (2000/43/EC) prohibits discrimination on the grounds of racial or ethnic origin in the areas of employment and occupation, education, social protection including healthcare, social advantage, and access to and the supply of goods and services available to the public, including housing; and requires member states to designate independent bodies to assist victims of discrimination, promote equality, and produce reports and recommendations. Notably, the Racial Equality Directive does not address discrimination by law enforcement. The directive also includes an exception under Article 3(2),<sup>41</sup> which permits differential treatment based on nationality. As has been noted:

While immigration decisions have to be made on the basis of nationality, this broad exclusion of nationality discrimination leave a significant gap in protection and can ‘mask’ forms of discrimination based on race or ethnic origin as supposedly legitimate differences based on nationality. For instance, stops conducted for the purpose of immigration control often fall on those people who “look foreign” to police, which in practice generally means non-white European appearance. In an increasingly multi-ethnic Europe, this practice

imposes an unfair burden of law enforcement attention on minority groups, particularly when police officers in many countries are ordered to identify and detain [undocumented] immigrants for deportation.<sup>42</sup>

The Action Plan notes that the Commission will, in 2021, report on the directive’s implementation and consider possible legislative proposals by 2022 to address gaps, with specific attention to possible new legislation to address such gaps as well as to strengthen the role and independences the national bodies tasked with ensuring rights are effective for victims of discrimination.

The Action Plan also considers risks linked to new technology that can drive further discrimination, pointing to the example of machine-based decision-making that can lead to biased results and discrimination. It acknowledges that, despite these well-founded concerns, the “Commission and the agency EU-LISA are working on facial recognition technologies to be used in the EU’s own large IT systems for border management and security”. It notes that the EU will propose a legislative framework that addresses risks of bias and discrimination and acknowledges that “biometric identification and other intrusive surveillance technology could be considered among high-risk AI applications that would need to fulfil specific requirements and undergo an ex ante conformity assessment”. This brief reference is telling and arguably a nod to concerns that have been expressed in many quarters over the increasing use of invasive digital technologies and the large-scale processing of personal data to support immigration control<sup>43</sup> in a way that reveals the increasing conflation of the EU’s migration and security agendas<sup>44</sup> in a way that further stigmatises non-citizens and drives more unlawful profiling and discrimination against racial,

39 [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Union of equality: EU anti-racism action plan 2020-2025.](#)

40 See, e.g., “Synthesis of the IPCAN seminar on 14 December 2018: Police conduct of law enforcement services in their relationships with migrants in Europe.”

41 According to Article 3(2): “This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.”

42 ENAR Fact Sheet 40 (June 2009), “[Ethnic Profiling](#)”.

43 See note 14.

44 Matthias Monroy, 16 July 2020, “[EU Presidency: Germany advocates ‘European Police Partnership’](#)”, Digitsite36.

ethnic and religious minorities – those most likely to be perceived as “foreign”. The scale, complexity and opacity of these initiatives have also raised concerns about accountability.<sup>45</sup>

The Anti-Racism Action Plan addresses structural racism, acknowledging the historical roots of racism, and the need to adopt an intersectional approach to combat it effectively. It commits to mainstreaming issues of racial equality across all areas of EU policymaking – including migration – through the work of the EU’s Equality Task Force, launched in 2019. Deepened engagement is foreseen with different stakeholders, including civil society organisations active in tackling racism, and a coordinator on anti-racism will be appointed to support the Action Plan’s implementation. As part of the plan, the Commission will also organise a summit on racism in 2021 and present legislation to address shortcomings in EU law on racial equality by 2022.

On its face, the Action Plan holds the promise of a genuine reckoning with the racist and colonial origins of the modern immigration system. According to the UN Special Rapporteur on contemporary forms of racism:

In addition to the contemporary manifestations of racial discrimination driven by explicit and implicit ethno-nationalism in the context of citizenship and immigration status, historical legacies remain operational. Especially in former colonial territories, long-standing citizenship and nationality laws often discriminate against indigenous peoples or persons belonging to racial and ethnic minorities, in ways that reinforce ethno-nationalist conceptions of political membership.<sup>46</sup>

Expectations for meaningful critical evaluation of the EU’s migration policy through this lens should be tempered by the fact that the Action Plan’s ambitious language and commendable scope are not matched by new resources; instead, it relies mainly on existing EU legislation and mechanisms, such as the work of the EU Fundamental Rights Agency (FRA) and of the High Level group on combating racism, xenophobia and other forms of intolerance. By contrast, the EU’s Pact on Asylum and Migration, announced the same day and introducing multiple legislative and non-legislative measures, represents a formidable investment in further securing the EU’s borders. Nonetheless, the commitments expressed in the Anti-Racism Action Plan have the potential to shape meaningful legislative proposals strengthening potential EU anti-racism legislation in 2022 in ways that could positively impact undocumented victims of both individual and systematic racist discrimination, including by law enforcement.

45 FRA (2017), Fundamental rights and the interoperability of EU information systems: borders and security, report on interoperability.

46 Human Rights Council (2018), Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, para 49.

## II. ACHIEVING IMPACT: MOVING FROM POLICY TO PRACTICE

Achieving the European Commission's aim of "safe environments for reporting crime" and "empowering victims" <sup>47</sup> to avail themselves of their rights under EU law in a way that is effective for undocumented victims requires three things:

1. Ensuring that all undocumented victims of crime can access support services and protection, consistent with the Victims' Directive's definition of victim, and are not limited by additional conditions not foreseen by the directive, such as having been the victim of a particular type of crime or being willing to cooperate with authorities in a criminal investigation;
2. Establishing measures that remove the risk of undocumented victims facing deportation if they interact with law enforcement or other actors within the criminal justice system, including by creating "firewalls" that restrict law enforcement's collaboration with immigration enforcement authorities in connection with victims, and promoting ways for community-based non-governmental organisations to act as mediators; and
3. Adopting an overarching approach to access to justice that promotes accountability and recognition of harm, including through civil processes,<sup>48</sup> equality bodies, restorative justice and community-based strategies that are centred on the interests of the person who has been victimised.

This section will consider each of these points in turn.

**Framework on safe reporting** >

<sup>47</sup> Victim's Rights Strategy, see note 32.

<sup>48</sup> This should include civil courts employment tribunals, and non-judicial complaints mechanisms including with labour inspection authorities, where relevant. See PICUM (2020), [A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice](#).

# SAFE REPORTING

## JUSTICE, SAFETY AND PROTECTION FOR ALL

### CRIMINALISING UNDOCUMENTED PEOPLE DECREASES THEIR SAFETY AND PROMOTES EXPLOITATION



Going to the police can trigger deportation for a person without papers – so they often avoid seeking help at all



This increases their risk of abuse and exploitation



The people who mistreat them (their employer, landlord, spouse) do so without fear of consequences



Individuals, their families and communities are left feeling unsafe, unprotected

### WHAT IS SAFE REPORTING?

Safe reporting prioritises justice, safety and protection for victims with insecure status

1

#### UNCONDITIONAL ACCESS TO HOLISTIC SUPPORT SERVICES AND PROTECTION

Ensuring that all undocumented victims of crime can access available support services and protection (including special permits for victims of crime) without limitation based on the type of crime committed or their willingness to cooperate with authorities in a criminal investigation.



