



Submission to the Committee  
on the Elimination of Racial  
Discrimination (CERD) and  
Committee on the Protection  
of the Rights of All Migrant  
Workers and Members of  
Their Families (CMW)

March 2024



PICUM

PICUM represents a network of 158 organisations working with undocumented migrants in 31 countries, for human rights and social justice.

PICUM welcomes the opportunity to provide input to the upcoming joint general comment/recommendation on State Parties Obligations on Public Policies for Addressing and Eradicating Xenophobia and its impact on the rights of migrants, their families, and other non-citizens affected by racial discrimination.

PICUM's submission begins by outlining the intersection between migration policies and racism and the approach to migration policies in the European Union (EU). It then goes on to provide recommendations based on the concept note of the upcoming joint general comment/recommendations.

## Migration policies and xenophobia

To respond to xenophobia and its impact on the rights of migrants, their families, and other non-citizens affected by xenophobia, it is essential to critically address the role of migration policies in enhancing and legitimising xenophobia, in particular racial discrimination.

Migration policies are not racially neutral.<sup>1</sup> They determine who is eligible for citizenship and political membership, people's mobility across borders, their access to services, the residence permits people can have (if any), etc.

Former UN Special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Tendayi Achiume noted that "ethno-nationalism"<sup>2</sup> is an important driver and manifestation of racial discrimination in citizenship, nationality and immigration laws, policies and practices.<sup>3</sup> It has deep historical origins where laws and policies determining political membership.

One example of this is how European colonialism used ethno-nationalist ideologies to "systemically exclude non-Europeans from effective citizenship status".<sup>4</sup>

She further underlines that in matters related to citizenship and migration status, it is particularly important to take an intersectional approach. This is because people perceived as 'foreigners' are particularly vulnerable to discrimination along a wide range of social categories such as race, ethnicity, religion, gender, sexual orientation and class, often irrespective of their nationality.<sup>5</sup> She further notes that there is a need to consider specific to gender: "in the context of citizenship, national and immigration law and policy, States rely heavily on patriarchal laws and gender-based discrimination to achieve racial, ethnic and religious exclusion or restrictions", for instance by denying women the ability to confer nationality on their children"<sup>6</sup>.

1 De Vries, K., & Spijkerboer\*, T. (2021). [Race and the regulation of international migration. The ongoing impact of colonialism in the case law of The European Court of Human Rights](#). Netherlands Quarterly of Human Rights, 39(4), 291-307.

2 According to the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, "Ethnonationalism, broadly defined, views the nation as defined in terms of assumed blood ties and ethnicity". See United Nations General Assembly, Human Rights Council, 2018, [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance](#), §29

3 United Nations General Assembly, Human Rights Council, 2018, [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance](#), §6

4 Ibid, §40.

5 United Nations General Assembly, Human Rights Council, 2018, [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance](#), §30, p.10; Child Friendly Justice European Network, 2022, [Towards LGBTI+ sensitive justice system for children in Europe; Fundamental Rights Agenda, 2020, A long way to go for LGBTQI equality](#)

6 United Nations General Assembly, Human Rights Council, 2018, [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance](#), §12, p.5

# EU and national migration policies

## Key features

The EU and Member States developed migration policies summarised by the following key features:

### Limiting safe and regular migration pathways

Policies increasingly limit opportunities for safe and regular migration pathways for third-country nationals to come to the EU.<sup>7</sup> This risks to be further entrenched through the implementation of visa restrictions to people from countries which are considered to not be adequately cooperating in the deportation of its nationals from the EU, as per the EU Visa Code.<sup>8</sup> At the same time, even for nationals of countries cooperating on readmission, the rhetoric around expanding regular migration pathways and mobility has not yet translated into significant and decent opportunities to migrate for work,<sup>9</sup> at times linked to racism and prejudice regarding which nationalities are 'desired' for labour migration. Women of certain nationalities are also more likely to be refused access to visas or stopped at borders (usually airports) and summarily deported to their country of origin, when border guards suspect them of being victims of trafficking.<sup>10</sup>

