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Migrants with Irregular Status in Europe

Evolving Conceptual and Policy Challenges

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Human Trafficking and Exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes" (with E. Galos, H. Cook, and N. Grant, IOM 2017), "Drivers of Highly Skilled Mobility from Southern Europe: Escaping the Crisis and Emancipating Oneself" (with A. Triandafyllidou and R. Gropas, JEMS 2017), and "Southern European Highly Skilled Female Migrants in Male-Dominated Sectors in Times of Crisis: A Look into the IT and Engineering Sectors" (with R. Gropas in A. Triandafyllidou and I. Isaakyan, Palgrave 2015).

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Chapter 1
Migrants with Irregular Status in Europe: A Multi-faceted and Dynamic Reality

Anna Triandafyllidou and Sarah Spencer

1.1 Introduction

This book explores the conceptual challenges posed by the presence of migrants with irregular immigration status in Europe and the evolving policy responses at the European, national, and municipal levels. Set in the context of recent patterns of migration and residence of migrants with differing forms of irregular status, this edited collection addresses the conceptual and policy issues raised, *post*-entry, by this particular section of the migrant population. This volume seeks thus to go beyond a vision of irregular migration as a crisis or a temporary emergency. By contrast, we look at the continuity of the phenomenon, its different facets and how they evolve as we seek to offer new conceptual tools for better understanding a complex reality.

Digging beneath common assumptions and polarised discourse, the book highlights the shades of grey that have been revealed by empirical findings of social realities such as the contrast between dominant representations of illegality and the actuality of semi-inclusion, or the tensions and trade-offs in policy responses that reflect competing policy objectives. In this volume we explore irregularity as a structural characteristic of contemporary western societies but yet fluid in its forms and implications. We conceptualise irregularity as a multi-faceted status with life changing implications for individuals as well as a driver of innovative policy change that has created friction in multi-level governance relationships particularly between local and national authorities.

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Necessarily multi-disciplinary in approach, contributions to this volume take the reader through philosophical and ethical dilemmas, legal and sociological analysis to questions of public policy and governance before addressing the concrete ways in which those questions are posed in current policy agendas, from the international to the local level.

Given the variety of situations that the label 'irregular status' entails and the different policy approaches as well as practices on the ground, this book gathers evidence from different parts of Europe. Different chapters complement each other through a deep dive into European regional and country case studies and a focus on key sectors of the labour market, conveying the breadth of significance of the issue while recognising significant differences in the forms of and responses to irregularity in different States and localities.

Irregular migration is a multifaceted, dynamic phenomenon that attracts disproportionate media and political attention. Migrants represent 3.5% of the world's population—notably a rather small fraction—and of those, according to recent estimates, migrants in an irregular situation represent between 15% and 20%. This would thus mean approximately 1% of the total world population, which still would involve 30–40 million individuals worldwide (UN OHCHR 2014; ILO 2015). Naturally such figures are estimates and vary among continents. Irregular migration is pervasive in some sectors and areas of Asia and Africa, reaching and exceeding 50% of the migrant population. It is quite extensive in North America (according to Rosenblum and Ruiz Soto's 2015 estimate there were 11 million irregular migrants in the US in 2013) but quite limited in Europe, where the most recent comparable estimates (Kovacheva and Vogel 2009) put the number of irregular migrants between 1.9 and 3.8 million in 2008 while a decade letter the Pew Research Centre (2019) estimates the same number to be between 2.9 and 3.8 million. There are reasons to believe that irregular migration may have slowed during the economic and financial crisis in Europe and the United States, a trend that might have been partially reversed due to the most recent developments affecting asylum-seeking and irregular migration to Europe from both Africa and Asia. It is nonetheless remarkable that the highest number in the estimates' range has remained rather stable despite the 2010s having been a turbulent decade.

Irregular migration involves different types of irregularity—legal entry and irregular stay, entry with fake documents, entry and abuse of the terms of stay, to name a few. However as irregular migrants are human beings like anyone else, they are active in both the public and private space: they find employment (usually without appropriate documents) and accommodation, have families, health and education needs; sometimes they actively contribute to their communities despite their irregular status, and advocate for policy change. They thus pose multiple governance, political, and moral challenges at the local, national, and European levels.

Our theoretical understandings of irregular labour migration can still be summarised largely in what Portes (1978) called the 'structural determinants in both sending and receiving countries': that is, the demand for cheap, irregular labour in receiving countries coupled with the demographic and economic pressures of booming young populations in sending countries. Restrictive policies 'generate' illegal residence status and irregular work to the extent that they make it very difficult for

both migrants and their employers to regularise their situation as they have two hurdles to overcome: migration legislation and labour law. Patterns of irregularity have increasingly diversified over time, including children born of undocumented parents, visa over-stayers and migrants who lost their legal status because of unemployment/non-compliance with some of the law's requirements, and rejected asylum seekers. As migrating legally to the EU and other western countries has become increasingly difficult, some have argued that irregularity can be a part of a labour market strategy that provides for a cheap and plentiful workforce for some sectors of the domestic labour market until some manage to regularise their status and remain (Jordan and Düvell 2002).

During the last decade, Europe has experienced two large indirect regularisation waves through the successive Enlargements to the East, in 2004 and 2007. Citizens of 'new' member states who were irregularly residing/working in the 'old' member states, through becoming EU citizens, could then shift to a regular stay with full socio-economic and labour rights. This change from irregular to regular residence did not automatically translate into jobs in the formal economy. Nevertheless, enlargements have significantly reduced the presence of irregular migrants within the EU, thus reducing the pool of people potentially involved in irregular employment because they had no right to stay/work in the EU.

The current volatile geopolitical context since the Arab spring and protracted conflicts in the Middle East and North Africa, coupled with the fragile recovery from the global financial and Eurozone crisis, creates a particularly dynamic environment within which the temptation of irregular forms of employment for both employers and foreign workers is high. On the one hand, we are likely to be facing a growing pool of people with uncertain migration/asylum status who cannot work legally. This pool includes irregular migrants (who entered illegally or with fake documents) and rejected asylum seekers. On the other hand, there is also a growing pool of people with tolerated or short-term legal status, people who do not have the necessary administrative knowledge to apply for a work permit, asylum seekers whose application is being processed, irregular migrants who cannot be returned to their countries of origin, and people with some sort of temporary or indeterminate status. In addition, in many European countries there continues to be a strong demand for cheap labour in several sectors of the economy, where irregular employment can contribute to savings and more flexibility for the employers, thus increasing their competitiveness. In a context of the economic fragility of many European countries, labour law reforms to reduce labour costs and increase flexibility rather than investments in re-structuring and boosting productivity are being implemented at a sustained pace (as in France, Italy, Portugal, and beyond).

1.2 Evolving Conceptual and Policy Challenges

In this complex reality of different types of irregularity and contrasting social and economic interests and forces around irregular migrant stay and work, we have observed competing imperatives leading to trade-offs in policymaking and the

emergence of a complex, multi-polar and multi-level process of governance. The process is multi-polar in the sense that it involves different actors such as enforcement agents, employers, trade unions, citizen groups, migrant associations, academics and experts and, of course, the media.

It is multi-level because its governance materialises at the local level, under national and transnational (European) rules, with a high degree of discretion (as often happens in many types of public policies) at the street-bureaucracy level. In addition, we witness the emergence of different types of actors competing with the national state for legitimacy and authority in this field. These include local authorities—notably cities and towns—as, more often than not, irregular migrants reside in urban centres. It is local authorities that are faced directly with the challenges of providing services and ensuring the respect of their fundamental rights while at the same time guaranteeing public order and social cohesion. The realities of providing shelter and access to basic health services, guaranteeing education for children, ensuring the right to family unity and a family life for migrants in an irregular situation, often contrast with rigid national regulations sanctioning irregular residence and requiring expulsion orders or indeed removal of irregular migrants and their families. Local and regional authorities are among the actors that have challenged national policies in the courts, contributing (with judicial activism and civil society test cases) to an evolving jurisprudence and intervention by human-rights monitoring bodies at national, European, and international levels. The semi-inclusion that emerges raises questions about our notion of citizenship—part of the conceptual framework on this issue that the contributions to this book explore.

The local challenges of irregular migration are also acutely felt by civil society actors. There are a number of civil society organisations that work to provide assistance and shelter to irregular migrants and particularly to minors and families. At the same time there are far-right groups emerging that seek to prevent such work and engage in campaigns of intimidation and stigmatisation of irregular migrants (or migrants and asylum seekers in general).

It is our contention that there are therefore important developments at the social, economic, political, legal, and policy levels which concern the realities on the ground of irregular migrants, their work, and their civic involvement as well as the modes of governance operated by local, national, and European actors to manage irregular migration.

This book complements a longer literature addressing irregular migration in Europe by pointing to recent developments relating to migrants post-entry. The situation of irregular migrants in Europe is in transition and the first key feature of this book is its focus on change—on highlighting new conceptual analyses that have emerged to help explain this rapidly changing and complex phenomenon. Likewise, it focuses not on law or policy *per se* but on evolving legal and policy frameworks, their drivers, diverse actors, and potential future scenarios. It is a text that not only informs the reader on the current situation but prepares for what is to come and thus seeks to build onto earlier literature such as Triandafyllidou (2010) that offered a first overview of the size and characteristics of irregular migration in Europe, and Bommes and Sciortino (2011) that delved into the connection between irregular migration, labour markets, and welfare states in Europe.

While much of the earlier literature focuses on illegal entry and managing irregular flows—a focus reinforced by the recent Mediterranean crossings and the whole 'refugee emergency' of the post-2015 period—this book concentrates on the situation post-entry: on irregular migrants *in situ* not in transit. It thus throws greater light on conditions within Europe which lead to irregular entry or stay, redressing a necessary but over-emphasised focus on 'push factors.'

This book also offers the missing link between earlier studies on the medium- and long- term challenges of irregular migration in Europe and the most recent emphasis on the refugee emergency of 2015–2017 and the particular challenges that this has raised. It thus offers a medium-term perspective, integrating the recent findings into past analyses and discourses. While the recent 'refugee emergency' may absorb significant policy and scholarly attention, if we take a step back and look at it within its wider context, it is inscribed in an already dynamic landscape of contradictory (at times) policies, uncertain or incomplete statuses, and informal but very real participation of irregular migrants in the economy and in society.

This book is not the first to focus on the tension between exclusion and inclusion. Bommes and Sciortino wrote in the conclusion to *Foggy Social Structures* that 'the most interesting feature of irregular migration is the evidence it provides about the condition of being fully excluded from the political system and yet still having the ability to participate in a wide range of social interactions' (2011: 220). In the intervening years since its publication, new forms of that tension have emerged within national legal frameworks and in municipal practices, as has empirical evidence on the social implications and analysis within academia, which this book reflects.

1.3 Contents of This Book

The volume starts with a discussion of what is irregularity. Bartolini and Triandafyllidou (Chap. 2) conceptualise irregular migration status as a continuum of grey areas or of degrees and types of irregularity, rather than a clear black and white distinction. The chapter thus sets the framework for understanding terms such as 'befallen regularity' and 'semi-legality'. The authors look at irregular migration and irregular stay or work as inter-related phenomena embedded in the labour market dynamics of European countries. They thus highlight the administrative rules and labour market conditions that can foster irregularity and create these spaces in-between where irregular migrants are positioned; and further seek to provide an estimate of the irregular migrant population in Europe. The chapter concludes by discussing why people with irregular status strive to remain in Europe despite the hardship they face by briefly investigating the challenges of (sustainable) return. This essentially introductory chapter concludes by highlighting the links between irregular migration and employment.

Further casting light on the complex dynamics of irregular stay, irregular work, and informal citizenship, Sébastien Chauvin and Blanca Garcés-Mascareñas (Chap. 3) look at the 'moral economy' of migrant irregularity. The authors point to the fact

that in spite of their rhetorical emphasis on enforcement, national governments have overseen a process of formal semi-inclusion of irregular migrants. That process has been taken further at regional and municipal levels. Chauvin and Garcés-Mascareñas explore the implications of that tension between formal exclusion and formal inclusion in two different ways. First, this apparent paradox allows us to deepen our understanding of the drivers and inherent trade-offs in the development of migration policies. Against unilaterally repressive theories, the authors argue that, in the area of migration, the State is confronted with contradictory imperatives and, ultimately, its various components have to choose whether to exclude those not recognised as legitimate members or embrace the population as it is. Second, by unveiling the new moral economy of migrant illegality (that is, the contemporary discourse-policy nexus regulating the construction of irregular migrants as more or less illegal) this chapter reconsiders the notion of citizenship beyond dichotomous frameworks based on binary oppositions between citizens vs non-citizens, formal vs informal, national vs local or legal exclusion vs performative acts of inclusion.

The contradictions of a moral economy of irregularity are further discussed by Colm O'Cinneide in Chap. 4 on the human rights of irregular migrants. O'Cinneide argues that human rights law is meant to provide comprehensive protection for the fundamental rights of all individuals, but this universalist aspiration is heavily qualified when it comes to migrants with irregular status, despite their marginalisation and vulnerability. Various factors play a role in limiting the reach of human rights law in this context, including States' resistance to giving effect to certain international human rights guarantees and other 'external' constraints; 'internal' factors such as a dilution of the relevant standards when it comes to applying them to irregular migrants; and the underdevelopment of human rights law in certain key respects. However, despite these limitations, the author argues that human rights standards can still provide an important platform for challenging exclusionary policies directed against irregular migrants. The chapter highlights how such claims are increasingly being used as levers by various political actors to subject such policies to political and legal contestation, with a recent example being how Dutch municipalities have invoked the provisions of the European Social Charter to challenge central government policies that imposed substantial constraints on irregular migrants accessing shelter and other forms of basic social support.

Turning to what is happening on the ground beyond normative expectations, Nicola Delvino (Chap. 5) looks at whether the European 'fortress' is slowly crumbling. This chapter outlines the evolution of EU and national legislation and policies responding to the presence of irregular migrants in Europe. It describes how the legal and policy responses of the EU and its member states have evolved around a predominantly 'exclusionary approach' towards irregularly-staying migrants that has contributed to building of 'Fortress Europe'. Besides the evolution of the EU immigration *acquis*, this chapter explores national developments in policy domains other than immigration legislation, including criminal law and social policies, aimed at marginalising irregular migrants to encourage their departure. However, as totally exclusionary policies have not succeeded in their ultimate goal of eradicating the presence of irregular migrants, European countries have partially re-thought their approach to take account of that presence and the social needs arising from it.

Against an over-arching, continuing exclusionary focus in law and policy, the author identifies a more recent counter-trend of policies slowly but increasingly showing instances of inclusion of irregular migrants, such as cases of de-criminalisation of irregular migration or extension of access to services and victim support for migrants with irregular status.

With regard to civil society mobilisation, Milena Chimienti and John Solomos (Chap. 6) explore the significance of the transnational mobilization of irregular migrants. The authors investigate why and how transnational collective action is taken by people in situations of vulnerability, not least how those with limited resources manage to mobilize at the transnational level. This core argument is illustrated through the investigation of one particular event that occurred in 2012, the European March of sans-papiers and migrants. The authors explore how the movement was triggered, how it was organized, what claims were made, and what impact it had. They argue that the movement was subversive in three different ways: irregular migrants sought to act like any other citizen; they questioned the boundaries of the nation state; and they refused to be defined and limited by the global social order. The chapter shows that the transnational character of the mobilization is closely related to the root of the problems it sought to address such as European migration policies. It also illustrates how mobilization at a transnational level reinforces the social movements of 'irregular migrants'.

The contradictions of policy discourses, policy responses, and their implementation is further investigated by Ilker Ataç and Theresa Schütze in Chap. 7, 'Crackdown or Symbolism?', an analysis of post-2015 policy responses towards rejected asylum seekers in Austria. The authors draw our attention to recent developments in Austria during the 2015 emergency when the country saw a significant number of asylum seekers transit and many eventually staying in the country. In late 2015, the Austrian federal government changed its short-dated policy of waving tens of thousands of migrants through uncontrolled borders and instead prioritized a tough stance towards asylum seekers. Simultaneously, there was a shift in the Austrian approach towards rejected asylum seekers and return enforcement became an increasingly dominant issue. On the one hand, the federal government introduced a series of restrictive policy responses, aimed mainly at gaining control of these individuals through various forms of confinement. On the other, a number of symbolic policies emerged, aimed merely as a signal to the electorate of the government's restrictive and effective action against rejected asylum seekers. Based on qualitative content analysis of parliamentary documents and media coverage of policies towards this group of irregular migrants, the authors show how a mix of symbolic and substantive policy responses emerged and discuss factors that stimulated this policy strategy.

Turning to long-term factors that shape irregular migration, Chap. 8 (Triandafyllidou and Bartolini) delves deeper into the connections between irregular migration and irregular work. Indeed, the links between irregular or undeclared work and irregular migration often combine in an explosive mix that stirs anxieties about the State's control over migration flows, labour market regulation, unfair competition with native workers and lost (tax) revenue. The chapter discusses the different types of irregular employment and irregular migration and the intersection between the two to construct a typology of irregular employment of irregular foreign

residents. The authors further investigate the dynamics of specific labour market sectors where irregularities in employment thrive, notably in domestic and care work, agriculture and the construction sector. The chapter adopts a double comparative European perspective, surveying findings from different countries, notably the Nordic countries, the UK, the Netherlands, Germany, and Italy with a focus on the different sectors, thus highlighting the role of (irregular) migrant workers within each sector and the related socio-economic and policy dynamics. The chapter concludes with a reflection on the role of enforcement and sanctions versus a variable geometry of regulation for specific labour market sectors.

The economic or labour aspects of irregular migration are discussed also in Chap. 9 (Bartolini, Mantanika, and Triandafyllidou), focusing more specifically on the economy of migrant and asylum seeker reception that has emerged in the post-2015 period. The authors explore how the recent surge in irregular flows across the Mediterranean has fostered the emergence of new economies of reception that transforms irregular migration from a challenge for border regions to an opportunity or even a strategy for survival. The chapter starts by discussing the available literature on the economies of migration control and the interlinked aspect that can be conceived as the economies of reception. The authors rerview the different types of emergency and longer-term EU funding directed to the reception and processing of migrants arrived by sea and by land in Italy and Greece, and explore the interplay between the different levels of governance and the related challenges that arise. Looking at the related emergence of local reception economies, the chapter discusses the reception system structures in Greece and Italy, their further impact in local contexts through the employment of reception-related professionals and the 'refugeeization" of local labour markets, and through the (often informal) insertion of migrants with different combinations of residence and work statuses. It is the authors' contention that, through the channelling of local and regional resources, migrants arriving through irregular channels create a whole set of economic activities, occupations, and types of professional and increase or transform the employment of both locals and settled migrants.

The importance of the local level of governance for irregular migrants in Europe and the challenges and tensions between cities and the state level cannot be overestimated. In Chap. 10, 'Cities Breaking the Mould? Municipal Inclusion of Irregular Migrants in Europe', Spencer considers municipal responses to irregular migrants living in their area and in particular the significance of inclusive responses to restrictive national welfare provisions. She questions whether, as tensions in the multi-level governance on this issue suggest, inclusive responses run counter to national immigration control objectives or whether these apparently divergent approaches are in fact more coherent than the tensions between them suggest. Setting municipal service provision in its structural, demographic, governance and policy context the chapter shows that some municipal measures facilitate the regularisation of immigration status, voluntary return and compliance with national return procedures, while others contribute to shared social and economic objectives. The chapter asks why in that case national governments regularly challenge inclusive municipal measures and posits four potential reasons for further empirical investigation. In conclusion it argues that the impact of municipal measures on national policy objectives will be fundamental to resolving what the extent of irregular migrants' access to services should be.

Looking at the different facets of irregular migrants, notably statistical definitions and realities on the ground, the (inclusionary) dynamics of labour markets and exclusionary policies, the role of local authorities and civil society, and the mobilisation of international law, this book seeks to highlight the many facets of the phenomenon of irregular migration in Europe and related conceptual and policy developments of recent years that are often neglected in public and political discourses. In the final chapter, Spencer and Triandafyllidou highlight the key themes that emerge, how they build on our understanding from earlier work, and the questions they raise for a future research agenda.

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Chapter 2
Understanding Irregularity

Anna Triandafyllidou and Laura Bartolini

2.1 Introduction

Irregular migration is a multifaceted, dynamic phenomenon that is attracting disproportionate media and political attention since the early 2000s and has been at the forefront of the political debate in most of the European Union's member states since the outbreak of the so-called 'migration crisis' of 2015. Indeed, the political attention paid to migration, and particularly irregular migration, is disproportionate compared to its volume. Migrants represent 3.3% of the world's population (IOM 2017a from UNDESA 2017)—notably a rather small fraction—with migrants in an irregular situation representing between 15% and 20% of all migrants, according to recent estimates. This would thus mean approximately 1% of the total global population, or some 30–40 million individuals worldwide (UN OHCHR 2014; ILO 2015). Naturally, these are estimates and vary between continents and particularly between countries. As suggested by Koser (2007) and Fargues (2008), irregular migration is pervasive in some sectors and areas of Asia and Africa, reaching and exceeding 50% of the total; it is quite extensive in North America (according to Rosenblum and Ruiz Soto's 2015 estimate there were 11 million irregular migrants in the United States in 2013) but quite limited in Europe, where the most recent comparable estimates (Kovacheva and Vogel 2009) put the number of irregular migrants between 1.9 and 3.8 million in 2008. Moreover, there are reasons to believe that irregular migration may have slowed during the economic and financial crisis

The opinions expressed in this chapter are those of the authors and do not necessarily reflect the views of the International Organization for Migration (IOM).

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in Europe and the US, a trend that might have been reversed by the most recent developments (long-lasting conflicts, insecurity, environmental change, lack of employment, and booming young populations) generating new flows of refugees and other migrants (Carling 2018) from both Africa and Asia to Europe.

Discussing irregular migration in Europe entails dealing with different paths towards irregularity—legal entry and irregular stay, entry with fake documents, entry and abuse of the terms of stay, to name only a few. Each of these paths represents a varying percentage of the total phenomenon in each country. There are degrees, so to speak, and types of irregular migration, and dichotomous distinctions ought better to be avoided. We should also not neglect the fact that irregular migrants are people with lives and jobs who make contributions to their immediate and wider social environment: they work (usually without appropriate insurance or pay or both), rent accommodation, have families, and also have health and education needs. Thus, they can actively contribute to their communities despite their irregular status, posing multiple governance, political, and moral challenges at the local, national, and European levels.

While the EU Returns Directive (2008) unequivocally states that people in an irregular situation cannot reside in the European Union—they must either be returned to their country of origin/last country of transit or must regularise their situation—reality is far more complex. This is not only because return often proves too complicated to be implemented, but also because while national or EU laws may dictate the expulsion of a person, this person may have developed ties with the country of residence that cannot be severed so easily. Such ties may include children that go to school and whose lives will be disrupted, employers who value a hard-working and reliable employee, neighbours and friends—both natives and migrants—who do not care about the legal status of their friend. These contradictory situations, where national law comes up against social reality, are often left to the city or regional level to be solved by local authorities that seek to ensure that their communities are welcoming, humane, yet also 'orderly' places to live. The challenges here can be political and moral (transforming the violation of migration regulations in criminal offences) but also socio-economic (providing health and welfare to persons who cannot pay taxes because they work without documents; tolerating irregular situations; dealing with people who find themselves homeless because they cannot hold a stable job because of their undocumented status).

This book focuses primarily on irregular residents (and workers) rather than on irregular entrants. In other words, it does not focus on the border but rather on internal controls and related practices and policies, covering different perspectives on irregular stay and work such as the policy and public discourses on irregular migrants' deservingness (Chauvin and Mascarenas, Chap. 3), or the human rights of all irregular migrants (O'Cinneide, Chap. 4) but also the special case of vulnerable groups (Chimienti and Solomos, Chap. 6). The book also looks at different aspects of irregular migrants' lives, notably their employment (Triandafyllidou and Bartolini, Chap. 8), their interaction with welfare and other public services (Atac and Schütze, Chap. 7) or with local authorities (Spencer, Chap. 10). In other words,

the book brings together different types and dimensions of irregularity with different perspectives and facets of the lives of migrants in an irregular situation.

This chapter introduces the multifaceted dimensions of migrants' irregularity in Europe, with a view to providing the framework within which the other contributions to this volume are framed. The chapter is organised as follows. The next part provides a brief theoretical reflection on the dynamics of irregular migration, on why and how it happens, and presents the main related definitions of the topic. We pay special attention to the pathways into irregularity of residence and the connection between irregular migration and irregular work, since we consider employment an important factor in shaping migration decisions but also in perpetuating conditions of irregularity. We highlight why and how irregular migration needs to be conceptualised not as a black-and-white distinction between legal and illegal status but rather as a continuum of different statuses between regularity and irregularity. While rejecting the dichotomous distinction helps understanding how irregular migrants' lives are possible and sometimes tolerated in the local contexts, the analysis of EU-sponsored schemes for voluntary returns of migrants at risk of falling into irregularity and of befallen irregular migrants is presented in the third part of the chapter. The ways in which return is conceived and implemented in practice leave doubts as to the sustainability of such schemes—from both a moral and an economic point of view—and contribute to the understanding of the persistence of a certain amount of irregularity even when alternatives are formally available. The fourth part delves into the available data and estimates about the size of irregular migration by residence status in Europe, although the dearth of reliable and comparable sources across countries allows only a rough evaluation in terms of magnitude and trends. The final section summarises the main points, which are then further investigated in subsequent chapters.

2.2 A Dynamic and Multifaceted Account of Irregular Migration

As pointed out recently in a comprehensive study by de Haas et al. (2016), policy changes over the past 20 years have diversified immigration policies, making them more selective and differentiated towards specific groups. This is applied using multiple criteria, differentiating among high- and low-skilled workers, students, refugees, and family members. In this panorama, policies targeted specifically towards family migrants, irregular migrants and on border controls have been tightened, and prospective international migrants seeking better jobs and life opportunities face increasingly higher walls, particularly if they aim to emigrate to high-income countries in Europe, North America, and Australia. Nonetheless, the demand for cheap (irregular) labour in migrant-receiving countries, coupled with the needs generated by ageing populations in Europe and economic pressures of booming young

populations in origin countries, create a powerful pull/push mechanism that defies border controls, visa restrictions, and internal control measures.

Restrictive policies produce irregular residence status and irregular work (De Genova 2004; Vickstrom 2014) as they limit legal channels for labour migration, raise the requirements for family reunification or family formation, and make regularisation of status difficult to reach. One might argue that this is precisely the objective: to make the lives of irregular migrants impossible and cut them off from both jobs and welfare so that they leave or are discouraged from coming. However, as we know, migration is a phenomenon that can be governed yet not controlled. It is not a tap that can be opened and closed. There is no single national interest on migration as politicians often argue, but rather the different interests of employers, workers, trade unions, and various sections of the local population that may benefit or suffer from migration. Regularity or irregularity are not two opposites but rather two extremes on an array of intermediate statuses.

Patterns of irregularity are diverse and can include people who crossed a border unlawfully as well as visa over-stayers, children born to undocumented parents, migrants who lost their regular status because of unemployment or non-compliance with certain requirements, and last but not least, rejected asylum seekers. Irregularity is not entirely of the migrant's making: it may result from red tape or labour market dynamics that privilege irregular stay and irregular work. Researchers have coined the term 'befallen irregularity' (González Enríquez 2014; Vickstrom 2014) to specifically characterise the cases in which migrants in southern Europe fell to irregular status because of red tape around stay or work requirements that are impossible to fulfil. The term 'befallen irregularity' or 'semi-legality' (Kubal 2013) is also used to emphasise the fact that migrants, particularly but not exclusively in southern Europe, may alternate periods of regular stay and work with periods of irregular stay and irregular work and may live in conditions of partial regular status, e.g. with the right to stay although not to work or participate in a regularisation programme yet eventually fail to fulfil all the conditions to obtain a durable regular status. Additionally, research has shown that irregularity is functional to labour market conditions in specific sectors such as construction, domestic work, agriculture, and the food industry as irregular migrant workers provide a cheap and plentiful workforce (Jordan and Düvell 2002; Van der Leun and Kloosterman 2006; Cheliotis 2017). By creating conditions of regular stay and work that are impossible to meet, states indirectly support the interests of unscrupulous employers and create ethnic segmentation and hierarchies in the labour market that are functional to the national economy.

Irregular migrants are often not completely deprived of formal papers that testify to their presence in a given country. Recent studies (Vasta 2008; Chauvin and Garcés-Mascareñas 2014) have shown that irregular migrants may possess legal documents such as social security numbers, work contracts, certificates of enrolment for their children in school, or identity cards issued by municipalities while still not having a regular stay permit. Such documents testify to the *de facto* inclusion of the migrant in the labour market and social life and are important in illustrating the dynamism and complexity of the irregular migration phenomenon as well as the fragmentation of its governance. A typical example of such fragmentation comes

from Spain where municipalities require all migrants to enrol with the local registry (*padrón)* even if they do not have regular permits of residence, which are issued by the national administration.

While regularisation of one's status is generally seen as the outcome of the application of the migrant and her/his family, Europe has experienced two large indirect regularisation waves through successive EU enlargements to the east, in 2004 and 2007. Citizens of 'new' member states who were irregularly residing and/or working in the 'old' member states became EU citizens, thus shifting to a regular stay with full socio-economic and labour rights. This of course has had important implications for all aspects of their lives and socio-economic and political inclusion in the countries of residence, even if it certainly did not automatically mean that they also acquired a job in the formal economy.

In addition, over the past two decades, a number of countries have repeatedly resorted to regularisation programs as a response to the presence of irregular migrants within their territories (Kraler 2009). Southern European countries have regularized the largest number of migrants with amnesty programs, but a sizeable number of migrants has also been regularized by Belgium and France and to a lesser extent Germany, the Netherlands, and Sweden (Baldwin-Edwards and Kraler 2009). While some 3.5 million migrants received a regular residence permit within the EU through regularizations (one of the most recent was carried out by Poland in 2013), in more recent years no single measure of that kind has been implemented by EU Member States, and the EU Return Directive explicitly restrains them from such measures if not in 'exceptional' circumstances.

2.2.1 Definitions of Irregularity

Although the concept of irregular migration is often treated as self-evident by media and political discourses, it deserves some careful reflection to avoid ambiguities and inconsistencies (Triandafyllidou 2010). A number of different terms and expressions are used for persons who enter a country illegally, overstay their terms of regular residence, live in a country without a residence permit, or break immigration rules in a way that makes them liable for expulsion. At the academic level—but also in the media and public discussion—terms like irregular, undocumented, or unauthorized have been preferred to the more discriminatory 'clandestine' or 'illegal' immigrants. Indeed, even though no human being is illegal (Ambrosini 2013), specific practices and behaviours in breach of the law can be referred as 'not legal' (for example, illegal border crossing).

For a complete and dynamic picture (Kovacheva and Vogel 2009), the distinction is made between irregular *residents*—foreigners without any legal residence status in the country and those who can be subject, if detected, to an order to leave or to an expulsion order (stocks)—and irregular *entrants* who cross an international border without the required valid documents (flows).

To clarify the various irregular statuses, below is a list of the different forms of irregular stay that migrants may experience which serves the purpose of illustrating the complexity of intersecting entry, stay and work related status:

- Persons with forged papers or persons with real papers but assuming false identities;
- Persons with seemingly legal temporary residence status. The so-called working tourists (entered on a tourist visa and working irregularly) are assumed to be the majority of irregular migrants in some countries. Migrants with a temporary conditional permit such as seasonal and contract workers may likewise be liable for expulsion if they break their contract terms (for example, because they work for a longer period than permitted);
- Persons who lose their residence status because they no longer satisfy the conditions that initially granted the permit (unemployed, no longer able to demonstrate employment relationship to obtain a work permit, student whose course of study has ended, expiration of family permit for young adults coming of age, etc.);
- Persons who never had a regular status because they entered illegally and couldn't find a way of regularizing their status;
- Persons entered illegally but are registered with public authorities. They have been denied protection after lodging an asylum application;
- Tolerated persons without a regular status, with or without a document to prove the suspension of their removal and thus their semi-legal residence status. This occurs when removal of the illegally-residing alien or return to the country of origin is not possible because there is no agreement with the country of origin or transit,[1] or it is not possible to establish the nationality of the migrant;
- Children born to parents who are unlawfully residing and hence without fully-documented status.

2.2.2 Flows of Irregular Migrants

Inflows and outflows of irregular migrants continuously contribute to the stock of irregular residents. Such flows may be demographic (births[2] and deaths), physical (actual entries or departures) or legal (most notably change of status from regular to irregular or vice versa). Geographical movements in and out the country may take place through unguarded border crossings or undetected unlawful entries at guarded border crossings. Unlawful entries may even take place under the control of the

[1] See the Regulation 1953 adopted by the European Parliament on 13 October 2016 regarding a uniform European travel document for the return of illegally staying third-country nationals (European travel document for return), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1953 (last accessed on 31 March 2019).

[2] Births into irregularity of children of undocumented migrants.

state in the sense that the irregular migrant may enter, be apprehended, receive a return decision asking her/him to leave the country (usually within 30 days) but still stay in that destination country.

The continuing refugee and migrant crisis, combined with the different and changing practices applied by European countries in terms of entry/transit of these flows, will likely result in an increase in the number of undocumented migrants in Europe as not all new arrivals are able or willing to lodge an asylum application and not all those who fall into irregularity can be effectively returned (EMN 2018).

Status-related flows concern people who fall into irregularity after a period of regular residence. The largest of such inflows is that of visa over-stayers: persons who enter with a tourist or other temporary visa and overstay the allowed period, possibly engaging into paid employment while their visa allows only for tourism/leisure activities. Status-related flows also include asylum seekers whose application has been definitively rejected or people whose permanent or temporary permit has been withdrawn as a consequence of a criminal offence. On the other hand, there are status-related outflows from irregular residence, ranging from regularization through marriage to collective amnesty programmes (Baldwin-Edwards and Kraler 2009), which are less frequent and smaller in size over the past years compared with the 1990s and early 2000s.

Third-country nationals may repeatedly shift from regular to irregular status and vice versa as, for instance, Vickstrom (2014) has shown for Senegalese migrants in France, Italy, and Spain. Migration policy reforms may create new status options or make established ones available for new groups of people. While widening legal options would represent a functional equivalent to regularisation for them, European migration regimes have become more restrictive and more fragmented over the past years. The increasing migrant and refugee flows between 2011 and 2018 put pressure on the EU system for governing the borders and managing asylum and irregular migration, creating temptations for member states to adopt individual rather than coordinated responses.

2.3 The Close Links Between Irregular Stay and Irregular Work

Irregular migration is to a large extent driven by labour market dynamics. This is an important issue that is often neglected in relevant political and policy discourses. For instance, the availability of jobs in agriculture or construction or the demand for live-in care workers can act as a pole of attraction for migrant workers who may decide to enter a country unlawfully or overstay their visa and violate its conditions because of the availability of work opportunities. The connection between prospective employer and employee takes place through relevant networks (for instance through referral from a migrant that already works in the same employment and recommends her/his friend, cousin, or co-villager) while these same networks may

mitigate the costs of (irregular) migration by providing for accommodation and support to the undocumented newcomer. Such a plentiful and disposable labour force can be handy for unscrupulous employers or seasonal and temporary jobs or both, as they incur no additional costs of firing or of paying for welfare or unemployment benefits.

Obtaining and keeping or renewing one's legal status in the EU often depends upon employment (even for those who hold family related permits, which are linked to the work permit of the main breadwinner), particularly for people on relatively short-term stay permits. Legally residing third-country nationals should be able to have jobs with proper contracts which respect labour laws and include welfare insurance. However, in practice it is often the case that migrant workers are employed in irregular ways, i.e., without being declared or having a proper contract, or with a contract that specified conditions of work and salary that are not respected in reality. This is because migrants are often concentrated in labour market sectors where there is a high incidence of informal work such as construction for men or cleaning and caring work for women, or catering, tourism, and agriculture for either. In addition, those recently arrived have less bargaining power compared to settled migrants or natives as they may have only partial information about their rights, or may not yet speak the local language or may not know where to address themselves if they suffer an injustice. On top of this, they may be in absolute need for a job and a livelihood—even if this does not come with all the required conditions—as they may have no other source of income or any social support networks to rely on. The importance of trade unions and labour market inspectors for protecting all workers, but particularly migrant workers in this case, cannot be overestimated (see also Triandafyllidou and Bartolini, Chap. 8).

In addition to these socio-economic dynamics attracting unauthorised migrant workers to a country to take up informal work or pushing legally staying third-country nationals to accept irregular employment, it would be important to consider how socio-economic exclusion interacts with symbolic inclusion/exclusion. As Ambrosini (2016) argues, we could conceptualise two levels of authorisation: one is that of regular versus irregular migration status and the other is one of symbolic authorisation in the sense of recognition that the migrant is filling a job vacancy and performing a job that is socially valuable. Ambrosini points out that this distinction is also gendered, as usually the female care workers and cleaners are those represented positively and recognised as valuable, while narratives of 'clandestine' migrant workers almost always refer to male migrants. Ambrosini points out that asylum seekers, too, although temporarily authorised in the receiving country's territory while their application is processed, are stigmatised and excluded as non-socially valuable.

The realities of irregular residence and irregular work combine in multiple ways, preventing clear-cut definitions and requiring attention to single national practices and legal frameworks even within the European context. We should better speak of a continuum between regularity and irregularity, ranging from situations where one is a regular foreign resident allowed to work and with a formal employment contract to cases in which one is an irregular foreign resident with an undeclared job.

