



EXECUTIVE SUMMARY

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

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**,¹ adopted in 2012, exists alongside other important legislation that bears on the rights of undocumented people who have been victimised,² creating common standards across all EU member states³ 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)**⁴ 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 areas⁵ and has an important focus on violence against women and girls, a stated priority of the Commission.⁶ 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.⁷ 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,⁸ 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.

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