### Channelling people into particular types of work

Bilateral labour migration agreements are often used as a tool at both national, and increasingly EU level, to organise labour migration. When corridors are created for people of a particular nationality to work in a particular job, recruitment also focuses on particular genders, resulting in very limited job opportunities based on nationality and gender. On the other hand, people residing irregularly have limited job opportunities in the absence of accessible regularisation pathways, in the sectors which have high levels of undeclared work, and often rely on undocumented workers, such as construction, hospitality, agriculture and domestic work.

The workforce in some of these sectors is also highly gendered (for example, men in construction and women in domestic, care and sex work). This contributes to reinforcing racial and gender biases in the country of immigration, disproportionately exposes certain people to risks associated with particular jobs.<sup>11</sup> Racial and ethnic discrimination also run through exploitative employment practices. In addition to discrimination based on not having a work permit – and in who has access

7 Rosenberg, Andrew, [Racial Discrimination in International Visa Policies](#) (December 18, 2022). *International Studies Quarterly*, Available at SSRN: <https://ssrn.com/abstract=4328842>; Spijkerboer, Thomas. (2018). *The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control*. *European Journal of Migration and Law*. 20. 452-469. 10.1163/15718166-12340038.

8 Regulation (EC) No 810/2009 as amended in 2019 by Regulation (EU) 2019/1155. Conditionality for cooperation on return and readmission is also being introduced into other policy areas, including international development cooperation and trade.

9 MEDAM (Mercator Dialogue on Asylum and Migration) (2020), [European and African perspectives on asylum and migration policy: Seeking common ground](#), 2020 MEDAM Assessment Report on asylum and migration policies in Europe, Kiel: IfW, p.28.

10 See for example, the Scottish Sun, '[100 sex slaves at airport: Around 100 sex slaves nabbed by border cops at Glasgow Airport in just nine months](#)', 24 August 2017. N. Vuolajärvi, [Governing in the Name of Caring—the Nordic Model of Prostitution and its Punitive Consequences for Migrants Who Sell Sex](#), 2018.

11 On the domestic and care sectors, see for example: A. Triandafyllidou, '[Irregular migrant domestic workers in Europe: who cares?](#)', 2013, p. 2; ILO, [Promoting integration for migrant domestic workers in Europe: A synthesis of Belgium, France, Italy and Spain](#), 2013, p.13; Alexandra Ricard-Guay, '[Addressing demand in the context of trafficking in the domestic work sector: perspectives from seven European countries](#)', DemandAT working paper, December 2016; Fundamental Rights Agency, [Irregular migrants employed in domestic work](#), 2011; Working paper: '[Shared concerns and joint recommendations on migrant domestic and care work](#)', February 2018. On sex work, see for example: PICUM, [Safeguarding the human rights and dignity of undocumented migrant sex workers](#), 2019.

to a work permit in the first place<sup>12</sup> – workers are sometimes assigned different jobs in a workplace, and paid different wages for the same work, along lines of national or ethnic origin.<sup>13</sup>

### Limiting access to decent employment and family life

National migration policies across Europe, and at EU level, continue to offer decent labour migration opportunities largely to workers with offers for highly-paid employment or for very specific skills shortages.<sup>14</sup> Discrimination – on personal, institutional and structural levels – is a major barrier to accessing high income employment. For example, on a personal level, stereotypes and prejudices about gender, and based on nationality or religion continue to play significant roles in recruitment and hiring practices.<sup>15</sup> On a statistical level, more first time permits for remunerated activities (highly-skilled, seasonal, researchers and others) were granted by the EU 28 member states in 2018 to citizens of the United States of America than to the citizens of all the African countries put together.<sup>16</sup> When decent and stable work permits, with the possibilities to bring family, are only available for people who secure high-paying jobs, it entrenches gender, racial and class inequalities across Europe.