2

#### ACCOUNTABILITY AND RECOGNITION OF HARM

Adopting an approach to access to justice that promotes accountability and recognition of harm through the criminal justice system or other processes, including restorative justice and community-based approaches centred on the interests of the person who has been victimised.

3

#### PROTECTION FROM DEPORTATION

Establishing measures (“firewalls”) that remove the risk of undocumented victims facing deportation if they interact with law enforcement or other actors within the criminal justice system, through structural changes and by working with trusted, independent specialist organisations that can act as intermediaries and whose interest is solely in the welfare of the victim.

### WHY DO WE NEED SAFE REPORTING?

Safe reporting is the foundation of a victim-centred response that promotes justice, protection and safety for people who have been victimised, regardless of residence status.



Trust in public institutions



Safe communities



More accountability for harms committed



More efficient use of resources



Support and referrals for victims of crime



Public safety prioritised

### EU LAW PROTECTS ALL VICTIMS

Under the **Victims' Rights Directive**, every victim of crime has the right to:



Report crime without fear



Free, confidential assistance



Receive information in a way they understand



Protection from further victimisation



Be treated respectfully

Under the **General Data Protection Regulation (GDPR)**, no victim or witness should fear that personal data revealed when seeking support and justice will be used against them for immigration enforcement purposes.

## 1. Ensuring access to support services and protection for all undocumented victims

### Unconditional access to holistic services and support for all undocumented victims

As we saw above, the Victims Directive has a very broad definition of “victim”, which encompasses any natural person who has suffered harm caused by a criminal offence. Moreover, a “person should be considered a victim regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them” (Recital 19).

All victims, under Article 8, have the right to free and confidential victim support services, including specialist services, and states must ensure that access to “any victim support services is not dependent on a victim making a formal complaint” to the authorities. Under Article 9, these services should consist, at a minimum, of information, advice and support about accessing compensation schemes; emotional and psychological support; advice about prevention of secondary or repeat victimisation; shelter; and targeted and integrated support for victims with specific needs (such as victims of sexual violence, gender-based violence, violence in relationships) such as trauma support and counselling.

Despite this clearly established right to access support services, without conditions, undocumented victims face significant obstacles in practice. For victims of trafficking, for instance, their right to benefit from various services and protections under national legislation depends on additional considerations, beyond having been victimised, namely their willingness to cooperate with the criminal investigation.

Under Article 6 of the EU’s 2004 directive<sup>49</sup> establishing residence permits for victims of trafficking, states must grant a “reflection period” to allow victims “to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.” During this period (usually between 3 and 6 months), victims of trafficking must be granted resources to ensure their subsistence and access to emergency medical treatment, with attention to the “special needs of the most vulnerable” (Article 7(1)). Under Article 12, survivors of trafficking should have access to existing programs or schemes available nationally “aimed at their recovery of a normal social life, including where appropriate, courses designed to improve their professional skills, or preparation of their assisted return to their country of origin.”

49 [COUNCIL DIRECTIVE 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.](#)

## PROMISING PRACTICE

### **BOX 1** Sexual Assault Care Centres (SACCs) in Belgium: Holistic Care for All Victims of Sexual Assault, Regardless of Status

Following Belgium's ratification of the Istanbul Convention, three sexual assault care centres (SACCs) were established in 2017 in the cities Brussels, Ghent and Liege, to provide forensic, medical and acute psychological care, based on World Health Organisation guidelines,<sup>50</sup> for survivors of sexual assault. Health professionals at the centres are supported by a team of physical and mental health specialists. In addition to providing necessary care, they work with specialised police and judicial inspectors to assist victims who would like to file a complaint. However, the filing of a complaint is not required to be eligible for care.

These centres were set up to address the fragmentation of care for victims of sexual violence in Belgium. Within the first year, the SACCs assisted 930 survivors, one third of whom were children.<sup>51</sup> Thirty-five percent were self-referred, while 41% were referred by the police. Services are provided regardless of the residence status of the victim.<sup>52</sup> While a number of migrant women reportedly used the service during the pilot, the absence of adequate protection measures for undocumented survivors, and assurances that they can safely report crime, hinder their ability to report their victimisation.<sup>53</sup> By the end of 2020, the SACCs had served more than 3,000 survivors.

The pilot having been completed, the Belgian government has committed to provide structural funding for the SACCs as of March 2020, and to extend the model such that by 2023 there will be SACCs in every judicial district in the country.<sup>54</sup>

In principle, the reflection period available to victims of trafficking is a positive measure. It is centred on addressing the harm experienced by the survivor and provides a window of time to focus on recovery. For survivors who may have suffered significant trauma, this time allows them space to focus on recovering and stabilising themselves so that they are in a better position to consider their options and make decisions about their future. These options might include applying for asylum or seeking to regularise their status. Some survivors may choose to cooperate with the criminal investigation. Some may choose to return to their country of origin. Whatever their choice, they are better equipped to pursue it if they have been given the time and the support they need.

In practice, however, NGOs point to deep flaws in the system. First, many victims of trafficking do not want to interact with the police for a variety of reasons, including fear and mistrust sometimes based in previous negative experiences,<sup>55</sup> or concerns about

their safety or the safety of loved ones. Even though the reflection period is ultimately intended to give time for a survivor to decide if they will collaborate with law enforcement in the criminal proceeding, engaging with law enforcement is usually central to being recognised as a potential victim to get a reflection period. In addition, the availability and length of a residence permit for victims of trafficking usually depend on the decisions and needs of law enforcement and prosecutors, rather than considerations linked to redress and prevention of further harm for the victim. Since their residence permit is temporary and typically tied to the criminal justice proceedings, survivors are hesitant to make themselves vulnerable in this way, because of their uncertainty about what will happen to them when their permit runs out when the criminal justice process has run its course.

Many undocumented victims who experience mistreatment and even violence will not meet the threshold of trafficking; and even some who

50 WHO, Guidelines for medico-legal care for victims of sexual violence, Geneva, World Health Organization, 2003.

51 S Baert, K Roelens, C Gilles, V Bay, I Keygnaert, *Piloting Sexual Assault Care Centres in Belgium: Who do they reach and what care is offered?*, *European Journal of Public Health*, Volume 29, Issue Supplement 4, November 2019.

52 Ibid.

53 Correspondence, Ines Keygnaert, University of Ghent.

54 Ibid.

55 ICRSE (2020), *Undeserving victims? A community report on migrant sex worker victims of crime in Europe*.

have experienced trafficking will not be eligible for protection under some states' anti-trafficking legislation.<sup>56</sup>

In Germany, some NGOs that normally receive referrals from law enforcement to provide support to survivors have agreed to take on the role of formally identifying victims of trafficking, to avoid victims having to interact with law enforcement.<sup>57</sup> Taking on this role does present risks, however, potentially changing the nature of the relationship these organisations have with their clients and moving from one of purely service provider to one that is accountable to authorities for decisions about who may qualify for specific protection measures.