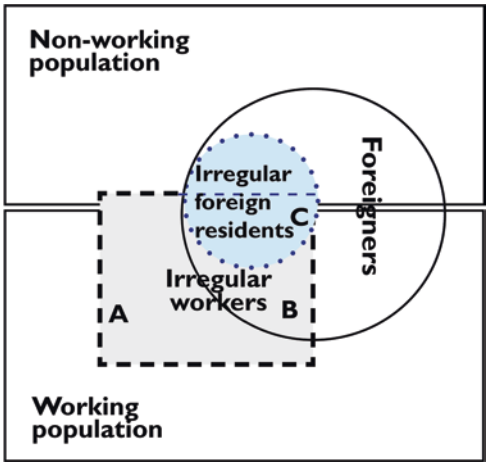

Fig. 2.1 Total resident population by work status, citizenship, and residence status. (Source: authors' compilation)

Moreover, one's status is not fixed. Changes in status (of residence, of permission to work, of employment conditions) are frequent and not necessarily in the direction of progressive improvement and stability (EMN 2016a). 'Spaces of' and 'pathways to' illegality (Ruhs and Anderson 2006; Düvell 2011) are thus found within the triangle of migration policies, labour market dynamics, and the individual choices of social actors. Different types and degrees of irregularity can be produced and negotiated among all actors involved and semi-compliance to (some) rules might be a frequent case (Ruhs and Anderson 2006).

Figure 2.1 summarizes the possible intersections of citizenship, residence, and work status: irregular employment can be found among the native labour force (A), foreigners with a regular residence status (B), and foreigners who are irregularly residing in the country (C). This book focuses on irregular foreign residents and delves deeper on the intersection between residence and work for foreigners in Chap. 8.

2.4 The Size of the Irregular Migrant Population in Europe

Figures on irregular migrants are difficult to compile, and most EU countries' national authorities do not provide any official estimate of the size of irregular foreign population in their territory. The last comprehensive effort for an EU-wide figure reflects numbers that are a decade old: the Clandestino Project (Kovacheva and Vogel 2009) estimated the number of irregular migrants as between 1.9 and 3.8 million, that is, between 7% and 12% of the total migrant presence in the EU-27[3] in 2008.

[3] Croatia had not acceded at that time.

Since then, some updated estimates are available for a few countries: irregular migrant residents were estimated at between 180,000 and 520,000 in Germany in 2014 (Vogel 2015); at around 300,000 in Italy in 2013;[4] at around one million in the UK in 2010;[5] and at around 33,000 in Sweden in 2017.[6] In general, most official and independent sources speak of an irregular migrant presence ranging from 6% to 10% of the total foreign resident population in Europe before the eruption of the so-called "migration crisis" in 2014–2015.

While a number of countries repeatedly resorted to regularisation programs until the late 2000s (Kraler 2009), no such measure has been applied in the last five years in Europe. Conversely, EU member states are taking major steps to combat irregular flows and stream-line the asylum-seeking process, even though increased securitization and criminalization coul hardly stop new migration flows (de Haas 2011). In particular, there have been explicit efforts in border securitization, in extending the mandate of the European agencies Frontex and EASO, in enforcing the EURODAC system for coordinated collection of fingerprints of all asylum seekers, in suspending the Schengen Agreement (1985) under certain "emergency" situations, and in discussing amendments to the recently updated Dublin Regulation (1990, 2003, 2013) to boost returns, which the EU Return Directive foresees as the main tool for dealing with irregular migration (see below).

National authorities have not released any new estimate of irregular migrants in their respective countries in recent years. Eurostat provides harmonized data on enforcement of migration legislation for EU member states and some other European countries (Iceland, Norway, and Switzerland). These figures are illustrative of irregular migration flows rather than stocks of total presence at one point in time. However, they might be informative on the degree of law enforcement and cross-country differences in migration management, offering an overview on trends in the number of migrants found irregularly present in an EU country.

Third-country nationals who are irregularly present within the territory of a member state include those who entered avoiding controls or with false documents and those over-staying their authorized period: Germany, France, Greece, the UK, Spain and Italy registered three quarters (76%) of all detections of irregular migrants in the EU in 2017, but the phenomenon is found in most of Europe (see Fig. 2.2). Differences across countries are a mix of geographical and contextual circumstances with the disparate efforts and resources put into controls. Detections are always above 400,000 individuals between 2010 and 2013, but the descending trend reversed in 2014, with 625,000 individuals detected and the peak in 2015 with more than two million detections (911,000, or nearly half, in Greece). The issue of double-counting individuals who engage in multiple cross-border movements in figures

[4] See ISMU Foundation: http://www.ismu.org/irregolari-e-sbarchi-presenze/

[5] See Migration Watch UK: https://www.migrationwatchuk.org/key-topics/illegal-immigration

[6] The Swedish Migration Agency (Migrationsverket) estimated that around 33,000 migrants who have been denied a residence permit will remain irregularly in Sweden between 2017 and 2019.

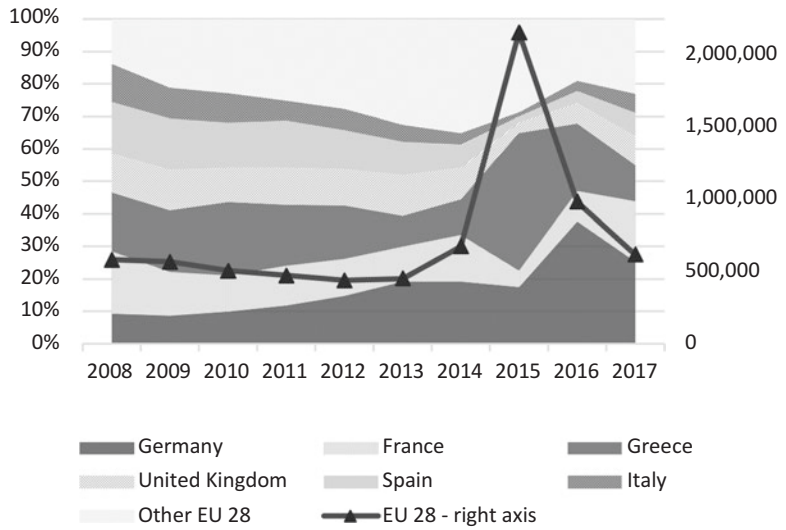

Fig. 2.2 Third country nationals found to be illegally present, % in top 6 EU countries and total EU-28, 2008–2017. (Source: Eurostat [migr_eipre], last checked on 31 March 2019)

released by Eurostat or Frontex has been underlined by many researchers.[7] This was particularly evident between 2015 and 2016, when thousands of migrants passed from Turkey to Greece and then to central and northern Europe via the so-called Balkan Route, and were detected more than once by authorities.[8] Regarding refusals of entry at borders, the biggest share is registered by Spain for all of the past ten years. Figure 2.3 shows the differences between detections, refusals of entry, orders to leave, and the share of individuals effectively returned from the EU as a whole. Some migrants might have changed their legal status, lodging a protection request after being detected as irregularly present or crossing. Of the roughly 500,000 annually ordered to leave since 2008, between 40% and 50% have returned to the origin country, while the rest is not registered as returned even though the return of irregular migrants—including rejected asylum seekers who no longer have the right to stay in the EU (see below) —is one pillar of the EU's current policy on migration and asylum (EMN 2016b).[9] These figures demonstrate the difficulties in law

[7] Frontex (the European Border and Coast Guard Agency) provides monthly series of detections of irregular border-crossing rather than the number of individuals; as the same person may cross an external border several times, it is not possible to obtain from these figures a precise number of persons entering the Schengen area irregularly.

[8] See https://migrantsatsea.org/2015/10/14/clarification-of-frontex-data-on-persons-detected-at-eu-external-borders-includes-significant-double-counting/

[9] In line with the Return Directive, member states are asked to first encourage rejected asylum seekers to return voluntarily, also through assistance programmes, before using forced return that includes coercive methods.

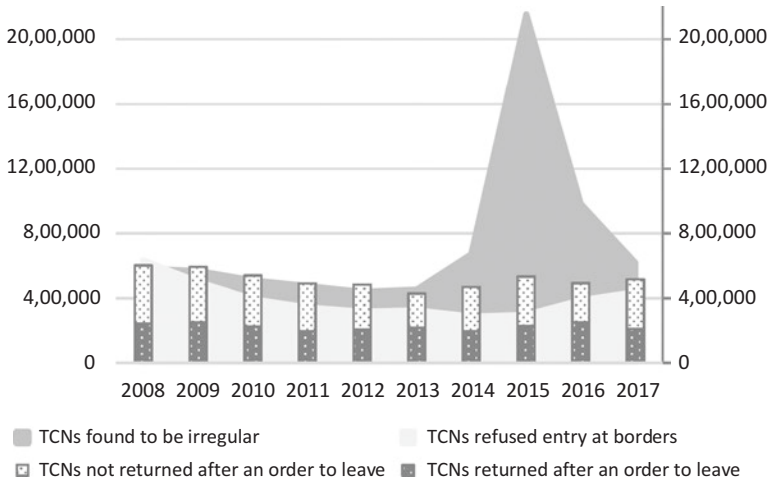

Fig. 2.3 Enforcement of migration legislation, EU-28 (current composition), 2008–2017. (Source: Eurostat [migr_eirfs, migr_eipre, migr_eiord, migr_eirtn], last checked 31 March 2019)

enforcement at national level and the existence of a certain degree of tolerance of irregular foreign residents even in countries where irregular residence is considered a crime.[10]

As the nature of new inflows is changing with the unstable contours of conflicts and crises in the Middle East, North Africa and Sub-Saharan Africa, data on detections of irregular migrants must be read in parallel with data on asylum applications, given that a large number of migrants entering the Schengen area irregularly since 2013–2014 have then applied for asylum within the EU.

First-time applications registered a surge in 2015 and 2016, when migrants could transit along the so-called Balkan route towards northern Europe with almost no impediment. at the same time, first-instance decisions on asylum applications have increased sensibly over the last few years. The share of rejections in first-instance decisions declined between 2011 and 2016 from 75% to 39%, to then recover at 55% in 2017 and 63% in 2018. The absolute number of rejections at first-instance has increased between 2014 and 2017, dropping in 2018 (Fig. 2.4). These migrants might appeal the first-instance decisions and still have the right to remain in the EU for the time of the judgement, but for all those whose application will be unsuccessful, the processing time of the asylum applications merely postpones a situation of irregularity.

[10] The share of forced returns of migrants following an order to leave varies considerably across member states. In 2017, Malta, Poland, Romania, and the Baltic countries registered shares higher than 90 per cent while Italy, France, Belgium, Czech Republic, and Portugal had shares lower than 20 per cent (Eurostat 2018). The difference is due to the different numbers of irregular migrants to be returned, its different composition in terms of nationalities, and different repatriation agreements with origin countries in place in each member state.

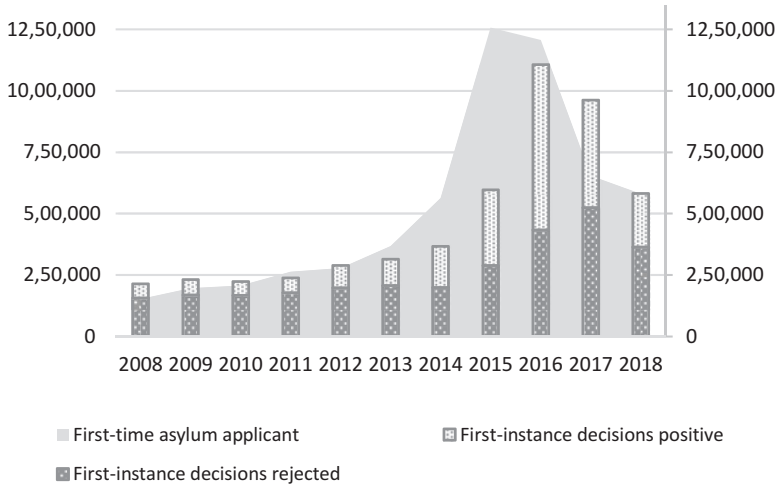

Fig. 2.4 Asylum applications and decisions in EU-28 (current composition), 2008–2018. (Source: Eurostat [migr_asyappctza, migr_asydcfsta], last checked 31 March 2019)

Top nationalities of migrants found irregularly present and of migrants who lodged an asylum application in the EU territory are almost the same. The mixed nature of new inflows, and of asylum applicants, is shown by the varieties of national groups involved. In 2018, most first-time asylum applications were by migrants from Syria, Afghanistan, Iraq, Pakistan, Iran, Nigeria (40% of the total) but also from Turkey, Venezuela, Albania, Georgia, Eritrea, Guinea, Bangladesh, and many other countries of Africa, Asia, and Latin America. As processing applications takes time, a non-negligible number of asylum seekers waits for months the end of the procedure, while others might remain in Europe notwithstanding the final rejection of their application.

While the number of rejections is quantified (although data on final decisions are not available for all EU countries), what happens after asylum seekers exit from the reception system at the end of the period established by national laws, remains unmapped. Both migrants who are recognized some form of international or national protection and rejected asylum seekers at some point are no longer eligible for receiving reception and assistance. These migrants, who might or might not have integrated into local societies through language, training courses, and possibly work experiences, exit the official accounting of people in need. Those without a regular permit to stay are likely to abscond and remain in the EU as irregulars (Tazzioli 2016; EMN 2018).

Outflows of irregular migrants, rather than through forced returns, might also come through regularizations, voluntary returns to origin, or re-emigration. There is evidence that some migrants living in countries most hard-hit by the economic crisis and with an irregular status or at risk of falling into irregularity have independently decided to return, especially those coming from non-turbulent areas (such as North Africa, eastern Europe or south Asia). Maroufof and Kouki (2017) have documented

Pakistanis returning from Greece in the post-2010 period, while Maroufof (2017) has also studied Georgians returning from Greece. Gonzalez Enriquez (2013) and Devitt (2013) documented both patterns of informal circularity and return from Spain and Italy to Morocco. Maroukis and Gemi (2013) and Gemi (2017) also showed that Albanian migrants and their families opted for returning when rising unemployment in Greece put them at risk of losing their residence permits.

Economic migrants from middle-to-low income countries with improving prospects might have preferred to return than to stay irregularly in Europe during the economic crisis (this was also found in the US, see Warren 2016). Some countries might have progressively replaced irregular migrants residing for a number of years with newly-arrived irregular migrants, asylum seekers in the process, and rejected asylum seekers. In these cases, the irregular migrant population is likely to be changing in terms of nationality, skills, and gender composition, with outflows of Latin American and North African irregulars compensated by recent inflows of migrants with uncertain status arriving from crisis and war countries who are less likely to return even if they can't regularize their status.

Among those with undetermined or unclear status, we also need to consider the 'Dublin returns': individuals who applied for asylum in country different from that of first-entry in the EU and that could be sent back to this first country of entry to have her/his asylum claim assessed there. Between 6000 and 14,000 Dublin transfers per year have been registered in the period between 2008 and 2015, while about 22 thousand transfers were registered in both 2016 and 2017. Thus, around 125,000 migrants with a temporarily-suspended asylum seeker status have been transferred within the EU between 2008 and 2017. At the same time, the number of requests for Dublin transfers have been far higher, reaching a peak of more than 140,000 in 2017 alone (Fig. 2.5).

Fig. 2.5 Total incoming requests and Dublin transfers, EU-28 (current composition), 2008–2017. (Source: Eurostat [migr_dubri, migr_dubti], last checked on 31 March 2019)

In a recent report, Fratzke (2015) convincingly argued that the Dublin system has not been efficient in terms of redistributing asylum responsibility, even if it has drawn a clear line as to which state is responsible. Also, the administrative workload involved in processing these Dublin transfers is significant compared to the result achieved. Negotiations for a new reform of both the Common European Asylum System and the Dublin Regulation were ongoing over 2018 but did not reach any tangible results before European elections of May 2019. At the same time, the EU Relocation programme which was meant to redistribute some of the migrants entered in Greece and Italy since 2015, closed, after some extensions, in March 2018, with low numbers compared to the initial goals. Whether member states will successfully engage in a permanent redistribution mechanism to overcome the shortfalls descending from the principle of "first entry" in EU territory remains to be seen.

2.5 Remaining or Returning?

Having outlined the challenges of estimating irregular foreign residents, a word is in order about why people stay despite being undocumented and facing significant hardship. Why do so many people stay without documents despite the risks descending from their precarious legal status? And why is it that return schemes do not work as foreseen by policy instruments?

In his seminal paper on returns, Cassarino (2004) spoke about the migration cycle in the biography of the migrant and of migrants' preparedness for returning to the country of origin. He considered return sustainable when the migration cycle is complete, and that assessment of favourable return conditions is both objective and subjective in the eyes of the migrant (see also Cassarino (2016: 217). It is clear that when return follows apprehension and irregular residence and informal work, the migration cycle not only is incomplete, but has also been abruptly interrupted. Indeed, irregular migrants need the income they are making at destination, no matter how meagre this may be,[11] to both survive and send back to their families in the country of origin. They are also aware that economic prospects back home are dire and the reasons that made them emigrate in the first place are still valid, whether predominantly related to unemployment and poverty or to insecurity and violence (see also Maroufof 2017; Schuster 2011; Dimitriadi 2017).

Assisted Voluntary Return (AVR) schemes shaped by the EU Returns Directive are normally available for migrants at risk of irregularity and for those who are

[11] Sexual and labour exploitation of irregular migrants are well documented all across Europe (see for example IOM Italy 2017). Moreover, there seems to be a proliferation of begging activities in many Italian cities, especially involving West African migrants. Migrants make very little money, which nevertheless is sent back home or used to access some services outside the reception centres where they are hosted: http://www.ontheroadonlus.it/blog/lo-sfruttamento-dei-migranti-nel-lavoro-nellaccattonaggio-forzato/

already in an irregular situation. In those cases in which migrants are offered the possibility to voluntarily return after having been apprehended, they are likely to be unprepared for returning and might face important vulnerabilities in the origin country (Schuster and Majidi 2013; Koser and Kuschminder 2015). Although AVR has become a very popular concept and practice among policymakers, scholars (Cassarino 2016; Kuschminder 2017) point to the gap between the presumed success of the return policies and the actual reality of return and reintegration, particularly in those cases when AVR is offered to avoid forced return. Indeed, some research (Webber 2011; Kuschminder 2017) suggests that it would be better to speak of 'Assisted' but not 'Voluntary' Return when migrants take part in one of the several EU-funded return schemes as a means of last resort, as they have already fallen into irregularity and with no possibility of regularizing their status.

These schemes are normally implemented through EU funds and efforts to monitor them mainly focus on the legal procedures at the national level (EMN 2018), but there is barely any evaluation of results in terms of sustainability of the reintegration at origin for returnees, in particular when it comes to return of irregular migrants (Kuschminder 2017).

Scholars and main implementing organizations have begun studying the implications of dealing with assisted and voluntary returns in terms of returnees' psychosocial wellbeing as well as of reintegration policies and practices of receiving countries at the national and local levels (Vandevoordt 2016; Koch 2014; IOM 2015). IOM, one of the main implementers of AVRR (Assisted Voluntary Return and Reintegration) programmes, provided assistance to more than 72,000 migrants in 2017 and to 61,300 migrants in 2018 globally. Most of these returns took place from a country of the European Economic Area: around 70% of returns assisted in 2017 and 55% of returns assisted in 2018 were from a European country, with Germany being the top host country of departure with around 29,600 departures in 2017 an almost 16,000 in 2018.[12] About 63% of IOM's assisted returnees in 2017 received some sort of in-cash or in-kind reintegration assistance once back in the origin country. The success of such schemes could be measured along different lines, in terms of sustainability for returned migrants and their origin communities. IOM seems to have recently developed up-to-date sustainability of reintegration indicators to monitor the economic, social and psychosocial dimension of reintegration (IOM 2017b), prompted by emerging researcher highlighting the necessity of monitoring tools able to adapt its programmes to changing conditions on the ground and to migrants' differentiated abilities and resources (Majidi 2017).

Indeed, the reintegration phase in the country of origin can be challenging for returnees for many reasons, including the shame of a failed migration project; the lack of resources; the fact that the migrant is returned to the capital city of their country rather than their own place of origin; their lack of a viable life perspective, if that existed in any case in the first place; or, the lack of viable development policies in the country of origin. Such situations are often further complicated by

[12] See: https://www.iom.int/assisted-voluntary-return-and-reintegration

bureaucratic hurdles and complex mobility patterns. The case of Afghan nationals is one of the most studied. Many Afghans have been returned to Kabul from northern European countries over the past years, after having seen their asylum applications rejected and after having spent long periods, even years, in other transit countries (Pakistan, Iran, Turkey, Greece). Cases have been reported of Afghan returnees with no documentation to prove their nationality and their region of origin, as they only spent their early childhood in the country. In these cases, returnees need to travel to their city of origin (which may be located in an unsafe area) and find two community elders who will testify to their identity. The returnee must then go back to Kabul and apply for Afghan identity papers. This is a very challenging process that frequently is not completed, leading to a marginalisation, which might ultimately push returnees to seek to re-emigrate (for further discussion, see McAuliffe 2016). The lack of alternatives is an important perspective to keep in mind when considering the fate of rejected asylum seekers or irregular migrants who persist and stay at the destination country despite the hardship they face.

2.6 Concluding Remarks

Media and policy debates tend to represent irregular migration and unauthorised stay in a country as an unambiguous concept and a clear legal category. It appears logically straightforward that we should be able to tell whether a person is authorised to stay and work in a given country. However, a closer look at the complexities of entry, stay, prolongation, and abuse of terms of stay shows that this is by no means such a black-and-white distinction. Firstly, there are different 'degrees' and 'types' of irregularity. Secondly, there are real physical and administrative flows between the two categories. Thirdly, there are also significant grey zones of people with unclear or temporary status. Thus, we may have people who enter legally but overstay, people whose entry was unauthorised but who then regularised their status, and people who enter legally and stay regularly but lose their regular status at some point because they could not renew their permits.

These categories are thus highly dynamic and fluid; both depend on the actions of the people concerned but also on the state bureaucracies and changing migration policies. As we have shown in this chapter, the legal status of migrants and their families depends largely on policies of fencing and gatekeeping (Triandafyllidou and Ambrosini 2011) that states apply to keep foreigners out, but also on labour market dynamics and employment situations. Thus, a regular contract for employment is a ticket to legal status; however, migrant workers often cannot simply secure such a contract or proof of employment and insurance because they work in sectors where informality is high (such as agriculture, domestic work, or construction) and they have little means to pressurise their employers in order to have their rights secured.

The following chapters will further investigate how employment and residence policies for foreign citizens are more and more inserted in discourses on

deservingness to protection for the most vulnerable but also to basic human and labour rights for all migrants, including those in an irregular position. The practises through which migrants' agency meets local communities, creating multiple interstices (Fontanari and Ambrosini 2018) to regularize one's status in terms of residence and work should also be considered, especially when it comes to situations in which multiple layers of jurisdiction are involved. This is, for example, the case of those migrants who engage in secondary movements within Europe with multiple registrations within the Dublin and Schengen areas. While the most visible expressions of unclear and fluid statuses are represented by the informal shelters that grow from time to time at specific border areas and in big cities (from Ventimiglia to Calais, from Oranienplatz in Berlin to Lachapelle in Paris, from Baobab in Rome to Velika Kladuša in Bosnia and Herzegovina), the option of return to the origin country for those who can't regularly stay is also not a straightforward process, particularly if it comes after an apprehension.

The failure or abrupt interruption of the migration project is likely to lead to unsustainable return, especially if it is a last resort to avoid forced removal. Voluntary return programs strive to guarantee assistance and support that could lead to effective and sustainable reintegration at origin, as the lack of long-term prospects at origin might indeed result in re-emigration of returnees.

As shown in these pages, the multifaced dimensions of irregular migration in Europe are particularly complex. The remainder of the book will deepen the analysis, trying to unpack concepts, dynamics, and policy categories to provide a representation that is more adequate and adherent to the situation on the ground.

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Chapter 3
Contradictions in the Moral Economy of Migrant Irregularity

Sébastien Chauvin and Blanca Garcés-Mascareñas

3.1 Introduction

Irregular immigration ranks high on Europe's political agenda (Triandafyllidou 2016). Southern and eastern European countries have intensified controls at the external European borders. This has resulted in higher and more sophisticated fences, more border patrols, and more detentions and immediate repatriations. Border control has also intensified at European seaports and airports, where more control has implied distinguishing tourists from potential immigrants before departure, making airlines and travel agencies responsible for checking passenger identities and identifying foreigners by new technological means and a European network of immigration databases. The awareness that borders do not halt irregular migration has also led to heightened internal controls. These have included more surveillance by the police, increased incarceration and deportation of irregular immigrants and their gradual exclusion from the labour and housing markets as well as from public services. Exclusion is meant to frustrate daily life to such a degree that immigrants who could not be stopped at the border or detained and subsequently deported would be forced to leave anyway.

Despite the gradual securitization of Europe's borders, most recent estimates put the number of irregular migrants between 1.9 and 3.8 million in 2008 (see Chap. 2). They may be detained and deported at any moment, are not allowed to work, may face serious difficulties in finding housing, and may have restricted access to health care. At the same time, most irregular immigrants are in employment and are entitled to some basic social services. More generally, unauthorized residents live,

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work, shop, walk, and drive among the rest of the population. This chapter explores the implications of that tension between exclusion and inclusion beyond dichotomous understandings of citizenship based on binary oppositions such as citizens vs non-citizens, formal vs informal, national vs local or legal exclusion vs performative acts of inclusion (Chauvin and Garcés-Mascareñas 2014). Against unilaterally repressive theories, we argue that simultaneous exclusion and inclusion does not primarily result from the distinction between law in the books and law in practice or from external constraints imposed on the state, but rather follows from the contradictory imperatives the state faces when confronted with immigration.

3.2 Beyond Methodological Dualism

Analyses of the civic condition of illegal migrants across Europe and North America have tended to rest on a dichotomy between formal exclusion on the one hand and informal incorporation on the other. The assumption has been that irregular residents mainly receive access to the latter. From this perspective, several studies have provided rich descriptions of the ways undocumented migrants integrate into mostly local environments, benefit from the support of non-governmental organizations, and participate in a host of institutions such as schools, churches, community groups, art collectives, and political associations (among many others, Chavez 1991; Pincetl 1994; Coutin 2000, 2005; Van der Leun and Bouter 2015; Engbersen et al. 2006; Menjívar 2006; Kalir 2010).

The informal incorporation of undocumented immigrants has been explained by highlighting the agency of three different sets of actors. A first strand of research has pointed out how undocumented immigrants acquire some features commonly associated with citizenship through their daily informal practices. What Sassen has labelled "informal citizenship" (2002) includes those dimensions of citizenship that are enacted through undocumented migrants' practices and produce at least partial recognition of them as members of society. According to Isin (2008), these practices constitute "acts of citizenship" as they involve transforming oneself from subject into claimant, from non-citizen into part of a constituency. These approaches understand undocumented immigrants' inclusion as the result of migrants' agency and resistance to the state in ways evoking James Scott's "weapons of the weak" (1985). Moreover, as noted by Bosniak (2003), they expand conceptions of active citizenship to new domains, such as the workplace, the marketplace, the neighbourhood, social movements and even the family, which have traditionally been excluded as sites of citizenship by conventional understandings of the political.

A second strand of the literature has explained irregular immigrants' incorporation as a consequence of the individual practices of "street-level bureaucrats" (Lipsky 1980). From that perspective, it is the agency of different actors at various administrative levels, rather than that of immigrants themselves, that would account for these "loopholes" of inclusion despite exclusionary policies. As migration control

does increasingly take place within the institutions of the welfare state, individual actors in local health agencies, schools, and social service departments have gradually been asked to fulfil important control and gatekeeping functions. However, several studies (van der Leun 2006; Schweitzer 2018) show that doctors, teachers, social workers or administrative personnel have their own interests, rationales, and constraints that may lead to reproducing, adjusting, or frontally contesting particular exclusionary measures (Chimienti and Solomos 2016; Geeraert 2018). In a seminal study of implementation practices in the Netherlands, Van der Leun (2006) showed that the higher the level of professionalism among street-level bureaucrats and practitioners is, the higher is their tendency to include irregular immigrants even if this contradicts immigration laws. In comparison with health care professionals and teachers, workers in the domains of social assistance and housing seem to display a much more legalistic attitude, thus validating the exclusion of irregular immigrants (*Ibid.*). This seems to suggest that humanitarian concerns for inclusion only become determinant when professionalism is also present. Yet, like most culturalist accounts, explanations of bureaucratic behaviour by "professional culture" leave open the question of why certain categories of public service providers develop a culture more favourable to migrants and not others (even within the same service), thus warranting complementary explanations in terms of more structural state-related factors on the one hand (Chauvin and Garcés-Mascareñas 2012) and individual trajectories on the other (Spire 2008; Alpes and Spire 2014).

A third line of research puts the emphasis on social and migrant organisations as key actors in the informal incorporation of irregular immigrants. Studies of southern Europe have shown that when governmental integration policies are absent, civil society actors such as trade unions, NGOs, charities, and civil movement associations may become key in providing various services and offering political support for immigrants' rights claims (Campomori and Caponio 2014). Research on Europe and North America has also shown that when and where the state excludes, social and migrant organisations may provide legal assistance, access to medical care and housing, and language and vocational courses (Bruquetas-Callejo et al. 2011). However, in this case, the informal incorporation of undocumented migrants does not result only from the agency of these organisations and their resistance vis-à-vis the state. The state itself, particularly at the local level, does often draw upon them in order to ensure basic services formally forbidden to irregular migrants. By financing these programmes, public administrations seek to respond to the need to assist those residing in the country without opposing national laws directly and without bringing this need to broader attention or giving rise to political concerns (Spencer 2018a).

While these developments have helped underline these other sources and arenas of citizenship, the focus on "informal practices" by migrants, street level bureaucrats, and social and migrant organisations risks reifying dichotomies such as those between structure and agency or repression and resistance, thereby insufficiently challenging the division between formal and informal citizenship by relying on an overly homogenous picture of the state. Some studies have aptly formulated this

dualistic model by declaring that, although formally "illegal," undocumented migrants were nevertheless considered "licit" by society at large. While such an opposition between "illegal" and "licit" works well for contraband practices or certain illegitimate businesses in developing economies (Van Schendel and Abraham 2005), we believe it misses some aspects of the contradictory citizenship rights experienced by undocumented migrants in many Western countries. Whereas at times their residence can indeed be described as "legally banned but socially sanctioned and protected" (*Ibid*:19), it often turns out to be *both* legally banned and legally recognized. Rather than revolving around a conflict between the state and civil society, many contradictions in the civic status of undocumented migrants lie at the core of the very formal mechanisms of exclusion and incorporation that the state aims at them (Chauvin and Garcés-Mascareñas 2012).

Furthermore, inattention to formal incorporative features is encouraged by *legitimist representations* of the social and economic world, among experts and the broader public alike, who may ostensibly be pro-migrant but still believe that the law is coherent. By "representations" we thus refer to unexamined epistemologies and mental topographies rather than explicit normative political positions. We call "legitimism" the positivist belief in the self-coherence and non-contradictory nature of law, here resulting in the conceptual conflation of "legal" with "formal". Epistemological legitimism implies confidence in the convergence of formality with legality, and faith that an increase in illegality automatically translates into a surplus of "informality." Examples of legitimism can be found in descriptions of the economic integration of illegal residents. In Europe, policy documents frequently equate illegal migrants' employment with informal and undeclared work when in fact many—and in some countries like the United States, most—undocumented foreign workers happen to occupy formal jobs in the legal economy, even when such access implies committing infractions, including borrowing, renting, or falsifying formal documents (Vasta 2011; Horton 2015; Andrikopoulos 2017). Similarly, the current hardening of controls is not mechanically pushing migrants into the informal economy: in many cases it is merely forcing them to breach more and more rules and thus make themselves "more illegal" in order to reach previously more accessible levels of formal economic and civic membership.

In this chapter we go beyond methodological dualism and argue that inclusion and exclusion are located within the law itself. Irregular immigrants become integrated into key formal institutions not only as a result of inclusion promoted by regional and local administrations or informal or illegal practices but also because the law excludes and includes at the same time. Only by analysing these inherent tensions can one understand the complex and multidimensional nature of citizenship in contemporary societies and deepen our grasp of state rationalities behind migration policies.

3.3 Formal Incorporation (and Exclusion)

Irregular migrants are most often *not* "legally non-existent" (Coutin 2000). Their legal existence or formal incorporation has been explained as a result of tensions between distinct geographic levels of government. In contrast to restrictive immigration policies and highly charged debates at the national level, local policies have commonly been characterised by a bottom-up, place-sensitive approach and a pragmatic logic of problem solving (Garcés-Mascareñas and Chauvin 2016). Whereas this may lead to inclusion in some instances and exclusion in others, several scholars have argued that local policies are more likely to provide immigrants with equitable opportunities, accommodate ethnic diversity and work with immigrant organisations, which in turn facilitates a greater degree of immigrant political participation (Scholten and Penninx 2016). In the field of health care, the tension between the national and local levels is particularly evident. While several national governments have gradually excluded irregular immigrants from health care services (Spencer and Hughes 2015), local authorities tend to be more concerned with the implications that effective exclusion could have on public health. This has led many European cities to introduce specific measures to cover irregular immigrants or 'uninsured people' in general.

In her seminal work, Manon Pluymen (2008) argued that, compared to the national government, local authorities in the Netherlands tend to have a greater interest in providing a safety net for destitute migrants. This was justified by local authorities on the basis of three arguments. The first is humanitarian: moral arguments calling for the inclusion of those residing in the municipality prevail over national regulations aimed at exclusion. The second is in terms of public health, public order and safety. In this case, imperatives to prevent the spread of particular diseases, overcrowded housing, or urban decay may be a higher priority for local authorities than those related to immigration control. The third argument is in response to national policies: feeling burdened with the practical implications of the shortcomings of national migration policy, local authorities protest and try to persuade the government to reverse certain aspects of its policy.

This strand of the literature thus highlights that municipalities tend to be more concerned with knowing who resides in the city, incorporating any person into the health care system or avoiding irregular housing. However, it would be too simplistic to conclude that national policies exclude while local policies include. Although national-level policies are often presented as those most coherently directed toward the exclusion of unauthorized migrants, they have been shown to allow for the inclusion of these residents as well. National law or national-level court decisions usually prevent the exclusion of minors from primary and secondary educational institutions on the sole ground of their unauthorized migration status. Other provisions guarantee access to some form of health services, as entitlements are either explicitly provided for by law or regulations or ensured implicitly in a universal provision from which irregular migrants are not excluded. Sweden extended greater health care and education to undocumented migrants at the national level in 2013,

while in 2015 the UK government made the decision to allow them free access to HIV treatment (Spencer and Hughes 2015). Spain is an interesting case regarding formal incorporation at the national level: while not recognizing undocumented migrants as legal residents, national law requires them to register in municipalities (the so-called *padrón*). "Documented" unauthorized migrants can then legally access health and education facilities. In other instances, irregular migrants are included in national welfare systems through special programs that grant comparable benefits through alternative procedures. Even in cases when unauthorized migrants are excluded from general health insurance schemes, some costs such as emergency care are still factored in yearly budgetary planning of hospitals and other service organizations: when analysing migrant bureaucratic incorporation, budgets clearly speak louder than words.

Labour law is another example of the extension of common entitlements to irregular migrants. In most European countries, labour law protects all workers irrespective of their legal status (Fodor 2001; Inghammar 2010). In France, the Code du Travail specifically states that illegally employed workers, regardless of their legal status, are entitled to the same guarantees as the regularly employed, including the calculation of seniority pay, even though these rights have eroded in the 2010s. Workers on strike are traditionally protected from police intrusion (Barron et al. 2016). Although the 2009 EU directive on "employer sanctions" (2009/52/CE) aims chiefly at coordinating the repression of illegal migrant employment among member states, it also lists a number of labour rights applicable to illegally-employed foreigners. Formal inclusion, however, does not necessarily translate into practical inclusion. Even when irregular migrants' labour rights are protected, difficulties in proving informal employment or abuses by employers — together with the lack of firewalls protecting irregular migrants from detention and removal—mean that they often do not have access to these rights in practice. In some cases, they may also be led to renounce exerting those rights in exchange for employer sponsorship in legalization.

Finally, national-level membership is not limited to official and legal pathways: in fact, undocumented immigrants do attain some crucial dimensions of citizenship that cannot be reached legally, precisely through illegal access. This is a key point as many studies tend to describe the recent hardening of civic boundaries in overly legalist terms, confusing legal prohibition with practical impossibility. For example, it has often been stated in Dutch immigration scholarship that since a 1993 restrictive law, undocumented migrants can no longer be given a social security (BSN) number (see e.g. van der Leun 2006), when the correct observation is that undocumented migrants can no longer *legally* be granted such numbers (there have remained ways for them to make use of BSN numbers in practice). Considered diachronically, legally-precarious migrants' documentary trajectories may follow a virtuous chain of "bureaucratic incorporation" during which a first element of citizenship, obtained through falsification (like a registered job) or not (like a tax number or a local identity card) becomes the condition of growing civic inclusion, made of increasingly formal and increasingly "genuine"—although often illegitimately acquired—papers (Vasta 2011; Reeves 2013; Chauvin 2014; Horton 2015). In those

cases, illegality mostly pertains to the "last instance" and only becomes relevant in the most official moments of civic life, when the "last instance" is the only possible definition of the situation (Bourdieu 1990).

3.4 Why Incorporation?

Faced with the riddle of the continuing incorporation of undocumented migrants into societies of residence, whether through tolerance for durable illegality or through various legalization mechanisms, scholars have advanced a series of complementary, and at times competing, explanations. Among them: the need of capitalism for cheap labour and international and domestic legal limits to withdrawing basic human rights. In this section, we review these explanations and add two more, one referring to material and civic constraints and the other to the dynamics of governmentality.

3.4.1 Labour

The benefits of foreign labour in capitalist economies have been extensively analysed by Marxist and globalisation theorists. Portes (1978: 471–482) and Sassen (Sassen-Koob 1978: 516–518) noted already in the 1970s that the demands for foreign labour do not only result from absolute labour shortages. Employers have also welcomed immigrants as a way of reducing the unitary cost of labour (by lowering wages) and increasing its flexibility. This explains why the demand for foreign labour does not necessarily drop in contexts of large-scale unemployment. However, this premise does not explain why states have often chosen to restrict labour mobility. In Zolberg's words (1989: 409), "given the advantages of an 'unlimited supply of labour', why don't capitalists deploy their clout to import many, many more, or even to obtain completely open borders?"