### Criminalising migration

Criminalisation of migration is done by developing policies that treat undocumented migrants as a potential security threat and irregular migration as a crime and that, therefore, often involve the use of criminal or administrative sanctions for irregular entry or stay.

The New EU Pact on Migration and Asylum (the Pact), expected to be adopted in April 2024, entrenches many such filters and racial distinction into EU legislation. In the new [Asylum Procedures Regulation](#), applicants who come from a country with a rate of positive asylum decisions below 20% will be mandatorily conveyed into accelerated and border procedures. This does not only lead to discrimination in terms of access to protection or regular stay, but also puts them at risk of being detained on the grounds of nationality.

Moreover, border and accelerated procedures can be applied to people who are considered a threat for national security and public order, including unaccompanied children. People conveyed to such procedures will not only be more at risk of being detained, but will have limited safeguards against deportation if their asylum application is rejected.<sup>17</sup> The new [Schengen Borders Code](#) also embraces a very harmful narrative which assumes that people

12 For example, data on first time permits issued for remunerated activities reasons (highly-skilled, seasonal, researchers and others) in the EU 28 member states in 2018, disaggregated by country of citizenship, shows that citizens of the 55 countries coded as Africa account for 5% (38,099), citizens of the 35 countries coded as America account for 13% (93,018 with 38,598 of those permits granted to citizens of the United States of America, more than the citizens of all the African countries put together), citizens of the 47 Asian and Middle Eastern countries coded as Asia account for 22% (156,668), citizens of the 15 countries coded as Oceania account for 2% (16,234) and citizens of the 10 countries coded as Central and Eastern Europe account for 51% (368,032) of the total of 726,039 first time permits issued for remunerated activities reasons in the EU in 2018 (analysis based on Eurostat data on [First permits issued for remunerated activities by reason, length of validity and citizenship](#), last updated 22 October 2019).

13 PICUM, 2020, [A Worker is a Worker: How to ensure that undocumented migrant workers can access justice](#); see also 2019 ruling of the Employment Tribunal in Paris ([Conseil de Prud'Hommes de Paris](#)) of 17 December 2019 (n° RG F 17/10051) which found the employer guilty of systemic discrimination against 25 undocumented Malian construction workers (PICUM, 2022, [Guide to Undocumented Workers' Rights at Work under International and EU law](#)).

14 For more information, see PICUM, 2021, [Designing labour migration policies to promote decent work and social inclusion](#).

15 For example, as highlighted in the [EU anti-racism action plan 2020-2025](#), 'discrimination at work or when looking for work is widespread; it can take many forms and affects certain groups more than others. People of African descent, for example, see a particularly strong disconnect between the quality of their employment and their level of education, manifesting in a lower paid work rate among those with a tertiary degree compared to the general population. There is evidence that candidates who openly identify as Muslim in their curriculum vitae receive fewer invitations to job interviews compared to equally qualified candidates with a 'religiously neutral' curriculum vitae (European Commission Communication [A Union of equality: EU anti-racism action plan 2020-2025](#), COM(2020) 565 final, Brussels, 18.9.2020).

16 Data on first time permits issued for remunerated activities reasons (highly-skilled, seasonal, researchers and others) in the EU 28 member states in 2018, shows that citizens of the 55 countries coded as Africa account for only 5% of permits (38,099). Citizens of the 35 countries coded as America account for 13% (93,018) with 38,500 of those permits granted to citizens of the United States of America, slightly more than to the citizens of all the African countries put together. Citizens of the 10 countries coded as Central and Eastern Europe account for 51% (368,032) of the total (analysis based on Eurostat data on [First permits issued for remunerated activities by reason, length of validity and citizenship](#), last updated 22 October 2019).

17 PICUM, 2024, [81 Civil Society Organisations call on MEPs to vote down harmful EU Migration Pact](#).

crossing borders without valid documents are a threat to the EU and proposes to address it by increasing policing. It also provides that member states to take any necessary measure to preserve "security, law and order", without any clear proportionality assessment, if a large number of migrants attempt entering the country irregularly "en masse and using force".