## KEY TAKEAWAYS

Consistent with the Victims' Directive's non-restrictive definition of "victim", undocumented victims of crime are entitled to have access, without obstacle or conditions, to the services and support they need to assist them in their recovery. This should include support in identifying available pathways to regularise their status. Their access to services and support must not be conditioned on the type of crime committed against them or their willingness to engage with law enforcement actors or processes. While embedded within a flawed framework, the reflection period available to victims of human trafficking is helpful in demonstrating the importance of access to holistic services "aimed at their recovery of a normal social life" (Art. 12, Directive 2004/81/EC), which allow them the opportunity to achieve a degree of stability, to contemplate their options and to prepare for their future in a way that fosters inclusion.

## Residence permits for some victims of crime

As noted above (see section *The EU Victims' Directive*), the Victims' Directive does not itself provide for residence permits for victims, and indeed states that reporting a crime or participating in criminal proceedings does not under the directive create any rights regarding the residence status of the victim.

However, several other EU directives address residence permits for certain victims of crime, namely the Citizens' Rights Directive<sup>58</sup> and Family Reunification Directive<sup>59</sup> (for survivors of conjugal violence with dependent status), the 2004 Anti-Trafficking Directive (as we've already seen, for victims of human trafficking), and the Employer Sanctions Directive (for victims of labour exploitation). The Return Directive allows member states to grant a residence permit "at any moment" to someone in an irregular situation for compassionate or humanitarian reasons.

Many member states have also ratified the Council of Europe's Anti-Trafficking Convention<sup>60</sup> and Istanbul Convention. Both treaties require state parties to make available permits for victims of human trafficking and gender-based violence, respectively, if this is necessary due to their "personal situation" (i.e., for protection-related reasons) or on the basis of cooperation with law enforcement. All EU member states 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.<sup>61</sup> Some member states have gone beyond these obligations to extend residence permits on additional grounds.

56 Article 10 of the [EU's 2011 anti-trafficking directive](#) requires member states to establish jurisdiction over trafficking offences committed on their territory or by one of the nationals; but merely *permits* them to do so for offences committed outside their territory, where it against one of their nationals or a habitual residence, for the benefit of an entity established on its territory, or where the offender is a habitual resident in its territory. So, a victim whose situation does not meet the requirements of national law will not be recognised as a victim of trafficking and the police will not investigate their claim.

57 Interview, Lea Rakovsky, Ban Ying.

58 [Directive 2004/38/EC](#) of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

59 [Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification](#).

60 [Council of Europe Convention on Action against Trafficking in Human Beings](#).

61 [UN Convention on the Elimination of All Forms of Discrimination against Women](#), 1979.

Residence permits are an important tool for ensuring an effective remedy for victims with insecure status. They attempt to address the reluctance a victim with precarious status might have in coming forward – reluctance linked to the risk they face of immigration consequences. In view of the vulnerability associated with precarious residence status, they can be viewed not only as providing a remedy for prior victimisation but also a tool for the prevention of future victimisation.

Despite their basis in a protection logic, there are important flaws in both the design and implementation of these legislative schemes nationally.<sup>62</sup>

- Obtaining such permits (as we saw in the case of human trafficking, above) often depends on the police, either to provide key documents or to initiate the process itself. This deters victims from coming forward at all or puts them at risk of facing deportation proceedings if they do.
- There is often little awareness of existing schemes among 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 instance, 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.

- 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 that 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 actors assume 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.

Existing "traditional" categories of victims who can qualify for permits (namely, victims of trafficking, severe labour exploitation, and domestic violence for victims on spouse-dependent visas) neglect the forms of mistreatment and exploitation that are much more commonly experienced by people with irregular status.

62 For a more detailed discussion, see PICUM (2020), [Insecure Justice? Residence Permits for Victims of Crime in Europe](#).

## PROMISING PRACTICE

### BOX 2 Lessons from Abroad: U-Visas and T-Visas for Victims of Crime in the US

In the United States, federal legislation grants special visas to certain victims of crime in a way that addresses some of the shortcomings of legislation common in Europe. The U-visa, for instance, 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, with approval rates consistently above 80% for the past five years.<sup>63</sup>

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.<sup>64</sup>

In the case of victims of trafficking, some member states go further than the EU's 2004 anti-trafficking directive and make it possible for survivors to obtain a residence permit based not only on cooperation with the criminal procedure, but also based on the personal situation of the victim. Spain and the Netherlands, for instance, both provide victims of human trafficking with specific long-term residence permits based on their personal situation.<sup>65</sup>

The United States provides a useful comparison. Federal legislation makes available a U-visa for victims of numerous crimes. While victims must show a willingness to cooperate with police, they may initiate a request for the U-visa themselves (see Box 2). Victims of human trafficking may apply for a T-visa.

## KEY TAKEAWAYS

A secure residence permit helps to ensure access to assistance and support for people who with insecure status and promote their safety and protection from further mistreatment. In the case of severe exploitation of undocumented workers, the EU Agency for Fundamental Rights has noted that access to assistance, support and justice "remains only theoretical as long as they are not offered a safe option of regularising their status."<sup>66</sup> Consistent with a victim-centered approach, and with the language and spirit of the Council of Europe Anti-Trafficking Convention and Istanbul Convention, undocumented victims should be able to apply for residence permits based on their personal situation, without pressure to cooperate with the investigation and prosecution of the accused person. Member states should also consider reforms that address the shortcomings of existing schemes, including extending the availability of permits to a larger number of crimes against the person according to clear and transparent criteria, learning from the example of the U- and T-visas in the United States as well as legislative schemes in Italy and Greece that apply to a broader range of undocumented victims.<sup>67</sup>

63 N. Delvino, September 2019, [Safe reporting of crime for victims and witnesses with irregular migration status in the United States](#).

64 Ibid.

65 LEFÖ (2020), [Residency Status: Strengthening the Protection of Trafficked Persons](#).

66 FRA (2015), [Severe Labour Exploitation: Workers Moving within and into the European Union – States' Obligations and Victims' Rights](#).

67 PICUM (2020), [Insecure Justice? Residence permits for victims of crime in Europe](#).

## 2. Establishing measures that promote access to justice without risk of deportation

Criminalisation is the defining feature of the EU's approach to irregular migration, with irregular migration framed as something to "prevent and combat"<sup>68</sup> rather than as a complex social phenomenon. In many EU member states, irregular entry and stay are criminal offences, often punishable with imprisonment.<sup>69</sup> Assistance to people in an irregular situation is criminalised under the Facilitation Directive,<sup>70</sup> which obliges member states to punish anyone who intentionally assists a person to irregularly enter or transit through a member state; and permits, but does not require, a limited exception for "humanitarian assistance". Quasi-criminal sanctions (most notably, deprivation of liberty through immigration detention) are applied for something that essentially concerns administrative status. There is a growing erosion of the line between immigration policy and security or policing, reflected as noted above (see section *EU Anti-Racism Action Plan*) in the growing use of invasive technology and large-scale processing of personal data to support immigration control and policing more generally.