Again, Marxist social scientists have argued that closed borders do not necessarily go against easy access to foreign labour. Instead, restrictive migration policies serve the needs of capitalists and capitalism as they place migrants in a more exploitable position (as undocumented labour). From this perspective, criminalising while tolerating irregular migrants functions as a means of constructing and preserving the legal otherness on which immigrants' condition as a cheap, flexible labour force rests (among many others, Bach 1978; Portes and Bach 1985; De Genova 2002; Calavita 2005). In the case of Italy, Maurizio Ambrosini (2013) has convincingly shown how tolerance for undocumented migration was tightly connected to the deficiencies of the care system, especially for the elderly, so that undocumented labour has come to function as informal welfare.

Although these effects are undeniable, such explanations again fail to account for the complexity of migration policies and states' rationalities behind them. If both

states and employers are interested in producing and reproducing migrants' legal and labour precariousness, why have governments then launched periodic regularisation programmes? In earlier publications, we have provided some answers. First, employers do not necessarily display a preference for undocumented migration. While favouring guest workers and circular migration systems, they have nevertheless supported regularisation programmes, even in countries where penalties for employing irregular migrants were minimal (Chauvin et al. 2013). For instance, in Spain employers have participated in the design and implementation of several regularisation programmes to the extent that the biggest and most recent one (2005) was considered a "normalisation of employers" (Garcés-Mascareñas 2012). Interestingly, trade unions accepted collaborating with employers by selecting and filtering applications in the name of both workers and employers (Bruquetas-Callejo et al. 2011). Second, progress in formalisation or access to legal status do not necessarily mean higher wages. Many foreign workers—regardless of their legal status—tend to work in sectors where wages are lower, whether they are undocumented or not. Thus, regularisation will most often keep a migrant's salary unchanged unless it is accompanied by a shift in sectors. True, undocumented migrant workers show more flexibility and willingness to work overtime, thus proving cheaper in practice than legal workers even with similar hourly wages on paper (Jounin 2008; Le Courant 2015). But recently-regularised migrants typically display comparable flexibility when they still hold temporary residence permits whose renewal depends on active participation in the formal labour market, thus indirectly on their employers.

3.4.2 Rights

Many scholars have signalled the extent to which human rights constrain state sovereignty and particularly its right to decide who enters and who does not, or who is an insider and who is not. Studies vary in the ways they define the source of these rights. Authors such as Soysal (1994) and Sassen (1996) have explained rights constraints on state sovereignty by the rise of an international human rights regime based on international agreements and conventions enshrining the rights of migrant workers or the status of refugees. Other scholars such as Hollifield (1992), Joppke (1998) and Guiraudon (1998) have understood rights limitations as being internally rather than externally produced. They emphasise how all Western constitutions enshrine a catalogue of elementary human rights that, together with strong and independent judiciaries, would hamper government capacity to restrict immigration.

Discussions on the limits of migration control in liberal democracies continue to be central in most political analyses of migration policies. Recently, a new strand of research has pointed to the morals of policymakers rather than the legal system or the political process as the main explanatory factor for the inclusion of immigrants.

In her study on the making of family migration policies between 1995 and 2005, Bonjour (2011) argues that the influence of court decisions on policymaking was much less significant than assumed by the literature to date. As conditions for entry and stay of foreign family members were entirely in the hands of Dutch politicians and civil servants, she claims that the making of family migration policies was not externally constrained by courts but rather shaped by immaterial norms such as family unity, equal treatment, and individual responsibility. In their study of undocumented children's access to accommodation and welfare support in the United Kingdom, Jonathan Price and Sarah Spencer (2015: 48) similarly showed that deservingness is mostly "not a legal concept that local authorities can apply in their assessments, but rather a value-based conception of families that inform assessment." Kawar (2015) and Bonjour (2016) recently concluded that, if courts influence migration policies, it may be indirectly by reshaping how political actors frame migration issues.

In a study to explain changes in immigrant rights over the period 1980–2008 in ten western European countries, Koopmans et al. (2012) point towards the importance of electoral factors: countries where a significant share of the electorate had immigrant roots were more likely to see subsequent liberalisations of immigrant rights which in turn, if they led to easier naturalisation and more immigration, expanded the immigrant electorate. In a more recent study of 29 countries worldwide, Koopmans and Michalowski (2017) argue that a colonial past and subsequent experience with cultural difference is what seems to account for a more open position towards immigrants. The final reason is electoral politics again: it is thanks to democracy, through voting, that openness towards immigrants is ultimately expressed. But how to reconcile this electoral explanation of generous migration policies with increasingly negative public opinion towards immigrants both in traditional countries of immigration and in former colonies of settlement?

More generally, accounts based on rights constraints in liberal democracies can hardly explain change and, more particularly, the increasing illiberalness of democracies in some respects. Indeed, the securitization of immigration has translated into a "quasi-military border control approach" (Spijkerboer 2007) that has systematically led to prioritise receiving states' perceived interests over immigrants' rights. Internal borders are being erected as well, from the proliferation of internment spaces and "states of exception" for irregular immigrants to the use of progressive liberal ideals as boundary-markers between those having "the right to have rights" and those who don't, even when legally resident or nationals (Mepschen et al. 2010). More importantly for our argument, explanations based on rights constraints or policymakers' morals in liberal democracies—such as those referring to the professionalism of street level bureaucrats—present inclusiveness as external to state concerns, which continue to be imagined as uniformly exclusionary. In contrast, we will argue that inclusiveness is also part and parcel of government's *raison d'être*.

3.4.3 Material and Civil Constraints

Moreover, exclusion can only be exerted within certain limits. Control and repression are thwarted not only by rights constraints but also by technical and internal limitations (Van der Leun and Kloosterman 2006; Broeders and Engbersen 2007). The stiffening of restrictions in many countries in the past two decades has made it indisputably more difficult for unauthorized residents to legally access basic elements of formal membership such as declared employment and the use of social services. But making such access more illegal does not make it disappear: it generates new coping strategies. Since 2007, in France all employers have had an obligation to check new foreign workers' residence cards for authenticity with the local branch of the national government (*préfecture*). Some employers then told their workers they could no longer work with a forged residence permit. The latter had to either borrow other people's authentic permits or forge French national identity cards. As French nationals are not submitted to the new compulsory checks, employers have no liability as to their authenticity (Barron et al. 2011).

A generalization of controls to the whole population may prevent this type of circumvention. But it would face two massive obstacles. The first one is economic: the cost of such generalization would likely be unsustainable and, in any case, greater than the supposed benefits believed to be gained from controls and the consequent removal of unauthorized migrants from the labour force. For example, forcing employers to check the authenticity of all employees (foreign or not) would, on the one hand, significantly obstruct economic activity and, on the other, tremendously inflate state bureaucracy, especially in an era of labour-market contingency and short-term contracts when such universal checks would have to be repeated often, if not daily or even several times a day in some sectors (De Lange 2011: 191). The second one is political. In other historical instances, the state's eagerness to control certain stigmatized groups contributed to "rationalizing" the whole national identification system in a more restrictive direction. In the case of France, Alexis Spire showed how the instauration of a single French national identity card in 1955 was generated by a governmental pursuit of more control over the movements of "French Algerian Muslims" (2003: 58–9). But the extension of controls to the most legitimate members of a society is likely to generate protests and resistance since irregular migrants' unauthorized access to at least some elements of formal membership cannot be effectively suppressed without infringing on the rights of citizens themselves.

As the generalization of labour-market controls is not viable and its limitation to self-declared foreigners is inefficient, a cheaper and more sustainable alternative would be to focus employment surveillance on those workers who "look" foreign, especially in ethno-racial terms. However, such alternative would prove equally untenable. Especially in multicultural societies, deciding on people's "foreign" appearance is a highly subjective operation that cannot be controlled in any unambiguous way. Of course, informal ethnic profiling by police forces has been widespread for a long time in continental Europe (Jobard et al. 2011), but it may only remain informally tolerated rather than positively enforced. Indeed, evidence of its

non-implementation would prove almost impossible to gather and would be unlikely to hold merit in court. Moreover, even if ethno-racial profiling may be legal and even culturally acceptable in certain countries (Vogel 2001:334; Castañeda 2010), in the case of the labour market, it would depend on the unlikely cooperation of employers, who—both judges and parties—can always claim good faith if investigated.[1] Finally, such focus would very likely be found discriminatory by courts and public agencies committed to the protection of ethnic minorities given that they have generally rejected mere ethnicity as a sufficient "probable cause" for checking immigration status. These material, juridical and political constraints account for the existence of a durable space for migrant life, work, and even 'careers' within illegality (Chauvin 2014).

3.4.4 Governmentality

Beyond labour needs, rights, and material and civic constraints, the state's rationality behind incorporation is also that of expansive governmentality. Here inclusion is not externally produced: it is not a question of markets and employers' demands; it has little to do with rights constraints imposed by liberal constitutions, independent judiciaries, policymakers' moral principles or, more informally, street-level bureaucrats' professionalism. As we have argued elsewhere (Chauvin and Garcés-Mascareñas 2012), the formal incorporation of irregular immigrants is inseparable from states' need to regulate. Foucault (1991) referred to "governmentality" as a regulatory logic by which state actors are not as interested in the law-abiding conformity of individual behaviour as in the predictability of collective conduct, a mode of government based less on controlling particular subjects than on ensuring overall governability. When states seek to produce a "legible", assessable, permanently identifiable population, "easily administered" from the centre (Scott 1998: 31–5), prediction and registration become more important than deportation, while on the other hand taxation becomes more urgent than formal authorization. States thus have a greater stake in regulating the actual population than in tracing boundaries between members and non-members.

There are multiple examples of how states often give priority to regulation over exclusion based on distinct concerns over public health, crime rates (rather than individual infraction) and crime reporting, economic regulation, and population management. In these cases, inclusion becomes an imperative not just for local administrations but also for regional and national governments. For instance, access to education may be framed as a human and social right, but incorporation in the

[1] In 2010, French employers rebuffed attempts by the French government to increase their liability in controlling the use of fraudulent immigration documents by responding that they could not reasonably hire professional 'physiognomists'—the official term for nightclub bouncers in charge of filtering entries on aesthetic criteria—to check if employees resemble the photographs on their identity papers (Barron et al. 2011).

school system is primarily based on the "public education" principle that the population must be educated and that a society cannot afford not to educate the next generation. The same could be said about public health. Access to health care can again be framed as an individual social right. While Western liberal democracies are increasingly limiting this right to nationals and legally-residing foreigners and/or contributing individuals, public health can only be ensured by covering the whole population, e.g. vaccinations have to be extended to all in order to be effective. Budgetary and political interests may also play a role. In the United States, for example, individual states insist on counting all their population in the national census (including unauthorized noncitizens) so as to increase the federal funds for which they are eligible and, even more importantly, their number of seats in the House of Representatives (Roberts 2009). Of course, these pro-inclusion rationales compete with other constraints. In their study on how British municipalities implement their duty to safeguard children "in need" under the s17 Children Act 1989, Sarah Spencer and Jonathan Price have shown how local authorities' discretion may lead in practice to more restrictive outcomes than stated by national laws; in this case, rather than giving priority to the needs of the child, local authorities seem to respond to other drivers, such as budget cuts and a negative opinion climate about both regular and irregular migrants (Price and Spencer 2015; Spencer 2018b).

At a broader level, inclusive governmentality faces the contradictory forces of sovereignty, which is more exclusively concerned with regulating the boundary between members and non-members. Indeed, against most political theories framing governmentality simply as a means to an end, that of exclusionary sovereignty, we argue that the two logics can be abstracted from each other in a way that shines the spotlight on their mutual tensions. While one often thinks of the "monopoly over legitimate means of movement" as a condition for the state's "embracement" of its population (Torpey 1998), when these two requirements enter in conflict the state may favour embracement at the expense of the monopoly (Chauvin and Garcés-Mascareñas 2012). A moderate loss of sovereign "control" may be the price to pay for more efficient "embracement." The recognition of people and processes seemingly located beyond state supervision can thus be construed as "the expression of an increasingly complex system of migration governance" (Kraler 2009: 21) by states having to reconcile conflicting demands in the field of migration policy (Boswell 2007: 92).

Not that sovereignty cannot win eventually—as the "internalization" of border control has evidenced in the past two decades. But, following our theoretical argument, privileging sovereignty means going against the inclusive tendencies of governmentality, rather than being supported by governmentality as a mere servant of sovereignty. As a consequence of this contradictory dynamic, the form of inclusive citizenship that regulates the inside of nation-states is very much unequal, hierarchical, and differentiated (Geeraert 2018). We argue that such stratification is not a product of the dynamics of governmentality but of sovereignty and its external assertion of membership principles: a product governmentality has to do *with* because it takes the population "as it is", including the inequalities generated by these exclusionary boundary-making processes.

3.5 Conclusion

This chapter sought to overcome dichotomous understandings of the law-society nexus by examining the inclusion and exclusion dynamics that shape the subordinated incorporation of undocumented migrants in western democracies, in ways that cannot be fully grasped through the formal vs. informal binary. We reviewed a host of existing rationales for inclusion. Although we recognize the weight of these rationales operating at different levels, in this chapter we eventually insisted on regulatory logics commonly associated with governmentality, which we argue favour inclusion. Determining whether governmentality concerns trump all others, compete with them, or lay in the background of most other arguments for inclusion, would require further analysis. Nevertheless, one can advance the hypothesis that the structural nature of governmentality constraints may account for the relative stability of forms of incorporation over time while moral and legal justifications for it come and go in a more fluctuating way. Indeed, these structural concerns—public education, public health, public order, road safety, economic and urban planning, and so on—could turn out to be acting at a deeper level than perhaps more superficial or "ideological" justifications for inclusion such as human rights or humanitarian concerns.

Our analysis has led us to argue that governmentality and sovereignty may be going in different directions. Such reasoning obviously requires an effort of abstraction, not one that opposes an "ideal" repressive government to the "reality" of inclusive practices, but one that learns to distinguish between the different ideals of government that can be found in reality. Interestingly, while the tension between sovereignty and governmentality principles creates a messy, multidimensional, and continuous citizenship regime *inside* countries, nation-states' external projections turn out to be more exclusively regulated by sovereignty and its strict binary between "citizens abroad" and non-citizens (Lafleur 2015). Ironically, the only space where nation-state sovereignty translates into a relatively pure form of citizenship binary may thus very well be located outside the nation-state itself.

Finally, identifying tensions between governmentality and sovereignty does not mean that governmentality is not itself traversed by contradictions. Indeed, one would go too fast attributing the current hardening of borders to the mere dynamics of sovereignty. True, we showed that there is a de-nationalized logic to governmentality although that logic does not necessarily point to a global or transnational imaginary (Sassen 2006). Yet, theorizing governmentality as primarily *not* being about membership uncovers a conundrum as to the relationship between governmentality, borders, and border policing.

Contrary to the oft-repeated idea drawn from Foucault's (2007) Collège de France lectures that sovereignty is tied to "territory" (thus borders) while governmentality deals primarily with the problem of "population," upon reflection it is quite clear that one needs a territory to define a population. While a *people* can lose its territory or become diasporic yet remain a people and even a nation, a population is more inherently defined by borders. Space—and bounded space—may thus turn out to be intrinsic to the de-nationalized imaginary of governmentality. The

resulting paradox that governmentality may "require" borders precisely because it is *not* about membership might perhaps help account for the contemporary coexistence of heightened border controls with the more inclusive dynamics of incorporation inside borders that we have described in this chapter.

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Chapter 4
The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism

Colm O'Cinneide

4.1 Introduction

Human rights law aims to provide comprehensive legal protection for fundamental rights. However, this universalist aspiration is often not translated into reality when it comes to the treatment of migrants with irregular status. The protection human rights law affords to such migrants is often diluted – either as a matter of law, or of *de facto* political reality. However, human rights law can still serve as an important tool for challenging exclusionary policies directed against irregular migrants. This chapter sets out to explore when and why this can be the case.

4.2 The Universalist Orientation of Human Rights Law

Human rights are supposed to be universal. By definition, they require every individual to be treated as entitled to a certain baseline level of dignified treatment, irrespective of nationality, race, gender, or any other distinguishing markers. Their universalism is affirmed by the founding text of the modern international human rights movement, namely the Universal Declaration of Human Rights (UDHR). Article 1 of the Declaration states that "all human beings are born free and equal in dignity and rights", while Article 2 asserts that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex…national or social origin…birth or other status".

Indeed, this quality of universality is often regarded as the special ingredient that (i) differentiates human rights claims from other important interests, entitlements, or values, and (ii) gives them a special prioritarian status that justifies why they

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should 'trump' other potentially competing considerations (Tasioulas 2010). What qualifies as a human right is usually defined by reference to accounts of what we owe each other as fellow human beings: these obligations, rooted in our common humanity, are deemed to prevail over other potential reasons for action, such as the obligations we feel we may owe to specific religious, ethnic, or national groups of which we are a member, or to particular ideological end-point goals, or to the state that commands our loyalties as citizens (Griffin 2008). In other words, universality gives force and definition to the concept of human rights: it is both their key distinguishing feature and the source of their normative power.

It is therefore not surprising that the universal scope of rights protection is acknowledged in the major international and regional human rights treaty instruments—which, unlike the UDHR, are binding as a matter of international law upon states which have signed and ratified their provisions. Thus Article 2 of the International Covenant on Civil and Political Rights (ICCPR), the major UN-endorsed international treaty covering core civil and political rights, echoes the language of Article 2 of the Declaration in providing that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, with distinction of status…" The provisions of the other major UN human treaties, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) are all expressed in similar universalistic terms (Dupper 2010).

At the regional level, Article 1 of the European Convention on Human Rights (ECHR) similarly provides that state parties "shall secure to everyone within their jurisdiction" the civil and political rights set out in the Convention. So too does Article 1 of the Inter-American Convention on Human Rights as also do multiple provisions of the African Charter of Human and Peoples' Rights and the provisions of the EU Charter of Fundamental Rights. Similarly, the core labour rights standards set out by the International Labour Organisation (ILO) protect all workers regardless of legal status or group affiliation (Merlino and Parkin 2011). In general, international human rights law is thus structured around the idea that every individual is entitled to the protection of their fundamental rights, regardless of nationality or other 'status' (ICJ 2014).

4.3 Rights Universalism in Tension with the Hierarchical Approach of National Law

In contrast, when one looks at the situation at the state level, national law does not treat non-nationals as being on an equal footing as nationals, meaning that sharp distinctions often exist between the legal rights of citizens and others. This is, for

example, the case with US constitutional law, where the US Supreme Court in the immigration case of *Demore v Kim* confirmed in 2003 that it was lawful for Congress to make rules "that would be unacceptable if applied to citizens" (Cole 2003).[1] Similarly, the status of non-national 'aliens' in the UK was historically regulated via the royal prerogative rather than through legislation, meaning that ministers of the Crown could regulate the lives of aliens present on UK soil in a manner that would have been unlawful if applied to UK nationals (Macdonald 2013).

There is therefore an inherent tension between the universalist orientation of international human rights law and the hierarchical approach of national legal systems, which regularly classify non-citizens as possessed of lesser rights than citizens. Given this tension, it is not surprising that issues of migrant rights are a regular flashpoint when it comes to the relationship between these two different categories of legal order—with the treatment of irregular migrants being a particular source of friction.[2]

Within national legal systems, irregular migrants suffer from a double layer of legal exclusion: (i) they are not accorded the special status and associated legal entitlements enjoyed by citizens of the state on whose territory they are present, but also are (ii) regularly denied access even to the lesser privileges accorded to the various classes of migrants who enjoy regularised status within the state concerned. The combined effect of these two layers of exclusion—usually set out in legislation or generated by administrative practice or both—often results in irregular migrants been driven to the margins of society. They can struggle to access basic health care, housing, and education, and are generally denied access to wider forms of social entitlements and the protection of labour law. Furthermore, they are vulnerable to the threat of deportation and other immigration control processes, and often exist in a legal 'grey area' with few of any secured rights to reside, remain, or work in the state in question (Pobjoy and Spencer 2012).

This vulnerable status is analogous to the concept of 'bare life' outlined in the work of theorists such as Agamben and Arendt, who argued that individuals denied political and/or socio-economic membership of a body politic were in effect deprived of the shelter of a civil identity and left in a rightless limbo (Agamben 1998; Arendt 1968; 147–82). This 'bare life' analysis fits the situation of irregular migrants in national law well: their lack of legal entitlement to participate in the life of the society that surrounds them, or even to contest the terms of their exclusion, makes them vulnerable to a comprehensive denial of their human needs (Rancière 2004; Schaap 2011).

However, at the level of international law, irregular migrants fall squarely within the universalist scope of human rights guarantees such as Article 2 ICCPR and

[1] *Demore v. Kim*, 538U.S. 510, 4 (2003), in turn quoting the earlier case of *Mathews v. Diaz*, 426U.S. 67, 80 (1976). In *Demore*, the Supreme Court concluded that a non-national could be detained by the immigration authorities for lengthy periods pending deportation, unlike the case with US nationals.

[2] See e.g. *Üner v The Netherlands* (2007) 45 EHRR 14; *AP (Trinidad & Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551.

Article 1 ECHR, with their requirement that states secure the rights of all individuals within their territory. Furthermore, their vulnerability—the way in which they are often reduced to the status of 'bare life'—would appear to run counter to core human rights values on account of how it exposes them to the risk of loss of shelter, separation from family, lack of means of subsistence, and exposure to the unconstrained coercive power of the state. As such, they would appear to be prime candidates to benefit from the universalist ambitions of human rights law.

The fact that irregular migrants come within the protective scope of human rights instruments has been repeatedly emphasised by a range of international organisations, including the UN and the Council of Europe. Such organisations have consistently argued that states should adopt a 'human rights approach' to migration control by focusing on protecting the human dignity of irregular migrants when implementing removal policies and regulating their access to social support, education, and health care, and so on.

Thus, for example, the UN High Commissioner for Human Rights (UNHCHR), in conjunction with the UN Global Migration Group (GMG), declared in 2010 that the "irregular situation which international migrants may find themselves in should not deprive them either of their humanity or of their rights. As the Universal Declaration of Human Rights states: all human beings are born free and equal in dignity and rights" (UNHCHR/GMG 2010). This statement was accompanied by a range of criticisms of existing state policies and practices, including a call for measures to be taken in conjunction with civil society to "respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfil the rights necessary for them to enjoy a life of dignity and security". Similarly, the Council of Europe Commissioner for Human Rights in 2007 called for a rights-centred approach to irregular migration, and set out a range of policy recommendations for putting this approach into effect, with the aim of ensuring that state policy strikes "a proper balance between protecting the rights of all those who are inside or at its borders, and maintaining control of the borders" (Council of Europe 2007).

Other bodies such as the World Health Organisation (WHO), the UN Committee on Migrant Workers (CMW 2013), the UN Committee for the Elimination of Discrimination against Women (CEDAW 2008), the International Commission of Jurists (ICJ 2014), the UN Special Rapporteur on the Rights of Migrants (Pizarro 2004) and even—in qualified terms—the UN General Assembly (UNGA 1985) have also called for the application of this 'human rights approach' to the situation of irregular migrants.

At the national level, NGOs, migrant support groups, and human rights campaigners have similarly campaigned for states to adopt a rights-focused approach to immigration control. Such campaigns have often invoked the universality of human rights to make the case as to why, for example, irregular migrants should be able to access primary health care, housing, and other forms of essential state support or to contest attempts to deport, detain, or otherwise subject them to treatment not generally afforded to other persons.

4.4 The Limits of Human Rights Law as It Applies to the Situation of Irregular Migrants

However, this appeal for a 'human rights approach' to the problem of irregular migration covers over some unresolved tensions. If one takes a closer, more detailed look at the substantive content of human rights law and its impact on the situation of irregular migrants, then some gloss begins to come off the picture. Sometimes human rights guarantees lack any impact due to what can be described as 'external' constraints on their impact. At other times, factors 'internal' to international human rights law dilutes the protection it should offer to irregular migrants if it were to remain in full concordance with its universalist aspirations. Furthermore, there are times when international human rights law is simply silent—meaning that it has not generated clear standards in areas of particular relevance to the situation of irregular migrants, often as a result of inaction or foot-dragging on the part of state parties whose consent to the establishment of such standards is always necessary. When added together, these limitations constrain the 'bite' of international human rights law as a tool for contesting state moves to create a 'hostile environment' for irregular migrants.

4.4.1 'External' Constraints

At times, these limits in human rights protection as it applies to irregular migrants are 'external' to human rights law, i.e., they involve problems relating to the impact and enforcement of human rights standards, as opposed to 'internal' flaws in their structure or content. Such external factors restrict the effectiveness of human rights law in many different contexts, which extend well beyond immigration control. However, their negative impact is often amplified when it comes to issues relating to the treatment of irregular migrants.

For example, states are often reluctant to give effect even to well-established international human rights standards, resenting what they see as external imposition (Goldsmith and Posner 2007). Attempts by NGOs and other campaigners to invoke human rights norms when challenging government policy will often generate backlash, with criticism frequently focusing on their 'undemocratic' or 'elitist' character (O'Cinneide 2019). Furthermore, the enforcement mechanisms for human rights treaties are very weak, meaning that states often face little international pressure to conform to their requirements.

International human rights law also often has an uncertain status within national legal systems. Its requirements may be subordinated to national legislation, or narrowly interpreted and applied by national courts, or otherwise marginalised. Legal remedies for rights violations may be difficult or even impossible to access. Coupled with political hostility, this can result in a situation where public authorities may face little or no substantive pressure to adhere to human rights requirements (Posner

2014), especially when they relate to vulnerable groups such as irregular migrants who are easy to demonise as undeserving of rights protection.

In other words, such external constraints on human rights law have a tendency to become a significant problem when the universalist orientation of human rights law runs up against political expectations at the national level that greater controls should be imposed on migrant influxes. In such situations, even well-established human rights legal frameworks can come under real pressure—as demonstrated, for example, by the political backlash in the UK, the Netherlands, and elsewhere against the constraints imposed on government deportation powers by the case-law of the European Court of Human Rights in respect of the right to family life protected under Article 8 ECHR (Bates 2014).

It can thus be difficult for the universalist orientation of human rights law to translate into positive improvements in the situation of irregular migrants. Rights universalism may promise more than it can deliver, especially when it runs up against political headwinds: external factors linked to the often-uncertain status of human rights law within national legal orders can substantively limit its impact.

That said, such external constraints come with the territory of human rights. They are perennial challenges that human rights campaigners strive to overcome in multiple different contexts. As such, these limitations pose a problem *for* the universalist ambitions of international standards rather than constituting a flaw *in* such standards: they are serious obstacles to be negotiated by campaigners fighting for a 'human rights approach' to be applied to the situation of irregular migrants, but do not undermine the 'internal' logic of human rights law itself.

4.4.2 'Internal' Constraints

However, the same is not true for certain aspects of human rights law as it applies to irregular migrants, where its universalist orientation has been diluted or otherwise compromised. In such situations, an 'internal' tension is generated between the lofty expectation that rights protection should apply equally to all persons and the qualified human rights law standards that are applied in practice—which undercuts human rights law's attachment to comprehensive universalism and substantially limits the rights protection afforded to irregular migrants.

To start with, the fact that irregular migrants are protected by human rights law does not necessarily mean that less favourable treatment of such migrants by states will constitute a breach of their legal obligations. Interference with individual rights will generally be 'objectively justifiable', if (i) the right in question is not a core or 'absolute' entitlement such as freedom from slavery or inhuman and degrading treatment and (ii) the interfering action in question can satisfy the 'proportionality' test used in human rights law to determine the legitimacy of state action. In this regard, courts have repeatedly accepted that state detention of irregular migrants, denial of access to social services, and certain other measures designed to create a 'hostile environment' constitute proportionate means of achieving the legitimate

aim of enhanced immigration control. Such judgments adhere formally to the universalist principle of equal rights protection, as irregular migrants are treated as having the same rights as others. However, the leeway usually given to national governments when it comes to defining what constitutes a breach of such rights often opens the way for irregular migrants to be subject to wide-ranging legal sanctions that would, in other circumstances, constitute a breach of basic norms (Costello 2015).

Similarly, courts have regularly adopted a narrow interpretation of the scope of state obligations to respect the human rights of irregular migrants on the basis that states can be assumed to have limited responsibility for migrants who have no legal entitlement to remain on the territory in question. For example, in the UK case of *R (Guveya) v NSS*,[3] the High Court concluded that there had been no breach of Articles 3 and 8 ECHR where no welfare support was given to a failed asylum seeker who refused to return home: the asylum seeker's failure to return was deemed to have relieved the UK government of any further obligation to meet their needs. Similarly, the European Court of Human Rights ruled in *N v UK*[4] that compelling irregular migrants to return to their countries of origin, even though they were receiving life-sustaining treatment in the UK that would not be accessible on their home states, would only constitute a breach the Article 3 ECHR right of freedom from inhuman and degrading treatment in certain very limited circumstances (Mantouvalou 2009). Again, there is formal adherence to the universalist approach in these cases, as irregular migrants are treated as benefitting from the scope of protection of rights provisions such as Article 3 ECHR just like anyone else. However, in practice, the restricted concept of state 'interference' with rights that is applied in such situations dilutes the impact of this formal universalism.

There are also 'internal' issues with the way in which human rights law has developed much more substantive standards in relation to some rights than to others. Across the human rights spectrum, certain rights are better protected than others, in the sense of being defined in more concrete terms, enjoying a more elevated status, and/or attracting higher levels of state compliance. In effect, this means that there are 'stronger' and 'weaker' types of rights claims, despite high-profile declarations made at international level recognizing the 'indivisibility of human rights'.[5] This distinction again sits uncomfortably with the universalist orientation of human rights law and has a particular impact on the situation of irregular migrants—as a comparison of the status of civil and political rights on the one hand and socio-economic rights on the other will show.

Civil and political rights such as the right to liberty or the right to fair trial fall into the 'strong' rights category. They are protected by a range of comparatively strong treaty instruments such as the ECHR, Inter-American Convention on Human

[3] [2004] EWHC 2371 (Admin).

[4] (2008) 47 EHRR 39.

[5] See e.g. the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5: "[a]ll human rights are universal, indivisible and interdependent and interrelated…".

Rights, and the ICCPR. Their scope and substance have also been mapped out in detail through the extensive case-law generated by bodies such as the European Court of Human Rights and the UN Human Rights Committee. Furthermore, civil and political rights standards benefit from a wide degree of political support: this ensures relatively high levels of compliance with this case-law. It is also common for civil and political rights standards to be incorporated into national law, meaning the provisions of an instrument such as the ECHR can be applied directly by national courts.

Thus, for example, if a European state detains irregular migrants pending deportation, their conditions of detention must satisfy the general requirements of the Article 3 ECHR right to freedom from inhuman and degrading treatment.[6] Article 5 ECHR, which protects the right to liberty, also requires that state authorities must have a clear legal basis for any such detention—as they should for any and all forms of deprivation of liberty.[7] Individuals without a lawful basis on which to remain on the territory of a host state cannot be deported back to their state of origin if they face a real risk of torture on their return or exposure to certain other forms of inhuman and degrading treatment—with this doctrine developing by extension from the absolute prohibition of torture applicable to all under the Convention.[8] Moves to deport irregular migrants may also in certain limited circumstances breach the Article 8 ECHR right to home, family, and private life, in particular where it would disrupt long-established family ties with the host state (Thym 2008): again, this particular doctrine is derived from the general protection conferred by Article 8 on all established family groups.

In contrast, the scope and substance of socio-economic rights such as the right to access health care or social welfare are much more contested. Socio-economic rights instruments such as ICESCR and the European Social Charter (ESC, the Council of Europe's social rights 'sister instrument' to the ECHR) have less status than their civil and political counterparts: states often regard their provisions as setting out vague aspirations rather than concrete rights guarantees, and it is rare for such rights to be enforceable in national legal systems. The standards developed by the expert committees that interpret these socio-economic rights instruments and assess whether state parties are complying with their requirements—the UN Committee on Economic, Social and Cultural Rights (CESCR) in the case of ICESCR, and the European Committee on Social Rights (ECSR) —are often disregarded or only attract lip service. Alston has even gone so far as to argue that socio-economic rights, in contrast to their civil and political counterparts, "remain largely invisible in the law and institutions of the great majority of states" (2017).

This differential approach to the protection of socio-economic rights has a real impact on irregular migrants. They often face substantial barriers in accessing social

[6] App. no. 53541/07, *S.D. v Greece*, Judgment of 11 June 2009; *M.S.S. v Belgium and Greece*, (2011) 53 EHRR 2.

[7] App. nos. 45355/99 and 45357/99, *Shamsa v Poland*, Judgment of 27 November 2003; App. no. 52722/15, *S.K. v Russia*, Judgment of 14 February 2017.

[8] *Chalal v U.K.* (1997) 23 EHRR 413.

services, education, health care, and other forms of socio-economic support. However, the obligations of states under human rights law to provide such services is not always clear—and little if any consensus exists as to when the exclusion of irregular migrants from accessing such services will actually breach the socio-economic provisions of human rights treaties (O'Cinneide 2014). Furthermore, there is usually very limited opportunity to invoke such rights before national courts, and they lack political status. As such, the segment of the human rights spectrum that is perhaps most directly relevant to the situation of many irregular migrants—on account of how they often lack access to basic forms of health care, housing, and social support—is lacking in real substance: a situation which is difficult to reconcile with the universalist aspirations of human rights law, and in particular with the notion that fundamental rights protection should be 'indivisible'.

4.4.3 The Lack of Express Human Rights Standards Relating to Irregular Migrants

There are also very few established standards relating to the rights of migrants as a distinct class of individuals. Human rights law has developed detailed requirements as to how women, ethnic minorities, persons with disabilities, children, and other vulnerable groups should be treated by states through instruments such as CEDAW, CRED, and CRC. But the one international treaty that sets out similar standards in relation to migrant workers—the UN International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (the 'ICMW')—has not been ratified by any state which is a net importer of migrant labour.[9] This has substantially undermined its status as an authoritative source of human rights obligations: non-ratifying states are not legally bound by its provisions, and the refusal of migrant-receiving states to endorse its provisions means that it also lacks political impact. As Pécoud has argued, the ICMW is "clearly the most controversial and contested" of the core UN international human rights treaty instruments (2017). This means that little, if any, clarity exists as to the scope and substance of migrants' rights as a specific category of rights-holders, let alone those of irregular migrants.[10]

Certain specific provisions of international human rights law impose concrete obligations on states in relation to irregular migrants. For example, Article 4(3) of the Council of Europe's 2011 Convention on Preventing and Combating Violence against Women and Domestic Violence (the 'Istanbul Convention') provides that state parties should give effect to its requirements "without any discrimination…on the ground of migrant or refugee status". This is an important provision, as it clarifies that female victims of violence are entitled to state protection and support

[9] No EU or North American state has signed or ratified the ICMW.

[10] Article 18 and 19 of the ESC contains provisions that set out certain migrant rights, but they are limited in scope and impact (as discussed further below).

irrespective of their migration status—a point emphasised in the official Council of Europe factsheets produced to accompany the Convention.[11]

However, such an express provision clarifying that irregular migrants are entitled to the full and equal protection of the rights set out in the human rights instrument in question is rare. The ICMV adopts a different approach. Its text makes it clear that irregular migrants are entitled to have their basic civil and political rights protected—and also to have access to certain socio-economic entitlements, such as emergency health care, education (in the case of children), and protection against employer exploitation.[12] Nevertheless, its provisions also differentiate between the rights of migrant workers and their families who are in a "documented or a regular situation" and those who are not, with the former benefiting from a much wider range of rights guarantees than the latter (Dupper 2010).[13] Furthermore, Article 35 of the Convention provides that nothing in its text "shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation". Thus, in giving with one hand, the ICMV takes with its other: it recognises irregular migrants as entitled to a range of fundamental rights protection, but also accepts that this protection should be considerably more limited than that on offer to other categories of migrant (*Ibid.*).

Other treaties go further in limiting their application to irregular migrants. The Appendix to the ESC, as discussed below, provides that Social Charter rights apply to non-nationals "only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". This ambiguous provision has caused problems of interpretation, as discussed further below. However, it is a striking example of the universalist reach of a human rights instrument being expressly reined in to limit its scope of application to irregular migrants—a decision that dates back to when the text of the Social Charter was agreed in 1960 (O'Cinneide 2014).

4.5 Dynamics of Dilution

To summarise, a tension exists between the universalist orientation of human rights law and its diluted scope of application to the situation of irregular migrants.[14] Why has this tension emerged? Why has the universalism principle—the conceptual basis of human rights law—been so diluted when it comes to the situation of irregular migrants?

[11] See Council of Europe, Safe from Fear, Save from Violence: Preventing and Combating Violence against Women and Domestic Violence (2016), available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046eabd

[12] See Articles 1–35 ICMV.

[13] See Articles 36–56 ICMV.

[14] For further discussion, see the excellent collection of essays in Dembour and Kelly 2011.

Several different factors seem to be in play. The under-development of socio-economic rights is a general problem within the field of human rights law: however, this particularly impacts on irregular migrants on account of their precarious status. Human rights law is increasingly exposed to political attack, on the basis that it allegedly interferes with national sovereignty: irregular migrants have to some extent been caught up in this cross-fire. Immigration control is a complex area, involving competing values and intricate questions of policy: human rights law can struggle to set out clear standards in such messy normative terrain.

However, there is one particular factor which impacts directly or indirectly on all these other considerations and which seems to exert a key influence on the dilution of rights protection as it applies to irregular migrants—namely, the wider tension discussed above between the universalist orientation of international human rights law and the hierarchical approach of national legal systems. The universalist orientation of human rights law may attract plenty of lip service, but the hierarchical approach of national law—and in particular the way it privileges accepted members of the civic community over 'outsiders' and gives national governments wide leeway to control migrant flows—is generally assumed to be a desirable, fixed, and necessary element of a state-centred system of global governance. As a result, the presumed need to preserve national immigration control is often assumed to trump the logic of rights universalism, in particular in situations where the rights claim at issue is not viewed as being sufficiently fundamental to justify a different approach, as tends to be the case with socio-economic rights, for example.

