1. Introduction

- For the past 12 years that the EU has had a common immigration policy, fighting irregular migration has been one of the main elements
- Migration control policies on EU level have focused on prevention, surveillance of borders, returns, readmission agreements, criminalization
- While reinforced budget for migration management at EU level, migration – and irregular migration is a reality, with continuous presence of UDM in Europe: DG Research Clandestino estimated up to 3.8 million UDM
- On EU level, notable absence of policies addressing fundamental rights of UDM
  - Very few protections afforded to them have been within the context of prevention of irregular migration (Employers’ Sanctions and Returns directives)
- Against this backdrop, would like to commend the FRA for its leadership role in addressing and bringing visibility to one of the most pressing and urgent fundamental rights issues in Europe today:
  - Systematic exclusion of part of the population from access to basic social services and to justice, due to irregular immigration status
- FRA’s reports:
  - They are a breakthrough, since for the first time, we have a clear picture in the EU27 about legal entitlements and barriers in practice to fundamental rights of UDM
  - Building on existing studies and compiling new data, the research incorporates input from wide range of actors, including practitioners, policy makers, and undocumented migrants themselves

2. Challenges in Protecting the Rights of UDM

2.1. Fair working conditions
• Addressing working conditions is crucial to addressing situation of UDM in Europe:
  o Irregular status makes UDM ineligible for social assistance, so bound to informal labor market as a means of survival.
  o Unless they are children, elderly, or seriously ill (and hopefully even in those situations not working), the majority of UDM are undocumented workers.

• FRA report: in majority of EU member states, labor laws guarantee fair remuneration but situation often unclear or subject to different interpretations (legal framework often already exists)
  o Situation in practice throughout EU demonstrates that almost impossible for UDM to claim overtime, unpaid wages, sick leave, holidays.
  o Most often employers threaten to report the undocumented migrant to the police, or end the working relationship when a complaint is made
  o Practical administrative obstacles to realizing these labor rights, including lack of identification, difficulty to prove the working relationship, lack of bank account, costs of bringing forth a case in labor courts, inability to make any formal complaint with labor inspectors when police raids are carried out on the workplace and workers put in detention centers and deported.

• Practitioners working closely with UDW have led the way in finding creative, pragmatic solutions in cases of exploitation and abuse: *(Ten Ways)*:
  o Informing, empowering UDM that they have rights
  o Unionizing UDM
    ▪ “A worker is a worker!” – at the heart of the issue – inherent labor rights
  o Campaigns, public awareness-raising to address demand (e.g. consumer campaigns especially in the agricultural industry)
  o Mediation and collective actions
  o Legal jurisprudence in national legislation on undoc. workers:
    ▪ Two supreme court rulings have clarified the inherent labor rights of UDM, that they can take legal action against their employers in court regardless of their immigration status:
      • Nov. 2007: Greek Supreme Court
      • 14 May 2002: Spanish Supreme Court
    ▪ Lower courts in NL, FR, B, Ireland: workers’ compensation, back wages
    ▪ More case law should be established in this regard
  o Establishing cooperation between migrant communities, NGOs, trade unions, and governmental agencies (e.g. local authorities, labor inspectorate, dep’t of...
Applying these rights in practice is *only* possible if strict FIREWALL is established between immigration law enforcement and basic rights.

- One of the biggest obstacles to upholding these rights: FEAR of being detected, which could lead to deportation
- Testimonies from UDM in videos: couldn’t complain about being exploited by employers

**FRA opinions:**
- UDM should have possibility to lodge complaint against abusive employers without fear of expulsion – safeguards should be established so that personal data is not shared with immigration enforcement bodies.
- Crucial that the various mechanisms for protecting UDMs’ labor rights are upheld in transposition of Employers’ Sanctions directive
- Labor inspectors should uphold task of enforcing labor conditions

### 2.2. Access to Health Care

- Wide divergence across the EU concerning legal entitlements of UDM to HC
  - In many EU MS, UDM are legally entitled to HC beyond emergency care services if they fulfill specific conditions
  - In some countries, UDM cannot access cost-free HC services beyond emergency care; and even then, some countries allow UDM to access emergency care only if they pay.