In recent years, states have also increasingly turned to smuggling-related offences as a way to deter migration. In 2023, media monitoring conducted by PICUM (publication forthcoming) revealed at least 76 cases of were criminalised on grounds of facilitation of irregular migration, smuggling and other charges. Research by other civil society organisations and activist groups also confirms this trend. Within Italy, the organization 'ARCI Porco Rosso' reported that as of January 2024, it is supporting 107 individuals accused of 'smuggling', the majority of whom are currently held in criminal detention.<sup>18</sup> In Greece, a recent report looking at the situation in the country's prisons found that, as of February 2023, people convicted of smuggling formed the second largest group by crime, with 1,897 (almost 90%) being third-country nationals.<sup>19</sup> Alleged boat drivers are often identified on the basis of faulty evidence or unreliable testimonies. Convictions are often issued after procedures characterized by lack of fair trial guarantees, such as lacking or inadequate access to legal aid and translation.<sup>20</sup>

### Placing strict conditions for stay in the EU and limiting access to services

The EU and Member States have developed policies with strict conditions for stay in the EU.

People are often put in situations where they are dependent on an employer or spouse which makes them vulnerable to exploitation and abuse. Women are more likely to be on spouse-dependent visas than men. If the relationship on which their status depends breaks down – for instance, because of domestic violence – they risk becoming undocumented.<sup>21</sup>

At the same time, Member States restrict access to services, including health, by linking a person's migration status to their access to services.<sup>22</sup> This creates health inequalities<sup>23</sup> and compounds people's risk of poverty, destitution, homelessness, violence and exploitation.

### Normalising racial profiling

To maintain a strong degree of migration control enforcement measures (e.g. immigration detention, policing), the EU and Member States are normalising racial profiling. For instance, the reform of the Schengen Borders Code (also expected to be adopted in April 2024), generalise police checks near internal EU borders for migration control, which will de facto be conducted on the basis racial profiling.<sup>24</sup> The introduction of a screening procedure for undocumented people apprehended within the territory of the EU Member States also risks encouraging discriminatory profiling, which would strongly rely on racial, ethnic, national, or religious characteristics.<sup>25</sup> In the context of criminalisation of sex work and anti-trafficking initiatives, migrants and people of colour – cis and transgender migrant women of colour in particular – are disproportionately subject to police harassment and targeted for immigration enforcement.<sup>26</sup>

18 Arci Porco Rosso, [Senza Frontiere: La Criminalizzazione Dei Cosiddetti Scafisti Nel 2023](#) (29 January 2024).

19 Borderline Europe, 2023, [The Systematic criminalization of migrants driving a boat or car to Greece](#).

20 Borderline Europe, 10 January 2023, [As Long As You Can Still Listen: The Criminalization of Migrant Boat Drivers in 2022](#); Borderline Europe, 2023, [The Systematic criminalization of migrants driving a boat or car to Greece](#).

21 PICUM, 2012, [Strategies to End Double Violence Against Undocumented Women Protecting Rights and Ensuring Justice](#)

22 Fundamental Rights Agency, 2016, [Healthcare entitlements of migrants in an irregular situation in the EU-28](#); PICUM, 2022, [A snapshot of social protection measures for undocumented migrants by national and local governments](#)

23 PICUM, 2023, [Migration status: A key structural social determinant of health inequalities for undocumented migrants](#)

24 PICUM, 2024, [Racial profiling key element in the new deal on the Schengen Borders Code](#); Fundamental Rights Agency, 2023, [Police stops and minorities: understanding and preventing discriminatory ethnic profiling](#)

25 PICUM et al., 2023, [Joint Civil Society Statement on Article 5 of the EU Screening Regulation](#).

26 PICUM, 2019, [Safeguarding the human rights and dignity of undocumented migrant sex workers](#); PICUM, 2024, [Submission to Special Rapporteur on violence against women and girls on prostitution and violence against women and girls](#)

Moreover, the EU and Member States are also deploying heavy policing and surveillance tactics, including through digital technology,<sup>27</sup> which is

increasing the distrust and insecurity in state authorities.