External pressure on human rights law thus often becomes very intense when it is invoked to challenge national immigration control policies.[15] Similarly, internal constraints on the application of 'full' rights universalism to irregular migrants are often based on the assumption that human rights law should not substantially interfere with the national prerogative of controlling migration flow, and that the responsibility of host-states towards irregular migrants is limited by virtue of their lack of legal entitlement to be on its territory.[16]

In other words, the limited reach of human rights law when it comes to the situation of irregular migrants seems ultimately to be motivated by the view that national authorities should generally be left alone to determine their own response to irregular migrants rather than being subject to overreaching international norms invoking an abstract notion of universalism. This view frames the problem of irregular migration as a social and economic issue to be determined by state regulation, rather than as a human rights matter: human rights law may be relevant at the margins to ensure compliance with fundamental civil and political entitlements, but beyond that, the interests embodied in state law and policy are assumed to have free rein (Vucetic 2007). This view has been subject to penetrating and compelling criticism on the basis that it gives insufficient weight to the human dignity and 'personhood' of

[15] As illustrated above by the example of political responses in the UK to the use of ECHR and EU legal standards to challenge migration policies.

[16] See e.g. the judgment of the European Court of Human Rights in Application no. 17931/16, *Hunde v Netherlands*, Judgment of 5 July 2016.

migrants present within the territory of states (Bosniak 2006; Carens 2013). However, it has cast a substantial shadow over human rights law as it relates to the situation of irregular migrants.

4.6 Changing the Dynamic: The Potential of Human Rights Law

Arendt had identified this tendency for individuals lacking a 'civic identity' to be denied rights protection in her classic *The Origins of Totalitarianism*, building on her 'bare life' analysis discussed above and particularly referring to how the Jewish population of Germany had been rendered effectively stateless before the Nazi regime began its extermination campaign. She argued that "[t]he Rights of Man, after all, had been defined as 'inalienable' because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon minimum rights, no authority was left to protect them and no institution was willing to guarantee them" (Arendt 1968: 171–2). In her view, rights could only be meaningfully articulated within a civic community—and refugees and other stateless persons, lacking membership of such a community, were therefore reduced to a state of intrinsic 'rightlessness'. "The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems within given communities—but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them" (Arendt 1968: 175–6). Agamben has made similar arguments, going so far as to argue that human rights are ultimately incapable of being delinked from membership of a particular political order (Agamben 1998; Lechte 2007).[17]

However, both Arendt and Agamben overstate their case: Arendt because she was writing before the evolution of modern international human rights law from the 1960s on, Agamben because he understates the inherent fluidity of law (Fitzpatrick 2005; Lechte 2007). Out of deference towards the hierarchical claims of national law, human rights law pulls its punches when it comes to the situation of irregular migrants. However, this deference is not all-encompassing. As outlined above, international human rights law imposes certain substantive limits on national immigration law and policy: these limits may, in general, only apply to civil and political rights, but they still establish a protective framework that ensures irregular migrants enjoy a qualified legal status as rights-bearing individuals. Furthermore, while the external and internal constraints discussed above limit the applicability of human rights norms to the situation of irregular migrants, they do not impose rigid cut-off

[17] These arguments were first developed in relation to refugees. However, their applicability to irregular migrants is clear.

points: such constraints act as drag factors on the development of rights protection, but some space is left for incremental development of existing standards.

This means that existing human rights law has the potential to expand its scope of protection. Its underlying universalist orientation is often watered down or even repressed when it comes to the situation of irregular migrants, in particular as regards the development of 'hard' law standards. However, it can nevertheless be used as a lever to open up new legal and political avenues of rights protection: the dynamic of dilution need not be the only process in play.

For example, as discussed above, states are given considerable leeway when it comes to justifying immigration control measures under the proportionality test used to decide whether human rights standards have been breached. However, this leeway is not unlimited: clear justification must still be shown for measures affecting fundamental rights, even when it comes to the rights of a marginalised and discounted group like irregular migrants. National governments regularly manage to satisfy courts that far-reaching immigration control measures are proportionate, but success is not guaranteed as evidenced by the number of successful legal challenges in multiple jurisdictions that result in such measures being struck down on the basis that they failed to comply with human rights requirements.[18] This pressure to show justification can deter governments from introducing certain anti-migrant measures – especially when particularly vulnerable groups of irregular migrants are affected, such as elderly persons, the sick, children and families.[19] It also gives human rights campaigners a point of leverage when it comes to challenging the necessity for such measures and opening them up to political and media contestation (Kawar 2015).

Similarly, even when courts adopt restrictive interpretations of the scope of human rights guarantees, this is not the end of the story. Such interpretations can be difficult to reconcile with the universalist orientation of human rights law and makes them ripe for both legal and political contestation. This tension can encourage courts to revise earlier approaches and adopt a more expansive approach, often in response to criticism from human rights campaigners. A classic example of this tendency can be found in the recent case-law of the European Court of Human Rights. As discussed above, the Court's 2008 judgment in *N v UK* adopted a very narrow approach to the interpretation of the right to inhuman and degrading treatment: it established that states deporting irregular migrants receiving life-sustaining treatment back to countries where they would not receive an equivalent level of treatment would only breach this right in "very exceptional" circumstances. This decision was subsequently subject to sustained academic and NGO criticism on the basis that it represented an abdication by the Court of its responsibility to protect all persons against degrading treatment generated by state action (Brems 2014). In response, in the

[18] See e.g. the South African case of *Khosa v Minister of Social Development* [2004] ZACC 11; the UK case of *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; the Irish case of *Luximon and Blachand v Minister for Justice* [2018] IESC 24.

[19] See e.g. the European Court of Human Rights judgment in application no. 16483/12, *Khlaifia and others v Italy*, Judgment of 15 December 2016 [GC], para. 194.

2016 case of *Paposhvili v Belgium*,[20] the Court ruled that it would constitute inhuman and degrading treatment for a person receiving such treatment to be deported when it would cause a "serious, rapid and irreversible decline in his or her state of health".[21] This has extended the protection afforded to irregular migrants by human rights law, and has been described as moving the Court's case-law "closer to its [underlying] principles" (Peroni 2016).

Even weak, inchoate, and underdeveloped areas of human rights law have the potential to generate new avenues of rights protection for irregular migrants. Socio-economic rights instruments such as ICESCR and the ESC may lack impact. However, their provisions—and the standards developed by the abovementioned expert committees which interpret these instruments, such as the UN Committee on Economic, Social and Cultural Rights and the European Committee on Social Rights—can nevertheless over time influence legal and political debate. They give greater definition to the content of socio-economic rights and consequently tend to be invoked as authoritative norms by NGOs, human rights commissions, and other groups campaigning for greater respect for such rights (Bódig 2016; McCall-Smith 2016). In turn, this helps shape policy discussions about what respect on a universalist basis for such standards entails—including in areas such as immigration control.[22] The same is true for the standards developed by bodies such as the UN Committee on the Rights of the Child (interpreting the CRC) and even potentially the UN Committee on Migrant Workers (interpreting the ICMW). Such standards only constitute 'soft law' norms, as they are not formally binding on state parties: however, they can still affect policy debates about the status and treatment of irregular migrants.[23] Indeed, Betts has argued that the development of such norms has the potential to close the "fundamental normative and institutional gap" that currently exists in international law relating to the treatment of such migrants (2010).

4.7 The Changing Dynamic: Municipalities as a Case Study

Thus, to recapitulate, human rights law offers limited protection to irregular migrants. But, Arendt and Agamben notwithstanding, such migrants are not 'rightless'. The 'hard' legal standards that protect them may be circumscribed, however, the universalist orientation of human rights law can still be mobilised so as to pose a challenge to national laws that threaten their human dignity: the impact of international rights standards can go beyond what is formally required by the strict letter of

[20] Application no. 41738/10, Judgment of 13 December 2016, Grand Chamber.

[21] Ibid, [183].

[22] See e.g. the evidence relating to the treatment of 'refused' asylum seekers presented to the Joint Committee on Human Rights of the UK Parliament in 2007, and the Committee's conclusions in its subsequent report: JCHR 2007. See also Council of Europe 2011; Grove-White 2014.

[23] See e.g. the case study relating to the Netherlands in the following section. See also the discussion of civil society activity in this regard in LeVoy and Geddie 2009.

the law. Benvenisti and Harel have argued that international human rights norms and national law exist in a conjoined relationship of 'discordant parity', meaning that the former can operate so as to expose flaws, blind spots, and inconsistencies in the latter (2017). This is particularly true in the context of immigration control, where the tension between the universalist orientation of international human rights law and the hierarchical, often exclusionary, approach of national law can open the latter up to political and legal contestation (Kawar 2015).

In the past, such contestation has often been driven by NGOs, migrant advocacy groups, and activist lawyers representing migrants being subjected to exclusionary measures. But it is increasingly involving more than just these 'usual suspects' from civil society.

International human rights law, in both its 'hard' and 'soft' iterations, has become a significant point of reference in national law and policy. Its provisions are increasingly invoked as guides to be followed by politicians, civil servants, and others working within state structures, with Goodman and Jinks identifying 'acculturation' in the form of cognitive and social pressure to adhere to rights standards as being a significant factor in encouraging compliance with human rights law at the level of domestic political governance (2013). Such domestic take-up of rights standards also increasingly covers both hard and soft law commitments, extending beyond civil and political rights to cover a wider range of human rights norms (McCall-Smith 2016). It thus opens up more room for rights standards to be invoked in domestic political struggles by various political actors pushing for change (Goodman and Jinks 2013: 187–88). As a consequence, not all political and legal contestation in the context of migration control stems from civil society: state actors in the form of different public authorities are increasingly also becoming involved, especially in situations where the policies of one arm of the state may run counter to the interests and/or values of another arm.

Oomen and Baumgärtel have highlighted the growing importance of local authorities' in this process of rights 'acculturation' and political contestation, especially as it plays out in the context of migration control (2018). They give numerous examples of situations where municipal authorities have committed themselves to providing greater levels of human rights protection than is necessarily on offer from central government and 'decoupled' from various state policies which they regard as violating international standards—with several of these examples relating to the treatment of irregular migrants.

Oomen and Baumgärtel suggest that this developing phenomenon of "human rights cities" involving the "legalisation from below" of otherwise contested international human rights standards represents a "new frontier" in the development of a multi-layered system of rights protection. It is certainly an increasingly important dynamic in the context of migration control. Measures by the central government directed against irregular migrants are increasingly being contested by elected

municipal authorities—in particular those in charge of liberal, multicultural cities.[24] In so doing, these municipal authorities often invoke universal human rights norms to justify their refusal to comply with edicts from the central government. Like many campaigning organisations in this context, they push beyond the formal limits of 'hard' human rights law to use its softer elements as a lever for change. In so doing, they demonstrate the potential of rights standards in this context—and the danger of assuming that their impact is confined to their 'hard' legal requirements.

One particular example cited by Oomen and Baumgärtel stands out as an example of this dynamic in action. In 2012, the Dutch central government prohibited municipalities from offering emergency shelter to irregular migrants as part of a wider migration control policy strategy. This was controversial, with city authorities in Amsterdam, Utrecht, and elsewhere objecting on the basis both of human rights concerns and also because of how they would be left to handle the social fallout from this policy. 'Hard' human rights law—such as the ECHR—offered no clear avenue of challenging the central government's decision. However, civil society groups brought a collective complaint before the ECSR, the expert body that interprets the ESC, alleging that this prohibition breached the rights to social assistance and housing set out in Articles 13 and 31 of the revised Social Charter (Oomen and Baumgärtel 2018; O'Cinneide 2014).

As discussed above, the socio-economic rights set out in the ESC are generally not viewed by states as having the same weight as the civil and political rights set out in instruments such as the ECHR. Furthermore, as also discussed above, the Appendix of the ESC limits its scope of application to migrants "lawfully resident or working regularly" in the state concerned. The Committee nevertheless concluded that these restrictive provisions of the Appendix had to be read subject to the universalist orientation of the ESC taken as a whole, with its overriding emphasis on securing human dignity.[25] It therefore went on to hold that the Dutch government had breached the requirements of the ESC in imposing a comprehensive ban on irregular migrants receiving emergency shelter, irrespective of need.[26]

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[24] For example, in New York City successive mayors have taken measures to protect irregular migrants against both exploitation by private employers and the application of what they see as abusive immigration controls by the federal government. See *The New York Times*, "De Blasio Defends New York Policies on Immigration", 28 June 2017, available at https://www.nytimes.com/2017/06/28/nyregion/bill-de-blasio-defends-new-york-policies-on-immigration.html

[25] Complaint No. 90/2013, *Conference of European Churches (CEC) v. the Netherlands*, Decision on the merits of 1 July 2017. See also Collective Complaint 86/2012, *FEANTSA v. The Netherlands*, Decision on the merits of 9 July 2014. Both decisions are accessible at https://hudoc.esc.coe.int/

[26] In this regard, the Committee followed its previous decision in Collective Complaint 47/2008, *Defence of Children International v The Netherlands*, Decision on the merits of 20 October 2009, which had focused specifically on the issue of whether undocumented migrant children should have an explicit legal entitlement to access social services. See also Collective Complaint No. 14/2003, *International Federation of Human Rights Leagues v. France*, Decision on the merits 8 September 2004; Collective Complaint No. 69/2011, *DCI v. Belgium*, Decision on the merits of 23 October 2012.

The Dutch government attempted to challenge the ECSR's decision before the Committee of Ministers of the Council of Europe, alleging that the decision failed to conform to the text of the Charter. It also pointed out that Dutch authorities were not formally required as a matter of national law to give effect to decisions of the ECSR (Oomen and Baumgärtel 2018).[27] However, the Committee of Ministers chose not to intervene to overturn the ECSR decision.[28] As a result, various Dutch local authorities announced that they would treat the ECSR's decision as setting out the requirements of international human rights law and proceeded to open up their emergency shelters to irregular migrants. This issue proved to be politically divisive, with sharp splits emerging in the Dutch ruling coalition. The government eventually proposed what it saw as a compromise position, whereby access to emergency housing shelters will be permitted but only for irregular migrants who co-operated with expulsion procedures. However, several municipalities—including Utrecht and Amsterdam—have continued to use the ESC standards as interpreted by the ECSR as the basis for their local policies as regards the provision of emergency shelter to irregular migrants (Oomen and Baumgärtel 2018).

This case study shows how even apparently 'soft' human rights standards like the ESC framework can be invoked to contest exclusionary policies directed against irregular migrants—and how different actors can be involved in different ways in this dynamic. (In the Dutch case, civil society organisations, municipalities, and the Council of Europe institutional framework were all involved, along with the centre-left political parties making up the Dutch governing coalition.) Human rights law may have limited 'hard' applicability when it comes to the situation of irregular migrants, but it remains a source of universalist-inflected 'soft' standards that can be used to challenge hierarchical national law and policy.

4.8 Conclusion

When it comes to the migration control context, human rights law is capable of generating both (i) binding 'hard' legal requirements (such as those arising under the ECHR) and (ii) fuel for political and legal contestation in the form of 'soft' principles (such as those set out in instruments like the ESC). The universalist orientation of human rights law may be highly diluted when it comes to the situation of irregular migrants, but it still has sufficient normative appeal so as to give some concrete definition to the notion of a 'human rights approach' to irregular migration.

[27] In addition, it should be noted that the European Court of Human Rights ruled that no violation of the civil and political rights set out in the ECHR had taken place: see *Hunde v Netherlands*, at ftn 17 above.

[28] Resolution CM/ResChS(2015)5, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, adopted by the Committee of Ministers on 15 April 2015, at the 1225th meeting of the Ministers' Deputies. See also Resolution CM/ResChS(2015)4, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, adopted by the Committee of Ministers on 15 April 2015 at the 1225th meeting of the Ministers' Deputies.

Academic research is increasingly trying to give more substantive content to this concept, as reflected for example in the recent call by Crépeau and Hastie (echoing NGO campaigns and municipal policies in New York and elsewhere) for a 'firewall' to be erected between immigration enforcement activities and public service provision (2015). This approach is also influencing the ongoing development of international standards in this context, as reflected for example in the recently-agreed text of the UN Global Compact for Safe, Orderly and Regular Migration which aims to set common international standards in relation to the treatment of all migrants. In particular, Objective 15 of the Compact commits states to ensuring that "all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services", which entails that "cooperation between service providers and immigration authorities [should not] exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services or unlawfully infringing upon the human rights to privacy, liberty and security of person at places of basic service delivery" (UN 2018). The influence of rights standards may also partially explain why greater restrictions on migration at the national level have not always translated into more restrictive access to essential social services for irregular migrants (Spencer and Hughes 2015): measures which appear to seriously undermine human dignity are difficult to reconcile with the universalist orientation of human rights norms, even if they may not be 'unlawful' *per se*.

As states tighten their immigration policies, it remains to be seen how much of an impact human rights law can have in this context, in either its 'hard' or 'soft' incarnations. However, the Dutch municipalities/ESC case study shows how human rights law is increasingly being invoked to defend the rights of irregular migrants in ways that go beyond the formal limitations of the ECHR and other instruments. Irregular migrants may have less rights than others, but they are not 'rightless'—and it is possible to speak meaningfully (albeit with some qualifications) about a developing substantive and contestatory 'human rights approach' in this context.

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Chapter 5
European Union and National Responses to Migrants with Irregular Status: Is the Fortress Slowly Crumbling?

Nicola Delvino

5.1 Introduction

Almost 20 years have passed since the Treaty of Amsterdam came into force in 1999, conferring legislative competences on immigration matters to the European Union (EU). Only one year later, Geddes discussed whether the direction of travel of European migration policies would be towards the construction of a 'Fortress Europe' (Geddes 2000), since agreement amongst EU member states could be more easily found on policies fighting irregular migration rather than on more inclusive aspects of migration policy. Since then, it has been widely-held that the policies of both the EU and its member states on immigration have disproportionally leaned towards combatting the unauthorised arrivals of migrants and discouraging the stay of third-country nationals with irregular migration status. The fight against irregular immigration through policies of strict border control and immigration enforcement constitute the very foundations of Fortress Europe, together with the imposition of increasingly restrictive conditions to legally enter Europe for labour or asylum purposes. However, in addition, EU member states have also been reinforcing the fortification internally with policies excluding irregular migrants from the opportunities of working or obtaining public assistance in an effort to discourage the stay and encourage departures of those already inside the 'fortress'.

It is widely recognised, nonetheless, that the irregular arrival and stay of migrants cannot be governed only through policies of enforcement and disincentives. In a simplified world, these policies would be sufficient to regulate irregular immigration by simply bringing irregular arrivals and stays to zero but migration is far from a simple matter and, as Castles (2004) showed, the many factors at play in migration phenomena—including the North-South divide, social dynamics related to migrants' agency, and conflicting interests within countries of destination, to name some—

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make immigration policies destined to fail. After all, the irregular arrivals to Europe of hundreds of thousands of people during the years of the so-called 'refugee' (or, interchangeably in this chapter, 'migration') crisis or the continuous presence of 11 million irregular migrants in the United States simply confirm that no fortress is impregnable. Law and policy cannot ignore this and need to recognise that the presence, no matter how unwanted, of migrants with irregular status is not eradicable, let alone in the short term.

Policies governing irregular immigration must develop into two equally relevant dimensions: on the one hand *policies on irregular immigration* aiming to prevent and reduce irregular arrival and, on the other, *policies on irregular migrants* addressing the treatment of migrants once they have entered a country (or overstayed their stay permits) in breach of immigration rules. This chapter will focus on this second policy dimension, outlining the evolution of EU and national laws and policies governing the presence of migrants with irregular status.[1] In particular, the chapter describes how the EU and its member states have adopted a predominantly exclusionary approach towards irregularly staying migrants, thus fortifying the European fortress from the inside, noting, however, how policymakers in Europe are gradually taking account of the social reality of migrants with irregular status and—occasionally and in a fragmented way—diverting from their overarching approach of exclusion.

The policies regulating the treatment of irregular migrants can, indeed, provide them with some form of accommodation into the hosting society, access to public services, and the possibility to regularise their status. They must in any case respect those fundamental rights, including certain social entitlements, that are recognised to everyone irrespective of migration status. Policies on irregular migrants, however, can be—and most often are—geared to obstruct accommodation in the hosting society, create a 'hostile environment', deny assistance, and ultimately encourage irregular migrants to leave. In this case, *policies on irregular migrants* discouraging irregular stays strongly resemble *policies on irregular migration* preventing irregular arrivals. They contribute to the building of the fortress, to the point described by Van Der Leun where national policies excluding irregular migrants from public assistance operate a real shift in immigration control from the external borders to forms of "internal migration control" (Van Der Leun 2006). This chapter focuses on this internal dimension of control to describe how it contributed to the building of Fortress Europe.

[1] With "migrants with irregular status" or "irregular migrants" this Chapter indicates third country nationals who have entered or stayed in a country without authorisation, including children who inherited an irregular migration status at birth, and those who remained beyond the limits imposed by their visa or residence permits. This last category embraces a wide variety of situations, including those of (previously regular) migrants who could not obtain the renewal of their residence permit before its expiration, or rejected asylum seekers after the final negative conclusion of their asylum procedure. In the context of the EU, the term 'irregular migrant' is only used to refer to non-EU nationals, and not to situations of 'irregularity' that can characterise the presence of certain 'new' EU citizens in another EU Member State.

The effectiveness of the deterrent factor of policies of exclusion is, however, highly disputed as there is no clear evidence that strict policies of internal migration control have ever reduced migration flows (Leerkes 2016). In some cases, certain exclusionary measures tested in Europe not only had no measurable deterrent impact, but also had significant negative side effects on the hosting state and society. The clogging-up of Italian courts resulting from the mandatory prosecution of all detected irregular migrants following the criminalisation of irregular entries and stays is a case in point (Delvino and Spencer 2014). Moreover, implementing a complete exclusion of irregular migrants from society is legally, socially, and morally not possible. Besides an obvious matter of human rights, a full marginalisation of a section of the population entails grave concerns in terms of, *inter alia*, public order, security, and public health for the whole population. As Spencer explains in Chap. 10, a number of local authorities in Europe may have been more concerned with potential social problems in their communities than national or supranational authorities.

While the official rhetoric of national authorities in Europe often praises zero tolerance for irregular migration and calls for a complete exclusion from services of irregular migrants (see the discussions around the 'hostile environment policies' in the United Kingdom), the truth is that in a number of cases, national and EU policymakers have been gradually and timidly recognising that totally exclusionary policies can be unsuccessful or may have undesirable negative consequences. While the overarching approach towards irregular migrants in Europe remains one of exclusion—which, in some cases, has recently been tightened further—in the last decade we also observe a number of instances of EU and national policies extending access to services and justice for irregular migrants, even taking a step back in some cases, e.g. in relation to criminalisation. This refers to formal instances of openness in official policy and not to the 'informal inclusion' operated by service providers (Van Der Leun 2006). Instances of formal inclusion do not necessarily overturn (and can go side by side with) a generally exclusionary approach, as they might reflect particular needs and rationales that are relevant only in specific areas of policy and service provision, yet they may indicate a partial re-thinking of totally exclusionary policies.

This chapter first provides a general overview of how the policies of the EU and European countries have evolved around an exclusionary approach and prioritised, on the one hand, strengthening immigration enforcement and removals and, on the other, deterring irregular migrants' stay by restricting access to services to minimal levels and criminalising irregular entries and stays. The chapter then analyses in greater detail the development of EU and national law and policy in specific areas of policymaking, starting with policies related to the enforcement of immigration law (removals, detention and criminalisation); it then analyses EU and national policies in the social domain, including the legal frameworks regulating access to services (healthcare and education) for irregular migrants; and finally it looks at EU and national measures regulating access to justice for irregular migrants who are victims of crime. In each area, the Chapter examines, on the one hand, the legal and policy framework established by the EU and its member states to ensure a strict

enforcement of immigration rules and exclude irregular migrants from support; on the other, it points out the increasing instances of openness in EU and national law and policy, including processes of de-criminalisation, extensions of rights, access to services, and victims' protection.

5.2 The Evolution of EU and National Law and Policy on Irregular Migrants: Building the 'Fortress'

5.2.1 The Evolution of the EU acquis *on Irregular Migration*

The legal basis of EU competences on immigration policy is to be found in Articles 79 and 80 of the Treaty on the Functioning of the EU (TFEU), which define policy and law on migration (both regular and irregular) and integration as a 'shared competence' of the Union and its member states. A quick read of the EU's legal basis on immigration policy is explanatory of the general setup of the EU immigration *acquis*: one that is based on a strict disjunction between policies of inclusion for regular migrants and policies of exclusion for those with irregular immigration status (Gilardoni et al. 2015). Art. 79 indeed states that the EU: "shall develop a common immigration policy aimed at [...]: the fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration".

It follows that the EU legal framework governing irregular migration has developed around the main aims of preventing the arrival and enforcing the removal of irregular migrants. The main piece of legislation of this framework is represented by Directive 2008/115/EC on "common standards and procedures in Member States for returning illegally staying third-country nationals" (the 'Return Directive'), whose core legal principle is that member states simply cannot tolerate the presence of irregular migrants (as more recently restated by the Court of Justice of the EU in C-38/14 *Zaizoune*). They "shall issue a return decision to any third-country national staying illegally on their territory" (Art. 6), the only alternative being regularisation at member states' discretion. The Employers Sanctions Directive (2009/52/EC), moreover, prohibited the employment of migrants with irregular status in the EU and imposed sanctions for employers who do so. Earlier pieces of EU legislation adopted in the early 2000s forming the EU legal framework on irregular migration, namely the 'Facilitation package'[2] and the Carrier Sanctions Directive (2001/51/EC), focused on fighting the arrival of irregular migrants by respectively imposing and harmonising the criminalisation of the facilitation of unauthorised entry, transit,

[2] Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (The Facilitation Directive); Framework Decision 2002/946/JHA; and Directive 2004/81/EC allowing for the issuance of residence permits 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, and cooperate with the competent authorities.

and residence in the EU as well as requiring carrier personnel to control third-country nationals' documentation at points of embarkation and deny boarding to irregular migrants.

Official EU policy, in line with legal developments, also evolved around the disjunction between the inclusion of migrants with regular status and the exclusion of those in an irregular condition. Following the birth of the common immigration policy with the Amsterdam Treaty, all the EU's multiannual policy programmes focused on the integration of regular migrants on the one hand, and the fight against 'illegal immigration' on the other, starting from the Tampere European Council Conclusions of 1999 (which asserted that the EU should "ensure the integration into our societies of [only] those third country nationals who are lawfully resident in the Union", and emphasised "the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes") (European Council 1999) to the more recent European Commission's communication *An open and secure Europe: making it happen* and the Council's *Strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice* for the period 2014–2020 (European Council 2014). The Commission reasserted that "preventing and reducing irregular migration is an essential part of any well-managed migration system" (European Commission 2014), while the Council stressed the need to address smuggling and trafficking in human beings more forcefully; establish an effective common return policy; and enforce readmission obligations in agreements with third countries. The only change in approach that is noteworthy is in terminology, with the gradual preference of the term *irregular,* over the more controversial *illegal*, to describe migrants' status. More recently, the Commission adopted the European Agenda on Migration (European Commission 2015) to respond to the 'migration crisis' on the declared assumption that "the migration crisis in the Mediterranean has […] revealed much about the structural limitations of EU migration policy", and that the Agenda would be the basis for "the steps to be taken in the coming years to better manage migration in all its aspects". In relation to migrants with irregular status, the Agenda's section dealing with irregular migration and titled *Reducing the incentives for irregular migration* focused on "the fight against smugglers and traffickers"; "return"; and "addressing the root causes of irregular and forced displacement in third countries". While new elements were introduced—for instance, an increased focus on the root causes of migration, the links between migration and development policies, and the importance of cooperating with countries of origin and transit—the Agenda did not represent a breakthrough from the Fortress Europe approach centred on fighting irregular migration.

Altogether, it is evident that EU legislation and policy on irregular migrants have adopted a control-oriented approach, hinged on enforcing removals, reinforcing the surveillance of the EU's external borders, and imposing administrative and criminal sanctions for third parties who interact with irregular migrants, either as facilitators (smugglers or traffickers), employers, or carriers. Given its legal basis on immigration, the EU certainly could not be expected to develop an approach that tolerates irregular immigration or prioritises the rights of irregular migrants over the

enforcement of immigration rules. However, the main criticism levied at the EU is that policies of prevention and enforcement should have at least been accompanied by rules or strategies also aimed at ensuring the fundamental rights of irregular migrants, which have been generally missing in the EU legal and political landscape (Merlino and Parkin 2011). Indeed, EU laws providing rights are generally attentive in specifying that an entitlement or a benefit should not apply to irregular migrants. Other critical accounts concern the general lack of legal channels for regular migration to the EU (United Nations 2015) which—next to restrictive rules against irregular immigration—could provide alternatives to irregularity. In addition, the paucity in EU law of channels for legal labour migration—let alone in low-skilled labour sectors—seem to be in contrast with the EU's structural need for labour immigration. Less restrictive policies on labour immigration channels could contribute to the EU's declared fight against undeclared work, irregular migrants' employment and labour exploitation; and tackle the vicious circle of interdependence between irregular migration and irregular employment (see Triandafyllidou and Bartolini, Chap. 9). However, instances of rules protecting the fundamental rights of irregular migrants, as we shall see in the following sections, are rare and sometimes not fully implemented in practice— but they are not completely lacking in the EU's legislative framework.

5.2.2 The Evolution of National Responses to Irregular Migrants

The immigration policies of the EU's 28 member states developed in different ways according to the specific history, economy, politics, and geography of each country. In particular, immigration historically has had very different features in the countries of northern, western, southern, and eastern Europe. Providing an extensive and detailed analysis of the different policies on irregular migrants adopted by all the 28 EU countries would be out of scope of this volume. However, national policies on immigration in Europe have been increasingly converging, also—but not only—because of the harmonising role played by the EU (Geddes and Scholten 2016; Mahnig and Wimmer 2000). Common drivers of legislative change in relation to irregular migration policies include accession to the EU and changes in EU legislation, as well as irregular migration influxes, public opinion, the economic crisis, global developments, and the actions of NGOs (EMN 2013).

The starting point of a historical overview of national immigration policies in Europe is the period between the 1970s and 1990s, when most European nations began imposing restrictions on the entry and stay of foreign nationals. Until the 1970s, countries in northern and western Europe—Germany, France, and the UK until the Commonwealth Immigration Act of 1962 and the Immigration Act of 1971—indeed had liberal immigration policies, with active recruitment of foreign 'guest' workers or open migration regimes for citizens coming from former

European colonies. Similarly, before the 1990s countries in southern Europe had a tradition of emigration, rather than immigration, and did not operate significant restrictions on foreigners' access and stays (Triandafyllidou 2010; Geddes and Scholten 2016). It was only after the introduction in that period of restrictive visa regimes that immigration policies started a process of increasing restrictiveness and stressed a focus on combatting irregular migration (De Haas et al. 2016).

It was, however, in the late 1990s and the 2000s that European states, faced with an increase rather than a reduction of inflows, tightened their exclusionary approach towards irregular migrants beyond the control of external borders and visa regimes to adopt increasing measures of 'internal migration control'. In particular, two main kinds of expedients were introduced by the national legislation of several EU countries as disincentives to unauthorised arrivals or stays:

1. excluding irregular migrants from public services and requesting service providers to report individuals with irregular status to immigration authorities. Topical examples are given by the Dutch *Linking Act* in 1998,[3] the German *Residence Act* in 2005,[4] and the Italian 'Security Package' in 2009,[5] which required service providers to check the immigration status of any individual requesting a service (or in the Italian case imposed on the latter the exhibition of a valid residence permit),[6] deny access to irregular migrants, and denounce them.
2. using criminal law to punish irregular entry and/or stay (criminalisation) with fines and even imprisonment. The first instances of laws making irregular migration a criminal—rather than administrative—offence date back the 1970s, but it was in the 2000s that this policy expanded throughout Europe to the point that in 2014 only three countries in the EU did not use criminal sanctions (or administrative sanctions mimicking criminal punishments) against irregular entrants[7] or stayers[8] (FRA 2014). Criminalisation of irregular migration in this period was further accompanied by an expanded *use of criminal law to punish people engaging with irregular migrants* beyond smugglers and traffickers, including landlords renting properties to irregular migrants (FRA 2014). A case in point is that of Nicolas Sarkozy's France, which adopted a law[9] in 2007 introducing a crime—later nicknamed 'crime of solidarity' (*délit de solidarité*) —penalising any person providing direct or indirect assistance to irregular immigrants with up to five years imprisonment, without restricting the criminalisation to those who profited from the irregular migration (Duarte de Carvalho 2016).

[3] *Koppelingswet,* Law of 26 March 1998.

[4] *Aufenthaltsgesetz,* Section 87, in force since 1 January 2005.

[5] *Legge* 94/2009.

[6] *Testo Unico sull'Immigrazione, D.Lgs*. 286/1998, Art. 6 par. 2.

[7] Malta, Portugal, and Spain.

[8] France, Malta, and Portugal.

[9] *Loi* 2007-1631.

Altogether, these policy developments in the 2000s constituted the foundations of Europe's generally exclusionary approach towards irregular migrants that persists today. Totally exclusionary policies, however, are not sustainable as they may cause negative effects on both migrants and the local population and have so far proved unsuccessful in eradicating the presence of irregular residents. Thus, national policies had to take account of that presence, and occasionally took measures to address the social problems caused by the marginalisation of irregular migrants. For example, health reforms in the UK (2012) and Sweden (2013) extending healthcare entitlements for irregular migrants were driven, *inter alia*, by concerns in terms of public health and with the aim of fighting communicable diseases. Similarly, the initiatives of local authorities extending access to services for irregular migrants have often been led by the aims of protecting local public health, public order, or the efficiency of service provision itself (Spencer 2018; Spencer and Hughes 2015).

While still adopting increasingly marginalising policies, one measure in particular has long been used by European countries to come to terms with irregular migrants' presence: *ad-hoc* mass 'regularisation programmes' (or amnesties). Since the 1970s till 2016, 40 such amnesties have been implemented around the world, 15 by countries in southern Europe alone (Larramona and Sanso-Navarro 2016), including regularisation programmes involving up to 600,000 people in Italy in 2002 and 500,000 in Spain in 2005. To a lesser extent, northern and eastern European states too have carried out similar programmes (most recently Poland in 2012). It is estimated that 3.7 million migrants had obtained regular status through amnesties across Europe over the period 1996–2007 (Baldwin-Edwards and Kraler 2009). Mass regularisations attest to the failure of exclusionary policies and are controversial measures criticised as a pull-factor for irregular migrants. Indeed, after a long tradition of frequent regularisations, European countries have not conducted any large-scale regularisations in the 2010s, indicating a trend reversal towards the disuse of this measure—except for Poland, where a more recent (2012) regularisation programme can be related to the country becoming a country of immigration more recently, and its later accession to the EU and the Schengen area (Reichel 2014). Instead of mass regularisations, the majority of member states have instead kept their 'regularisation mechanisms', which differ from regularisation programmes in that they are not run for a limited period of time or *ad-hoc*, but are regular procedures incorporated in the longer-term migration policy framework to allow legalisation for migrants who 'earn' it because of pre-defined conditions such as a long-term residence, humanitarian considerations, non-deportability, health conditions, family ties, and so forth (Baldwin-Edwards and Kraler 2009).

While the 2000s represented a culmination in the increasing exclusion of irregular migrants (alternated by their occasional inclusion operated through mass regularisations), as we shall see in the following sections, in the late 2000s and early 2010s European countries have been showing instances of trend reversals towards an expansion of irregular migrants' *inclusion* in public services, and modest steps in terms of *de-criminalisation* of irregular migration. Also, restrictions of entitlements have been observed in the 2010s, and the official rhetoric against irregular migrants has not—to say the least—softened. However, together with the disuse of mass

regularisations in favour of regularisation mechanisms, the few steps taken towards the de-criminalisation and (re)inclusion of irregular migrants may indicate the beginning of a new way of taking account of their social reality in a more structural, and less occasional, manner.

5.3 Policies Enforcing Immigration Law: Increasing Restrictiveness and Decreasing Success

5.3.1 EU Aquis *on Removals*

A good understanding of return policies, their evolution, and the issues at stake determining their success (or failure) is key for developing a sound understanding of the official positions of national and EU authorities towards the presence of irregular migrants. In a simplified world, where border control and removal policies are able to eradicate irregular immigration, there wouldn't be a need for policies on the treatment of irregular migrants. The truth is that just like EU borders—no matter how technologized or strictly controlled—have never been sealed off to un authorised arrivals, return policies in Europe have not been able either to eradicate the presence of irregular migrants. In 2014, the average rate of effective removals from EU countries was as low as 36.6% of the total number of detected irregular migrants issued with a removal order. In 2015, this rate further decreased to 36.4%, notwithstanding an increase in the number of migrants ordered to leave rose (from 470,080 in 2014 to 533,395 in 2015) (European Commission 2017). As a growing number of politicians across Europe adopt hostile narratives towards irregular migrants and praise swift removals as the solution to the problems brought by irregular migration—or even to the 'refugee crisis' (DeBono 2016) —it is crucial to understand that the reality is far more complex: there is a variety of obstacles to the enforcement of returns, which often do not depend on migrants' resistances or absconsions, but also on a number of complex legal and practical issues, including, for example, the lack of cooperation from authorities in the migrant's country of origin; administrative, organisational, or economic shortcomings of the returning state; legal and humanitarian limitations; medical impediments; a condition of statelessness of the returnee, and so forth (EMN 2016b).

Member states' discontent over their poor return rates may explain the increasing attention towards improving removal policies and the fact that the EU *acquis* on irregular migration is all framed around the Return Directive, including the few instances of rights recognition to irregular migrants in EU law. At the EU level, the main policy effort carried out in the area of irregular migration was represented by the adoption in 2008 of the Return Directive, which laid down the common rules to be applied in member states for returning irregular migrants. The Directive provided a rich body of rules regulating the procedures and standards for removals, including on the use of coercion, detention, and re-entry bans as well as on the rights of

migrants involved in a removal procedure. As seen, the core principle of the Directive is to be found in Article 6(1)'s obligation on member states to issue a return decision to *any* third-country national staying irregularly on their territory, unless exceptions apply, including whether a member state decides to regularise a migrant by granting them a residence permit or other authorisation 'for compassionate, humanitarian, or other reasons' (Art. 6, para. 4).

