

**PICUM Submission to DG Home Affairs Consultation:
Debate on the future of Home Affairs policies: An open and safe Europe – what next?**

PICUM Five-Point Action Plan for the Strategic Guidelines for Home Affairs from 2015

21 January 2014

The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of more than 160 organisations and 190 individual advocates working with undocumented migrants in more than 38 countries, primarily in Europe as well as in other world regions, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With over ten years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

Introduction

Throughout the EU multi-annual programmes in the area of justice and home affairs, the central goal has been to achieve efficient and effective management of migration, through a balanced and comprehensive EU migration policy. Member states are committed under the Lisbon Treaty to develop 'common' migration and asylum policies. This approach includes supporting the integration and protecting the rights of regular migrants and reducing irregular migration as well as trafficking in human beings. It is supposed to contribute to the EU's economic development and performance in the longer term.

However, over the past decade, an increasing number of international and regional human rights institutions, various regional legislative bodies, civil society actors, and migrants themselves, have identified major shortcomings in the current approach to regulating migration taken at EU level. Failing to reflect the realities of migration and economies in Europe, the current piecemeal approach to regular migration and focus on and treatment of migration as a security issue contradict the above stated objectives of the EU framework.

There has been a clear shift in the EU multi-annual programmes in the area of justice and home affairs, away from the goal of near-equality for all residents in the EU with a strong basis in human rights, to the idea that rights belong to citizens, and that a security approach to migration is needed to protect the fundamental rights of EU citizens. This is contradicted by evidence from the ground that clearly

indicates that increasing securitisation and discrimination against migrants has not reinforced or strengthened the freedom, security and well-being of EU citizens, nor curbed irregular migration. It also ignores and limits the significant economic, social, demographic, and cultural contributions that migrants – regular and irregular - make to the EU.

As migration is not a criminal activity, policy responses which treat it as such are ineffective and inappropriate. Furthermore, the current approach makes migrants - regular and irregular - vulnerable to violence, exploitation and trafficking in human beings, and leads to numerous violations of human rights – and deaths – at borders, in detention centres, in communities. The current approach has disproportionate impacts on migrants that may face multiple discrimination e.g. on grounds of gender or age (women and children) and tears families apart, through restrictions on family reunification, limited family rights for regular migrants, detention and deportation of irregular migrants. This situation contradicts the founding principles and goals of the EU according to the Treaty of the European Union and across all other policy areas, including the obligation of the EU and member states to protect the rights of all people in their jurisdictions, regardless of administrative status.

Five-Point Action Plan

For the strategic guidelines for EU Home Affairs from 2015, PICUM proposes a five-point action plan to address the shortcomings in the current approach and improve the efficiency and effectiveness of EU migration policy, both in the short and long term:

1. Take an evidence-based approach to reducing irregular migration.

When data on irregular migration are carefully contextualised, it becomes clear that the political significance of irregular migration far outweighs its numerical significance. DG RTD (FP6) [Clandestino](#) and Undocumented Workers in Transition projects were the first that systematically and scientifically gathered and analysed available data on irregular migration in the EU, and identified that:

- Previous numbers of undocumented migrants quoted in EU policy documents (8 million) were significant overestimations – up to 3.8 million undocumented migrants lived in the EU in 2009.
- Increasing restrictions on mobility, residence and employment through criminalising measures has not halted irregularity.
- Irregular entry is the *least common* pathway into or cause of irregularity.
- The most common reasons why migrants are undocumented are: loss or expiry of regular status due to loss of employment, breakdown of a personal relationship, refusal of an asylum application, difficulties to fulfil administrative requirements and administrative delays.

The causes of irregular 'migration' are linked to the existing migration policy framework. The limited regular channels for migration for work and family reunification meet neither the needs of potential migrants and their families nor those of employers and the labour market, particularly in key sectors (often low-wage). For example, the increasing need for migrant domestic and care workers in the European Union is not addressed with fair migration policies for domestic work. Further, the existing channels are too inflexible, tying migrants to a particular employer or personal relationship in such a

way that they lose their status as soon as difficulties arise. Shortcomings in the existing policy framework for regular migration, as well as asylum systems which employ strict interpretations of qualification criteria (leading to low recognition rates and high rates of appeal and people denied protection but unable to return to their countries of origin) are at the root of most irregular residence and work in the EU.