The close relationship between the police and the immigration authorities in many countries undermines faith that the police are as concerned with protecting the interests and rights of a victim as they are in immigration enforcement.

A report by the London-based organisation Latin American Women Rights Service<sup>71</sup> found that 27% of

the women in their study who reported to the police had their residence permit questioned, while 18% said they were arrested for immigration-related matters as a result of reporting. Sixty-two percent of the survivors of gender-based violence in the study felt they could not get support due to their immigration status, and 54% feared the police would not believe them because of their insecure status. According to a 2019 report by the FRA on severe labour exploitation,<sup>72</sup> 57% of 237 migrant workers surveyed did not report their case of severe labour exploitation to the police for fear of losing their jobs, being arrested or removed from the country. By contrast, in Belgium,<sup>73</sup> over 300 undocumented workers have since 2010 reported cases of unpaid wages to labour inspectors without suffering immigration consequences under the concept of "professional secrecy", which removes the labour inspectorate's duty to report undocumented migrants to immigration authorities. Such a system does not, however, exist for victims of crime in Belgium, where the police retain a duty to report.<sup>74</sup>

### KEY TAKEAWAYS

Absent robust safeguards that protect them from arrest and deportation if they engage with the criminal justice systems, people with insecure status who have been victimised avoid doing so. Given the often important role that law enforcement has in referring people to support services and facilitating their access to protection measures, including residence permits where they are available, this not only profoundly limits their access to justice, but also potentially their access to protection and support services.

68 [Consolidated version of the Treaty on the Functioning of the European Union \(TFEU\)](#), Article 79.

69 FRA (2014), [Criminalisation of migrants in an irregular situation and of persons engaging with them](#).

70 [Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence](#); European Parliament (2018), [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#); ReSOMA (2019), [Crackdown on NGOs and volunteers helping refugees and other migrants](#).

71 LAWRS (2019), [The Right to be believed: Migrant women facing Violence Against Women and Girls \(VAWG\) in the 'hostile immigration environment' in London](#).

72 FRA (2019), [Protecting migrant workers from exploitation in the EU: workers' perspectives](#).

73 FLEX (2020), [Opportunity Knocks: improving responses to labour exploitation with secure reporting](#), see footnote 87 at p. 34.

74 Anja Van den Durpel, September 2019, ["Safe reporting of crime for migrants with irregular status in Belgium"](#), *COMPAS: Oxford*.

## Implementing “firewalls” to support access to justice

It is helpful to recall that under human rights law, the aim of criminal justice is to “redress the wrong done to victims and thus to restore victims’ confidence in the validity and binding nature of their rights and in their status and recognition as persons before the law”.<sup>75</sup> States must provide effective access to justice, which means the right to go to court or to an alternative dispute resolution body, and to obtain a remedy when rights are violated.<sup>76</sup> For a remedy to be effective, a victim should feel they have been recognised, heard and taken seriously.

The EU Charter of Fundamental Rights is also relevant in this context. It governs the application of EU law and therefore applies whenever national authorities deal with victims of crime.<sup>77</sup> Article 47 of the Charter grants victims of crimes against the person the right to proceedings that establish the truth of an offender’s conduct and accountability for the violation of the victim’s rights. The 2018 report of the special adviser on compensation to the President of the European Commission<sup>78</sup> urges an approach to remedies for victims that moves beyond compensation to reparation, from a narrow focus on damages to include recognition, restitution, support and care.

For people who are undocumented, or who have insecure residence status, obtaining an effective remedy for violations of their rights requires creating “firewalls” that shield them from the threat of deportation when they engage with the criminal justice system. “Firewalls” have been recommended by the former UN Special Rapporteur on the Human Rights of Migrants Francois Crépeau<sup>79</sup> and the European Commission against Racism and Intolerance (ECRI) of the Council of Europe in its General Policy Recommendation 16<sup>80</sup> as necessary to ensure the fundamental rights of undocumented people. Where, in the absence of a ‘firewall’, a victim support response is accompanied by immigration enforcement, it effectively renders meaningless the rights of undocumented people under the Victims’ Directive. The EU Strategy on Victims’ Rights commits to looking for solutions, among EU policy tools and through exchange of member states’ practice, to address precisely this dilemma.

Box 4 describes initiatives in the United States, the Netherlands and Spain intended to promote safe reporting through different conceptions of the “firewall”.

75 FRA (2019), *Justice for victims of violent crime: Part I, Victims’ rights as standards of criminal justice*, p 27.

76 FRA, *Access to justice in Europe*.

77 Ibid.

78 Report of the Special Adviser, J. Milquet, to the President of the European Commission, Jean-Claude Juncker: Strengthening Victims’ Rights, March 2019, [“From Compensation to Reparation. For a new EU Victims’ rights strategy 2020-2025”](#).

79 François Crépeau and Bethany Hastie, 2015, [“The Case for ‘Firewall’ Protections for Irregular Migrants: Safeguarding Fundamental Rights”](#), *European Journal of Migration and Law (EMIL)*, 157-183.

80 ECRI General Policy Recommendation N°16 on safeguarding irregularly present migrants from discrimination, adopted on 16 March 2016.

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**BOX 3** Municipal identity cards in U.S. cities

Multiple cities and counties in the United States<sup>81</sup> have issued city identification cards that are available to all residence regardless of immigration status. The cards can be used as a valid form of identification to access city offices and services, and when people are stopped by police, avoiding police having to bring people to the station to confirm their identity if they do not have papers when they perform a routine stop.

Cities like Oakland<sup>82</sup> and Richmond,<sup>83</sup> California introduced identity cards that also function as debit cards, to address the problems faced by undocumented people, people experiencing homelessness, and others who may struggle to access bank accounts and be forced to carry cash, putting them at constant risk of theft.<sup>84</sup> Chicago launched its Chicago CityKey program in 2018, providing city cards to residents that functioned as valid government-issued identification, access card for the city's public transit system, and a library card.<sup>85</sup> Mercer County, New Jersey began issuing a community identity card in 2011 through the Latin American Defense and Education Fund. The card is accepted by law enforcement and municipal agencies, health clinics, hospitals, libraries, social services and some stores and banks. New York City's IDNYC municipal identification card was implemented in 2015 for all New Yorkers, regardless of immigration status, to facilitate access to municipal and private services that require photo identification, as well as providing benefits to residents like discounts on the theatre and cinema.<sup>86</sup>

Another approach to limiting the risk of immigration enforcement against victims of crime who engage with the criminal justice system: the mediating role of community-based organisations (see Boxes 5 and 6, below). Sometimes these are specialist organisations that provide holistic services, including legal support, to people with precarious status. Sometimes initiatives are driven by the community-based activism of collectives who share a common experience of oppression. This is exemplified by various sex worker-led initiatives to foster access to justice and defend sex workers against prosecution.