This directive is critically important for our analysis for two opposite reasons: it is at the same time the main foundation at the EU level of Fortress Europe and, paradoxically, also the main recognition of safeguards and protections for irregular migrants in the EU immigration *acquis*. The Directive's adoption, indeed, represented a critical step in the development of EU migration policies. As such, it attracted fierce criticisms and was approved through strained negotiations between the European Parliament and the Council. Some expected that "the Return Directive would be a significant contribution to the protection of the human rights of irregular migrants, by ensuring adequate procedural safeguards against expulsions and setting substantive limits on detention" (Baldaccini 2009). On the other side, national governments saw in the approval of EU-wide legislation on removals a chance to enhance cooperation in this area and increase returns, and therefore viewed legal safeguards as additional obstacles to effective removals. Thus, restrictions on detention, obligations to provide legal aid, and provisions increasing the possibilities for challenging, delaying, or preventing removals were forcefully resisted by the Council. The Parliament's involvement ensured the adoption of some important safeguards for migrants in removal procedures, although along the way to approval the text lost important protections provided in the original draft submitted by the Commission. Provisions subjecting member states' power to issue a return decision to fundamental rights obligations—as derived from the European Convention on Human Rights, the Geneva Convention and the EU Charter of Fundamental Rights—were removed from the main text and relegated to the preamble (recitals 21 to 24). The Directive was strongly condemned by civil society organisations, and it has been argued that the result of the negotiations was "the codification at EU level of an expulsion regime that is lacking from a perspective of the rights of the individual" (Baldaccini 2009). In this sense, the Return Directive could be seen as a milestone in the building of Fortress Europe. We shall see below that the Directive did lack important safeguards, as in the case of non-removable migrants. However, it is also true that it did provide irregular migrants with significant safeguards, even if limited and only in relation to migrants in removal procedures.

The Return Directive and Non-removable Migrants The Return Directive did not regulate the condition of '*non-removable migrants*': that is, those whose presence in the territory is known to the immigration authorities, but who, for a variety of reasons cannot be removed. The Directive did not establish their right to regularise status, nor provided an alternative to return, leaving non-returnable people—even when they are 'unreturnable' regardless of their will—in an irregular situation and an enduring condition of legal limbo, without the rights to work or receive public assistance. It is one issue where the more restrictive approach adopted in the

final version of the Return Directive proved its deficiencies. Regulating the condition of non-returnable people was indeed considered during the negotiations of the Directive, and it was originally proposed to apply to them the same standards recognised by EU law to asylum seekers. However, the issue was considered too 'politically sensitive' and was therefore deferred to the national level (Keytsman 2014). The Directive's Preamble (Recital 12) thus simply suggests that the "situation of third- country nationals who are staying illegally but who cannot yet be removed should be addressed" but "their basic conditions of subsistence should be defined according to national legislation". Only Art. 9 provides for the *possibility*—and only in limited cases, the obligation—for member states to postpone the return in certain situations when the return proves impossible to implement. As a result, in 2013 it was found that 31 very divergent approaches had been adopted by the member states (and the Schengen Associated Countries) *vis-à-vis* the rights granted to non-returned migrants as well as their chances of obtaining a regular status and receive accommodation pending removal. In particular, in 2013, situations where no official postponement of the return (providing additional rights) was provided had been found in 23 countries (European Commission 2013). In situations like these, non-returnable migrants have no alternative but to linger indefinitely in a situation of limbo without any rights other than those enjoyed by all migrants with irregular status. They thus represent a strongly marginalised section of the population exposed to destitution, homelessness, and crime (Vanderbruggen et al. 2014), and a living example of the limitations of a strictly exclusionary approach.

Safeguards and Rights for Irregular Migrants in the Return Directive The case of non-returnable migrants clearly shows that resistances to the adoption of safeguards have led to an EU legislation favouring a restrictive approach towards irregular migrants, whether or not their irregularity depends on their will. This is confirmed by the generalised paucity in EU law of rules establishing entitlements for irregular migrants. It is true, however, that besides being a crucial step in the building of the fortress, the Return Directive has also played the opposite role of introducing the main recognition, in the immigration *acquis,* of rights and safeguards for irregular migrants—even if for a restricted category only, namely returnees. In particular, Article 14 provided a minimum set of guarantees for people pending a removal procedure, including the right to family unity, emergency and essential health treatment, and basic education for minors. Art. 5 required member states to "take due account" of the best interest of the child, family life, the state of health of the third-country national concerned and respect the principle of *non-refoulement*. These safeguards don't reflect all human rights to which migrants with irregular status are entitled and are only applied to a restricted category of irregular migrants. Yet, in all its restrictiveness and limitations, the Return Directive—to the extent that it introduced the mentioned safeguards and those provided to people in immigration detention which we shall see below—represented an innovation at the EU level in terms of recognition of rights to irregular migrants, and as such today still constitutes one rare example in the EU legislative landscape.

5.3.2 *European Policy and Trends on the Use of Pre-removal Detention*

Pre-removal detention of migrants is one of the most contentious issues regulated by the Return Directive. The introduction of rules on detention in EU law spurred strong concerns that the Directive would lower standards and rights for migrants in detention, increase the maximum time limits for detaining, and generally introduce a highly-restrictive detention regime (Baldaccini 2009). However, pre-removal detention is one area where the Directive has indeed served the role of introducing a number of safeguards for migrants in detention. Some argued that the Directive—alongside European case law—has 'constitutionalised' the rights of people in immigration detention and thus contributed to higher protection standards for detainees (Cornelisse 2016).

Art. 15 of the Directive establishes that member states *may* keep in detention a third-country national who is the subject of return procedures, "unless other sufficient but less coercive measures can be applied effectively in a specific case" in order to prepare their return or carry out the removal process or both, and only when: 1) there is a risk of absconding; or 2) the migrant hampers the preparation of return or the removal process. It is noteworthy that member states thus have the option, and not an obligation, to detain returnees. It is one aspect where the European Parliament succeeded in securing a more favourable provisions for migrants against the opposition of member states, as the original draft of the Directive provided the mandatory character of detention. The Directive imposes the immediate termination of detention where a reasonable prospect of removal no longer exists. It also provides for procedural guarantees (e.g. judicial reviews) and limitations to the maximum duration of detention, which "shall be for as short a period as possible"; Art. 16 requires that detention conditions should reflect the non-criminal nature of the measure and guarantee detainees' rights, including the possibility to establish contact with legal representatives, family members, and consular authorities; the right to obtain emergency health care and essential treatment of illness; the possibility for relevant and competent national, international, and non-governmental organisations and bodies to access the detention facilities to provide information about rights and obligations of detainees. Art. 17 provides specific guarantees for minors and families in detention.

Moreover, while detention became a systematic migration management practice across the EU, data suggest that following the adoption of the Directive, EU countries have actually significantly reduced, rather than increased, the use of detention. According to the European Migration Network (EMN 2014) in 2009—before the Directive's transposition—116,401 people were in pre-removal detention in Europe compared to 81,221 in 2014 and 64,334 in 2015 (EMN 2016a). EMN in 2016 also reported that several member states had reduced their detention capacity over the years, with the Netherlands, for example, reporting a 65% decline since 2010 in the use of administrative detention (EMN 2016a). This suggests that the enthusiasm of European governments towards the use of detention has tapered over the years,

probably because the impact of policies of extensive or prolonged detention have proven "rather insignificant" in increasing returns (EMN 2014) against high costs, both in terms of funds and fundamental rights.

Furthermore, the Directive promoted the adoption in Europe of less coercive alternative measures to the detention of returnees. With detention defined as a measure of last resort in the Directive, member states are indeed *obliged* (as clarified by the CJEU in the case *El Dridi*, C- 61/11) to provide for alternatives to detention. By 2014, almost every member state had introduced some form of alternative to detention, including reporting obligations, residence requirements, the obligation to surrender identity or a travel document, release on bail, electronic monitoring, provision of a guarantor, and release to care workers or under a care plan (EMN 2014). However, it is worth noting that while the law provides for alternatives to detention, little is known about the extent to which these are being applied in practice, and the Fundamental Rights Agency of the EU (FRA) in 2015 actually denounced that alternatives were still being too little applied (FRA 2015a).

5.4 The Criminalisation of Irregular Migration

European countries have counteracted irregular immigration not only through restrictive immigration legislation, but also through the use of law in other areas of policymaking, including social policies and criminal law. Criminal sanctions (or administrative sanctions emulating criminal punishments) have been increasingly adopted not only to punish smugglers and traffickers, but also the smuggled and the trafficked, as well as anyone else overstaying a visa or otherwise in breach of immigration rules, with a view to discouraging irregular entries and stay. The use of criminal law to regulate immigration matters has gone even further to include other actors that socially interact with irregular migrants, such as individuals renting out property to a tenant with irregular migration status. The process of increasingly developing multifaceted intersections between immigration and criminal law and the embedment of criminal enforcement authority within a civil regulatory regime, described as '*crimmigration*' (Koulish 2016), included the development of practices of border management and immigration policing that evoke practices used by states to fight crime and of political discourses that increasingly describe migrants as a criminal threat (Parkin 2013).

The trend of criminalising irregular entries and stay to discourage and sanction irregular migration started in the 1970s and accelerated in the 2000s alongside the increasing exclusion of irregular migrants from access to services. This process expanded throughout Europe to the point when the FRA in 2014 reported that in almost all EU countries irregular entry and stay were offences, often punishable with custodial sentences. Irregular migrants can indeed be convicted to both the payment of fines or imprisonment for up to 5 years. By 2014, 17 member states punished irregular *entry* with imprisonment or a fine or both, in addition to the coercive measures that may be taken to ensure the removal of the person from the

territory of the state. Ten countries also punished irregular (over)*stay* with imprisonment; eight states sanctioned migrants for irregular entry with fines only, as did 15 countries for irregular stay. In 2014, only three countries in the EU did not penalise irregular entry or irregular stay[10] (FRA 2014).

Instances of De-criminalisation Criminalisation of irregular migration is an area where a common trend of increasing restrictiveness amongst EU countries can be clearly identified. However, as mentioned above, more recently during the 2010s, official decisions or commitments of national institutions in a few European countries may be the first signs of a (timid) rising countertrend towards de-criminalisation. The most illustrative example is that of France, which in 2012 repealed its provisions punishing irregular stay but kept the crime of irregular entry.[11] In 2013, France also repealed the aforementioned legal provision nicknamed as a 'crime of solidarity'. An interesting case is that of Italy, where only 5 years after the introduction of the crime of irregular entry and stay in 2009, the national parliament voted for its full repeal in 2014. The implementation of the actual repeal and transformation of the crime into an administrative offence, however, was delegated to the government which, in fact, never repealed it because this would have been too sensitive politically. Also in 2014, the Netherlands turned down a proposal to consider all unauthorised stays a criminal offence, and Belgium declared plans to modify the criminalising rules of the Immigration Act were being considered (Delvino 2017). In addition to political decisions, the possibility of punishing immigration law offenders through criminal imprisonment has been severely limited by the jurisprudence of the CJEU and national courts (Peers 2015). It is increasingly doubted whether criminalising policies have, indeed, ever had a deterrent effect on irregular migration (Parkin 2013), while they may have undesired consequences for the state. In Italy, a report of the Ministry of Justice found that the crime of irregular entry and stay proved "a totally inefficient and symbolic criminal provision" (Ministero della Giustizia 2012) that showed critical deficiencies and represented an excessive burden on the Italian criminal justice system (Delvino and Spencer 2014).

[10] In particular, in 2014 Malta, Portugal, and Spain did not criminalise irregular entry, while France, Malta, and Portugal did not criminalise irregular stay.

[11] *Loi* n° 2012–1560, Article 8.

5.5 EU and National Responses to Irregular Migrants in the Social Domain

5.5.1 EU Policies in the Social Domain and Irregular Migrants: A Pattern of Exclusion

EU legislation does not address access to measures of public assistance and services for irregular migrants, apart from the limited entitlements provided by the Return Directive to returnees. EU laws providing rights are indeed particularly attentive in explicitly restricting their scope to regular migrants, except for—as we shall see below—Directive 2012/29/EU (the Victims Directive). It is important to understand that, in contrast to immigration policies where legislative competences have allowed for the production of a rich body of EU legislation, the Union has limited powers in the social domain, which still largely falls within national competences. The EU cannot, for instance, introduce legislation modifying national regulations on health care or homelessness. Moreover, the EU's 'social dimension' has developed around the Union's single market and is accordingly framed around the promotion of employment and workers' rights; thus, as irregular migrants do not have the right to work, they are generally excluded from measures addressing working conditions or social protection systems for workers. The TFEU, however, mentioned "the combating of exclusion" (without restrictions to citizens or legally residing migrants) as one objective of EU competencies in relation to social policies (Art. 151 and 153 TFEU) and the EU's 'social dimension' has been increasingly expanding to cover potentially every area of social policy—albeit within the Union's limited prerogatives in this area, which consist only in the adoption of exhortative 'soft-law' (non-binding) instruments encouraging cooperation and facilitating harmonisation between member states.

Yet, social policies at the EU level have seemed to follow a trend of increasing exclusion *vis-à-vis* irregular migrants. In this regard, two EU soft-law instruments should be taken into consideration: (1) the *Europe 2020 Strategy*, the EU's agenda for growth and jobs for the decade 2010–2020, which set the objective of lifting 20 million people out of poverty (European Commission 2010); and (2) the more recently proclaimed *European Pillar of Social Rights*, a joint declaration establishing the political commitment of EU institutions and European leaders to respect and implement 20 principles and rights in the social domain, including, for example, "*everyone's*" right to preventive and curative healthcare, childhood education, protection from poverty for children, the right to housing for those in need, the right to shelters and assistance for the homeless, and the right to access essential services. The *Europe 2020 Strategy*, adopted in 2010, mentioned migrants (without reference to their status), thus making no explicit exclusion of those with irregular status from the scope of its anti-poverty target. The position of the EU institutions *vis-à-vis* migrants with irregular status within the strategy has swung between stances of inclusion and exclusion, but occasionally the specific vulnerabilities of irregular migrants have been taken into consideration by official documents adopted by the

European Commission in the overarching framework of the strategy (Delvino 2018). The decision on whom to target with actions of social intervention in line with the strategy was ultimately left to member states. In contrast, the more recent *European Pillar of Social Rights* (2017) has shown a clear pattern of exclusion for irregular migrants by *explicitly* restricting the scope of application of its rights and principles to EU citizens and legally-resident third-country nationals (Preamble 15). As the *Pillar* aims to serve as a guiding framework for member states and the EU in developing social policies, its adoption had high political significance; it can be expected that EU's upcoming initiatives in the social domain will be highly inspired by the pattern of exclusion chosen by the *Pillar* (Delvino 2018).

5.5.2 National Policies on Access to Services for Irregular Migrants: A Tradition of Exclusion Towards Increasing Inclusion

In line with EU policies, national legislation on access to services have developed a highly exclusionary approach towards irregular immigrants, limiting their access to minimal levels and mostly to areas such as healthcare and education where irregular migrants are entitled to assistance under international and constitutional human rights legislation. Allowing irregular migrants to access services is often seen as a *pull-factor* inviting them to stay in Europe and, as such, does not fit within the system of incentives to leave and disincentives to stay developed by EU countries. Instead, marginalising irregular migrants, by *excluding them from public services*—and requesting service providers to report individuals with irregular status to immigration authorities—has been seen as a way to discourage their stay and encourage their departure. As mentioned above, in the late 1990s and in the 2000s, the legislation of several European countries tightened the conditions for non-nationals to access services, requiring them to show a valid residence permit when a service is requested (with exceptions made for some fundamental services).

Accordingly, an EU-wide mapping study of irregular migrants' legal entitlements to healthcare and education—the two areas where international obligations clearly establish a right to a certain level of assistance—in the national legislations of the 28 EU member states found that in 2015 the overriding pattern of national policies was one of exclusion. Particularly in relation to healthcare, access to public assistance was generally kept to minimal levels, with emergency health care being the only minimum level of access recognised to irregular migrants throughout the EU—and also the maximum level allowed in six countries. In 12 EU countries, migrants could only access *specific* specialist services in addition to emergency healthcare but were otherwise excluded from primary and secondary care. Only in ten member states were irregular migrants entitled to some level of access to primary and secondary care services. The treatment of irregular migrants was found more favourable in relation to education: in 23 out of 28 countries, children with

irregular status were entitled to attend school, whether through an explicit entitlement in law (ten countries) or an implicit right deriving from an entitlement of *all* children to attend school, from which those with irregular status are not excluded (13 countries). Children often also had a wider access to healthcare than adults, including in eight countries the same access as children who are nationals of those countries. Still, in five countries the law did not entitle irregular children to attend school and their access to education was, in practice, left to the discretion of schools (Spencer and Hughes 2015).

It is noteworthy that even where there is an entitlement to a service, practical barriers may impede effective access to irregular migrants, thus nullifying their right. A requirement for service providers to report users with an irregular status or requirements of bearing inaccessible costs for provision of a service are two examples of such obstacles. For instance, in Germany service providers have a duty to report customers with irregular migration status, and while medical doctors are now exempted from such duty, the social security officials responsible for reimbursing the expenses of primary and secondary care are not. In countries where the right to attend school is implicit, procedural requirements to enrol in local schools (such as a proof of address) can equally restrict or deter access.

Recent Instances of Inclusion in the Provision of Services Against a general pattern of exclusion from services, the study carried out by Spencer and Hughes (2015) found that the "direction of travel" of national policies in relation to both healthcare and education for irregular migrants was towards the *extension of rights*, rather than a further restriction. Indeed, while there had also been some cases of further restrictions (e.g. Spain's 2012 reform of the national healthcare system), in the 2010s there have been several instances of national reforms extending access to both healthcare and education. For healthcare, these include *inter alia* Italy's extension of access to paediatric care for irregular children, the UK's extension of healthcare for victims of domestic and sexual violence (2015) and patients needing HIV treatments (2012) with an irregular status, and the Swedish 2013 reform on irregular migrants' access to healthcare extending their access from emergency care only to the same level of care provided to asylum seekers (which includes dental care, maternity care, contraceptive counselling, abortion, and related medicines) (PICUM 2017). In relation to education, the main extensions of access were initiated by the decisions of national courts. For instance, the Spanish Constitutional Court that ruled that irregular children up to the age of 18 have the same right to non-compulsory education and related financial support, receive a diploma, obtain qualifications, access grants and financial assistance as Spanish nationals, and in some cases can also access work experience placements or internships. (2007).[12] The Italian Council of State stipulated that irregular students should be allowed to continue attending school after reaching the age of majority and be admitted to high school final exams (2014).[13] In

[12] Spanish Constitutional Tribunal, STC 236/2007, 7 November 2007, appeal of unconstitutionality number 1707–2001.

[13] Italian Council of State, Decision No. 1734 of 2007.

2013, the Netherlands allowed students with irregular status to take up apprenticeships. In 2009 and 2011, amendments to the German Residence Act excluded medical[14] and educational institutions[15] from the obligation to report patients and students with irregular status to immigration authorities (Spencer and Hughes 2015). Often, these measures were adopted through policies and decisions overtly targeting irregular migrants (and not through an implicit inclusion in a universal entitlement), indicating a clear intention to include these migrants.

5.6 EU and National Policies on Access to Justice for Victims with Irregular Migration Status

Access to justice for victims of crime with irregular migration status is an area of policymaking where both EU and national policies have been mitigating their exclusionary approach by opening up new possibilities for people with irregular status to obtain protection by—and a permission to stay in—the state. Irregular migrants' possibility of confidently reporting crime to law enforcement authorities without fearing identification for immigration purposes and deportation is a delicate issue that touches sensitive interests of both the victims and public authorities. Uncertainty (for both migrants and police officers) over whether those reporting crime would be themselves prosecuted or deported for their status translates, on the one hand, to migrants' mistrust towards the police and their vulnerability *vis-à-vis* criminals aiming to take advantage of their fear of reaching out to the police and, on the other, in underreporting of crime from victims and witnesses with irregular status, impunity of perpetrators, and subsequently a potential increase of crime. Therefore, this is an area where an inclusionary approach is favourable not only for migrants, but also for policymakers concerned with security and public order, thus instances of openness, although fragmented and poorly implemented, have been proliferating in the policies and laws of the EU and its member states.

5.6.1 EU Measures Facilitating Access to Justice for Victims with Irregular Status

Besides the safeguards provided in the Return Directive, the only other instances of openness towards irregular migrants in EU law are to be found in the area of access to justice. These include, within the immigration *acquis,* the residence permits provided to certain victims of specific crimes by Directive 2004/81/EC on "the

[14] General Administrative Provision of the Federal Department for the Interior, § 88.2 amending the German Residence Act, 2009.

[15] German Federal Law Gazette I no. 59 of 25. November 2011, p. 2258.

residence permit for victims of human trafficking", and the Employers Sanctions Directive (2009). In particular, Directive 2004/81/EC *required* member states to allow for a reflection period during which a third-country national who is a victim of trafficking in human beings cannot be expelled as well as to consider issuing a residence permit for the victim if they cooperate with the authorities after the expiry of the reflection period (Art. 6 and 8). In addition, EU law also requires member states to provide assistance and support measures before, during, and after the conclusion of criminal proceedings (Directive 2011/36/EU, Art. 11). In 2009, the Employers Sanctions Directive (Art. 13) established that "Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers" and provided member states with the *possibility* to grant, on a case-by-case basis, permits of limited duration to irregular migrants involved in cases of labour exploitation, but only in situations where the workers were minors or subject to particularly exploitative working conditions resorting to a criminal offence.

It is noteworthy, however, that while important as rare examples in EU law of inclusive measures for irregular migrants, these provisions in both cases have a limited scope and, most significantly, have not been fully used or implemented by national authorities. In short, access to justice and redress for irregular victims often remains only theoretical. By 2015, more than half of EU member states had never introduced the possibility to issue residence permits under the Employers Sanctions Directive, and research showed that even where legislation is in place, it is only rarely applied (FRA 2015b). As for the permits under Directive 2004/81/EC, in 2013 only around one-third of all member states made use of special residence permits for trafficking victims; the rest do not make any use of this measure, with 19 member states in 2013 granting fewer than six such residence permits each (FRA 2015b).

Access to justice and protection for crime victims is also the only area where, with the adoption of Directive 2012/29/EU *establishing minimum standards on the rights, support and protection of victims of crime* (the 'Victims Directive'), an EU law outside the immigration *acquis* has introduced legal entitlements (including to services) to individuals without excluding—and instead explicitly mainstreaming—irregular migrants from its scope. The Directive, which applies to any criminal offence and therefore constitutes a cross-cutting tool for victims' protection, explicitly provides rights to all victims of crime regardless of their residence status (Art. 1). It neither regulated the issue of residence permits for victims with irregular status nor ensured that those reporting a crime will not be apprehended and deported (Recital 10), but provided a number of crucial entitlements for irregular victims, including e.g. the right to be informed of their rights and their case in a way they understand; to make a complaint in a language they understand;[16] to participate in criminal proceedings to the extent permitted by national law;[17] and the right to

[16] Articles 3, 4, 5, 6 & 7, and Recitals 26 & 34.

[17] Articles 10, 13 & 14, and Recitals 34 & 47.

access support services and specialist support services,[18] which member states are required to provide in a free and confidential way, and shall include shelters for victims in need of a safe place to avoid the repetition of a crime and targeted, integrated support for victims with special needs. This is an extremely rare example, in the EU legislative landscape, of an entitlement to a service applying to irregular migrants. It is still unclear to what extent member states have been attentive in mainstreaming irregular victims in the transposition of the Directive and its implementation, but at least the Netherlands, when transposing the Directive, rolled out throughout the country a practice tested by Amsterdam's police—known as the 'free in, free out' policy—according to which police officers should not question the migration status of individuals reporting a crime (PICUM 2015).

5.6.2 National Measures on the Special Residence Permits for Victims of (Certain) Crimes

At the national level, access to justice is an area of policymaking where the process observed in the 2010s of taking account of the presence and needs of irregular migrants by national policymakers is particularly evident. The production of national legislation introducing measures that facilitate access to justice in the form of residence permits for victims of crime (or the suspension of deportation orders for the duration of criminal proceedings) has been particularly prolific, although limited to targeting specific categories of victims of specific crimes. Both France and Spain, for instance, followed a process of legislative production that culminated in Spain in 2011 with the repeal of the obligation on police officers to open deportation files for irregular women reporting episodes of gender-based violence and permitting the women and their children to get a provisional permit; and in France in 2014, with the adoption of a law granting residence permits for victims (men and women) of spousal violence and human trafficking. In 2015, a Greek law (4332/2015) allowed victims (and in some cases witnesses) of a wide range of crimes—including trafficking, sexual violence, racist violence, labour exploitation, child labour, and domestic violence—to obtain a residence permit on humanitarian grounds (PICUM 2015). In 2012, the UK's Home Office introduced the Destitution Domestic Violence concession enabling victims of domestic violence to apply for temporary leave and ultimately permanent residence status, and access benefits and social housing for 3 months while they apply to stay in the UK as a victim of domestic violence. In 2013, Italy introduced special permits for victims of domestic violence and already provided permits for victims of criminal organisations.[19]

[18] Articles 8 and 9.

[19] Article 18 and 18-bis, Italian Legislative Decree No. 286 of 25 July 1998.

5.7 Conclusions

This overview of the legal and policy responses to irregular migrants showed that the EU and its member states have chosen a predominantly exclusionary approach that has earned Europe the nickname of 'Fortress Europe'. This fortress was built on the EU's prioritisation of policies fighting irregular migration and enhancing removals over policies regulating the treatment of irregular migrants (or mainstreaming them in the domain of social policies), including when they are non-returnable. At the national level, the fortress was further reinforced internally through the use of criminal laws sanctioning irregular migrants and, in the area of social policies, by restricting irregular migrants' access to services to minimal levels.

While determining the number of irregular migrants in Europe is no easy task (see Triandafyllidou and Bartolini in Chap. 2 of this volume), the rising number of irregular arrivals in the years of the 'refugee crisis' and the poor return rates presented above clearly show that, no matter how restrictive, Europe's exclusionary approach has not succeeded in eradicating the presence of irregular migrants, and that the fortress built by the EU and its member states is far from impregnable. The marginalisation of migrants who cannot be returned irrespective of their will is further testimony of the limitations of an unbalanced approach that addresses irregular migrants' asymmetrically, focusing on their departure and disregarding the social needs related to that presence. Those social needs need to be taken account of for the benefit of marginalised migrants, but also the public interests of the wider population.

The compromise found by European states between the exclusionary approach and the need to recognise irregular migrants' presence has long been one of occasional 'exceptions to the rule' through the use of mass regularisations. These measures indeed opened the gate of the fortress to irregular migrants only *exceptionally and occasionally*, thus keeping its legal and policy structure sound and stable. However, occasional regularisations do not solve the underpinning problems related to irregular migration, and show the failure of restrictive policies and may in the longer term constitute a pull factor attracting more irregular arrivals in a vicious circle. European states in the recent decade have thus been abandoning the use of this measure, or at least have not employed it with the frequency and size of the past.

National policies have thus adopted new forms of coming to terms with the presence of irregular migrants and the social needs of a neglected population. Over the last 10 years, EU countries have been mitigating their exclusionary approach by moving towards the de-criminalisation of irregular migrants, their re-inclusion in the provision of certain services, and increasingly allowing them new opportunities to access protection and justice. The decreasing use of pre-removal detention, and some instances of de-criminalisation, also show a new sceptical approach of national authorities towards the effectiveness of restrictive policies' deterrent factor. The EU, for its part, has been more reticent in diverting from the exclusionary approach, and, indeed, the main recognition of rights for irregular migrants at the EU level is found in a law, the Return Directive, which at the same time constitutes the very pillar of

the fortress. New developments in the area of access to justice, and particularly the Victims Directive, indicate however that the EU may also adopt stances of openness towards certain individuals with irregular status.

So, is the structure of Fortress Europe falling apart? Not yet. First, as seen in Sect. 5.2, immigration policy at the EU level has not moved away from an approach centred on combatting irregular immigration, smuggling, and trafficking; the control of external borders; returns; and the reduction of "incentives for irregular migration". Divergences from a totally exclusionary approach, though, can be observed in relation to the 'internal dimension' of immigration control, but policies and laws extending access to services and justice stay *exceptional vis-à-vis* an overarching rule of exclusion. Recent policy developments also operated further restrictions towards irregular migrants as seen, for instance, in relation to their exclusion from the scope of the principles of the European Pillar of Social Rights. Additionally, inclusive developments in law and policy are not always followed by a thorough implementation so that their inclusive approach—for instance, residence permits in cases of labour exploitation—in many cases remains merely theoretical. After all, the official rhetoric against irregular migrants and in favour of 'hostile environment policies' does not seem to lessen. In certain instances, inclusiveness is not the choice of policymakers, but of the courts (as with the case of access to education in Italy and Spain or the jurisprudence of the CJEU in relation to the criminal imprisonment of irregular migrants), or local authorities (see Spencer, Chap. 10). In other cases, such as processes of de-criminalisation, the steps taken are too few or too modest, to identify a clear countertrend.

However, as shown in this chapter, the number and types of instances of inclusiveness and openness, in EU and national laws have indeed been increasing, particularly in the last decade. These include the extensions of irregular migrants' access to services seen in Sect. 5.5.2; the increased possibilities for irregular migrants' to obtain protection and services as victims of crime brought by national laws providing protective visas, as well as at EU level by the Victims Directive (Sect. 5.6); and instances of de-criminalisation of irregular entries and stays (Sect. 5.4). In addition to these, it is said that at EU level the Return Directive and subsequent jurisprudence have "constitutionalised" certain safeguards in EU law (Sect. 5.3.2); while the use of pre-removal detention was found to be in decline (Sect. 5.3.2). This suggests a new countertrend towards a wider and more pragmatic recognition of irregular migrants in European societies. Indeed, the new instances of inclusion found in law and policy diverge from mass regularisations in that they are *not occasional measures*, but an integral part of the legal and policy frameworks of the EU and its member states. Therefore, while it cannot be said yet that EU and national policymakers are demolishing Fortress Europe (certainly not in relation to visa, border, or enforcement policies), *in regard to forms of internal migration control we could observe the first signs of its crumbling*.

It is plausible that the main reasons for this partial rethinking of Europe's approach are related to the recognition that the negative side-effects of policies excluding and criminalising irregular migrants—on the migrants themselves and on the wider society in terms of public health and order—have outweighed any

potential deterrent impact. And while such deterrent effect is not measurable, the only visible result from Italy's criminalisation of irregular migration, for instance, is a mounting backlog of cases in the courts, not a drop in irregular migrants. It is also plausible to think that the disuse of mass regularisations (which were seen as a pull factor) has itself created a space for alternative methods of recognising these migrants' presence. The difficulties in enforcing removals might as well have encouraged acceptance among policymakers that the presence of irregular migrants cannot be tackled only through enforcement and short-term policies. More research is needed, however, on the reasons and drivers that spurred policies that step back from an approach of total exclusion; on the role played by civil society (e.g. medical associations, lawyers, NGOs) or local authorities in encouraging more inclusive and/or pragmatic approaches; and on whether the emergence of the 'refugee crisis' and the increase in the number of rejected asylum seekers will further stimulate awareness of the social needs of irregular migrants, or whether the recent surge of anti-migration sentiments in Europe will instead freeze any further inclusive response.

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Chapter 6
The Transnational Mobilization of 'Irregular Migrants'

Milena Chimienti and John Solomos

6.1 Introduction

This chapter explores one facet of the experiences of 'irregular migrants'[1] in the contemporary conjuncture, namely the role of transnational movements as modes of mobilization by 'irregular migrants' that aim to help them gain access to rights and protection. In particular, we investigate why 'irregular migrants' take the risk to become public not only locally but, in the case discussed in this chapter, why they strive to mobilize beyond national borders. The chapter seeks to understand how they manage to mobilize at the transnational level despite their lack of resources and what additional costs such mobilization beyond borders represent. We use the case study of the International Coalition of Sans-Papiers and Migrants (hereafter IC SPM) and the specific event of the European March of Sans-papiers and Migrants that took place in 2012 in order to provide an empirical context for the arguments that are developed in the chapter as a whole.[2] This March followed several national

[1] We use the terms 'irregular migration' or 'migrants' in quote marks to emphasize the social construction of their irregularity or their status as migrant, which changes according to the individual profile, the period of time, the definition of borders, the countries, and the individual interpretation of the representatives of authorities. We also want to stress in this way that, from a legal point of view, they are criminalized although it is only because they do not have a permit to stay.

[2] The research was supported by the scientific commission HESSO Western Switzerland and the HETS HESSO Geneva. The interviews were conducted in part by Anne Alberti.and Joan Stavo-Debauge. We thank the interviewees who participated in this research, and Sarah Spencer and Anna Triandafyllidou for their useful comments.

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mobilisations and symbolized the passage to a transnational movement of irregular migrants, although in an ambivalent manner. On the one hand the activists involved in the March crossed different national borders and their claims addressed global issues. On the other hand, the majority of the participants came from one country (France) questioning therefore the transnational character of the movement.

The chapter argues that the move to a struggle beyond national borders took place at a time when the local/national mobilizations were becoming less significant, while at the same time the cause of the criminalization of migration was related to wider European policies. In this sense its organization, whilst important, seemed at that time more feasible and effective given the weakening of local/national movements.

We have organised the chapter in seven main parts. In the next part we discuss the wider context of 'irregular migration' and anti-migration politics. This allows us to situate the context in which the improbable mobilization by 'irregular migrants' can be explained. Then, we provide a literature review on transnational social movements in order to outline the main characteristics of transnational movements and raise the question of the extent to which this body of research is helpful in analysing the case of transmobilisation by irregular migrants. We then describe the methods and data we utilized in the research. The next three parts of the chapter besides the conclusion present the key empirical examples on which we draw. We start by discussing the origin of the transnational movement of irregular migrants and the 2012 March. Then, we examine the organization of this transnational movement by looking at the claims, the decision-making process, the participants, and the characteristics of its transnationalism. We then examine the forms that the movements of 'irregular migrants' took, interrogating the transnational characteristics of the movements. Finally, we discuss the impact of these mobilizations.

6.2 Situating 'Irregular Migrants" Mobilization

'Irregular migration' is emblematic of the failure of migration policy, both in terms of controlling migration and its human consequences. In the past 20 years, a number of scholars have described and analysed the reasons for the failure of both nation-states and international human rights with regard to migration (Bolzman 1992; Chimienti 2018). As Stephen Castles has argued: "Only when the central objective shifts to one of reducing inequality will migration control become both successful and—eventually—superfluous" (2004: 224). In other words, "migration policies fail because they are about *migration*" instead of addressing the root causes, which are linked to globalized inequality and justice (Anderson 2017: 1528). In this sense the presence of 'irregular migrants' is triply subversive: with their presence and by working, they act "as if" they were "ordinary citizens" (Bassel 2015); as activists, through local or national protest they question the national structure; and through transnational mobilization, crossing national borders, they refuse to be defined and limited by the global social order.

In practice, it is not only the failure of migration policies that lay behind 'irregular migration' but also "the long-term political success of scapegoating migrants" (Anderson 2017: 1533). 'Irregular migration' is the result of neo-liberal economic policies that created both push factors leading to impoverishment in the Global South, and pull factors, increasing the demand for cheap and disposable workers in 'receiving' countries. However, at the same time, such policies can lead to demand being restricted only to those who are useful to the economy and to the rejection of those seen as 'unneeded' and 'unworthy' (Stoler 2017). Such policies are the consequence of the historical acceptance of global inequalities, imperialism, and exploitation in the Global South by the Global North. In other words, 'irregular migrants' symbolize the 'persistent epistemic violence' that silenced or subjected marginalized groups (Spivak 1988).

The anti-migration politics targeting the 'unworthy' highlights that it is not mobility per-se that is the problem, as some migrants are seen as 'mobile citizens' (Anderson 2017: 1535), but more a question of class, sometimes correlated (but not always) with race. It is the figure of the 'Eastern Europeans' who are depicted in the media as 'taking jobs' and 'undermining conditions' or as 'dealing drugs'; the 'Syrian Muslim who is seen as a potential terrorist'; and the 'Eritrean woman who is suspected of living her whole life on social assistance'.[3] In other words, categories such as 'migrants' (and indeed citizens) are a social construction based on historical, territorial and policy agendas.

In reaction to a context that became particularly repressive in the 1990s, local and national mobilization by 'irregular migrants' burst into the public view in the 2000s in some US and European cities (among others in Los Angeles, Paris, Turin, Brussels, Geneva). Local and national mobilization by 'irregular migrants' took place when their semi-inclusion was challenged and repressed[4] (see *inter alia* Ambrosini 2013b; Barron et al. 2011; Chimienti 2011; Laubenthal 2007; Montforte and Dufour 2011; Nicholls 2013; Siméant 1998). These local or national mobilisations took more or less extreme forms, from simple protests to occupations and hunger strikes, and managed in a few cases to a degree of longevity, such as in Paris the 'coordination sans papiers 75/CSP75' which started in 2002 and still organizes regular events.[5]

A few years ago, we explored whether such local and national mobilizations by 'irregular migrants' could make a difference (Chimienti 2011; Chimienti and Solomos 2011). In these previous papers we argued that the claims by 'irregular

[3] See *inter alia* Mcqueeney 2012; Riecker 2014 As shown by *inter alia* Philo et al. (2013) and Poole (2002) the mass media have often been criticized for reproducing negative and simplistic representations of immigration.

[4] Mobilization by irregular migrants and their allies seemed to occur not only when there was a change from their relative tolerance to their repression (Iskander 2007; Laubenthal 2007; Milkman 2006), but also when there was a shared awareness among irregular migrants and structural opportunities. The absence of one or more of these conditions explains why mobilizations by irregular migrants did not occur in all European cities where they reside (Chimienti 2011).