Nevertheless, political commitment and considerable financial resources have been and continue to be invested in border management, and in punitive measures such as detection of irregular migrants, detention and deportations, as the main ways to tackle irregular migration to Europe. Criminalisation of irregular entry or stay and of those providing humanitarian assistance to migrants is also increasingly common, or increasingly enforced. These punitive measures are disproportionate, ineffective, and bear significant costs – human, social and financial.

The criminalizing discourse around detaining irregular migrants feeds negative perceptions of migrants in communities and can cause social tensions, violence and xenophobia. Financially, significant sums of EU funding are being used to finance the construction and management of detention facilities, despite EU and international law stipulating that detention should only be used as a last resort.

Recommendations

Regular channels:

- Develop more evidence-based policies on migration that include regular channels for migration for low-wage employment, including domestic work, with rights for migrant workers in line with international human rights and labour standards and respecting the principle of non-discrimination and the right to family unity. The EU and member states should implement international labour standards for all workers in the European Union.¹ Harmonising standards regarding admission and rights does not preclude member states' sovereignty to decide on individual applications (considering all relevant information).
- Tackle disproportionate restrictions on family reunification.

Loss of status:

- Ensure migrants have access to independent permits. For example, where a person's residence status is linked to a personal or employment relationship, a bridging visa system should enable those who would lose their status due to relationship breakdown to have a period of time to apply for a new residence permit, through alternative employment, grounds relating to connection to the country, humanitarian, international, or other protection grounds.
- Promote permanent mechanisms for undocumented migrants to regularise their status on the same grounds, within EU member states.

¹ This should include ratifying and implementing the UN Convention on the Protection of the Rights of All Migrant Workers. A study carried out by IOM's International Migration Law Unit and Regional Office in Brussels for the European Parliament on the *Current challenges to implementation of the International Convention on the protection of the rights of all migrant workers and their families (ICRMW)* found no major obstacles for member states to ratify it (available online at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROI_ET\(2013\)433715_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROI_ET(2013)433715_EN.pdf)).

- Invest resources in services that help migrants maintain their status and facilitate re-documentation or regularisation through providing information, support and counselling about future prospects, regardless of status.

Stakeholder dialogue:

- Ensure structured dialogue with stakeholders, to concretely and regularly incorporate an increasing body of evidence gathered by practitioners, think tanks, human rights bodies and academics in policy-making, monitoring and evaluation. The proposal to widen the scope of the current Integration Forum to the Migration and Integration Forum should also provide the space for civil society to address the wide range of issues at stake in EU migration policy.

Fundamental rights in immigration control

- Ensure that border control and punitive measures – apprehensions, detention and deportation – are always carried out in full compliance with human rights standards. This should include implementation of the [EU Fundamental Rights Agency's \(FRA\) guidelines on apprehension practices](#), which stipulate the need for a clear separation or 'firewall' between the provision of services and immigration enforcement, in terms of apprehensions and data protection (including ensuring there is no duty to denounce or criminalisation of assistance).
- Clarify the position of the EU, and Facilitation Directive in particular, that humanitarian assistance and renting accommodation to undocumented migrants should not be criminalised (unless under exploitative conditions).
- Foster agreement that irregular entry and stay should not be criminalised in the European Union.
- Ensure that the fundamental rights of migrants are guaranteed in any actions resulting from EU agreements and cooperation with third countries; while outside EU territory, such practices are within the EU's jurisdiction.

2. Ensure due process and justice is guaranteed in legal procedures, including in migration-related decisions.

All EU and national legislation within the EU must comply with human rights and mention is systematically made to these guarantees. However, the processes and decisions which result in rights violations in practice largely arise in the absence of due process and implementation of procedural safeguards to ensure that human rights are upheld, and migrants are treated equally before the law. While mentions are made they are rarely operationalized. Fundamental procedural rights such as the right to information in an appropriate language, the right to a fair trial, the right to an appeal and best interests of the child assessment and determinations, are regularly denied or performed in a meaningless and insubstantial manner in the context of migration. Therefore, despite minimum rights guaranteed to migrants in the processes of return procedures and sanctioning of their employers, their rights are being violated daily in practice.