A recent report by the International Committee on the Rights of Sex Workers in Europe found, based on interviews and focus groups with sex workers, that the "majority of sex worker interviewees interacted with police during identity checks (57%), followed by residency checks (30%), which indicates high levels of surveillance and profiling negatively affecting the migrant sex working community's trust in law enforcement".<sup>87</sup> The report also underscores, in this context, the critical role of community-based

organisations in promoting safety, through solidarity, social support, empowerment and accompaniment through justice processes, where someone chooses to report.

In the metropolitan county of Merseyside, in the United Kingdom, the police implemented an innovative project – the Red Umbrella Project<sup>88</sup> – to protect street sex workers from abuse and exploitation and encourage them to report crimes. The project entailed working in partnership with the South Wales Police and with Changing Lives, a charity responsible for advocacy work on Merseyside. It also involved the appointment of a dedicated Police Sex Worker Liaison Officer to help sex workers. The project put in place victim-focused processes<sup>89</sup> to better support sex workers who were already victims and those who were at risk, both on the streets and online. Despite leading to convictions of violent offenders,<sup>90</sup> the project came to an end in March 2020 as the government decided not to renew funding, believing it is up to local bodies to sustain funding long-term.

81 Wikipedia, "City identification card", [https://en.wikipedia.org/wiki/City\\_identification\\_card#cite\\_ref-15](https://en.wikipedia.org/wiki/City_identification_card#cite_ref-15).

82 Matthai Kuruvila, 1 February 2013, "Oakland launches municipal ID card", *SFGate*.

83 Richmond City ID, <https://www.richmondcityid.com/home.html>.

84 Tyler Osburn, 6 July 2011, "Council approves municipal ID cards for Richmond."

85 City of Chicago, "Chicago CityKey", <https://www.chicityclerk.com/chicagocitykey>.

86 IDNYC, <https://www1.nyc.gov/site/idnyc/index.page>.

87 See note 55, p 30.

88 Red Umbrella Project.

89 Merseyside safeguarding adult board, "Merseyside Police launch Red Umbrella project to support sex workers on Merseyside".

90 Jonathan Humphries, 14 March 2020, "Tories end funding for vital service that helped catch murderers and rapists", *Echo*.

## PROMISING PRACTICE

### **BOX 4** Safe reporting measures in the United States, the Netherlands and Spain

In the **United States**, many localities have taken steps, either formally or informally, to limit the assistance they give to federal immigration authorities seeking to detain and deport irregular migrants. The City of San Francisco, for instance, declared itself a “City and County of Refuge” in 1985. The City’s mayor, responding at the time to increased immigration from Central America, signed a resolution declaring that no city department would “discriminate against” or “jeopardize the safety and welfare of law-abiding” Salvadorans and Guatemalans because of their immigration status. This resolution was followed in 1989 by a bill, passed unanimously, forbidding the use of city funds or resources to assist the enforcement of federal immigration law, or to gather or disseminate information about people’s immigration status in the city, unless required by statute, regulation or court decision. The law also prevented city officials, including police, from stopping, questioning or arresting “any individual solely because of the individual’s national origin or immigration status.” Similar policies have been adopted in cities across the United States – often called ‘sanctuary cities’<sup>91</sup> – as well as at the state level in the US.<sup>92</sup>

There is less understanding about the existence of similar initiatives in the European context. A study by the University of Oxford’s Centre on Migration, Policy and Society (COMPAS) sought to address this lacuna by investigating the law, policy and practices around safe reporting in four European countries (Belgium, the Netherlands, Italy and Spain) and the United States. Among the practices considered was a policy in **the Netherlands** that has for years been cited as an example of promising practice by NGOs and human rights scholars, but that had not previously been the focus of academic study. The below summarises some of the findings of that report.<sup>93</sup>

That policy, known as “Free in, Free out”, allows people in an irregular situation to enter a police station to report a crime and then to leave freely, without being arrested or facing possible expulsion, regardless of the type of crime reported. It started as an initiative of the Amsterdam police as part of efforts to build a better connection with migrant communities in their city and eventually spread to cities like Utrecht and Eindhoven. In 2016, after the Dutch Ministry of Justice and Security supported a pilot of the program, “free in, free out” became official national policy as part of the Netherlands’ implementation of the Victims’ Directive. The policy is mentioned in an official “explanatory memorandum” released by the Dutch Parliament, with an internal “work instruction” for police, citing Article 1 of the Victims’ Directive. Although the Ministry of Justice and Security and Public Prosecution Service contemplated a more comprehensive legal framework, it opted for a more “pragmatic” and informal approach geared towards supporting local police’s efforts in crime prevention and equal treatment of victims. Oxford University’s research, through interviews with stakeholders, found that undocumented people reported a range of crimes under the “free in, free out” policy, including labour exploitation (from unpaid wages to forced labour), theft, sexual violence, drug trafficking, domestic violence, blackmail and stalking. It was generally agreed that people with irregular status rarely went to the police because of the risk of deportation, and when they did it was thus mainly for relatively serious crimes.

91 American Immigration Council, “Sanctuary Policies: An Overview.”

92 PICUM (2015), Guide to the EU Victims’ Directive: Advancing Access to Protection, Services and Justice for Undocumented Migrants.

93 R. Timmerman, A. Leerkes, & R. Staring, September 2019, “Safe reporting of crime for migrants with irregular status in the Netherlands”, COMPAS: Oxford; R. Timmerman, A. Leerkes, R. Staring & N. Delvino, 7 October 2020, “Free In, Free Out: Exploring Dutch Firewall Protections for Irregular Migrant Victims of Crime”, *European Journal of Migration and Law*, 22(3), 427-455.

Overall, three important shortcomings were identified by the Oxford researchers: (1) the fragile nature of the firewall between police and immigration authorities, given systematic exchange of data about immigration status between police and immigration authorities; (2) the lack of access to services and protection for victims to accompany “free in, free out”; and (3) the inconsistent practice among local police and pervasive lack of trust. Moreover, “free in, free out” does not cover other forms of victimisation that fall outside of criminal law (such as labour rights violations), nor does it cover cases where it is not a victim entering police precinct but the police coming to an incident where it may be less clear who is a “victim”.