[5] https://csp75.wordpress.com/ (last consulted 17 June 2018).

migrants' were essentially of an existential form—meaning that they were largely of an *immediate, instrumental, and individualistic* nature, such as demanding the right to stay and work in a given country. We argued that as long as they are in a situation of vulnerability, 'irregular migrants' will not be able to afford political and transformative claims and that their supporters need to attend to their basic needs or risk overshadowing their social suffering.

However, we also highlighted that the mere presence of 'migrants'—and even more so of 'irregular migrants'—is already subversive. As stated by Alessandro Monsutti (2018: 448), they "subvert the classical form of territoriality and distribution of wealth" (see also Balibar 2000, 2004; Isin 2008). We can explain this apparently non-revolutionary character by the concept of 'weak agency' (Chimienti 2009; Soulet 2004). This concept helps us to conceive forms of action that would not have been otherwise interpreted as agency. Thus, it allows us to understand that in situations of vulnerability, mobilizations will necessarily be at first instrumental and aimed for the personal good as one cannot afford—and does not have the resources—to aim to change the system as a whole. However, as Sara Ahmed argues, drawing on the work of Audre Lorde (2014) "caring for oneself" is "an act of self-preservation".[6] More forcefully, Patricia Hill Collins's work has illustrated that "survival is a form of resistance" (2000: 201). This line of analysis is taken a step further by Bassel and Emejulu, who argue that "survival strategies" are fundamental in order to build a sense of solidarity and resistance although they do not create a shift to "epistemic justice" (2017). In other words, whilst the local and national mobilizations by 'irregular migrants' "challenge the notion of citizenship", they lead at best to some regularizations and are not transformative in nature.

In this chapter we shall take this analysis forward by exploring the role of transnational modes of mobilization by 'irregular migrants'. We shall, in particular, explore the extent to which transnational mobilizations are aimed at broader transformative demands.

[6] "Caring for myself is not self-indulgence, it is self-preservation, and that is an act of political warfare (…) Sometimes, 'coping with' or 'getting by' or 'making do' might appear as a way of not attending to structural inequalities, as benefiting from a system by adapting to it, even if you are not privileged by that system, even if you are damaged by that system […] When you have less resources you might have to become more resourceful. Of course, the requirement to become more resourceful is part of the injustice of a system that distributes resources unequally. Of course, becoming resourceful is not system changing even if it can be life changing (although maybe, just maybe, a collective refusal to not exist can be system changing) […] Some have to look after themselves because they are not looked after: their being is not cared for, supported, protected" (Sara Ahmed 2014).

6.3 Defining Transnational Social Movements

Before moving on to the specific transnational mobilisations that are the main focus of this chapter, we want to briefly discuss the literature on transnational mobilization in order to outline some of the conceptual arguments that we shall draw on later. In particular we shall discuss some ways in which transnational mobilization has been defined, specifying what is meant by it and its main characteristics and highlighting the difference between transnational and national/local mobilisations. This overview will help us better understand the case of transnational mobilisations by 'irregular migrants'.

In Tarrow's (2001: 11) words, transnational social movements are "socially mobilized groups with constituents in at least two states, engaged in sustained contentious interaction with power holders in at least one state other than their own, or against an international institution, or a multinational economic actor". Whilst, until recently, the lens of analysis of social movements remained the nation-state, since the 1980s the literature on transnational or global social movements has expanded (see, *inter alia*, Boli and Thomas 1999; Della Porta and Tarrow 2005; Della Porta et al. 1999; Guidry et al. 2000; Però and Solomos 2010; Smith et al. 1997). However, as argued by Johanna Siméant (2010), this literature often overlooks the fact that transnational mobilization is not a recent phenomenon.[7]

The literature on transnational movements focused during its initial stage on NGOs (see Bennett 2005; Boli and Thomas 1999; Keck and Sikkink 1998; Smith et al. 1997). In contrast, the more recent literature describes transnational movements as "a loose network of activists, using new technologies of communication in a self-organized way and advocating for multiple issues and diverse aims and with an inclusive identity" (Bennett 2005; Siméant 2010: 9). This description characterizes the transnational nature of 'irregular migrants' mobilization which relies on new technologies of communication, has to be inclusive, and is necessarily more flexible in order to increase the number of participants as we shall show later.

Siméant (2010) also highlights the lack of clarification over the level of globalization or transnationalism: is it correlated to the profile of the protesters, the level of claims or the effects of mobilization, or does it entail all these aspects at the same time? As argued by Tarrow (2001) and Tilly (2004) we should distinguish between these different levels in order to understand the real characteristics of globalization or transnationalism in the movement and identify what is really new in these types of mobilization.[8] Although the 2012 March did not include an equivalent number of

[7] This is illustrated, for instance, by the nineteenth-century labor movement (the *Internationale*) and, also the International Workingmen's Association (IWA), as well as by 'protypical transnational actors' such as Marx and Engels, by the movement against slavery, or by the women's suffrage movement, all of which occurred in the 1800s (Nimtz 2002).

[8] Tarrow (2001) suggests that four levels of globalization can be distinguished: the coalition of local mobilisations making global claims and seeking international support; the coalition of national or international activists who organize international protest events targeting international organizations; the coalition of international activists who mobilize against nation-states' violation of international norms; and activism within international organizations and the redaction of treaties.

participants from all countries, it fits with important characteristics of transnationalism which is at the core of the movement as we shall see later.

Finally, the protestors' or activists' reasons for mobilizing transnationally or implementing an international protest event are not necessarily based on a clear common agenda and values. Rather as Keck and Sikkink (1998) show it is often a blockage at the local or national level that leads them to find support at the international level in order to put pressure on the national government—what they call 'the boomerang effect'. These blockages can be material (e.g. lack of financial resources to continue the movement) or nonmaterial (lack of attention, legitimacy or media coverage). This is an important factor for 'irregular migrants' transnational mobilization, since they face several limitations at the local level. The 'transnational opportunities' and 'cross-national affinities' favour mobilization beyond nation-states, such as new communication technologies and international organizations (Giugni 1998), although the transnational character cannot be reduced to the globalization era (Della Porta and Tarrow 2005).

Besides these few specificities of transnational movements (which are described as more inclusive and more flexible than local movements), what is really different or new in transnational movements, according to Tarrow and McAdam, is the importance and strength of contentious action: "a change in the number and level of coordinated contentious actions leading to broader contention involving a wider range of actors and bridging their claims and identities" (2005: 331). For Tilly (2004) they are more professional, that is related to their internationalization,[9] and more often led by an elite with important human capital who might be disconnected from the movements' basic claims. For these reasons transnational movements developed according to Cohen and Rai (2000) a new repertoire of actions and forms of protest compared to the "national and autonomous" ones analysed by Tilly (2004). Their repertoire of actions would draw on "transnational and solidarist" repertoire of actions (Cohen and Rai 2000: 15).

By contrast, for Siméant (2010) transnational social movements have not led to a new repertoire of actions, which would imply a 'global repertoire', as national spaces have still a predominant political power. She argues that, whilst social movements can use some transnational 'shade' and might have occurred because they lack resources at the national level, their actions are not necessarily transnational but local and using a national repertoire of action to support their claims.

To what extent does the case of 'irregular migrants' mobilization fit with the wider scholarship on transnational social movements? In the rest of the chapter we will look in particular at the transnational nature of their specific mobilization, by exploring the extent to which it is more inclusive, flexible, and in a way stronger as it supposed to involve more and larger contentious actions, be more professional,

[9] "To understand the internationalization of claimants and objects of claims, we must recognize two other aspects of internationalization: (a) proliferation of intermediaries specialized less in making claims of their own than in helping others coordinate claims at the international level, and (b) multiplication of lateral connections among group activists involved in making similar claims within their own territories" (Tilly 2004: 115).

and rely on a new repertoire of actions (Tarrow and McAdam 2005; Cohen and Rai 2000). We shall also explore the 'transnational opportunities' or rather the 'local blockages' which helped to trigger the 2012 March and the transnational coalition of irregular migrants and whether they still use the local context to sustain their struggle. Finally, we will explore the question of the extent to which the transnationalisation and putative professionalisation reinforce the claims and the longevity of the mobilizations.

6.4 Methods and Research Participants

The focus on a case study of a specific type of transnational mobilization resulted from our aim to situate this form of action within particular environments and contexts. Through previous research we had noticed that from the early 2000s onwards there were a number of attempts by 'irregular migrants' and their supporters to mobilize transnationally. One of the first transnational movements we identified was the 'No Border Network' which started in 1999. It was more a coalition between grassroots activists and organisations than a movement self-represented by 'migrants'. Its members met twice a year and worked otherwise by emails. According to the website, the network aimed to be "a tool for all groups and grassroot organizations who work on the questions of migrants and asylum seekers in order to struggle alongside with them for freedom of movement… It enables many grassroot groups, including out of Europe, to coordinate actions, to exchange information and to discuss about migrations and borders" (http://www.noborder.org/). The network stopped being active in 2004 but its website is still updated and local initiatives with the same label continue, such as the No Border UK (http://noborders.org.uk/). Yet, despite this history of efforts to mobilize transnationally there remains a gap in research that explores the forms and impact of transnational mobilizations by 'irregular migrants'.

It is in order to deal with this gap we have focused on the case of the International coalition of sans-papiers and migrants, which is still active, self-organised by '(irregular) migrants', and which provides a thorough documentation of the movement through a blog, social media, and its journal. We concentrate more specifically on the 2012 European March of sans-papiers and migrants that marks the origin of the IC SPM and symbolizes the transnational character of the coalition by crossing different national borders without authorizations.

The empirical material that informs this chapter is based on 20 interviews conducted between 2014 and 2015 with both 'irregular migrant' activists directly involved in the 2012 March (10 of them) and members of solidarity networks that have supported them (10). 'Irregular migrant' transnational activists were recruited through the website of the March's blog,[10] which indicated some of the participants

[10] http://marche-europeenne-des-sans-papiers.blogspot.ch/ (last consulted, 17 June 2018).

by country and then by snowballing. We interviewed the activists indicated on the website and who seemed therefore to have played a more active role during the March in the respective country where they reside but might represent less the motivations of the basis of the mobilization. We chose those based in France, Italy, Switzerland, and Belgium.[11] France and Italy were obvious choices, as the mobilization started there and was documented mostly by activists from the two countries. Switzerland and Belgium were opportunistic choices as the research team was based there at that time in the first case and had personal contacts in the second. The interviews with activists based in Belgium were conducted via Skype. Media output by the movement, such as websites, blogs, flyers, pamphlets, calls for demonstrations, its Facebook account,[12] newspapers, and press releases, were also used for the analysis.

6.5 The Emergence of the International Coalition of Sans-Papiers and Migrants and Their March in Europe

The International Coalition of Sans-papiers and Migrants (hereafter IC SPM) follows an important history of local mobilization by 'irregular migrants' since the 1970s in Paris and in the 1990s and 2000s in some other European cities (as mentioned above). The IC SPM was launched together with the 2012 European March. The idea of a European March came from current and former 'irregular migrants' who were based in France (Paris) and Italy (Turin). The spokesperson for the IC SPM, which was created in 2011 with the aim of implementing a European march, is also the spokesperson for the *Coordination sans papiers 75* (CSP75) based in Paris.

Two main mobilizations, both of which took place in Paris, seem to have triggered the creation of the IC SMP and the launch of the 2012 European March. The first involved the occupation of the labour exchange (*bourse du travail*) and, after their expulsion, the occupation, in Rue Baudelique, of the premises of the health insurance company CPAM from May 2008 to August 2010 in a bid to push for the regularization of *sans-papiers*. The second mobilization was the march from Paris to Nice in 2010 in order to meet with around 40 heads of state from African countries during the France–Africa summit.

Both mobilizations led to a number of consequences. First, an action such as the occupation of the labour exchange and the CPAM in Rue Baudelique—which lasted 2 years—bore a heavy cost for the activists in terms of time and energy and probably also economically, with only limited results, whilst a march such as that which

[11] The interviews were conducted in French and translated into English.

[12] https://www.facebook.com/CISPM-Coalition-Internationale-des-Sans-Papiers-et-Migrants-339882146184374/

took place between Paris and Nice might represent a less important cost yet have the equivalent or even greater effect. This may be related to the 'boomerang effect' analysed by Keck and Sikkink (1998), where the transnational level appears more accessible and more effective for mobilization.

Second, as more 'irregular-migrant' activists—as well as protesters related to different mobilizations, such as the anti-deportation protests (see Bader and Probst 2018; Ruedin et al. 2018)—joined the movement, the future leader and the spokesperson of the IC SPM (who were involved in both events and were part of CSP75) refined the claim more broadly, not only addressing the regularization of 'irregular migrants' but addressing the whole issue of the right to migrate and reside in a country. This included the whole trajectory from the countries of origin, of transit and of residence as, up until then, the issue had been fragmented, as illustrated by the specialization of some associations in defence of asylum-seekers and refugees and others on labour migrants whilst a third focused on the case of 'irregular migrants'. In so doing they intended to give one voice to the mobilization and to treat migrants' "claims according to the same logic of right to migrate". As explained by one of the leaders of the march and the spokesperson of the IC SPM in Turin (from Ivory Coast, but lives in Italy, an who obtained a permit of stay after the March):

> All this because, progressively, new people were joining the struggle and we felt this need… this need to re-target, to review the analysis, as we wanted to take on board everybody… this changed my views. I started to understand that whilst, for me, the issue of the struggle was to get a permit of stay… I then discovered that other issues are important (AS).

The fact that some of them spent time in different European countries and noticed the important and often similar difficulties faced by 'irregular migrants' in each country led them to think of a common mobilization. Third, this led them to broaden the target of their claims beyond national borders. Although the implementation of migration remains national, European regulations such as the Dublin Regulation and measures for control such as Eurodac and Frontex, are at the heart of the issues faced by 'irregular migrants'. Research has highlighted the responsibility of European policies for the increased criminalization of irregular migration (see *inter alia* Bloch and Chimienti 2011; Schuster 2011; Triandafyllidou 2010; and Delvino in this volume) and the arrangements made at the local level (Ambrosini 2013a; Spencer 2018). As mentioned by the spokesperson for the IC SPM and for the CSP75 (Malian origin, lives in Paris at the time of the interview and has a permit of stay since 2005), the roots of their problems are transnational, and therefore their claims and mobilizations have to be based at the equivalent level:

> As we know, all the directives are given at the European level although each state might still implement them as it wishes. So, to be as many, as visible, we need to do the same and take the struggle to the international level. (…) Everybody says that the smugglers are responsible [for the deaths] in the Mediterranean Sea, but nobody says that it is the responsibility of European policy, nobody says that this is the responsibility of French policy. (…) African countries should mention this (…) [a transnational mobilization] also helps to put pressure on African states (AnS).

Considering the global trajectory and responsibility and noticing that each amnesty or collective regularization was followed, to use the term of one of our interviewees, by a 'political vacuum', the leaders of the movements extended in this way their claim for the political denunciation of globalization and the capitalist system and targeted both countries of destination and the whole of Europe. They also broadened the historical analysis to a postcolonial denunciation, as the spokesperson of the IC SPM in Turin states:

> This struggle is not between the white and the black. This struggle is not between the migrant and the so-called European. This struggle is between the exploited and the exploiter (AS).

This might correspond to the 'transnational and solidarist' repertoire of actions analysed by Cohen and Rai (2000: 15) but at the same time this claim made by the leaders of the movement might not represent the voice of the mass of 'irregular migrants'.

The perspectives of the leaders of the movement have been shaped by experiences of struggle and mobilization, but also by common forms of intellectual formation. For instance, the spokesperson in Paris edits the e-journal *La Voix des Sans-Papiers*[13] that has existed since 2010 and the one in Turin has a Master's in Sociology and is currently a leader of the trade union *Union Sindicale di Base* (USB).[14] They both became public figures, regularly contacted by the media and visible online.[15] They met in 2002 when they participated in the Social Forum and have stayed in contact since then. They both obtained a permit of stay (in 2005 and just after the March). The same holds true for the spokespersons of the IC SPM in the other countries who participated to the 2012 European March, such as A. Ch—an ally and member of the association *NoBorder* based in Germany—or L. R, based in Switzerland. During the 2002 Social Forum they agreed on the importance of having a movement represented by the 'irregular migrants' themselves rather than only by their supporters, and they analysed their situation in relation to macro issues and global inequalities. Their long-term relationship, the network they created through their respective political engagement, and their human capital allowed for the implementation of transnational mobilization when the idea arose during the 2011 Social Forum after the Paris–Nice march and another in Dakar. Given their profiles, they represent more leadership roles rather than being spokespersons, and it remains unclear for us how their voice is representative of the rest of the movement.

[13] http://lavoixdessanspapiers.eu.org/

[14] https://www.usb.it/

[15] See, for instance, https://fr.wikipedia.org/wiki/Anzoumane_Sissoko

6.6 Doing Transnationalism: The Organization of the International Coalition of *Sans-Papiers* and Migrants and the 2012 March

The European March from June 2 to July 2, 2012, which marked the creation of the IC SPM, symbolizes transnationalism in several ways. The activists crossed six countries (France, Belgium, Germany, Luxembourg, the Netherlands, and Switzerland) and nine borders.[16] Whilst the March was transnational, the geographical origin of the 128 participants of the entire March was less heterogeneous. There was a majority of 'irregular migrants' with a sub-Saharan African background, a minority from North African countries, one person from Haiti, one from Syria, and one with a Chinese background. The majority came from France and were then joined by other local 'irregular migrants' and supporters at each milestone. Only around five of these local protesters walked the entire route. In other words, the transnational character of the mobilization is more related to the target of their claims and the event that involved the passage of six countries rather than to the profile of the activists. Besides, the 'walker-activist irregular migrants' were almost all men, which shows that the coalition was based on a limited network of people with similar profiles. At each milestone they were joined by women, as well as by local protesters with more diverse profiles.

Each milestone was chosen according to the historical relationship between migration and each European country—particularly in terms of colonial history but also according to current restrictive European migration policy. In this way the choice was very symbolic and carried an important political message, which shows yet again the significant human capital of the March organizers. For instance, one of the first milestones was Verdun, where marchers were able to commemorate the involvement of soldiers originating from African countries—Malians, North Africans, Senegalese—who fought for France during the First World War and are often forgotten in historical commemorations. Whilst thousands of their ancestors died for France, current migrants from these countries are today considered illegal in France.

Another milestone in France was the town of Hénin-Beaumont, chosen because there was an increase in the number of people there voting for the *Front National* (the French extreme-right party) and because the city is close to the border with Belgium. From Hénin-Beaumont the marchers crossed the border and walked to Brussels, where they protested against European migration policy, focusing on a critique of Frontex and the Dublin Regulation, before proceeding to Schengen, where the Treaty of Maastricht was signed.

They also joined protest events occurring in the towns on other issues in order to strengthen theirs. One of the 'irregular migrants' who was part of the March put it this way:

[16] Paris, Brussels, Liege, Maastricht, Luxembourg, Schengen, Florange, Jarny, Verdun, Metz, Mannheim, Heidelberg, Freiburg, Basel, Bern, Turin and Val di Sussa, Strasbourg.

> (…) One of the leaders had explained to me that, in the end, one rallied to a cause ... all the causes that appeared to them unfair. Even if it had nothing to do with the right of the sans-papiers. In the end this movement joined ours too (E.M., Senegalese origin, lives in Paris at the time of the interview, obtained a permit of stay after the March).

This was the case, for instance, in Italy, where the March joined the movement against the TAV (the high-speed train) in Valle di Sussa. Each milestone was organized by local supporters, which gave direction to the March. Local protesters informed the local authorities about the March and asked for the necessary permissions. They were also responsible for advertising the event and mobilizing local activists to join it. The number of walker-protesters, added to local activists, created a more visible and audible mobilization. Marchers' recollections are full of emotion: shock, fear, moving moments, and laughs. As one interviewee recalls:

> To see more than 600 people cross the border in Basel to get hundreds of *sans-papiers*. For me it was a shock. As there were some customs officers who looked at us as if we were pariahs, we said 'Hello' – *laughs* (CT,.Western African origin, lives in Milan, without permit of stay at the time of the interview)

As argued by Siméant (2010), transnational social movements by 'irregular migrants' are embedded in national spaces and use national repertoires of action to support their claims. However, embodying the right to mobility by crossing national borders had an important and empowering meaning for the participants. As one interviewee recalled, it was the first time—after ten years in France—that he had left the country, and he felt liberated by the experience. He was moved when he noticed that the conditions for 'irregular migrants' in other countries into which he crossed were even worse than the ones he knew in France:

> In Brussels *sans papiers* were living in the streets (…) in Germany *sans papiers* are in camps, detained (…) we became aware that we are more privileged in France and have a few more rights in France (E.M).

To walk miles, to live together in rudimentary conditions, to face risks crossing borders as 'irregular migrants' was also described as both more physically demanding than planned and yet energizing.

> It was physically difficult. There were some difficult moments when we did not know what to expect. When I left France, I thought it would be for one month and I took a big bag with a lot of clothes (…) we did not have transport and each one had to carry his bag. From this point of view, we were not well prepared. We walked a lot, sometimes 10–15 kilometres (…) sometimes we walked in the rain, in the cold. But sometimes it was really convivial, we were welcomed very warmly, we chatted, we exchanged information. At the beginning of the march, even when I was part of the CSP75, we did not know each other well but because [during the march] we were obliged to spend all this time together, to sleep together, to walk together, to eat together and to talk together, a lot of links were created. At the end it was heart-breaking (…) there were tears (…) it was moving (…) it has really cemented the collective. (E.M.).

Another participant recalls the provocations and insults they had to face in some cities and the repeated directive not to react to such provocation. There was a division of roles among the participants: some were responsible for security and each time there was the risk of escalation of problems, they brought things back into

order; others were responsible for food and cooking and yet others for circulating the flyers.

Another interviewee remembers the fear they felt when they were controlled by the police at the border crossing between Belgium and Luxembourg.

> There were some problems, too, some fears as well (…) we were controlled on the bus at the border. Imagine, we were 70 *sans-papiers* and some supporters (…) who were controlled. You can imagine the fear, as we had to go to a police station: 'Everybody out, document control'! 'We do not have documents'… You can imagine our fear… Some peed in their pants (laughs) …(CH., Haitian origin, lives in Paris, without permit of stay at the time of the interview).

Whilst going transnational appeared at the beginning as no more demanding than other forms of mobilization—such as the occupation for months of the labour exchange or of churches—and was an obvious level at which to situate the claims of 'irregular migrants', given the European migration restrictions, all the costs and risks taken during the march leads to the question over whether it was worth 'going transnational'.

6.7 Impact of the 2012 March

The March was well documented by activists (in the form of blogs, films, photos, social media coverage); however, the media in the different countries into which they crossed did not cover the events very much. Except for some press releases, the events did not attract much attention from journalists. This relative failure could not be explained by the different participants we interviewed. However, and despite the above-mentioned difficulties, the March was a success from the participants' point of view and an "extraordinary" moment. The March was described as "cementing the group", a "source of oxygen" and a source of strength due to the solidary it created and the hope of a better future. In this sense, the contributions made by the March were both symbolic (the mobilization provided hope) and concrete, as they created an international coalition and reinforced the group's sense of solidarity and feeling of sharing a similar situation. As explained by one of the participants, to see that, through being together, they can challenge the usual image of them as "poor and unfortunate" was important, and that facing the police empowered them:

> For me the march was a breath of fresh air (…) for these poor and unfortunate people to notice that the police could not arrest us has been something exceptional and this has been a success …(PA, lives in Switzerland, without permit of stay at the time of the interview).

From the policy point of view, the contributions of the mobilization are, as usual, difficult to assess. One participant mentioned, however, that the fact of being received by the European Parliament in Strasbourg was symbolically important and somehow helped to modify the law in France:

> Some of us had swollen feet but this solidarity…the one who cannot walk will be carried (…) we put our bodies to an important test. We suffered but we reached our goal (…) what

> was important was to be received in Strasbourg. Those who could not walk would be carried, we will go with you, it was the aim and we achieved it. We were received in Strasbourg by the European Parliament. We were escorted like lords, it was extraordinary. For us it was phenomenal and when we got back to France, (…) we forced the Constitutional Court, the highest legal instance in France, to stop arresting people because they do not have documents. This has been extraordinary. (…) To denounce abusive detentions, inhuman expulsions (…). So, I think we had an influence on the decision about this law …(CH., Haitian origin, lives in Paris, without permit of stay at the time of the interview).

Despite the heroic description and optimistic account, the respondent later added a slightly more realistic view:

> I would not say it is taken for granted but it has been like a jurisprudence to defend the *sans-papiers*. Before, a *sans-papiers* could be restrained for 72 hours. But now a *sans-papiers* cannot be held for more than 4 hours.[17] So it means that it gives us some flexibility to fight against their detention in a centre. (CH).

This interviewee refers to the law of 31 December 2012 on legal restraint for the verification of the right to stay (Articles 1 and 2, Law 2012 1560[18]) that was aimed at migrants residing illegally in the country. This law allowed their legal retention while their situation was checked. It was formulated when the Court of Justice of the European Union (CJEU) decriminalized irregular stays. Therefore an 'illegal migrant's' detention, i.e., the privation of his or her freedom, which is intended for those suspected of committing a criminal offence, was not legal. A retention is less repressive, and the duration is shorter.

One aspect of the possible impact of the March were actions to allow for the regularization of 'irregular migrants', although in practice it is difficult to relate all of these actions to the March itself (see also Delvino in this volume). For instance the county of Geneva launched a two-year action to regularize the living and working conditions of 'irregular migrants'.[19] Another important change that seems more directly linked to the March, because it occurred a few months after the event, was the document drawn up by Emmanuel Valls (who was, at that time, the Minister of the Interior under the presidency of François Hollande), which clarified and listed a number of criteria for regularization on a individual basis. This did not represent an amnesty but made possible some regularizations in France.

However, as mentioned by one of the interviewees quoted above, this should not be taken for granted, as the new law on asylum-migration passed by the French Parliament in April 2018 increased the maximum duration of retention to check a person's legal status to 24 hours. This new law did not add any suggestion of regularization for irregular migrants through employment. This highlights the difficulty of assessing the direct impact of the mobilizations that we have analysed in this chapter on policy agendas and political strategies. The spokesperson of the IC SPM

[17] According to the law, the maximal time of legal restraint is 16 h.

[18] Available at https://www.legifrance.gouv.fr/eli/loi/2012/12/31/INTX1230293L/jo/article_2 (last consulted, 17 June 2018).

[19] See https://www.ge.ch/dossier/operation-papyrus

in Paris told us that they try to mobilize and put on events on a regular basis in order to highlight their demands and as a way of mobilizing support for their demands.

6.8 Conclusion

At the beginning of this chapter we raised the question of how 'irregular migrants' could make a difference when they are confronted by structural inequalities and patterns of exclusion. We argued that despite the existential claims at the basis of the movements of irregular migrants, their transnational mobilization is subversive in three ways: by their existence, by their use of local movements, and by their transnational mobilization. We have used the example of one specific mobilization to highlight the ways in which transnational modes of mobilization by 'irregular migrants' can be seen as form of 'survival politics'. Whilst the concept of 'weak agency' allows to understand forms of action that would not been interpreted as such otherwise, the concept of 'political survival' allows us to conceive forms of collective resistance that would otherwise remain unseen within mainstream definitions of activism because they do not aim to bring about structural changes but rather to demand the right to remain and exist.

In the current global conjuncture there are about 30 to 40 million migrants who are not 'authorized' (see Triandafyllidou and Spencer, in this volume), who by their presence challenge the system. They refuse to be defined, assigned to a prescribed category and fixed in their mobility as citizens and workers. By labelling themselves *sans-papiers* or *undocumented migrants* they also refuse their criminalization by such terms as irregular or illegal migrants. As we argued in discussing the case of the 2012 European March of Sans-Papiers and Migrants, they shape their claims so broadly in order to denounce not only migration policy but the whole epistemic violence of the structure between "the exploited and the exploiter", in the words of one of their spokespersons.

More generally we have argued in this chapter that the focus on transnational modes of mobilization was seen as necessary given the source of their problems, namely European-level institutions and policy agendas. At the same time mobilization at the transnational level was also opportunist, in the sense that after years of local mobilization with only limited impact, it was hoped that transnational mobilizations could have a 'boomerang effect' and create spaces for more effective local and national mobilizations. Perhaps the main impact of the transnational mobilizations explored in this chapter is that they created a sense of solidarity among 'irregular migrants' and their supporters. Their transnational character remains limited, however, given the difficulty of mobilising transnational solidarity but also the continuing importance of the national migratory regime in defining who is included and who is not.

In the current climate, the price of being categorized as 'illegal' remains really high. At the time of writing this chapter, images circulating on social media show a two-year-old girl who was separated at the US-Mexico border from her mother, who

was considered to be an 'irregular migrant'. Such images are extreme, but at the same time they help highlight the extent to which some politicians seem willing to go to develop 'harsh immigration regimes' in the current environment. The violence that underpins current migration policies—which has led to deaths during the journey, to the criminalization of migrants and to emotional trauma for them and their children by separating them—leads in many ways to the dehumanization of those caught up in the process. In this environment, mobilizations by migrants and their supporters will necessarily play an important role in questioning and perhaps limiting these restrictive trends. This is why, as we have argued in this chapter, it is vitally important to try to make sense of the on-going mobilisations that are taking place both nationally and transnationally. The current restrictive situation makes it even more important to continue to mobilize locally as well as transnationally in order to highlight the need for a global approach to migration involving sending countries, countries of destination and migrants themselves.

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Chapter 7
Crackdown or Symbolism? An Analysis of Post-2015 Policy Responses Towards Rejected Asylum Seekers in Austria

Ilker Ataç and Theresa Schütze

7.1 Introduction[1,2]

In 2015, Austria served as both a transit and a host country to asylum seekers from war-ridden regions. The numbers of applications for asylum increased dramatically, transit centres were set up, and people moved through the country on their way to Germany and Sweden. Already in the fall of 2015, only a few weeks after the borders were temporarily opened without controlling the persons who crossed, Austrian politicians began to prioritise a tough stance towards migration and asylum. The government also changed its approach towards *non-removed rejected asylum seekers* (NRAS). In early 2016, the national government proclaimed the ambitious plan to deport at least 50,000 persons by the end of 2019. In so doing, Austrian government representatives constituted no exception to state leaders across Europe, who have since 2015 prioritised the enforcement of removals (EMN 2017; Lutz 2018). Subsequently, the federal government proposed and adopted several measures with the aim of fostering return enforcement. However, some of these policies are symbolic, aimed at signalling to the public certain values and the government's commitment to this goal. In sum, the federal government pursued a *shift* of policies towards a very narrow and one-sided response to the presence of NRAS through a mix of substantive and symbolic policy measures.

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In this chapter, we analyse the federal government policies regarding NRAS in Austria in response to the events that occurred after the 'refugee crisis' in 2015. We attempt to answer the following research questions: (1) To what extent are policy responses towards NRAS substantive measures to control and deter them in order to foster the deportation regime, and to what extent do they represent symbolic measures directed towards voters? (2) How can we explain the emergence of symbolic, substantive or both types of policy responses through the particularities of NRAS?

We employ the analytical perspective of substantive and symbolic policy responses towards irregular migration that differentiates between two fundamental functions that policies can serve: signalling vs. intervention (Slaven and Boswell 2018). Together they address a wide range of aims, from creating a hostile environment and disincentives to stay or come (Triandafyllidou and Ambrosini 2011; Lahav and Guiraudon 2006) to policies that criminalize (Hammerstad 2014), incarcerate (Schmoll 2016), and mark migrants as a threatening figure (Bosworth 2008). Following Bagley and Ward, we define policy responses as both actions (by governments) to solve problems and actions to "persuade social actors to subscribe to particular beliefs that delineate action" (2013: 1).

We focus on NRAS and follow Heegaard Bausager et al. (2013) in defining NRAS as those who have been issued a negative decision to their asylum claim and are therefore under the legal obligation to leave the country but have been neither forcefully deported nor departed on their own. NRAS constitute a growing segment of European society. According to the European Commission (2015), in 2015 about 40% of return decisions were processed in the European Union; in Austria, around 50% (Table 7.1). Even if nation-states are successful in increasing return rates in the years to follow, it seems unlikely that the number of non-removable returnees will significantly decrease (cf. Lutz 2018: 50). The European Commission estimates that more than one million people in Europe will soon become rejected asylum seekers (EU Commission 2017).

This chapter contributes to the existing literature by investigating policy responses in the field of asylum and return, and by providing detailed insights into the *interplay* of the symbolic and substantive dimension of policies against irregular migration. In the next section, we provide an overview of the theoretical literature that inspired the evaluation and analysis of our empirical collection of policy responses to NRAS. In Sect. 7.3, we explain why we understand NRAS as a subcategory of irregular migrants and present our methodology. Section 7.4 provides a synopsis of relevant information of the Austrian context. In Sect. 7.5, we present the empirical findings, followed by a discussion of why a mix of substantive and symbolic policies emerges in Austria.

Table 7.1 (Non-cumulative) deportation gap of third-country nationals and number of rejected asylum applications in Austria between 2008 and 2017

Austria	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Final rejected asylum applications	16,255	21,660	19,425	16,695	17,850	17,125	3440	8440	14,145	29,315
3rd country nationals ordered to leave	8870	10,625	11,050	8520	8160	10,085	N/A	9910	11,850	8850
3rd country nationals returned, following order to leave	5855	6410	6335	5225	4695	6790	2480	5275	6095	6115
Additional[a] "deportation gap" per year (third country nationals)	**3015**	**4215**	**4715**	**3295**	**3465**	**3295**	**N/A**	**4635**	**5755**	**2735**

Source: Own compilation based on the following tables from Eurostat: migr_eiord (http://ec.europa.eu/eurostat/web/products-datasets/-/migr_eiord), migr_eirtn (http://ec.europa.eu/eurostat/web/products-datasets/product?code=migr_eirtn), first instance decisions (http://ec.europa.eu/eurostat/tgm/table.do?tab=table&plugin=1&language=en&pcode=tps00192) and final decisions (http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tps00193&language=en), as well as research on metadata information of Eurostat

[a]The phrase additional deportation gap means that this figure needs to be added to the already existing cumulative number of non-deported persons in Austria from previous years. However, it is much harder to assess the original size of the group to which each year's deportation gap would be added in order to then be able to estimate the overall size of the existing deportation gap at any given moment

7.2 Theorising Policies Towards Irregular Migrants and NRAS

Academic literature from the last two decades provides us with insights on policies developed and implemented to control irregular migrants in European countries. As a subcategory of irregular migrants, this literature serves as an instructive contrasting foil to discuss the commonalities and particularities of policies towards NRAS.

To systematise these policies, the literature differentiates between external and internal control policies. External control policies are defined as policy measures developed to control irregular migration at state borders as well as through cooperation with other states and private companies (Triandafyllidou and Ambrosini 2011; Lahav and Guiraudon 2006). In contrast, internal control policies are actions that concern immigrants staying inside a nation's borders. In this paper, we focus on internal control policies to understand how those boundaries that physically and symbolically separate politically undesired yet present rejected asylum seekers from other parts of society on the same territory are created and enforced.

To understand policies concerning irregular migrants, the literature provides us with another important differentiation—that of substantive versus symbolic policies to deal with irregular migration. Following Slaven and Boswell, we understand substantive policies as "measures to steer the object of intervention", whereas the common basic property of symbolic policies is that they are "high profile measures" and "cosmetic policy adjustments" primarily intended to "signal values and intent" (2018: 1), usually directed at the voting population. While the two do not necessarily contradict each other in practice, they follow different fundamental aims, namely those of *steering* (substantive policies) vs. *signalling* (symbolic policies).

Substantive policies against irregular migration discussed in recent academic literature are mainly centred on detention as the most prevalent form of confinement. Detention works as an instrument of immigration control as well as "a wider instrument of control of 'undesirable foreigners'" (Majcher and de Senarclens 2014: 4). Detention policies include punitive elements and, far from fulfilling only an administrative function of physical control, are intended to deter irregular residence and enforce return of irregular migrants (Leerkes and Broeders 2013).

Deterrence measures describe policies intended to make migrants' everyday living situation difficult with the aim of discouraging individuals from migrating irregularly or staying in a country without a legal residence permit (Schmoll 2016). Their substantive aim is to steer the behaviour of the target group (s. Slaven and Boswell 2018: 3). As Hamlin (2012) shows, the use of deterrent policies is not limited to irregular migrants but extends to asylum seekers by reducing incentives for making asylum applications through strict border control, time limits, narrowing the grounds for asylum, removing workers' rights for asylum seekers, and putting increasing numbers of asylum seekers in detention (cp. Schuster 2011; Scheel and Squire 2014). Besides harsh treatment through punishment and detention, another deterrent measure is cutting off welfare benefits such as access to public services, accommodation, and health services for irregular migrants. Exclusion from welfare benefits became a means of immigration control, a trend heightened in the 2000s in relation to asylum seekers and irregular migrants (Ataç and Rosenberger 2018).

In the past decades, scholars have argued that these mostly restrictive, substantive measures are unlikely to achieve the promised outcome of full state control of irregular migration for various reasons. On the one hand, liberal constraint theorists argue that international human rights obligations and the re-enforcement of individual rights and their extension to minority immigrant groups in the post-war era restrain restrictive and punitive policies towards irregular migrants (Hollifield et al. 2014; Joppke 1998). Another dominant line of argument is that such policies do not address the global structural forces underlying migration (Massey et al. 2005; Sassen 1988). These limits to substantive, restrictive national policies against irregular migration render the use of "*symbolic* policy instruments to create an *appearance* of control" more attractive (Massey et al. 2005: 288) and indicate why they are particularly present in this field (Castles 2004: 867; Triandafyllidou 2010: 17; Slaven and Boswell 2018).