Access to justice is also paramount in the context of criminal, civil and labour law. Migrants regularly face immigration enforcement as a result of reporting violence, crime and other forms of exploitation, as

well as discrimination within family court proceedings. This situation breeds impunity for crime, and undermines the rule of law. It can also be the cause for loss of status.

Recommendations

Procedural guarantees:

- The EU must ensure that rights are not violated in practice, particularly within the framework of EU law, with emphasis on the necessity of operationalizing procedural guarantees throughout all stages of migration related processes. An independent complaints mechanism with suspensive effect should be implemented.

Access to justice:

- Ensure that undocumented victims of crime and labour exploitation (including forms of labour exploitation not covered by criminal law) are able to report incidents to the relevant authorities and access justice without the risk of being subjected to immigration enforcement as a result. A clear separation must be in place between access to justice and redress mechanisms and immigration enforcement. Open removal instructions or deportation orders must be suspended to ensure participation in proceedings. These provisions are vital for proper application of the Employers Sanctions Directive and to tackle trafficking in human beings.
- The EU Victims of Crime Directive must be fully transposed and implemented to ensure equal rights and access to support services for undocumented victims of crime. DG HOME should coordinate with DG JUST regarding guidelines to member states to ensure this issue is specifically addressed, facilitate the exchange of good practices and plan monitoring and evaluation accordingly.
- Invest resources to build member states capacities to ensure legal representation, legal aid and procedural safeguards.

3. Tackle discrimination against women and promote equality.

Existing policies governing the entry, residence and employment of migrant women pose gender-specific challenges that are rarely recognized or addressed. Contrary to EU objectives to fight gender-based discrimination and violence and promote gender equality and women's rights, migration policies often push migrant women into situations of legal and financial dependency, particularly in relation to their residence status, and place them at risk of violence, exploitation and abuse. This is even more marked when women are undocumented. Across the EU undocumented women risk arrest if they report violence to the police and are denied access to shelters and support services. Perpetrators targeting those with an insecure residence status are rarely held to account and the lack of political will to address this situation has fostered a culture of impunity. Undocumented women have effectively become Europe's zero-risk victim. By linking immigration control mechanisms with access to justice and services, the existing policy framework is not only increasing the suffering of migrant women, but is putting the right of all women to live a life free from violence under threat.

Recommendations

Take gender-specific experiences into account:

- Conduct a gender-analysis of EU policies on asylum, family reunification, labour migration and irregular migration (including measures which limit access to services, such as health care and shelter) and redress gender discrimination; in particular, how existing policies place migrant women at disproportionate risk of violence, exploitation and abuse, and of becoming undocumented. Ensuring access to independent status and to services is crucial.
- Ensure migrant women – both with regular and irregular migration status – are explicitly included in EU initiatives to address gender-based discrimination and violence, including the development of indicators, data collection and funding programmes.
- The EU and member states should implement CEDAW General Recommendation No. 26 on women migrant workers, which gives clear guidance on how to define gender-sensitive migration policies.

Violence against migrant women:

- Pay specific attention to the situations of migrant women on dependent visas and undocumented women in the transposition, implementation, monitoring and evaluation of the Victims' Directive (see point 2) to ensure an effective de-linkage of immigration control mechanisms from access to justice and essential services for victims of crime.
- The EU and member states should implement the UN Migrant Workers' Committee General Comment No. 2 on undocumented migrant workers, which makes specific reference to violence against undocumented women and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), to ensure effective protection for all migrant women experiencing violence.
- Address the specific protection needs of female migrant in the EU, regardless of the status of the work (declared or undeclared) and the worker (regular or irregular).

4. Develop measures to ensure protection of all migrant children, including those that are accompanied by their parents or other caregivers.