It is notable that the Dutch “free in, free out” policy diverges from examples in the United States to the extent that in sanctuary cities, local police decline to enforce federal immigration rules; whereas in the Netherlands, local police systematically communicate about a person’s status with immigration authorities, and it is up to the latter to use their discretion not to enforce immigration laws where the person in question is a victim. Another difference is that, in the United States, jurisdictions that decline to prosecute immigration offences do so not only with respect to potential victims of crime; they also decline, with limited exceptions, to collaborate with federal authorities in the prosecution of such claims against potential offenders.<sup>94</sup>

A contrasting approach can be seen in **Spain’s** Civil Guard (“*Guardia Civil*”), one of the country’s two national police forces, which has not sought to mainstream “firewalls” but instead has created a distinct team within its own ranks that exists to serve the needs of migrants. In 2000, the *Guardia Civil* deployed special teams as a pilot to respond to the needs of migrants in some of its territories.<sup>95</sup> These groups, called Immigration Attention Teams or EDATI (“*equipos de atención al inmigrante*”) were given the explicit mission of providing assistance to migrants, including undocumented migrants, by informing them of their rights, advising them on how to regularise their status and supporting them in lodging complaints against employers and others for mistreatment and exploitation. Unlike traditional *Guardia Civil*, undocumented people who engage with the EDATI do not face possible expulsion because members of the EDATI teams do not have the power to arrest or to issue deportation orders. Teams consist of three members, a least one of whom is a woman, and receive training in immigration law, the cultural backgrounds of the migrants with whom they will have dealings and on the reality of the experience and challenges migrants may face in Spain, with a preference for people with a command of French, Arabic and English. In 2012, EDATI teams across Spain reportedly assisted 10,700 migrants, and took 12,000 actions<sup>96</sup>. EDATI officers often dress in civilian clothes and work out of their vehicles so that the people they assist to not have to go to a *Guardia Civil* station to report. EDATI’s work is intended to prevent crimes targeting undocumented people from remaining unreported and, therefore, to counter the vulnerability they face because of their status.

94 Regarding, for instance, the New York City Police Department’s policy regarding requests from the federal Immigration and Customs Enforcement to further detain people in police custody for immigration purposes, see Legal Aid Society, 22 August 2019, “[NYPD Data Shows Noncompliance with ICE Detainer Requests](#).”

95 Ministerio de Interior, 3 April 2000, “[La Guardia Civil crea equipos de atención al inmigrante](#)”.

96 Inés Benítez, 10 December 2013, “[Policías españolas que protegen a los «sin papeles»](#)”, *lpsnoticias*.

## BOX 5 Holistic Support and Accompaniment for Undocumented Survivors

**Differenza Donna** was founded in Rome in 1989 to address gender-based violence in Italy. Today, it has hundreds of members and carries out a variety of initiatives aimed at fostering gender equality and supporting women in overcoming barriers to safety and equality. Differenza Donna provides psychological support; runs shelters for survivors of violence; and trains social workers, health professionals, lawyers, law enforcement and judicial authorities in trauma and gender-based violence.

Differenza Donna operates a help desk in the Ponte Galeria detention centre in Rome to assist women who have experienced trafficking and other forms of violence. In Ponte Galeria, they have encountered women in the detention centre who were brought there by the police when they attempted to report abuse. In one case, they met a woman who went to the police to report the kidnapping of her five-year-old child by her violent partner. Her claim was ignored, and she was taken to Ponte Galeria.

Part of Differenza Donna's work is acting as an intermediary between undocumented women who are victims of mistreatment who are afraid of reporting, and the competent public authorities. Differenza Donna's shelters and help desks collaborate closely with their lawyers to prepare reports that can provide the basis for a complaint, for women who wish to file one.

Differenza Donna also organises workshops for migrant women on human rights literacy, which increases their understanding of their rights and of the network of organisations and services available to them that they can access without risk of deportation or other negative consequences due to their insecure residence status.

Differenza Donna has agreements with Territorial Commissions for International Protection and the Civil Court of Rome, which give them the opportunity to meet twice per month with asylum seekers and women who have appealed asylum decisions, to identify situations of unreported violence and support them in accessing justice. There is also a referral mechanism so that the Commission and the Court can refer women to Differenza Donna and the other anti-trafficking civil society organisations that are part of the referral protocols.

In addition to running shelters, Differenza Donna offers counselling and other assistance such as job orientation, social support, accompaniment to access health and social services, legal support, for instance for family reunification at its help desk. They have a strong collaboration with organisations that provide internships for migrant women, which are useful in job orientation and with other organisations that do similar work to whom they can transfer cases, for instance, if they are in a part of the city easier for a woman to get to. In 2019, 155 women survivors of trafficking and sexual exploitation were supported by Differenza Donna, among whom thirteen were accommodated in their shelter for survivors of trafficking, including women they encountered in the detention centre or who were referred by the Commission or the Court.

In some police stations in Rome, officers can request the presence of an anti-violence operator from Differenza Donna when necessary, to be in the office at the moment of an encounter with a woman in need. In Differenza Donna's experience, their presence as someone whose purpose is different from the police, and whose focus is on the interests of the victim, changes the dynamic and acts a kind of "firewall" within a law enforcement structure. After this first meeting, follow up meetings can happen outside the police station, in places where the woman feels more at ease.

97 Red Acoge (2020), *Diagnóstico sobre la discriminación y herramientas para combatirla*.

98 Mujeres supervivientes Sevilla, <https://mujeressupervivientessevilla.org/>.

99 Mar Gallego, 25 November 2020, "La olla del Pumarejo: "Urge amar con un plato de lentejas"", *Pikara Magazine*.

100 Interview, Antonia Avalos Torres, Founder, Mujeres Supervivientes.

**Red Acoge** is a network of twenty Spanish non-governmental organisations that promotes the rights of migrants, refugees and stateless people in Spain. In 2017, Red Acoge launched a free mobile phone application, “Discrimination Alert” (*Alerta Discriminacion*), as a simple, fast and anonymous way to report incidents of discrimination in different languages. A complaint made on the app is received by Red Acoge’s technical office in Madrid and then referred to one of its offices in 12 different localities (Lucena, Cordoba, Valencia, Alicante, Burgos, Salamanca, Valladolid, Rioja, Cantabria (Santander), Guadalajara, Barcelona) or to the Assistance and Orientation Service for Victims of Discrimination, provided by the Council for the Elimination of Racial and Ethnic Discrimination. If requested, assistance is made available to the person who has experienced discrimination.

The app allows the collection of detailed data<sup>97</sup> that can provide insights on the geographical areas where the most incidents are registered, as well as the types of discrimination more frequently reported, helping to understand the scope of the problem and to design and develop awareness-raising and training actions.

The app was created with funding from the Spanish Ministry of Inclusion, Social Security and Migration to provide evidence of the incidents of discrimination experienced by people – in particular undocumented people – who otherwise might not report their experience to public authorities. The sustainability of the tool hinges on continued funding to support the teams that are available to assist and accompany those individuals who would like to file a formal complaint with the authorities.

**Mujeres Supervivientes**<sup>98</sup> is a network of mutual support of women survivors of violence. Based in the principles of sisterhood, equality, community and empowerment, among others, the organisation was founded in 2013 to advance towards a society free from violence against women and girls. Their approach is an intersectional, communitarian feminism that informs the way they understand violence – not only gender-based violence, but also structural and institutional violence against migrants –and survival: through community responses and empowerment. The women who are part of Mujeres Supervivientes are themselves survivors of gender-based violence and mainly migrants from different countries and cultural backgrounds. Among the activities they carry out are legal, psychological and economic support and accompaniment for women, including specific support to women without status to report violent situations, as well as workshops to empower women to report mistreatment.