- *Is requiring an UDM to pay for emergency care services (e.g. giving birth in Sweden can be minimum 2,000 Euros) fair and in conformity with human rights obligations?*

- **What is impact of not providing health care to UDM?**
  - Worsening of the health condition of the migrants
  - *Increasing expenses to state* (emergency care more expensive to cover than preventative care)
  - Health professionals caution, potentially creating wider risks to community health.

- Restricting access to social services, particularly health care, has been used a tool of migration management by some member states, in order to make life miserable and unbearable for UDM – to encourage a more speedy return and act as a deterrent effect
for future irregular migrants
  o July 2009 - Italian parliament adopted “the Security Package” which criminalized irregular entry and stay in Italy. Draft proposal had a measure which would have required health professionals to denounce their patients to the immigration authorities.
    ▪ Campaign “We Are Doctors! We Are Not Spies!” was successful in overturning that provision in the bill.

  • Health professionals, often working closely with NGOs, have played a crucial role in realizing the right of UDM to HC and in advocating for a change in legislation:
    o 141 health organizations representing over 3 million health professionals in Europe signed a declaration which was handed to the European Parliament on 22 March 2011, urging EU institutions and MS to take action to allow health professionals to respect their medical ethical obligations
      ▪ Eur. Parliament issued a resolution on “Reducing Health Inequalities in the EU” (8 March 2011), which calls on MS to tackle health inequalities in access to HC for UDM.
    o In Sweden, the “Right to Health Campaign,” made up of more than 45 major NGOs and trade unions, has pushed for legislative reform to enable access to HC for UDM; now awaiting public consultation following a parliamentary inquiry on this issue
    o In the Nordic countries, in the absence of effective access to mainstream health services, voluntary clinics have been set up in many cities throughout the region to enable UDM to access basic health care without fear and debt

2.3. Children in an irregular migration situation

  • Focus on separated children in the policy and public debates around migrating children has also been accompanied by almost a complete lack of consideration of children who are with their parents or other caregivers.
  • Families with children in an irregular migration situation are subjected to the same restrictive policies on irregular migration without due consideration of the best interests of the child.

“Undocumented migrant children in an irregular situation: a real cause for concern” – adopted on 7 October 2011

- “A child is first, foremost and only, a child. Only then a migrant.”
- Lack of and unclear legal entitlements to primary and secondary education, health care and housing means that these children face high risks of poverty, exploitation, social exclusion and violence

- Professionals, particularly in the field of education, have underlined that discrimination of undocumented children has detrimental impact on the psycho-social development of these children, and also has an impact on their peers the wider society:
  - Parent of a 9-year old undoc. Brazilian girl in Belgium told one of our member organizations that she has been enrolled in a private school for 3 years, but has never been able to participate on any extra-curricular activities with the group due to irregular status
    - “Mom, why am I different?”
  - Video testimony from Quoc Pham, a 22-year old young man from Vietnam, has been in NL since the age of 11. Vietnamese gov’t doesn’t accept him to return to Vietnam, and NL doesn’t issue him a residence permit, so he is a non-removable UDM.
    - “I don’t have a possibility of studying any more, or working. I want to have a normal life, like everyone. As a young man, I feel that I should have a chance in this life, but I don’t know what I should do in this situation.”

- Responsibility to find solutions for desperate families facing poverty and destitution overwhelmingly falling on local actors – NGOs, local authorities, churches, etc.
- Many local authorities overwhelmed by volume of undocumented families in their districts
  - PICUM workshop in London: one LA referred to 50-60 families With No Recourse to Public Funds (NRPF) being supported in temporary accommodation;
  - Good practice: The London-based NGO Praxis has been working closely with its Local Authority in the Borough of Tower Hamlets to address this issue. Tower Hamlets Council has issued guidance to its frontline staff on local authority duties and how to deal with people with NRPF, in order to harmonise standards of response.

- More effective cooperation on the fundamental rights of irregular migrants should be promoted at local, regional, national and European level.”
- Local level actors should also be allowed to access financial frameworks that would enable them to carry out much-needed work:
  - “Actions supported through the current and future EU Funds in the area of freedom, security and justice, such as the External Borders Fund, the European Return Fund, the European Refugee Fund, and the Integration Fund, need to take into account the respect of fundamental rights of irregular migrants.”