The European Union has reaffirmed its commitment to children's rights and the Convention on the Rights of the Child in the Lisbon Treaty and the Charter of Fundamental Rights (Article 24), and all EU member states are legally obliged to ensure its implementation. The Committee on the Rights of the Child has made clear that every child in the context of international migration should be treated as a child, first and foremost, and that the Convention applies equally to all children, regardless of residence status. While some children – such as those who are unaccompanied or trafficked - have specific protection needs, the Committee has stated that there must be no hierarchy of protection and rights and urged a less categorical approach appreciating that migrant children change between statuses at various points in their migrations (e.g. they may migrate unaccompanied in order to join a family member in the EU). The Council of Europe Parliamentary Assembly and Commissioner for Human

Rights, and the European Parliament, have also made important declarations along these lines in recent years, alongside critical jurisprudence from the European Court of Justice, European Court of Human Rights and European Committee on Social Rights reaffirming undocumented children's rights in Europe. Nevertheless, the EU and DG HOME in particular have currently limited their actions regarding migrant children to unaccompanied children and child victims of trafficking.

At the same time, there are numerous and systematic violations of the rights of migrant children throughout the EU. Children are given little independent consideration in decisions on applications for asylum and migration of their parents, making them more vulnerable to becoming undocumented. Undocumented children are subject to restricted access to essential services including education and health care, arrest, detention, deportation and family separation. EU and member states policies on migration and reducing irregular migration violate children's rights, and directly harm children's well-being and development, in the short and long term.

Recommendations

Child rights strategy:

- All EU legislative and non-legislative measures should be reviewed and adapted to ensure full compliance with child rights. Legal safeguards in EU and national law and policy, such as due consideration of the best interests of the child in decisions on immigration, asylum, detention and deportation, should be operationalised and implemented in practice with support from the European Union.
- Ensure the scope of EU action is widened to address the situations of all migrant children, including those that are accompanied by their parents or other caregivers. Their rights must also be protected.
- Strengthen the measures being developed for unaccompanied children, and adapt them to protect children who are accompanied by their parents or other caregivers where relevant. For example: measures to ensure that Best Interests of the Child Determination assessments and procedures are included in all migration-related decisions with the involvement of appropriate child protection and welfare specialists; measures to ensure access to information, legal representation, a caseworker to follow the family's case from the start and to explore all potential future prospects; and psychosocial and medical services, should be promoted. Children should never be separated from their parents for the purposes on immigration control or due to parental poverty alone.
- Measures should also be developed to ensure equal treatment in terms of access to services, protection and justice for all migrant children, regardless of whether they are accompanied by a parent or other caregiver, and regardless of their or their parent's migration status. For example, the planned guidelines on child protection could be an initial soft-law mechanism at EU level.
- Promote permanent mechanisms that enable children and young people who have resided for a number of years in the European Union to access secure, long-term residence status and citizenship, regardless of their or their parents' residence status, particularly if they have been born in an EU member state.

Detention:

- Take up the guidance of the Committee of the Rights of the Child that detention of a child because of their or their parent's migration status always constitutes a child rights violation and contravenes the principle of the best interests of the child, and adapt interpretation and application of relevant EU legislation governing the detention of migrant and asylum-seeking children and families accordingly. Ending the immigration detention of children in the EU should be a tangible goal for the EU within the next strategic framework.
- The EU must guide and support member states in developing alternatives to detention – both for unaccompanied children as well as undocumented children accompanied by their parents. Alternatives to detention must be implemented for the whole family.

Coordination:

- The rights of every child in immigration and asylum procedures should be concretely mainstreamed throughout EU policy, through improved structural coordination with the Child Rights Coordinator and other relevant DGs. For example, with DG JUST to ensure all migrant children are included as a priority in the EU's strategy on child rights post-2014 and to promote access to child-friendly justice for children involved in migration and asylum processes and criminal or administrative justice proceedings, as well as with DG EMPL, to promote the implementation of the European Commission Recommendation "Investing in Children" for all migrant children.

Data collection:

- Promote systematic and comparable disaggregated data collection on children involved in migration and asylum processes in EU member states for inclusion in Eurostat. Data should be available on the numbers of children making or involved in applications and the outcomes of those applications, and the numbers of children subject to immigration enforcement measures, such as detention and deportation. Personal data protection must be ensured.