Since the creation of the organisation, Mujeres Supervivientes have also been running a soup kitchen (*comedor social*) open to the whole neighbourhood. This initiative, which started as a community response to the economic crisis, now takes place twice a week (three times per week before the COVID-19 pandemic) in the Pumarejo Square of Sevilla, Spain and gathers around 120 people to eat and spend time together.<sup>99</sup> The work is always divided among many people and the neighbours contribute with food and resources, which allows them to serve food for lunch and dinner for everyone. Inspired by the *ollas populares* (community pots) from South America, they similarly carry out the soup kitchen as a collective strategy of resilience and resistance. The *comedor social* is about meeting basic needs, especially, creating community and a space where all people feel dignified and welcome. The conversations while cooking and eating are what nurture the initiative. The result is a loving and respectful space for encounters, care and community activism among very diverse people: students, sex workers, young and old people, migrants and natives. Over the years, it has become a model of coexistence, feminism, antiracism and ecologism, appreciated by the neighbourhood and beyond. Their motto is *comer y amar* (eat and love).<sup>100</sup>

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### **BOX 6** Sex-Worker Led Initiatives in the United Kingdom to Support Safe Reporting

**National Ugly Mugs**<sup>101</sup> (NUM) is a pioneering national organisation that provides greater access to justice and protection for sex workers who are often targeted by dangerous individuals but are frequently reluctant to report incidents to the police. Offenders are often serial sexual predators who pose a risk to the public. NUM takes reports of incidents from sex workers and produces anonymised warnings that are sent directly to sex workers and front-line support projects throughout the UK. It shares, with the victim's consent, anonymous intelligence with the police and supports sex workers in making full reports to the police so that perpetrators can be identified, arrested and convicted. It also ensures sex workers have access to professional services when they have been a victim of crime.

The **English Collective of Prostitutes** (ECP) is a network of sex workers campaigning for decriminalisation and safety. They have helped sex workers win against charges of soliciting, brothel-keeping and controlling. The latter two charges are frequently used against women working together for their own and others' safety. ECP has defended street workers against civil orders used to criminalise and ban them from particular areas. Their efforts also paved the way to the first ever successful private prosecution for rape in England and Wales in 1995 that resulted in the conviction of a serial rapist.<sup>102</sup> ECP formed the Safety First Coalition in the aftermath of the murder of five women in Ipswich in 2006 which includes well-regarded mainstream organisations like the Royal College of Nursing and Women Against Rape.

101 National Ugly Mugs (NUM), <https://uglymugs.org/um/about/>.

102 English Collective of Prostitutes, 1 January 1996, "[Successful private prosecution of serial rapist – R v Davies](#)".

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## BOX 7 Restorative Justice to Support Migrants Who Experience Discrimination and Violence: Examples from Switzerland and Spain

In **Switzerland**, the *Association contre le racisme* (ACOR) SOS-Racisme, founded in 1995, was influenced from its earliest days by the restorative justice movement. A 2005 report describes<sup>103</sup> two occasions when it applied restorative justice methods to support people with insecure residence status who experienced discrimination. In one case, a young undocumented woman in the process of regularising her status had a humiliating experience during an identity check on a city bus that resulted in her being handed over to the police. ACOR contacted the management of the company and expressed concerns about the way this woman was treated. No sanctions were sought against the controllers. A meeting between the controller and the young woman was held, where ACOR supported mediation between the parties. The controller apologized for the pain caused by involving the police and the institution acknowledged not having recognised the good faith of the young woman.

In another instance, a young African man suffered a broken shoulder during a police check. He approached ACOR for assistance when he was summoned to the examining magistrate because the police had filed a complaint against him for resisting the authorities. Shocked at this accusation by the same police who had treated him violently, he filed a complaint against the police for racial discrimination, abuse of authority and bodily harm. When his case was dismissed because of conflicting accounts between the young man and the police, ACOR approached the police force's Ethics Officer about the possibility of redress. An informal mediation was proposed between the young man and the police officers who participated in the police check to discuss the event, in ACOR's presence, as it had been experienced by all involved and to determine a fair solution.

In 2011, ACOR and four other antiracist organisations founded the Listening Centre against Racism (*Centre-Ecoute contre le Racisme*, or C-ECR), which supports victims of discrimination and monitors incidents of racist discrimination. In its 2019 annual report, C-ECR noted that that people with precarious status – “the most vulnerable and the most likely to suffer racial discrimination, who could fear administrative reprisals”<sup>104</sup> – were profoundly under-represented amongst those making complaints due to fears of administrative sanctions if they came forward.<sup>105</sup>

In 2017, the Federación SOS Racismo in **Spain** began implementing a restorative justice approach as a way to overcome the shortcomings of the criminal justice system when dealing with racial discrimination complaints, and to reach solutions for the victim based on their needs and in a community-centred response. Federación SOS Racismo, an umbrella organisation consisting of eight member organisations in different Spanish regions created in 1995 to combat racism, launched a pilot project in Barcelona to respond under this new approach to some of the reports they receive of racial discrimination and community conflicts raised by migrants and racialised people.

The pilot in its first year began with training activities to create specialised teams, with the intention of applying this approach with a few cases during the second and third years. The type of cases selected for this channel of resolution include those involving discrimination in access to services, discrimination in the public space, and disputes between neighbours, among others. One ongoing case involves four families denied access to a water park by staff because of their Romani background. When they tried to report to the police the discrimination suffered, the police response left the families feeling humiliated and without a solution. The COVID-19 pandemic delayed the project in 2020, whose next phase involves supporting the different parties in the conflict through mediated encounters to redress the harms suffered. At the end of the pilot project, SOS Racismo would like to integrate the restorative justice approach into its strategy for resolving complaints of discrimination, alongside other approaches, and to extend the project to other regions.

103 Anne Catherine Salberg, 2005, “Racisme et médiation, l'action restauratrice d'ACOR SOS-Racisme”.

104 C-ECR (2020), *Rapport annuel 2019* (« Le fait que les personnes aux statuts précaires et donc les plus vulnérables et les plus à même de subir des discriminations raciales, pouvant craindre des représailles administratives, sont sous-représentées, a encore pu être observé pour 2019, comme précisé dans les statistiques sur le statuts de séjour »).

105 Ibid. See also Réseau de centres de conseil pour les victimes du racisme, *Incidents racistes recensés par les centres de conseil (janvier-décembre 2019)*, p. 17.

### 3. Facilitating access to processes that promote accountability and recognition of harm

Article 2 of the Victims' Directive defines *restorative justice* as "any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party".