Symbolic migration policies are closely connected to processes of securitisation and criminalisation. On the one hand, migrants are constructed as threats to

communal cohesion and national identity through policy efforts that bring them under the realm of security and military policy (Hansen 2014). Ceyhan and Tsoukala emphasize the importance of the symbolic dimension of policies for the construction of migrants as a threat (2002: 23), the effectiveness and success of which in turn rely upon mass media to reach discursive significance (s. Rheindorf and Wodak 2018:21). Scholars also debate the convergence between migration and criminal law, depicted as *crimmigration* (Stumpf 2006). Hence, securitisation/crimmigration presents the symbolic dimension detention policies, for example, and other policies that constitute a comparable handling of (irregular) migrants and offenders. On the other hand, securitisation and 'crimmigration' are discursive phenomena preceding concrete policies, which help legitimise harsh treatment and punitive measures against irregular migrants by constructing them as a security issue in the first place (Bigo 2005). However, the short-term benefits of securitisation and criminalisation for policy makers—to draw public attention to policy measures and the appearance of a strong commitment—bear the risk of increasing pressure on authorities in the long term, due to risen public anxiety (cf. Slaven and Boswell 2018: 15f).

Slaven and Boswell (2018) have identified three drivers of symbolic policies towards irregular migration: (a) *manipulation*, the use of (often security-related) narratives addressing morality, affection, and emotions to generate public support; (b) *compensation*, the use of bold and simple measures to divert attention from the gap between public preference for restrictive measures and a state's ability or willingness to effectively implement such measures (s. Joppke 1998; Hollifield et al. 2014); and (c) *adaptation*, which refers to the discrepancy of knowledge on irregular migration between the implementing apparatus 'inside' and the voting public 'outside', and the adjustment of public policy to popular narratives.

Through the analytical differentiation between measures designed to change the reality of a certain issue on the ground and those targeting mostly the public perception of how an issue is handled policy-wise, we may better understand how the mix of both measures are used in a strategic way to achieve certain objectives. Moreover, just like symbolic policies may have real effects on the issue at stake as well as the "intended audiences" (Slaven and Boswell 2018: 3), substantive policies also (re) produce societal norms on how a subject is handled and influence the way it is perceived. In other words: *Signals* also *steer*, and *steering* sends *signals*. Connecting to the interrelatedness of substantive and symbolic measures, Bosworth explains how punishment and detention measures towards irregular migrants have both a symbolic as well as material dimension: "Prisons or immigration removal centres are singularly useful in the management of non-citizens because they enable society not only physically to exclude this population, but also, symbolically to mark these figures out as threatening and dangerous" (2008: 207–8).

Based on these conceptual debates on policies towards irregular migrants, we analyse policy responses directed at NRAS. Often, the literature does not explicitly consider policies on NRAS (notable exceptions are Cantor et al. 2017; Heegaard Bausager et al. 2013; Lutz 2018; Rosenberger and Koppes 2018; Schoukens and Buttiens 2017), and until now no account of policies for NRAS has been empirically explored and systematically discussed. This chapter aims to begin a new conversation about this literature and conceptual work.

7.3 Case and Methods

Irrespective of whether a rejected asylum seeker is not removed just yet or whether long-term impediments to the removal exist, he or she lives in a legal status of irregularity as long as the obligation to leave the country remains upright and no temporary residence status is given. We therefore define NRAS as a sub-category of irregular migrants. In the group definition we include persons holding a toleration card, since this formal postponement of removal has no legalising effect on the person's residence status (Triandafyllidou 2010: 6). While the group of non-removed irregular migrants reflects a variety of different trajectories, in this article we focus specifically on NRAS for two reasons. First, rejected asylum seekers have been particularly present in the public debate after asylum applications in Austria increased significantly in 2015 and 2016. Second, they constitute by far the biggest sub-group of non-removed persons who benefit from basic welfare support. We assume that the latter stems at least in part from the circumstances that NRAS (compared to other non-removed persons) have been in contact with authorities and a part of public services throughout the course of their asylum-seeking process.

In order to assess the policy responses directed at NRAS in Austria since 2015, we undertook a qualitative content analysis of parliamentary documents and media coverage. The former consisted of a body of government programs, parliamentary debates, stakeholder commentaries to legal amendments, and press releases that specifically referred to policy proposals regarding NRAS. To investigate the media coverage, we created a database of articles about policies on NRAS in one renowned nationwide newspaper (der Standard) through the Austria Press Agency (APA). The time period of analysis spans from the refugee movements in September 2015 until November 2017, shortly before the former government coalition left office and when the most recent amendments on aliens related laws came into force.[3] We carried out four rounds of data collection using the search terms 'asylum seeker', 'reject', 'deport', 'illegal', 'negative', 'basic welfare', and 'refugee' in varying combinations. Based on a close reading of the government documents and media articles and through the use of the qualitative data analysis software Atlas.ti we created a detailed timeline of policy proposals by the government. This chronology of policy responses was supplemented by information on the status and content of each policy, whereby the media analysis was particularly helpful in identifying unadopted policy proposals and their significance to communicate political will.

We distinguish policy responses according to their status in the policy cycle and differentiate between *tabled* and *adopted* policy responses. Tabled policy responses refer to government policy proposals that are debated but have not (yet) come to a resolution (a legal or administrative adoption). By contrast, adopted policies or

[3] The assessment period comprises activities of the preceding coalition government between Social Democrats and the conservative Austrian People's Party. The activities of the right wing-conservative government which took office in December 2017 are excluded from the analysis since its time in office is hitherto too short to comprehensively retrace policy developments.

actions are geared towards measures already in use, either at the implementation or legislation level. In so doing, we attempt to gain a systematic understanding about whether a proposal remains political talk or whether a policy measure is passed. Following Czaika and de Haas (2013), we look at the divergence between tabled and adopted policies to operationalize the search for a potential "discourse gap", meaning the difference between public discourse and actual policies on paper. Such differentiation informs us about the kind of symbolic policies that intervene in the discourse and may alter the political climate and public perception of the government's approach without actually becoming manifest rules, i.e., translated into official policy. The second kind of symbolic policy responses that we aim to identify are adopted as official policy but remain "action for show" because they are not sustainably pursued (Rein 2008: 394; for a similar definition of symbolic policy s.a. Delaney 2002: 7; Krause 2011: 46; van der Leun 2006), implying that "the superficial and short-term reassurance of the electorate is the main aim of political actions" (Triandafyllidou 2010: 17). For this kind of symbolic policy, e.g. the enforcement of deportations in military planes, the prevalence in media articles served as an indicator for "the show".

In addition, the analysis of the period before 2015 in this chapter is based on a comparative research project in which we analysed access to welfare services for NRAS in Austria, the Netherlands, and Sweden. The data collected in the course of the project consist both of legal and policy documents and media reports as well as 73 semi-structured qualitative expert interviews we conducted between June 2016 and July 2017—25 of them in Austria—with academics, lawyers, and policymakers at the national and local government levels, as well as with representatives of NGOs with expertise in the situation of non-removed persons.

7.4 Inside the Deportation Gap in Austria

Due to instability, war, and crises in the Middle East and other parts of the world, record numbers of asylum seekers have arrived in the territory of the European Union (EU) since 2015. This resulted in 1,322,825 asylum applications filed in the EU in 2015 and 1,258,865 in 2016 (Schoukens and Buttiens 2017). Among European countries, Austria received the third-largest number of asylum applications per capita after Sweden and Hungary in the 12 months from July 2015 to June 2016 (Eurostat 2018). In total, in Austria 88,340 asylum applications were made in 2015 and 42,285 in 2016 (BMI 2016). While the number of asylum applications that were accepted increased in relative terms after 2015, the absolute number of rejected asylum applications rose simultaneously with the overall number of applications.

This results in an overall growing *deportation gap* (Gibney 2008), which describes the numerical difference between return orders and *de facto* returns. The overall, cumulative, deportation gap must logically be growing as long as more persons are ordered to leave each year than actually return or are deported. This overall gap can only be very roughly estimated, since the whereabouts of absconded

asylum seekers are usually unknown due to the transnational mobility of irregular migrants to avoid law enforcement targeted at migrants' exclusion (Wyss 2019). We derive an approximation from statistics on orders to leave in a given year and the number of persons returned in the same year. This calculation results in an average deportation gap in Austria of 3903 persons per year between 2008 and 2017 (see Table 7.1). Since the number of rejected asylum seekers in 2017 is quite large, as illustrated in the table above, and returns have not really increased, the deportation gap will very likely continue to grow in subsequent years.

To get a better sense of the diversity of the group, NRAS can be differentiated according to whether their individual situation is formally recognized or not, and whether this implies access to associated rights. Based on an empirical inquiry in the EU and Schengen associated countries, Heegaard Bausager et al. (2013) identified three types of such (non-)recognition of non-removed third-country nationals, namely: a) an official postponement of return granting additional rights, b) an official postponement without additional rights, and c) no formal recognition or formal postponement of return (p. 2f).

Deriving but also departing from this typology, the situation of NRAS in Austria is a bit peculiar. Similar to the first type above, an official postponement of return through a "toleration card" (*Duldungskarte*) can be granted to NRAS in Austria. However, with around 300 issuances per year (Parlamentarische Anfrage 2016), the numbers of issued toleration cards are very low and feature not only NRAS, but also persons whose subsidiary protection status has been withdrawn. A second, considerably bigger group only has access to services comprised by the basic welfare support system[4] although their situation is not formally recognized. The number of NRAS in the basic welfare support system has remained relatively stable, growing only slightly from around 3000 persons in 2012 to around 3400 persons in 2017. This group of NRAS fits neither type described above but is highly relevant in Austria. A third group of unknown size is neither formally tolerated nor a factual beneficiary of basic welfare support, consistent with the third type above (see also EMN 2016a). This last group includes NRAS excluded from basic welfare support because they were deemed uncooperative or who exited the system of their own accord. Based on the estimated deportation gap and the number of rejected asylum seekers (see Table 7.1), we conclude that there is a notable group of persons who do not receive welfare services from the state but are nevertheless part of the deportation gap—existing in a state of legal limbo and uncertainty. Numerical data on rejected asylum seekers who find themselves outside this welfare system do not exist.

[4] Basic Welfare Support includes health care, the provision of adequate food and basic clothing as well as a monthly allowance for beneficiaries in organised reception facilities (EMN 2016b).

7.5 Policies Against NRAS

In this section we will explore national policy responses towards NRAS in Austria. In the first part, we present the policies prior to 2015; in the second part, we look at policies between 2015 and 2017. In the third part, we analyse the policy responses after 2015 by providing detailed insight into how a mix of substantive and symbolic policy measures emerges.

7.5.1 Policies Before 2015

In Austria, major policies regarding NRAS date back to 2004. In this year, the Basic Welfare Support Agreement (*Grundversorgungsvereinbarung*, *GVV*) was adopted between the federal government and the provinces, as a result of the implementation of the EU Reception Directive (2003/9/CE). This agreement regulates the care of "vulnerable foreigners", including asylum seekers and those entitled to asylum as well as persons who cannot be removed for "legal and factual reasons", including NRAS. According to the agreement, the provinces are primarily responsible for implementing the GVV, while the federal government carries 60% of the financial costs. In addition, there exist forms of coordinated interaction between the federal state and provinces, such as the coordinating council (*Landes-Flüchtlingsreferentenkonferenz*), which aims to develop a joint approach for coordinating and harmonising welfare services and their quality. This closely approximates the model of multi-level governance described by Scholten (2013) in which weak central policy coordination structures exist and provinces have strong implementation power.

However, this system is not only a system of coordination and consensus. Conflicts emerged between the province of Vienna and the federal government, as well as amongst the provinces, around the question of strict or generous policy implementation (Ataç 2019). While the federal agency of migration (BFA) requires provinces to dismiss NRAS from the welfare system in case of assumed violation of the cooperation duty, provinces (such as Vienna, Tyrol, and Vorarlberg) have in the past ignored such requests (Rechnungshof 2013). As a result, the federal agency refused to pay its contribution. Also, conflicts between the provinces emerged when some provinces denied NRAS access to welfare services, thereby transgressing the legal agreement (GVV). Consequently, the burden fell on provinces such as Vienna or Tyrol, which offered NRAS these services.

A further important regulation for NRAS took place in 2005 when the Aliens Police Act was amended and preparations made for the status of *toleration* and the *toleration card* for non-removed persons to come into force in 2006 (§46a FPG 2005). The toleration card does not provide a residence permit and can be prematurely withdrawn by the federal agency of migration at any time (Hinterberger and Klammer 2015). As a prerequisite for the toleration status, the person concerned must cooperate with return. This means providing correct identity information and

actively seeking a traveling certificate from the relevant embassy that would enable return. The Aliens Law Amendment Act 2009 created for the first time an opportunity to regularise the residence of persons who cannot be deported for factual reasons. After 1 year of toleration, asylum seekers can apply for "special protection" (§57 AsylG 2005), which goes hand in hand with legal residence status.

With the Aliens Police Act 2005, detention of NRAS has turned into a popular policy instrument with the aim of fostering their return. The Commissioner for Human Rights of the Council of Europe (2007) has criticized the growing popularity of the practice of detaining asylum seekers and NRAS since 2006. This tendency of placing NRAS in pre-deportation detention remained high until 2010 (Commissioner for Human Rights of the Council of Europe 2012). Thereafter, annual detention numbers started to decrease, from approximately 6200 in 2010 to nearly 1900 in 2014 (Rechnungshof 2016). Reasons for the decrease include changing courts practices, increased focus on voluntary departure, as well as growing reliance on short-term detention (Verwaltungsverwahrungshaft), which is based on arrest orders to secure removal, especially in cases where deportation of NRAS is possible within 72 hours (Global Detention Project 2017).

In sum, before 2015 *de facto* toleration, that is access to basic welfare services without granting a legal status, was characteristic for the Austrian governance of NRAS. Also, in the period between 2010 and 2015, the detention practices were weakened.

7.5.2 Policy Responses Post-2015: Fixation on Return

The policy responses after 2015 demonstrate a radical shift from a policy with temporarily uncontrolled borders for tens of thousands of asylum seekers at the beginning, towards a restrictive standing and the total superimposition of policies with the sole, direct or indirect, focus on return. In this section, we systematically review the policy responses brought forward by the Austrian government towards NRAS post-2015. Within the total of 38 policy measures we found in the field of general asylum and border policies, we discerned 18 distinct policies concerning NRAS (Table 7.2).

Our analysis of these policies leads to three major findings. First, policy responses regarding NRAS have increased significantly since 2015. After the introduction of both main regulations regarding NRAS in 2004 and 2005 described above, the rejected asylum seekers inside the deportation gap were not on the political agenda, and only minor national and regional policy responses emerged prior to 2015. Moreover, the government programme at this time mostly prioritised voluntary return (Regierungsprogramm 2013: 81).

Second, there is a striking concentration of measures to address NRAS that can be assigned to return policy. Sixteen of 18 identified policy responses are in the field of return. Five legally-adopted policies in the field constitute the core of policies towards NRAS: a much-debated reform package of the Aliens Law Amendment Act

Table 7.2 Substantive and symbolic polices

internal			*external*
Substantive policies	**Symbolic policies**		
All adopted/implemented	*Tabled*	*Adopted*	
Extension of detention pending deportation (FrÄG 2017)	Criminal procedure in case of non-departure		Extending the list of 'safe countries of origin'
Coercive detention (FrÄG 2017)	Wider executive powers for staff in return centres		Defining 'safe third countries'
Territorial restriction (FrÄG 2017)	No preannouncement of deportations		Readmission agreements with countries of origin
Administrative penalty for non-departure (FrÄG 2017)	Deportations in	military planes	Tighter cooperation with FRONTEX
Return centres (FrÄG 2017)			
Monetary incentives for 'voluntary' return			
Increased return counselling			
	Cancellation of basic welfare support		
No cash benefits in return centres	Cancellation of cash benefits for NRAS		
Increasing the number of deportations	50.000 deportations		

Source: Own compilation from 38 policies. 18 policies between 2015/09–2017/11
Table legend: - - - - = policy is adopted but deviates from tabled policy

2017 (*Fremdenrechtsänderungsgesetz, FrÄG*). The bills that are part of this package include the extension of detention while pending return, coercive detention in case of lacking cooperation with return, restricted movement, the installation of special return centres, and administrative penalties reaching 15,000 euros for failure to comply with a return decision and imprisonment as a substitute.

Further adopted policy responses in the field of return address external obstacles to return. These include the expansion of return agreements with third countries, the definition of "safe third countries" and "safe home countries", and a tighter collaboration with Frontex. This category also includes use of military planes for deportations—a topic that generated massive public attention in early 2016, as actors from both coalition parties bragged about their goal of "50,000 deportations" by 2019.

Against this background, public debate on rejected asylum seekers was to a considerable extent dominated by the Minister of Defence's plan to use military airplanes to carry out deportations. The idea sparked a sizeable and controversial discussion in the media. Ultimately, the planes were deemed suitable for deportations, but took place only twice.

Third, not all of the laws or return policy measures that were proposed or brought up in political debates were adopted. Three return policy measures that were not adopted include: a) the proposal to no longer preannounce deportations to destined deportees, b) to expand executive powers of the staff in reception and, more specifically, in return centres,[5] and c) the initiation of a criminal procedure in case of non-departure. This latter policy concerns the penalizing of irregular stay *per se*, after a rejected asylum application is unsuccessful in all its attempts. The initial proposal by the former Minister of the Interior to initiate a criminal prosecution in case a rejected asylum seeker exceeds the deadline for departure and cannot be deported by force, failed to be adopted. Instead, the above-mentioned administrative penalty was introduced for the same 'offense', which can be passed without a conviction.

None of the policies with links to social policy were adopted in the way they were proposed. Most importantly, the proposition of immediate cancellation of basic welfare support with a negative asylum decision (when NRAS do not cooperate with return) was not adopted, an outcome that we analyse in detail further below. The cancellation of cash-benefits was only adopted for those few transferred to return centres, not all NRAS. Below, we provide an analysis of these developments.

7.5.3 Analysis

Far from paying only lip-service to increasing deportations, the Austrian government has created several substantive policy responses to achieve this aim. Affirming the trend carved out in the literature on policies against irregular migration, we find that detention has again become a popular policy tool in Austria after 2015. All five major policy measures that were adopted in the course of FrÄG 2017 boil down to the instrument of forcible confinement. Two of these speak directly of detention, that is, the use of coercive detention against NRAS to make them take steps in their own departure and the prolongation of detention pending return from ten to 18 months. The other measures present a diversification of freedom-restricting policies, complementing or replacing the tool of detention. The government justified the necessity of return centres as preventing NRAS from going underground and strengthening incentives to leave. NRAS are placed in a return centre in cases when detention is not feasible. At the start of the debates on return centres, they were indeed discussed as a form of detention. The government argued for these centres:

[5] This proposal included the recognition of the return centres' staff as law enforcement authorities ("Organe der öffentlichen Aufsicht"), and subsequently gave them the power to issue orders and execute coercive measures against the centres' inhabitants (Brickner 2017).

"Who doesn't leave, will be locked up" (Sterkl 2017). However, the result was the territorial restriction to a single district and the accommodation in return centres with increased return counselling aimed at restricting mobility to a confined area. These 'softer' forms of confinement equally confront NRAS with physical exclusion, control, and immobility.

The last measure in the adopted law package is the threat of an administrative penalty for failure to comply with a return decision, which starts at 5000 euros and can be as high as 15,000 euros. This is connected to detention in the sense that inability to pay results in imprisonment of up to 6 weeks. Considering this mostly unattainable cost, the penalty will very likely result in imprisonment in many cases. Most of these policies were also introduced into the debate as part of a graduated scheme. They followed the idea of tightening mobility restrictions according to the degree of unwillingness to leave the country, starting with confinement to the district, then the return centre, and culminating in coercive detention. Although the short-term nature of the analysed time period does not allow us to determine causation, detention numbers have risen dramatically since 2015. In 2017, a total of 4627 detentions were ordered, compared to 2434 in 2016 and 1436 orders in 2015 (Parlamentarische Anfrage 2018b). Hence in 2017, the number of detainees rose by 90% (ORF 2018).

The diversified and multiple forms of confinement present a tool of immigration control. They are substantive measures to steer NRAS towards return and increase control to foster the deportation regime. Their punitive character serves the purpose of deterrence and physical exclusion to disincentivise NRAS to stay.

While post-2015 policy responses are mainly focused on forced return, the goal of fostering voluntary return has not vanished completely: one adopted policy introduced a monetary incentive scheme for voluntary return. Offering financial benefits for return complements the process of increasing disincentives to stay with a 'positive' incentive to leave. Similar to the various confinement measures, it follows a graduated scheme—the sooner a person leaves, the more money she receives—and therefore follows the idea of disciplining migrants to act in certain ways. However, since 2015, the percentage of voluntary returns in overall removals has decreased (Parlamentarische Anfrage 2018a: p.29), correlating with the overall punitive approach by the Austrian government against NRAS which prioritizes deportation over 'voluntary' return.

The relevance of the investigated policies, however, does not only and not mainly lie in the enforcement of deportations, but equally in how they aim to shape public perception of NRAS; in short, their *symbolic* relevance. Firstly, detention and confinement policies themselves have a symbolic dimension, marking NRAS as "threatening and dangerous" (Bosworth 2008). The multiple and diverse confinement policies signal that NRAS are to blame, and that one can punish them and lock them up like criminals. Moreover, as Bosworth demonstrates, "institutions of confinement like Immigration Removal Centres provide material evidence that the state is taking an issue seriously" (*Ibid.*: 211). Based on the adopted legal regulations, affected persons can be penalised if the degree of their cooperation with return is considered insufficient or simply because they are not leaving the national territory.

In a nutshell, confinement instruments work "both symbolically and practically as a tool of border control" (*Ibid*.: 208).

In addition to the preponderance of control tools of forcible confinement, we also find in Austria policy responses whose symbolic character and intent is far more apparent than their relevance in handling the deportation gap. One example of such a symbolic policy is the use of military planes for deportations. The negligible impact of this policy—which was only twice put into effect—on the state's return policy bore no relation to its immense media publicity and examination procedures, which lasted several months. This measure was clearly symbolic, since it represented a more attention-grabbing substitute to other deportation flights, without any substantive increase of return numbers. The symbolism of shifting the issue of deportations from its customary political arena of domestic policy to the area of defence policy represents rejected asylum seekers as a threat to national security and signals control through the militarization of Austrian borders.

Simultaneously, asylum debates were increasingly superimposed with security concerns, coinciding with the killing of a woman in Vienna by a Kenyan citizen who was also a rejected asylum seeker. In the aftermath of this incident, the Ministry of the Interior announced an "Action Plan for the Safety of Austria" (*Aktionsplan Sicherheit Österreich*). Formally, it addressed all Austrian residents and citizens, but it repeatedly appeared in the same context with debates on "alien criminality", and therefore served a "rhetoric about the dangers inherent in foreigners" (Bosworth 2008: 200). The plan was directed at 'worried' citizens, while the measures in the plan predominantly targeted non-citizens. Such criminalisation of the entire status group of NRAS surfaced likewise in the yet unadopted policy proposal to file criminal charges for illegal residence.

The idea of restricting welfare entitlements for NRAS emerged as a migration policy tool especially in political debates, and less so in adoption. The proposed aim was to impel rejected asylum seekers to leave the country, but the proposals remained in the discourse gap and manifested as a symbolic intervention. Respective proposals were either not adopted, as in the case of cancelling basic welfare support, or only adopted with decisive reservations, as in the case of cancelling all cash benefits when transferred to a return centre. Notwithstanding the fact that in the bigger picture these harsh welfare restrictions were not feasible, the government was able to demonstrate that in their view NRAS were undeserving of such benefits.

In sum, we find a series of measures, mostly in the form of forcible confinement, which serve as policy instruments to achieve the substantive purpose of control and deterrence. At the same time, these harsh policy developments were complemented by symbolic proposals and measures that served the purpose of constructing NRAS as a security issue and stating their 'undeservingness'.

7.6 Discussion: Locating the Substantive and Symbolic Manifestations of the Post-2015 Policy Shift

The policies analysed in this chapter articulate a very narrow understanding of problems and domestic policy solutions to the presence of rejected asylum seekers after 2015. Policy responses that have since prevailed aim either to enhance control over NRAS to facilitate their forced return or to convince the public of a strong commitment to this goal. How can we understand this policy shift from a regime of *de facto* toleration with a relatively inclusive welfare arrangement to the adoption of deterrent measures and criminalisation? First, we place the identified policy responses within a broader framework of policy and political changes of the post-2015 phase and, second, link them to the particular constraints to policy designs against irregular migration and NRAS and to the particularities of the Austrian federal political system (cf. Rosenberger 2018).

The described policy responses are part of more comprehensive domestic changes towards migration and asylum seekers in the post-2015 context. The government put forward various policy responses targeting the voting population's sceptical views on asylum seekers and refugees, such as a cap on the annual number of asylum applications, a temporary limitation of the granted protection status, the possibility of withdrawing protection status, and restrictions on welfare benefits. The main political aim of these measures was to demonstrate the restoration of control over migration and borders, deter future asylum seekers by making it more difficult to apply for asylum, and disincentivise the stay of refugees living in the country by making living conditions tough and unpleasant (Rosenberger and Müller forthcoming; Rutz 2018). Return enforcement as an instrument of state sovereignty was the narrow policy solution to the challenge that an even larger population without legalised stay presents. This tendency is also a Europe-wide approach. The European Commission (2017) published a recommendation outlining measures for making returns more effective and substantially increasing the rates of return through applying the EU's legal norms, especially the Return Directive. At the EU level, too, policy approaches pertain to the fields of creating disincentives to come and stay, as well as to eliminate barriers to the removal of rejected asylum seekers (Lutz 2018).

The policies reflected a general shift towards hostility: in a short period of time, the public mood and opinions within Austrian society changed from mostly welcoming to sceptical and anti-refugee views (Gruber 2017). Against this background, the polarising events of 2015 dominated emotionally-led election campaigns at both the federal and regional level (Plasser and Sommer 2017). Here, the issue of regaining control and sovereignty over borders became the main issue for both governing parties—independent of their position in the political spectrum—and the principle of strengthening internal and external borders has become the core aim of asylum and migration policy.

But as mentioned earlier in the chapter, certain return enforcement tools, especially detention, are limited by legal norms such as EU directives, the critique of

human rights agencies, as well as a critique of their cost-inefficiency (Rechnungshof 2016). To bypass these constraints, the Austrian government has engaged in the multiplication and diversification of confinement policies. Already before 2015, the government had started to diversify its strategies by opening a detention centre in Vordernberg in 2014 exclusively for detaining persons awaiting removal, with the aim of achieving human rights standards and the requirements of the Return Directive (EMN 2016b). Another strategy involved using mechanisms like short-term detention that do not appear in detention statistics. Through the multiplicity of tools to physically control NRAS, the government's policies aim to even out the systemic inconsistencies that manifest in the deportation gap. However, efforts of control alone are unlikely to nullify the various reasons why people are present even though they have been denied that right. Hence, seeking political popularity through a tough stance on return enforcement makes symbolic policies attractive, or maybe even necessary, to keep up the appearance of following through with the task.

In our case, it is also the particularities of the Austrian federal political system and resulting responsibilities between the federal government and provinces that limit substantive restrictions towards NRAS. The proposal that NRAS should be deprived of welfare benefits shows this discrepancy. The primary obstacle these proposals encountered is the constitutional rank of the Welfare Support Agreement of 2004 between the central government and the provinces, which makes NRAS an explicit target group of welfare entitlements. The implementation of restrictive policies was thus not possible. Still, the symbolic content of the proposed restrictions on welfare entitlements was intended to signal commitment to the audience, fuelling public narratives about the 'undeservingness' of NRAS. Further, this policy proposal was met with outright opposition from local government actors. In the debates, they stressed the hazard of potential consequences like rising destitution and homelessness. These impediments indicate why the deterrence mechanisms against NRAS are built primarily on return policy and, ultimately, less on welfare restrictions. The former is more effective, as it can be steered and enforced by the central government alone. Consequently, the central government's substantive aim of deterrence was enacted mainly through confinement policies, while welfare cuts were stuck in the discourse gap.

Contrary to substantive control policies, the problems being tackled through symbolic policies are not the actual impediments to return but the (homespun) increased public awareness of the deportation gap, which the government aims to soothe through the demonstration of sovereignty. In compliance with the above-mentioned functions of symbolic policies categorized by Slaven and Boswell (2018), we depict the symbolic policies as a compensation mechanism for the state's sovereignty being called into question by the NRAS' presence. The use of military planes for deportation provides evidence of the ambition to reconstruct the tarnished state sovereignty by militarising return policies. The depiction of NRAS as a security issue, on the other hand, validates the ideological preconception of certain groups and "alter[s] the political climate" (Delaney 2002: 27) in order to gain legitimacy for harsh measures. This form of "manipulation" (Slaven and Boswell 2018: 2f), which we found for example in the policy suggestions in the context of the

"Action Plan for the Safety of Austria" and the accompanying debate in the mass media (s. Rheindorf and Wodak 2018: 21), promotes the criminalisation of NRAS.

7.7 Conclusions

The chapter investigated policy responses directed at NRAS in Austria from 2015 to 2017, when Austria received a large amount of refugee arrivals. Based on an empirical analysis of government responses, we presented a number of findings. During this period, there was a significant increase in policy proposals focused on this group, which have pursued the direction of their deterrence with the unanimous aim of fostering the deportation regime. These policy proposals include features of punishment, like confinement instruments such as detention and return centres and, to a lesser extent, reductions in welfare benefits. Notably, the government has not adopted any political measures which support regularisation of the group, although the size of this group has been increasing since 2015. This means that the uncertain current situation and future of NRAS remain outside the scope of the political responses. However, we also find symbolic policies as a significant part of policy responses towards NRAS, on the one hand, as part of substantive policies and, on the other hand, as solely symbolic policies for signalling commitment and marking the 'threatening' and 'unwanted' figure.

This chapter contributes to the literature on irregular migration policy by analysing policies towards NRAS in Austria as a case study. We identify a variety of reasons that may explain the emergence of the policy turn described above. The restrictive policy development is part of a bundle of deterring measures directed against asylum seekers and refugees. This development forms part of a trend of the government itself, placing the issue on the political agenda thereby declaring its intent and claiming to reduce and be tough on asylum seekers and other unwanted migrants. For this policy turn, the so-called 'refugee crisis' presents a critical juncture and the crucial driver of its agenda. These single-sided policies may be identified as responses directed at voters in the first place to demonstrate the restoration of sovereignty over borders and people. This voter-oriented character, together with the legal and practical constraints on policies that facilitate deportation, explains why we found a mix of substantive and symbolic policies.

The timeframe of policies considered in the analysis of this chapter ends with November 2017. This is a limitation of this chapter, as in December 2017 the far-right government, which ran on an explicit anti-migration agenda, came into office (see Regierungsprogramm 2017). Since then, policies producing a hostile environment, and in particular punitive policies, have become even more prevalent. Additionally, the policies at the intersection of welfare and migration are gaining in importance. In light of the discussed constraints to restrictive policies, it would be interesting to determine whether symbolic policies have become any more important, or whether the right-wing government coalition found other ways to 'deal' with those restrictions.

In this chapter, we analysed the simultaneous production of substantive and symbolic policies. Our results illustrate more general European developments and point to avenues for further research and in-depth discussions about how effective control, detention, and welfare reductions are at steering individual behaviour while appeasing public opinion concerning tough measures against unwanted migrants. Future studies will have to investigate the dialectic of steering and signalling as well as the effectiveness of such policies for the reinforcement of the deportation regime. To do this, comparative studies will be useful to identify the role of national contexts, institutions, and political orientations in relation to the effects of these policies.

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Chapter 8
Irregular Migration and Irregular Work: A Chicken and Egg Dilemma

Anna Triandafyllidou and Laura Bartolini

8.1 Introduction

Irregular employment is a multifaceted phenomenon, which spans from totally undeclared work (paid lawful activities not declared to public authorities) to activities involving organized networks that engage in illicit economic activities (e.g. smuggling of goods, drug trafficking, or other criminal activities). Under certain circumstances, the presence of irregular work may be widely accepted and not even be perceived by citizens as outside of the law properly speaking, especially in countries where the informal economy is a sizeable phenomenon (Williams et al. 2017). However, irregular employment that involves foreign workers is a target of significant national and international political debate leading to policy actions in the fields of immigration and labour market regulations in most of European countries for over 20 years now (OECD 2000). The connection between undeclared work and irregular migration often combines in an explosive mix that stirs anxieties about state's control over migration flows, labour market regulation, unfair competition with native workers, and lost revenues for the state.

Although rough and volatile, estimates on the size of irregular migration in Europe point to a quite limited phenomenon involving between 1.9 and 3.8 million people in 2008 (Kovacheva and Vogel 2009). However, according to most analysts

This chapter draws on previous work of the authors, in particular Triandafyllidou and Bartolini (2016, 2017).
The opinions expressed in this chapter are those of the authors and do not necessarily reflect the views of the International Organization for Migration (IOM).

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and scholars, this slowed during the economic and financial crisis to partially restart growing due to the most recent inflows of asylum seekers, refugees, and other migrants in Europe over the past 5 years.

Our theoretical understandings of irregular labour migration can still be summarised largely in what Portes (1978) called the "structural determinants in both sending and receiving countries": the demand for cheap, irregular labour in receiving countries coupled with the needs arising from increasing demographic and economic pressures of booming young populations in countries of origin. While there is a structural demand for migrant workers in a number of sectors—of mostly low skill, low prestige and low pay jobs (as those discussed in detail further below in this chapter) —related legal migration policies do not cater for such demand. Restrictive policies somehow 'generate' (De Genova 2004) illegal residence status and irregular work to the extent that they make it very difficult for both migrants and their employers to regularise their situation, having to face two hurdles: migration legislation and labour law.

Patterns of irregularity are extremely diversified, including children of undocumented parents, visa over-stayers, migrants who lost their legal status because of unemployment, and rejected asylum seekers (see also Triandafyllidou and Bartolini, Chap. 2). As migrating legally to the EU and other western countries has become increasingly difficult, scholars have argued that irregularity can be part of a labour market strategy promoted by governments to cater for the needs of employers for a cheap and plentiful workforce, particularly for some sectors of the domestic labour market and agriculture, in order to compress costs and increase profits (Jordan and Düvell 2002; Lewis et al. 2015; Kilkey and Urzi 2017; Palumbo and Sciurba 2018).

The current volatile geopolitical context—the post-Arab spring situation in North Africa and the Middle East, the protracted conflicts in parts of Asia (e.g. Afghanistan) and East Africa (Sudan, South Sudan, Eritrea, Yemen) as well as instability in Central and West Africa (Democratic Republic of Congo, Nigeria, Lake Chad basin), and the fragile recovery from the global financial and Eurozone crisis—have radically transformed international migration flows towards Europe. First of all, today we witness flows of migrants who have mixed motivations: they seek better employment and a better future for themselves and their families, but they also escape violence, conflict, insecurity (Galos et al. 2017). Second, there is an increasing participation of minors in these flows, particularly of adolescents who travel alone through the Eastern, Central and Western Mediterranean routes (UNHCR, UNICEF, and IOM 2018). Third, there is a continuous feminisation of flows catering for specific sectors such as domestic work and cleaning or catering as well as sex work. Fourth, the lack of regular entry channels and the long distances that migrants travel along with hardship faced along the route, make them particularly vulnerable and, indeed, desperate to find a job. There is a clear link between the restrictive labour migration and asylum-seeking policies in Europe and the presence of migrants with an insecure, temporary, or indeed irregular status (Triandafyllidou et al. 2019). Asylum seekers who are rejected on first instance or who are awaiting for their case to be processed, minors and women who do not receive adequate support or protection, and individuals with tolerated status

represent a pool of people that is likely to accept irregular work out of necessity as they have no other option (Palumbo and Sciurba 2018; van Hear et al. 2009; Lewis and Waite 2015; Vickstrom 2014). Such workers are actually in demand in several European countries in specific sectors of the economy, spanning from agriculture to catering, tourism, and the retail industry, where irregular employment can contribute to lowering costs, increasing flexibility, and competitiveness.

The chapter's first aim is to highlight the complex and multifaceted relationship between irregular or temporary migration and irregular work by offering a typology of irregular/informal work and of statuses, and relationships between irregular migration and irregular work. In other words, we seek to systematise the already-existing knowledge and data highlighting the dynamic relationship between the two phenomena. Second, we take a closer look into the overall inter-relationship between irregular work and both irregular and regular migration with a view to highlighting how migration policy may feed into irregular employment and facilitate the violation of migrants' labour rights. The chapter then turns to three sectors where informal work is widespread and where the irregular employment of migrants or the employment of irregular migrants abounds. We look closer into each sector to highlight the dynamics and conditions that breed these phenomena, examining how labour market needs interact with migrant labour offer and with migration and labour laws. The chapter concludes by highlighting the conditions that feed into irregular migrant work and teases out the relevant policy implications of our study.

8.2 The Complex Relationship Between Irregular Work and Irregular Stay

8.2.1 Irregular Employment

The notion of irregular employment is inextricably connected with the notion of informal economy, intended as the economic activities that are hidden from the authorities and non-compliant with relevant regulations and thus 'not-observed' or 'unknown' in terms of production and/or employment generated. Looking at internationally agreed definitions, the OECD speaks of informal employment any time "although not illegal in itself, {employment} has not been declared to one or more administrative authorities" (OECD 2004). More explicit in excluding criminal activities, the European Commission defines undeclared work as "any paid activities that are lawful as regards their nature but not declared to public authorities, taking into account differences in the regulatory system of Member States" (EC 1998). In line with these approaches, our working definition of undeclared work excludes illegal activities (e.g. drug dealing, prostitution, black market of alcohol and cigarettes, etc.), irrespective from workers' migration status. As some of these activities are sometimes legal in a few EU countries, estimates presented in the

Table 8.1 Informal economy by sector and production unity, activity, job type and status in employment

Sector of the economy and type of production			Job type and status in employment				
			Self-employed with or without employees		Employee		Contributing family worker
Sector/ Production Unit	**Activities**	**Definition**	**Irregular**	**Regular**	**Irregular**	**Regular**	**Irregular**
Formal sector enterprises: firms, non-profit institutions, corporations etc. formally registered and producing goods or services for the market	Underground activities	Production of goods and services legal but deliberately concealed from public authorities to avoid payment of income, taxes, or social security contributions and compliance with certain legal standards (hours & shifts, safety/ health standards, etc.) or administrative procedures, etc.	NA	Registered self-employed or employer of registered entity	**1.** Under-reported / undeclared paid employee in a registered entity.	Declared employee in a registered entity.	**2.** Family worker contributing to a registered entity.
Informal sector enterprises: private entities totally unregistered, which produce for the market.	Informal activities	Productive activities, conducted by enterprises that may take place within household units, and are not registered and/or are less than a specified size in terms of employment.	**3.** Self-employed or employer in his own informal entity	NA	**4.** Undeclared paid employee in an informal entity	NA	**5.** Family worker in an informal entity
Household	Production of households	Production of goods or services consumed or capitalised by the household itself.	**6.** Self-employed for own final use	NA	**7.** Under-reported / undeclared paid employee	Declared paid domestic worker	NA

Source: Authors' adaptation from (OECD 2002; Hussmanns 2004)

following pages will look at only transactions and activities that are considered equally lawful in all EU countries (Williams et al. 2017).