## Human rights consequences

Across all these policies and legislations, the EU and Member States instrumentalise people's migration status<sup>28</sup> to legitimise discrimination. This is also the case of undocumented children, whose rights continue to hold lower importance for governments than their priorities on managing migration – carried out largely through the use of enforcement policies.<sup>29</sup> In fact, while the EU's legislation in the field of victim rights covers non-discrimination based on residence status,<sup>30</sup> this ground for non-discrimination (residence status) is not included under Article 21 of the Charter of Fundamental Rights of the European Union.<sup>31</sup>

Moreover, the intersection between migration policy and racism is not recognised nor addressed by EU policymakers. On the contrary, within days of announcing its new Anti-Racism Action Plan in September 2020,<sup>32</sup> the European Commission released the Pact<sup>33</sup> which focuses on restricting access to Europe, increased immigration enforcement measures, containment and de facto detention, increased data processing and use of technology for increased surveillance and profiling.

From the outset, this raised doubts about the EU's commitment to combat racial discrimination. Despite repeated warnings from civil society organisations across Europe,<sup>34</sup> the European Parliament and Council reached a political agreement in December 2023 on the Pact.<sup>35</sup> As the European Network Against Racism remarked:

*"whenever the subject of structural racism is broached, EU policymakers are quick to refer to the EU Anti-Racism Action Plan as evidence of Europe seriously tackling structural racism. However, the new Migration Pact is a step in the opposite direction, signalling that those who do not fit imagined stereotypes of Europeanness are unwelcome — not due to Europe's inability to provide protection but solely because of their non-whiteness."*<sup>36</sup>

Racialised communities – whether undocumented or not – are disproportionately affected by these practices. The EU Fundamental Rights Agency (FRA) showed that Black people, Asians and Roma

27 See also: PICUM, 2023, [PICUM's submission to the Secretary-General's report on the Human Rights of Migrants](#)

28 The term 'migration status' refers to a person's formal recognition of residence by the country they live in (in the EU, the term 'residence status' is often used to refer to migration status). Residence or migration status is based on an individual's administrative situation, linked to a residence permit or a suspension of deportation. Residence permits can be issued for a fixed or indefinite duration and on various grounds (e.g. employment, study, family, medical reasons, international protection or a child protection order), subject to EU or country-specific rules. See also p.6 of PICUM, 2023, [Migration status: A key structural social determinant of health inequalities for undocumented migrants](#)

29 PICUM, 2023, [Key aspects of child protection systems that help protect all children from harm](#)

30 [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, Article 1

31 Charter of Fundamental Rights of the European Union (2012/C 326/02)

32 European Commission, 2020. A Union of equality: EU anti-racism action plan 2020-2025, [COM\(2020\) 565 final](#)

33 European Commission, 2020, [New Pact on Migration and Asylum: A fresh start on migration in Europe](#) COM/2020/609 final. Among others, the plan commits to "counter discrimination by law enforcement authorities" and avoid "profiling that results in discrimination".

34 PICUM, 2023, [Over 50 NGOs pen eleventh-hour open letter to EU on human rights risks in Migration Pact](#), Press release; PICUM, 2023, [EU now poised to lower detention and deportation age to six in shock Migration Pact move](#); PICUM, 2023, [Migration Pact: EU lawmakers flirt with racial profiling in final negotiations](#).

35 European Commission, 2023, [Commission welcomes the major progress achieved by Parliament and Council on the New Pact on Migration and Asylum](#);

36 European Network Against Racism, 2023, [Structural Racism in the New European Union Pact on Migration: A devastating blow to the right to asylum](#). Policy Briefing.

are more likely to be stopped by the police.<sup>37</sup> It can be accompanied by excessive use of force, racist language and violence. It stigmatises undocumented migrants, and, as the FRA has

noted, legitimises and reinforces racism and false stereotyping against people from Africa or of African descent in wider society and among law enforcement officials.