Transformative justice shares with restorative justice a focus on the interpersonal and social dimensions of harm and accountability. Transformative justice arguably goes further, directly challenging the idea that law enforcement keeps people safe, pointing to evidence that punitive approaches, such as incarceration, tend to operate mainly against minorities and poor people, and fail to acknowledge or address the harm suffered by victims or the societal factors that may make some types of harm pervasive. It calls into question the reflex that many people have to call the police to respond to disturbances, discord and violence within communities.

Transformative justice, which has roots in indigenous practices, presents alternative forms of community-centered accountability<sup>106</sup> that do not rely on the criminal justice system. Instead, transformative justice focuses on minimizing future harm, removing power from the one who has done harm, and increasing the survivor's agency. As distinct from punishment, accountability within this approach requires acknowledging the harm done, and intentional and explicit action to remedy it.

A common critique of transformative justice is that it cannot work and has never been tested, in practice. However, as one activist has noted: "trans and queer people of color, especially those who are sex working, disabled, housing insecure, have always known that we could not rely on policing for safety, and so we experiment frequently with many other strategies to keep each other safe".<sup>107</sup>

#### KEY TAKEAWAYS

For people with insecure status, who face the risk of arrest and deportation every time they engage with the police, it is especially important to take a broader view of avenues that can promote accountability and recognition of harm that do not necessarily rely on the criminal justice system. Civil procedures and processes grounded in community and worker organising are often better adapted to addressing the broader social context in which harms occur, as well as providing some form of remedy or redress for that harm to victims. Promoting access to justice should include access, where appropriate, to civil processes,<sup>108</sup> equality bodies, restorative justice and community-based models of justice that are centred on the interests of the person who has been victimised.

106 Transformative Justice, "[What are Community Accountability & Transformative Justice?](#)"

107 Reina Sultan, 27 July 2020, "[How transformative justice responds to violence without the carceral system](#)", *Shadow proof*.

108 This should include civil courts employment tribunals, and non-judicial complaints mechanisms including with labour inspection authorities, where relevant. See PICUM (2020), [A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice](#).

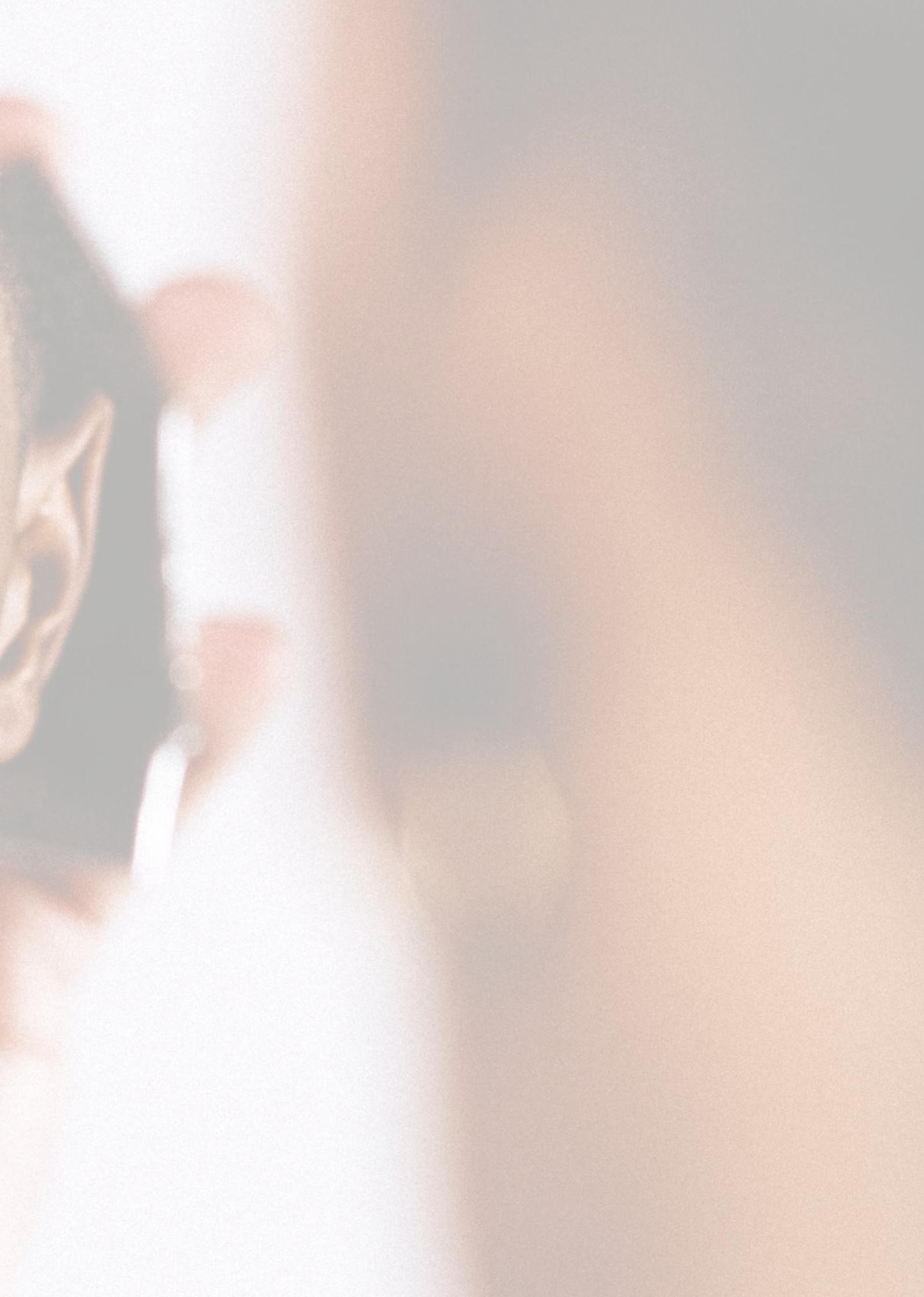
# CONCLUSION

The Victims' Rights Directive clearly established that, when a person is victimised, their residence status should not be a barrier to accessing generic or specialist services or to engaging with the criminal justice system.

Five years after the deadline for its transposition into national law, there is little evidence that member states have taken any steps to make the rights of undocumented people effective – and ample evidence of the urgent need for action. The EU's new Strategy on Victims' Rights' welcome inclusion of undocumented victims and commitment to addressing the dilemma facing them when they attempt to engage with the criminal justice system due to the risk of deportation, presents an opportunity to promote improved implementation of the directive, through multi-stakeholder engagement that allows for the identification and promotion of promising practices among member states as well as proposals for legislative and policy measures that clarify the rights of victims with insecure status.

Combined with the EU's full-throated commitments under the Gender Equality Strategy, and possible legislation reflecting both the text and the spirit of the Istanbul Convention, not to mention the European Commission's ambitions under its Anti-Racism Action Plan, there is an unprecedented opportunity to reaffirm and to strengthen, through an intersectional lens, the rights of all people in the European Union to support, protection and justice when they have been victimised, regardless of their residence status – and to draw attention to the structural factors that undermine their rights and ultimately perpetuate insecurity, exploitation and violence.











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