Integration Fund, Integration Strategy in particular should address fundamental rights of UDM, particularly since families with children have always been a priority group for those regularized in many countries (through integration)

2.4. Social Support and Protection from Gender-Based Violence

- Many women migrating to Europe for work or for family reunification:
  - Control of immigration status generally given to an employer or spouse
  - This status can be withdrawn if the relationship breaks down.
  - This dependency creates power imbalance which very often leads into violence.
- Structural barriers to report violence to the police or pursue legal remedies: inability to hold perpetrators accountable - “zero risk” victim.
  - France: CIMADE “Do Not Hesitate” campaign: In over one third of cases of foreign victims of violence in 75 police stations across Paris, undocumented women face direct risk of expulsion if reporting violence.
- Numerous administrative and financial barriers prevent undocumented women from accessing shelters and other support services for victims of violence.
- Spain: “Gender Based Violence Act” (2004): protection of undocumented migrant women most comprehensive in the EU:
  - Right for a court order for UDM which provides legal protection.
  - Right for temporary protective order and receive a residence and work permit from the authorities.
- Administrative file for irregular status automatically suspended until resolution of criminal proceedings.
- Instruction issued to all police stations to inform them of protocol for dealing with undocumented women victims of domestic/gender-based violence.

- **France:** Law on Violence Against Women (9 July 2010): Prefect has the obligation to give a temporary residence card to UDM victims of violence; in cases of condemnation of perpetrator, residence card can be delivered to UD victim.

  - *Law on violence against women of 2010*: the “ordonnance de protection” states that the Prefect has the obligation to give a temporary resident card to UDMW victims of violence, as soon as possible. In cases of condemnation of the perpetrator, a resident card can be delivered to the UD victim. [LOI n° 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants]
    - “The French law on violence is a copy/paste of the Spanish law on GBV, but a bit weaker. We inspired ourselves very much from the Spanish law for our “ordonnance de protection”. French deputies went to see how the law worked in Spain and exchanged a lot with their Spanish colleagues.” (La Cimade).

  The ‘Collectif national pour les droits des femmes’ has set up a vigilance committee to control the application of the law. This committee includes associations, elected representatives and justice professionals.

- **FRA EU-wide survey on violence against women** should include focus on undocumented women, and barriers they face to accessing services and justice.

  - Should address undocumented migrant victims of violence and the obstacles that they face in accessing protection and justice.

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3. **Final conclusions**

1. **Strengthen legal mechanisms to uphold rights**
   - Monitor implementation of Charter of Fundamental Rights
   - Ratify and implement the UN Convention on the Rights of Migrant Workers and their Families, in order to protect the basic human rights of migrants.
     - UN Migrant Workers’ Committee: General Comment on undoc. migrants.

2. **Address the multiple legal, structural, financial and administrative barriers** which prevent UDM from accessing essential services and justice.
1. Ensure a firewall so that professionals, local authorities, labor inspectors, etc. are not tasked with immigration law enforcement so that undocumented migrants can access services and also safely report abuse.

2. EU Anti-Poverty and Social Cohesion framework:
   - National Reform Programs (which are charged, under the Europe 2020 Strategy, with delivering the EU poverty-reduction target) should have particular focus on the situation faced by undocumented migrants.

3. Promote the regularization of undocumented migrants and improved access to regular channels for migration as policy solutions.
   - As many undoc. migrants become UDM “through no fault of their own”, trying to address problems in the system that create these categories.
   - EU Seasonal workers’ directive: may represent increased channel for legal migration; draft version contains proposed amendment to allow for transitional period for workers currently employed irregularly in the sector.

4. Role of local actors (NGOs, local authorities, professionals, etc.) is crucial.
   - Those providing humanitarian assistance to UDM should not be criminalized.
   - UDM should be a specific thematic focus in funding mechanisms.
   - EU could play a role in establishing dialogue with these actors on the ground (e.g. through consultation mechanisms).

5. Address public perception of migrants with proper terminology.
   - Stop using terms “illegal immigrants” and “illegal immigration,” and instead use “irregular migration” or “undocumented migrants”.
     - UN General Assembly 1975 recommendation; UN treaty bodies; Council of Europe – none use “illegal” and all refer to “irregular” or “undocumented”