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37 FRA, 2021, [Your rights matter: Police stops – Fundamental Rights Survey](#)

# Recommendations

In the relevant sections, we recommend that the upcoming joint general comment/recommendation:

## Goals

- Stresses how migration policy frameworks perpetrate xenophobia and racial discrimination, and how public policies (e.g. in health, labour, housing, child rights, etc.) fail to introduce safeguards to address the disproportionate effect of migration policies on certain groups (e.g. workers; children; women; people at risk of poverty, etc).

## Key Elements of a Comprehensive and holistic public policy

- In addition to the competent authorities identified in the concept note<sup>38</sup>, targets also competent authorities in the field of migration policy, such as the ministries of Interior, police and border guards, etc.

## General and specific thematic guidelines

- Develops a thematic guideline on safeguarding undocumented migrants from discrimination, which builds on the Council of Europe European Commission against Racism and Intolerance (ECRI) Policy Recommendation N° 16.<sup>39</sup>
- Across all relevant thematic guidelines identified in the concept note,<sup>40</sup> stresses the implementation of strict data protection safeguards so that service providers' data is not accessible nor used for immigration enforcement purposes.
- Includes additional guidelines addressing the following topics:
  - Equal access to secure residence status. This should include :
    - The development of regular migration pathways on a range of grounds;<sup>41</sup>
    - The design and implementation of regularisation programmes for people in the territory<sup>42</sup>
    - Before a return decision is issued (in screening and border procedures as well as in the territory), ensuring a comprehensive assessment of fundamental rights considerations (including but not limited to the right to health care, private and family ties, best interests of the child and non-refoulement) and whether third country nationals fulfil the criteria to apply for an autonomous residence permit or other authorisation granting a right to stay.<sup>43</sup>
    - The design of migration laws that ensure that procedures are affordable and accessible;

38 The concept note identified the following competent authorities: Education; Justice administration; Communication; Health; Labour; Cultural Affairs; Social Protection; Economy; Interior; etc.

39 Council of Europe European Commission against Racism and Intolerance (ECRI) [Policy Recommendation N° 16 on safeguarding irregularly present migrants from discrimination](#), adopted on 16 March 2016.

40 Such as the guidelines on health and other social services, justice administrative, education, child welfare and youth.

41 See also PICUM, 2021, [Designing labour migration policies to promote decent work](#)

42 See also PICUM, 2023, [Regularisation mechanisms and programmes: Why they matter and how to design them](#)

43 See also PICUM, 2022, [Barriers to return: Protection in international, EU and national frameworks](#)



- Promoting the use of proportionate fees, which do not exceed the cost of the services actually provided to process applications and issue permits; <sup>44</sup>
- Promoting equal access to decent work permits across all jobs and sectors, within general work permit systems (for all nationalities), and addressing racial discrimination in recruitment at structural, institutional, and individual levels;
- The design of permits and statuses that prevent people from falling out of status, by including accessible and affordable permit renewal or conversion procedures and criteria, and by making certain that people can access labour and social protection measures without endangering their residence permit. This should include ensuring that people migrating on the basis of family ties have access to independent permits, and that migrant workers can freely change their employment and access transitional permits if they experience rights violations.
- Promoting safety and protection for victims of crime without discrimination based on residence status, including by developing and ensuring access to special permits under EU and national law based on personal circumstances.
- Migration enforcement, which focuses on dismantling legislation and policies that use criminal law in response to migration and effectively prevent racial profiling practices in border controls and policing.
- Employment standards, including by including systems of judicial and non-judicial complaints mechanisms and procedures accessible and effective for all workers, including by ensuring that personal data collected in the context of labour inspections or complaints is not used for immigration enforcement purposes.

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44 See also PICUM, 2023, [The use of fees in residence procedures in Europe: pricing people out of a residence permit?](#)



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