5. Improve policy coherence through an integrated, credible and comprehensive approach to migration.

The current policy approach to migration contradicts other legitimate EU and member states' interests – such as reducing undeclared work and exploitative working conditions, maintaining the rule of law, having accurate data on resident populations, procuring taxes, and protecting fundamental rights. There is an urgent need for better accountability and transparency at the EU policy level on the situations facing up to 3.8 million undocumented men, women and children who are residing in the EU, living in our communities and contributing to our economies, and the impacts that policy measures aiming to curb irregular migration have on every person and other policy objectives.

This is not just an issue of preventing entry and facilitating return, which is the primary focus area of DG HOME concerning irregular migration. Examples of other DGs also concerned by irregular migration and the living and working conditions of undocumented migrants in the EU include:

- DG EMPL: undeclared work, wage theft, intimidation and dangerous working conditions are an employment issue, regardless of the status of the worker; and increasing homelessness, poverty and exclusion are a social affairs and inclusion issue;
- DG SANCO: difficulties facing undocumented parents to have their children vaccinated and persistent health inequalities are a public health issue;
- DG EAC: barriers to adolescents and youth finishing their education and developing skills are an education issue;
- DG JUST: the impunity currently benefitting perpetrators who target women on grounds of residence status and systematic violations of fundamental rights and exploitation of a group of people due to their residence status is a justice issue.
- DG DEVCO: people being compelled to migrate because they have limited or no opportunities to make a living, because their human rights are being violated, or due to gender discrimination and inequality in their countries of origin is a development issue.
- EEAS: provision of financial and technical assistance to third countries to increase their border management and prioritisation of readmission agreements in cooperation with third countries, without accountability for the human rights implications, are a foreign policy issue, which risks undermining the credibility and consistency of the EU's external action.

Failing to address the situation endured by undocumented migrants in each of these domains lowers the acceptable standard of living, working, health and justice standards for all in the EU. Further, the current criminalising discourse and approach to migration is contributing to the rise in xenophobia and racism in Europe. Undocumented migrants are precisely the type of group for whom the international human rights regime was designed to protect - their right-to-rights are continuously called into question. It is only by upholding minimum decent standards in all sectors that the EU can effectively suppress abuse, reduce irregularity, combat racism and discrimination, and achieve smart, sustainable and inclusive growth.

Recommendations

Fundamental rights strategy:

- Recognise the legal competency of the EU to pursue and promote measures to protect fundamental rights of all people within its jurisdiction, regardless of residence status, based on the Treaty of the European Union (fundamental rights, dignity, anti-discrimination and social cohesion), the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights, the ratification of EU member states to the international and regional human rights instruments, and their necessity to achieve EU policy objectives in areas of EU competence and common action.
- Install a Fundamental Rights Coordinator with the mandate and resources to:
 - Bridge competencies of DGs to ensure accountability.
 - Coordinate amongst migration “focal points” in relevant DGs to ensure policy coherence – that the policy objectives of other DGs are not being contradicted and undermined by migration policies, to manage discrepancies based on evidence and address contradictions, as well as mainstream the rights of migrants into the relevant policy areas

(employment, health, education, justice, development, gender equality, children's rights, etc.).

- Monitor the implementation of human rights and procedural safeguards for migrants and develop specific actions to operationalise and ensure application in practice.
- Recognise the need for and work towards a separation between immigration enforcement and the provision of services, protection and justice or “firewall”, using the FRA's guidelines on apprehension practices as a key mechanism.
- Foster realistic, evidence-based and pragmatic policy-making on migration and the inclusion of migrants through EU policy discussions, peer reviews and exchange of good practices (soft law/ coordination measures)
- Encourage EU member states to ratify and fully implement the international and regional human rights instruments, and take steps towards the EU acceding as an independent party where technically possible.
- Engage and consult regularly with stakeholders
- Ensure the use of correct terminology (“undocumented” or “irregular”)

Funding:

- Redress the imbalanced allocation of EU funds towards migration management measures and ensure adequate funding to support inclusive services, integration measures and access to justice for all migrants, irrespective of migration status.
- Implementation of the new EU Migration and Asylum Fund, as well as the European Social Fund, should ensure that services for all migrants, regardless of their residence status, are able to receive funding, and address the various legal, administrative and practical barriers to frontline organisations accessing the Funds.