Without distinguishing between local and migrant workers, Table 8.1 presents a classifications of informal economy and informal employment (within firms or within households), focusing on the types and categories that are most relevant for the European economies. Even excluding unpaid and voluntary work and illegal activities, there is a wide range of irregular employment conditions that arise from different combinations of sectors, types of job, and status in employment. Thus, the table distinguishes between undeclared activities by regularly-registered firms that remain hidden/undeclared and informal activities that involve employment or production of goods or services by informal sector enterprises (totally unregistered and hence irregular).

The table also allows to distinguish among seven types of irregular employment conditions (see the second part of Table 8.1):

– Employees holding irregular jobs outside (1) and inside (4) the informal sector or employed as paid domestic workers by private households (7): the employment relationship is at least partially not covered by labour legislation, income taxation, social protection, and employment benefits. Depending on national laws, employees holding irregular jobs may include: employees without written contracts or not subject to labour legislation; workers who do not benefit from

paid annual or sick leave, social security, or pension schemes; domestic workers employed by households; most casual, short-term, and seasonal workers. Informal employment can be totally or partially undeclared, if a portion of the salary (usually the legal minimum) is officially registered while the rest is paid "off the books".

– Self-employed workers with or without employees are irregularly employed in their own informal sector enterprises for the market (3) or for their own consumption (6), as by definition their condition of employment is defined by that of their enterprise. This category also includes members of informal producers' cooperatives, who can be assimilated to autonomous workers for the degree of risk/autonomy they face
– Contributing family workers are always considered as irregularly employed, irrespective of the type of enterprise (in case they are registered, they are classified as employees) (2 & 5).

According to the ILO (2013), small shops and businesses, micro-manufacturing industries, warehouses, among subcontractors in the construction sectors and in agricultural activities. Under-declared work is even more frequent in industrialized economies and found in almost all sectors to avoid tax payment and decrease labour costs (for example paying under the table or not paying at all for nightshifts, weekend, or overtime work, but ensuring some social security coverage to workers by declaring the statutory minimum). The practice of subcontractors—used mostly in construction, transportation, logistics, and big commercial chains—often hides the use of cheap or undeclared labour hired by the subcontractor to replace regular, regulated and therefore more expensive, in-house employment. Temporary work agencies might also convey irregular practices in hiring and firing workers, while the extensive use of very short-term contracts for seasonal activities, on-call contracts, and voucher systems is generally found in the services sector (domestic and care, restaurants and hotels, entertainment, etc.). Finally, the practice of bogus or false employment is more common among highly-skilled, professional sectors where the presence of migrant workers is still rare across Europe; the widespread use of internships among young adults is likely to affect in high numbers both national and foreign prospective workers, and it is often more similar to unpaid work than to an on-the-job training period.

Indeed, irregular employment exists among local and migrant workers, with important implications at various levels. At the individual level, workers are excluded from social security coverage against the risk of illness, work injuries, unemployment, or age. Even when non-compliance with legal requirements is the result of an intended action of the workers—who might go for short-term benefits in-cash instead of long-term benefits in social security provisions—it implies some form of exclusion from what happens in the regular economy: higher vulnerability and more exposure to exploitation, low enforcement of labour rights, more insecurity and less continuity of employment or accruing of wages. This is true especially for low-skilled workers and less-qualified occupations, but it is not limited to them. At the structural level, irregular employment and the whole informal economy

threatens the sustainability of welfare systems through a race to the bottom in standards and safeguards of formal enterprises to be competitive with informal ones through more deregulation and liberalization. In the long run, it reduces the quality of work and possibly the overall competitiveness in the global economy.[1]

The difficulty of referring to irregular employment in a single category, given the variety of possible combinations illustrated, becomes further complicated when the worker is a migrant and may or may not have the right to reside and work in the country.

8.2.2 Irregular Work and Irregular Migrants: Multiple Dimensions

Triandafyllidou and Bartolini in Chap. 2 of this volume have discussed the different types and degrees of 'irregularity' in relation to the residence status. The step further is to look at the possible ways in which irregular foreign residents and legally-residing foreign residents are irregularly employed.

Table 8.2 distinguishes between possible citizenship and residence status, entitlement to work, and nature of employment of migrants of working-age within the European Union, seeking to produce a typology to understand where the irregular employment of irregular and regular migrants may arise.

The categories and conditions presented in Table 8.2 need to be understood in conjunction with the available knowledge on where the "most common expressions of undeclared work in the EU" lie (ILO 2013, 15–20), to unveil which are the combination between one's status in terms of residence and of employment that are most likely to be associated with vulnerability to exploitative conditions at the individual level which also create important challenges for the labour market in terms of controls and policy coordination. Indeed, migrants who find themselves in an irregular position both with regards with their residence and their employment condition are more likely to be found in certain specific sectors of the economy, as the next paragraph will further show, reinforcing dynamics of exclusion from the formal sphere of social and economic life migrants whose presence is somewhat known and tolerated from the authorities.[2]

[1] See the debated efforts to include estimates of informal and illegal economy into GDP figures at the European level (Merler and Hutl 2015).

[2] Practical examples of this toleration of irregular migrants by residence and inclusion with various degrees of regularity into local labour market are the case of Greece, which passed a law in 2016 to employ irregular migrants in agriculture to cope with farming needs (EMN 2016), and the case of Malta, in which the construction sector is known to extensively employ sub-Saharan migrants coming from Italy and in possess of an expiring Italian residence permit (see https://www.newsdeeply.com/refugees/articles/2018/08/06/migrants-malta-does-not-want-are-powering-its-economy).

Table 8.2 Working-age migrants by possible residence and employment status

Nationality	Residence status	Registered by authorities	Entitlement to work	Nature of employment	Examples of irregular (undeclared/ under-declared) working conditions
EU nationals	Right to reside	Documented / semi-documented	Yes	Regular/ irregular	Undeclared or under-declared, low to highly skilled
TCNs	Residence permit: permanent, long-term, work, family, study, seasonal, international and national protection etc.	Documented	Yes	Regular/ irregular	Undeclared or under-declared, low to highly skilled: some permits provide the specific number of hours to be worked (study, part-time work etc.)
	Pending (right to stay & wait): ongoing renewal ongoing regularization ongoing asylum procedure	Pending procedure, registered by authorities	Yes / depends	Semi-regular	Foreigners who are waiting for a renewal or a regularization usually keep working while waiting. In some cases, there might be de-alignment between the issuing of a permit and the date of start / continue a job. This is usually considered as not irregular by authorities; Asylum seekers can be prevented to work for periods that vary from 0 months to 1 year or more depending on the country while waiting that a decision is taken.
	Visitors	Visa-free and tourist-visa	No	Irregular	Foreigners who do not need a visa to enter or enter with a tourist visa, and then work irregularly.

(continued)

Table 8.2 (continued)

Nationality	Residence status	Registered by authorities	Entitlement to work	Nature of employment	Examples of irregular (undeclared/ under-declared) working conditions
	Irregular	Forged papers/ identity	Formally yes	Regular/ irregular	Until detected, foreigners with forged papers might work and live as regularly residing ones.
	Irregular	Lost status: no renewal, end of period of study, end of family permit for those aged 18+, end of seasonal permit; rejected asylum application	No	Irregular	Foreigners who do not satisfy anymore conditions to obtain a residence permit might decide to stay and work informally, for example if they have an irregular job which is not valid to obtain the permit or if they are looking for a job after finishing the study period.
	Irregular	No status (never had)	No	Irregular / none	Foreigners who over-stay the length of the visa or enter irregularly, and work irregularly. Some can avoid working and relying of family networks (e.g. family members reunified without authorization, including children).

(continued)

Table 8.2 (continued)

Nationality	Residence status	Registered by authorities	Entitlement to work	Nature of employment	Examples of irregular (undeclared/ under-declared) working conditions
	Irregular (transit)	No status	No	None / irregular	Transit irregular migrants who enter irregularly and avoid controls while trying to reach another country, they might sometimes engage in informal jobs to survive during the journey and can rely on smuggling services to reach their destination.
	Irregular / tolerated	Registered because detected at some point	No	Irregular	Foreigners whose removal/ deportation is suspended (formally or not) and therefore are known to authorities but tolerated

Source: Authors' adaptation from (OECD 2000; Kovacheva and Vogel 2009)

8.3 European Labour Market Dynamics and the (Irregular) Migrant Work

Adopting a structural approach in looking at European labour markets to understand where most common forms of irregular work arise which involve the migrant workforce, a special attention is placed by a consistent body of work to the role of institutional and context-specific factors, such as labour market structures and regulations, size and pervasiveness of underground economy, welfare regimes or immigration policies, typically adopting comparative research approaches (Piore 1979; Kogan 2006; Reyneri and Fullin 2011).

As initially theorized by Piore (1979), looking at the segmentation of the labour market in the destination country helps explaining how migrants integrate into local labour markets and in which ways migrants can be involved in irregular forms of work. According to a consistent body of research based on Piore's work on "dual labour market", migrants' labour market integration process is influenced by the segmentation level of labour markets at destination, in which a "primary" segments

with relatively high-pay, highly-skilled and stable jobs can thrive and rely on a "secondary" segments with low paid, low-skilled and highly volatile jobs, with low possibility of upward mobility, which are often filled by migrant workforce (Reyneri and Fullin 2011). In many recent official reports at the EU level, labour market segmentation is indeed recognized as a persistent feature that needs targeted interventions across EU countries (EC 2015b, 2017).

Although there is no single definition of segmentation with regards to the specific indicators and measures that needs to be taken into account, various work have looked at the characteristics of the workforce in terms of age structure, age, race, migration status, skills, sectors of specialization, and so on) together with a number of structural features of local labour markets (ageing dynamics of the workforce, levels of female labour participation, the proportion of highly- versus low-skilled occupations, the prevalence of small versus big firms, the proportion of self-employment and temporary contracts, the prevalence of subcontracting procedures in some sectors) of the economic system as whole, as for example the tax and social contribution wedge (the proportional difference between the worker's cost for the employer and the worker's net wage), of the public administration (the level and quality of public services to support economic activity and family reproduction, the level of efficiency and/or bureaucratization of administrative procedures), of immigration policies (the degree of enforcement and controls), the social acceptance of economic informality (Reyneri 2001; Ambrosini 2013; Düvell 2006), and the economic cycle.

Moreover, social norms are often mentioned in discussions on where and why irregular employment and irregular migration are more likely to be found: scholars often agree that in some southern European countries it is easier to avoid compliance to norms than in countries of central and northern Europe, and especially in sectors like agriculture, construction, small or family firms in the manufacturing sectors, services, and self-employment (see for instance Ambrosini 2015). Indeed, these countries are internationally rated as those with most rigid state regulation of economic activity but with low enforcement levels and widespread free-riding behaviours. Nevertheless, an important share of the estimated irregular employment is also found in central and northern European countries. In each country, depending on the characteristics listed above, the interplay between irregular activities and immigration flows might generate different levels and combinations and create special niches for informal labour of irregular migrants to flourish.

8.3.1 A Steady Demand for Low-Skilled, Precarious and Cheap Workers Within a Restrictive Migration Environment

Over the last 30 years, tensions between labour market demands and increasingly selective immigration policies have become evident in most industrialized countries. In the EU context, efforts to strengthen controls, curb irregular migration and

establish a common migration and asylum system have been on the rise especially since the beginning of the 2000s, reducing regular entry channels and officially promoting only highly-skilled immigration. While many European countries—perhaps with the exception of the UK—seem unable to compete in the global battle for brains (Campanella 2014), their need for immigration is structural and likely to remain at high levels in the medium term. In the words of the European Commission, "The EU is […] facing a series of long-term economic and demographic challenges. Its population is ageing, while its economy is increasingly dependent on highly-skilled jobs. Furthermore, without migration the EU's working age population will decline by 17.5 million in the next decade. Migration will increasingly be an important way to enhance the sustainability of our welfare system and to ensure sustainable growth of the EU economy." (EC 2015a, b: 14).

As for low-skilled jobs, the chronic mismatch between national restrictive policies and economic demand for cheap and flexible labour in many sectors such as construction, cleaning, caring, catering, and tourism has led to the toleration of certain levels of 'physiological' irregular migration (Ruhs and Anderson 2006; Ambrosini 2013).

Already in the mid-1990s some researchers (see for instance Arango and Baldwin-Edwards 1999) were pointing to the structural imbalances in southern European labour markets where a relatively high level of domestic unemployment combined with high levels of immigration. Migrants were indeed taking the jobs that natives were reluctant to fill because of both low pay and low prestige. This was particularly the case in labour-intensive and seasonal sectors, as well as in the caring and cleaning sector, as native women engaged in paid work leaving the care needs of old and young family members uncovered (Reyneri 2004; Ribas-Mateos 2004). The same sectors are typically those where informal work thrives and is tolerated, especially when the workplace is a private space and inspections are virtually non-existent.

Additionally, bureaucratic hurdles to permits' renewal often may lead migrants to periods of undocumented/illegal stay (for example, because of unemployment). Several studies have confirmed that migrants with more precarious and unstable work and residence conditions can fall into vicious circles of irregular stay and informal employment until a regular occupation is found with characteristics that allow them to regain their regular migration status. In this sense, informal employment may be part of such adaptive responses to difficulties posed by migration rules that keep a close connection between legal stay and a registered job (Reyneri 2001).

However, as more recent research on the UK has shown (Anderson 2010), immigration controls that are supposed to protect migrant workers from exploitation and locals from unfair competition can create an environment of informal work as they institutionalise vulnerability and uncertainty. Migrant workers with insecure status or with restricted socio-economic rights—restrictions on family reunification, restricted access to housing benefits or family allowances—live in a status of precariousness that conduces to informal and exploitative work. To avoid the risk of being fired, they are willing to accept to work overtime or in unfavourable night/weekend shifts with little pay, or to be falsely self-employed. Especially when they

have no family and only short-term prospects of staying at destination, they might prefer some additional cash in hand than the protection of labour and welfare rights which are often non-portable. The dependence of the migrant worker on the employer creates incentives for exploitation and irregular work arrangements.

As outlined earlier, the overall demand for migrant work in Europe has been geared towards sectors where informality is structurally high. Furthermore, after the EU enlargements in 2004 and 2007, citizens of the new member states provided for a legal migrant labour force, competing with third-country nationals as they were freed from the need of permit renewal. EU citizenship has not been sufficient to protect these intra-EU migrants from severe exploitation and irregular work. Studies on agriculture in Italy and Spain, for instance, show that EU migrants, particularly women, work under extreme conditions of vulnerability and have little access to their rights. Issues like having networks, not being isolated at work, or knowing the language are more important or equally important as being an EU citizen, regularly present in the destination-country (Palumbo and Sciurba 2018; Mesa de la Integración 2018).

Asylum seekers with pending applications also experience special vulnerability (Lewis and Waite 2015). They may temporarily reside legally in the country but without the right to work for periods that vary from two months (Italy), to three (Germany, Austria, Switzerland), nine (France), or 12 (United Kingdom). In most of the cases, asylum seekers might look for jobs in construction, agriculture, or other sectors, with a view of earning some income while waiting for the outcome of their request. These legal residents with pending status are particularly alluring for unscrupulous employers as they pose no danger in terms of breaching migration law but offer the possibility of lowering labour costs for jobs that do not require a high degree of specialisation or language skills, or for jobs that are unstable, seasonal, and badly paid.

Semi-compliance involving legal stay and irregular work can be an intentional strategy for employers and (migrant) workers. As already argued, there seems to be an "economically optimal level of illegal migration" (Boswell and Straubhaar 2003) and notion that immigration can "grease the wheels" (Borjas 2001) of labour markets even in its irregular form. Keeping migrants in an irregular employment condition, when they cannot be contained, seems to add particular, though unfair, economic advantages to their presence (Düvell 2006).

Moreover, the employment of irregular migrants does not only involve the convenience of single employers or private households but has economic and social impacts on the whole society. The presence of irregular foreign residents in a country increases the local labour supply and can represent a form of unfair competition against the local workforce, leading to a sort of crowding out or substitution of regular workers for occupations at the very bottom of the skill and wage scales. Nevertheless, the overall economic effect of irregular migrant workers is far from being clear and should be tested case by case depending on the overarching labour market structure. Several empirical studies suggest that immigrants are complements rather than competitors in their host countries' labour market (Venturini and Villosio 2008). Overall, a real competition between migrants and natives in general

has barely been proven as irregular migrants have skills and characteristics different from the local workforce and can hardly replace it at all levels and in all sectors. Interactions between migrants and the host labour markets can determine a strong specialization of (irregular) migrants in sectors not adequately filled by local workforce. In filling these gaps, migrants allow locals—especially in the traditional labour markets of southern Europe—to up-scale and reach higher positions in the labour market (Fullin and Reyneri 2011). Moreover, the overcrowding argument has lost its plausibility for almost all European countries, whose working-age populations are decreasing.

Even during the European economic downturn, despite the rhetoric on brain drains from hard-hit countries and replacement of migrants by natives, no large-scale movements of native workers to the lowest-ranked jobs and occupations to find employment were observed (Triandafyllidou and Isaakyan 2016). Although data for a systematic analysis of the effect of the economic recession on the composition of workforce by sectors and skill-levels are yet to be analysed comparatively across Europe, the most visible effect is the higher risk of unemployment of migrants than natives and the increase in the number of non-renewals of work permits, especially in the construction and industrial sectors. In some cases, there might have been a displacement effect of third-country nationals by EU migrants (agriculture, domestic, and care work); in others, losing residence and work status might have increased the irregular migrant population (Triandafyllidou 2014).

8.3.2 Irregular Migrant Work: A Sectorial Approach

Today, as in the early 2000s, the highest concentration of irregular foreign workers is found in agriculture, manufacturing, construction, public works (through public procurement and sub-contractors), and the service sector (tourism, entertainment, hospitality) (ILO 2013). To these, the big return to paid domestic labour worldwide and specifically in Europe, recently described as the "defamilialization of care" (Estévez-Abe and Naldini 2016), has to be added. Agriculture, tourism, and construction are characterized by high competition, a certain degree of seasonal fluctuations and low profit margins, made possible only by squeezing labour costs. In some cases, informal labour arrangements are favoured by the nature of the workplace, which is difficult to control or not visible (construction sites, farms, cleaning companies, and services provided through internet) (Triandafyllidou 2013). In others, employers with or without employees are themselves hardly structured and observable (small family businesses, households, and self-employed service providers).

To delve deeper into those niches where irregular work of irregular migrants are more likely to be found, the following subsections combine a sectorial approach—discussing the prevalent dynamics of the irregular work of irregular migrants in the domestic and care sector, agriculture, and the construction sectors—by presenting some country-case examples. The three selected sectors show different labour and

migration dynamics and different challenges: the domestic/care work takes place in a very personalised and 'private' domain; agriculture is a domain of temporary and informal work squeezed by large conglomerates in the agri-food business; and construction represents an area where again employment is unstable albeit not seasonal but rather tied to specific building projects and where multiple levels of subcontracting dominate.

Domestic and Care Work in the Home According to the ILO (2015), 80% of migrant domestic workers are concentrated in high income countries (9.1 million out of the 11.5 million estimated). The observed increase of paid domestic work since the early 2000s is associated with at least two main trends shared by most of the advanced economies in Europe and elsewhere: population ageing and the increase in labour market participation of (native) women.

Especially in countries where there is low male participation in reproductive roles and household chores, the greater presence of women in the labour market depends, in the abstract, on the provision of private care and domestic services by someone else in the home. Hence, the availability of cheap, irregular work to provide for domestic and care work has played a key role in allowing more women to find paid employment outside the home (Ambrosini 2013) in those countries with more unbalanced gender relations and with poorly-developed social safety nets for both child and elderly care (Estévez-Abe and Naldini 2016).

Different countries have opted for different solutions to ensure financial viability of long-term care provisions for the elderly, coping with generalized welfare cuts, and growing care needs at the same time. Several studies have shown that different welfare and care regimes led to different types of migration, care arrangements, and care markets, with Italy and other southern European countries relying on a specific division of labour among family migrant carers (mostly female), and skilled native workers (Bettio et al. 2006). More specifically, in a recent study on Italy, the UK, and the Netherlands (Van Hooren 2012), the Italian familistic care regime is found to provide cash allowances to families without controls on how they spend the funds, which incentivises the emergence of a 'migrant-in-the-family' model of care, with families becoming employers of migrant care workers. In the British care regime, where care is increasingly transformed into cash payments, a double market emerges with more affluent families that resort to the private market for paid care and less affluent families that use care allowances to cover food or transportation costs and directly provide care to the elderly person, only in few cases with the help of a paid care worker. As the UK government monitors how the allowances are spent, hiring an irregular migrant care worker is not an option. In the Dutch case, care services are provided by the public welfare system and there is thus no private market of care services, with a very low demand for migrant care workers (Van Hooren 2012, 141–42). Also, in a larger study on the care sector, Da Roit and Weicht (2013) find that Germany, Austria, Italy, and Spain rely mainly on migrant care workers at home, while the Netherlands, Norway, Sweden, and the UK tend to rely more on the formal sector and on services provided by public or private entities.

The distinction between familistic and liberal regimes can also partially explain the cases of Austria and Germany with the limited public resources, the public preference for cash programmes, and the segregation of migrants in low skilled jobs (Da Roit and Weicht 2013, 479). The scarcity of cash-for-care programmes is complemented by a high level of informal work arrangements mainly involving migrants (see also León and Pavolini 2014), which together with a strongly segregated labour market leads to a migrant-in-the-family model (Da Roit and Weicht 2013, 481). At the same time, when there are no uncontrolled cash benefits and no large informal economy, a migrant-in-formal-care model can arise, as in the case of the Netherlands, France, Sweden, and Norway. These factors alone are not sufficient though, as in the UK case where there is a strong presence of the private sector and formal care arrangements through private providers.

To summarize, the emergence of informal migrant work in the domestic home care sector is shaped by a combination of factors: total public expenditures on formal care services, the presence or absence of uncontrolled cash-for-care programmes, and the presence or absence of irregular migrants or indeed of migrants who can afford to work without a formal contract (EU citizens, TCNs with permanent permit, with a permit linked to their spouse or naturalized, and all those who do not need to prove to be employed in order to keep/ renew their residence permit).

Moreover, the intrinsic characteristics of domestic and care work in private households may exacerbate the specific barriers to information and understanding of administrative procedures and labour laws that are usually faced by migrants. Live-in migrant domestic workers tend more than others to be isolated from peers, service providers and the host society in general, with limited freedom of movement in the public sphere. Hence, they are hence more at risk of exploitation, abuse, lack of access to fundamental rights (privacy and dignity, freedom). Live-out immigrant workers too may experience the same kind of exclusion and marginalization if they are in irregular resident position (Triandafyllidou 2013). As recently recalled by (Marchetti and Salih 2017), this is a particularly gendered area of employment for migrant workers, attracting both irregular migrant women and regularly-residing migrant women who are nevertheless channelled to care or domestic work.

Agriculture When we look at the agricultural sector, the analysis of the labour dynamics intersects with the analysis of how the production of food and the management of natural resources have changed over recent decades, in relation to other sectors of the European economies and to other countries where rural communities still represent a significant share of the total population. Agriculture is still particularly relevant in EU countries of the south—Italy, Spain, Greece, Portugal, and France—where the management of the rural territory is central for agro-industry and the tourism sector. Despite its success in supporting production levels, the Common Agricultural Policy has achieved less satisfactory results on a social and environmental level, with rural populations affected by faster ageing and higher emigration rates than the average. Immigration has consistently filled the growing demand for seasonal, hard and low-paying work, as natives are reluctant to engage

in agricultural labour because of its low prestige and profits and because of the general internal migration to urban areas. Regular and irregular migrant workers are now found in many local districts of agro-food production in almost all European countries, with conditions of work and residence that vary depending on the more general country-context of immigration (see among others Cillo and Toffanin 2014 on Italy; Scott et al. 2012 on the UK; Rye 2017 on Norway).

The connection with commercial networks, agro-entrepreneurs, intermediaries, and the final consumers push for lowering the prices of vegetables and fruits at any costs and with difficult traceability of products. The dynamics of irregular employment in agriculture are thus shaped by a number of factors that are not confined to labour migration management but rather have to do with the organisation of production and related sectorial labour market dynamics. The inherent seasonality of agricultural productions requires ultra-flexible mechanisms to regulate the existing workforce; workers should be available on call, be easily dismissed, work under adverse conditions, and have few prospects for upwards mobility. Moreover, international and national competition among large corporations in the retail and agri-food production chains creates pressure for lowering production costs at the lowest level of the chain, especially squeezing labour costs when all other production inputs—water, energy, fertilizers, and mechanization of processes—are put under control (Palumbo and Sciurba 2018).

In this context, migration policy plays an important role by restricting channels for legal labour migration with the aim of domestic electorates against the threads of a 'migration crisis' (Dines et al. 2018). At the same time though, they have an important side-effect of creating a plentiful young labour force available to work at extreme conditions, vulnerable to exploitation because of its irregular or insecure legal status (Lewis and Waite 2015; Amnesty International 2012).

In Ireland, the UK, Germany and the Nordic countries, the demand for agricultural labour has been largely met through intra-European migration from the newly-accessed member states. While this migration was linked to seasonal contractual employment, recent research has shown that employment was formally legal but often exploitative, involving sub-standard conditions in terms of working hours, wages, and safety conditions. Potter and Hamilton (2014) document how mushroom pickers coming from the new member states worked initially without papers, either because they were unaware of the necessary documentation or because they trusted the employer's promise of subsequent regularization. In the case of the UK, concerns are growing over what will happen after Brexit, on whether there will be seasonal schemes to cater for a much-needed labour force from EU countries, incentives for native unemployed workers to take up jobs in the sector, or investments in increased automation (McGuinnnes and Garto Grimwood 2017).

In southern Europe, male and female migrants of different nationalities are concentrated in specific regions and local districts. Many of them are seasonal workers whose administrative position makes them more prone to abuses by employers. The quota system applied in Italy is not aligned with the real needs in cultivations which

are highly dependent on the season and not always foreseeable, but always higher than what the formal entry quotas permit (Cillo and Toffanin 2014). Moreover, in the last few years there has been an increase in a particular kind of flexible migrant labour force in agriculture—that of migrants who have applied for protection and those with a regular refugee, subsidiary or humanitarian status —that has led to what has been defined as "refugeeization" of specific segments of the migrant labour force (Dines and Rigo 2015), which involves young and mostly male migrants from sub-Saharan Africa, North Africa and southeast Asia in Italy, Greece, Spain (see also Palumbo and Sciurba 2018).

Construction Construction is a volatile sector whose dynamics are strongly related to fluctuations of the local and national economic cycle, of energy and raw material prices, on political decisions on the use of land for new buildings or infrastructures, as well as on incentives for private demand/supply of new construction or renovation sites. Construction is a labour-intensive activity that is usually dominated by small firms with limited fixed capital, with the exception of some large companies that can manage entire building projects and often outsource single segments to smaller subcontractors (Bosch 2012). Labour is usually provided through temporary work agencies and specialized subcontractors, thus contributing to the creation of a competitive job market where workers can be summoned at short notice and where employment is certainly not stable (Ibid.). In the case of Europe, the issue of posted workers from southern and eastern European countries competing with local workers of central and northern European countries has gained public attention since the entry into force of the Posting of Workers Directive in 1996.

Hence, construction has evolved into a sector for mostly European migrant employment, especially in the case of Germany, the UK, and other northern European countries. On the other side, in Mediterranean countries like Italy, Greece or Spain, migrants from eastern Europe have traditionally filled the gap for cheap and flexible labour along with migrants from North Africa. In these countries, construction is a highly-segmented sector with a relatively small, highly-regulated force of workers, protected by trade unions and respecting the standards, plus a large peripheral, unregulated labour market that included a large number of irregular migrants. Spain stood out in particular because of the boom in residential construction of the 2000s which attracted a large number of immigrants, both regular and irregular (Fellini et al. 2007) that suffered from high unemployed in recent years. The same recurrent dynamics are found across southern Europe, with Albanians in both Greece and Italy, Georgians, Ukrainians, and Bulgarians in Greece,and Ukrainians, Poles; and Romanians in Italy and Spain. Such dynamics have also been found in the UK (Bloch 2013) and the Netherlands (Snel et al. 2015).

The match of offer and demand in construction initially takes place through word of mouth and later on through migrants themselves who become formal or informal subcontractors, with their own teams of co-workers providing their services to a native subcontractor. Employment is irregular when workers are irregular. However, upwards mobility to better-paid or more skilled position and/or to the creation of an

independent enterprise for subcontracting is possible as workers regularize. Co-ethnic networks are crucial in this respect. Upward mobility has been more readily available to Poles, Bulgarians, and Romanians as they acquired EU citizenship, but the same was true for TCNs regularized through one of the large 'amnesty' programs implemented, for example, in Italy in the late 1990s and early 2000s. Nonetheless, regularizing the residence status did not necessarily mean a fully-regular employment too. More often, migrant construction workers were paid partly off-the-books to top up minimum wages, formally declared to receive social insurance coverage and the renewal of work permits. This has proven to be an important bargaining tool in the hands of subcontractors, both formal and informal, who brokered deals with big construction companies for suppressing the costs of labour.

Different dynamics were observable in northern Europe. Here, subcontracts and employment agencies played a crucial role for opening migrant employment channels. In Germany, posted worker arrangements and a massive entry of foreign workers in the construction sector happened already in the mid-to-late 1990s despite trade union protest (Fellini et al. 2007). In the British construction sector, massive migrant employment became common with the arrival of Polish workers after the 2004. Practices of subcontracting and bogus self-employment have been widespread in the sector (Caro et al. 2015). The role of transnational contractors that had good relations with construction firms in Germany, the Netherlands, or the UK is also crucial: these tend to have a flexible pool of migrant workers which they can tap to satisfy demand. Given the mobile nature of the work and the need to move between construction sites, oftentimes workers depend on their employer not only for work and pay but also for temporary housing and transportation. In her study, Berntsen (2016, 8) documents how such subcontracting arrangements with migrant workers are preferable as workers are there without their families, are housed in groups, and are thus more reliable and ready to work over time. On the other side, a study on Finland, Germany, and the Netherlands (Caro et al. 2015) found that this hyper-flexibility and high mobility reduces incentives for workers to integrate as more permanent migrants, and it is likely to segregate them within mono-national or mono-linguistic co-habiting solutions with colleagues.

Moreover, migrant workers in the construction sector are hardly protected by trade unions as the efforts of the latter to enforce labour standards generally leads to employer retaliation (Berntsen and Lillie 2014), with migrant workers "kicked out, have no job anymore and usually no accommodation, and find themselves, literally, standing in the streets without any protection" (trade union official cited in Berntsen 2016, 10). As in the case of agriculture, contracts are not secure as the job market is very competitive, and wages are still competitive compared to earnings at origin, thus substandard conditions are the rule. The extent to which substandard conditions may amount to irregular work depends on the type of labour market regulation in each country. In Nordic countries where wages are determined predominantly by agreements between unions and firms instead of mandatory minimum wages applicable across the board, this may lead to opening up windows for low-wage

competition and sub-standard conditions as typically migrant labourers are not unionized. Thus as Friberg et al. (2014) show, migrant workers may be exposed to such exploitative arrangements in Norway and Denmark. However, it should be noted that such arrangements are characterized more as atypical work rather than as irregular work *tout court*. Irregular work perhaps comes into play mostly in these countries when migrant workers (particularly from EU countries and hence with legal stay status) perform house maintenance tasks for private households.

To sum up, irregular migrant employment is difficult in the construction sector particularly when it comes to large construction sites. However, the concern for sub-standard conditions that verge on exploitation and illegality is widespread, as migrant workers are generally not sufficiently protected by trade unions or collective because of the highly competitive and inherently unstable nature of the construction job market. In this context, subcontractors and employment agencies can provide both more and housing thus making the overall migration project viable and profitable for migrant workers as wages are still superior to those at home.

Irregular employment in construction is more likely in small sites, in private household maintenance, and also more generally in southern European countries where the deep economic crisis has hit the construction sector particularly hard since 2008, leading to massive unemployment among migrant workers (particularly men). Under such conditions wages have fallen significantly and informal work abounds, while third country nationals previously employed might have been unable to renew their permits and might have decided to return (see Mai 2011 on Italy and Albania).

More comparative and sectoral studies would be needed to see what is happening during the fragile economic recovery of southern European countries particularly hit by the crisis since 2008 on one hand, and how the workers' and contractors' reaction to Brexit are impacting posted workers from eastern Europe in the UK, on the other.

8.4 Concluding Remarks

This chapter aimed to show that irregular migration has a close interactive relationship with demand for a cheap and flexible labour force in specific sectors of western and southern European labour markets. The first part of this chapter reviews critically the different ways in which irregular stay status and irregular work status intertwine to produce different typologies of irregularity. We point to the role of third actors such as employment agencies or subcontractors in this complex landscape. The chapter thus shows the complex dynamics of demand for irregular work which include both long-term structural factors linked to specific labour market sectors and migration policies that do not properly respond to labour market needs but rather create more precariousness, vulnerability, and irregularity.

The long-term structural factors vary in different employment areas as this chapter shows by reviewing domestic and care work, agriculture and construction. For domestic and care work in the private home, an important role is played by the chronic underfunding of public welfare services and the privatisation of care in western and southern countries. In agriculture, the situation is characterised by the development of an intensive agriculture model in several areas of southern and western Europe for greenhouse productions and a parallel pressure on the market for low prices in vegetables and fruits. The harsh working conditions, the seasonality of jobs, the existence of multiple intermediaries, and the power of big supermarket chains to squeeze prices in order to maximise profits lead to a context where migrant workers are the weakest link in the chain, the one more prone to exploitation. Structural factors in the construction sector to some extent resemble those of agriculture: the sector is not seasonal, but it is volatile, often characterized by long sub-contracting chains and project-based, with frequent changes of employers.

All these factors create conditions of migrant workers' vulnerability in these sectors, as jobs are private (in domestic work) and inherently unstable (in agriculture and construction), and the. There is difficulty for workers to become unionised and hence know their rights and have access to them.

Migrant workers come to this context characterised by exploitation and precarity as well as harsh working conditions (hard manual work, unsocial hours, low pay, low prestige) and offer a flexible and exploitable labour force. This is particularly the case for undocumented migrants, asylum seekers whose cases are still pending, and especially for women migrants with family responsibilities. The lack of legal migration channels in general (for private domestic/care work and construction) or the existence of seasonal schemes that tie the worker to the employer (so as to guarantee to be called again the following year) leave the migrant worker vulnerable to the whims of unscrupulous employers. The difficulty of monitoring private homes as workplaces and remote agricultural areas further exacerbate these phenomena in domestic/care work and agriculture.

Addressing irregular migrant employment depends more upon labour market reforms that would eliminate or reduced the structural factors of demand for such work rather than on migration control to reduce the available, exploitable, and vulnerable workforce. Indeed, the enforcement of employment legislation, controls, inspections, verification of contracts, working conditions, accommodation, actual pay (Scott et al. 2012) are recurrently found in all policy documents at the national and European levels, offering different recommendations depending on the sector and the specific type of intersection between irregular work and irregular migration that we have described in the previous section (Wagner and Berntsen 2016). Within this context of combatting irregular work, there is a need to open up predictable and neat legal migration channels for workers in those sectors where demand for migrant workers is high and where domestic supply is low. Such channels would also safeguard the rights of native workers employed in these sectors as they would reduce the vulnerability of (irregular) migrant workers and would help guarantee labour standards (Ambrosini 2013).

Today there is also a deepening concern that recently arrived migrants and asylum seekers from the 2015–2017 flows might offer a pool of cheap and flexible workers who will be engaged in irregular work as their legal status may be unclear while they will feel the urgent need to make a living and provide for their families. A protracted waiting period for asylum seekers in process, without a formal right to work, may push them inadvertently into irregular employment as housing and in-kind allowances while the asylum process is ongoing may not be sufficient for them to make ends meet. In addition such protracted no-work waiting periods may make their insertion into the formal labour market later on, even more difficult (OECD 2016; Martín et al. 2016).

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Chapter 9
Emerging Reception Economies: A View from Southern Europe

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9.1 Introduction

Irregular migration in Europe and irregular migration flows mainly by sea and by land to Europe are not a recent phenomenon. However, while in the 2000s irregular migration was largely absorbed in fast-growing economies in central and northern as well as southern Europe, the early 2010s were marked by two concomitant dramatic developments: the global and Eurozone economic crisis and, since 2014, a sudden surge of migrants, refugees and asylum seekers moving to Europe from Syria and the Middle East as well as Asia, Western and Eastern Africa. Thus, while addressing irregular migration has been a long-standing concern at both local and national levels in most European countries, the most recent debate and policy developments take place in a context marked by relatively high unemployment, economic austerity, and public spending cutbacks in frontline countries of southern Europe (notably Italy and Greece). The context is also marked by high immigrant (and native) unemployment in Greece (Triandafyllidou 2016, 2017), while in Italy third-country nationals show a relative job retention during the crisis years but also a high segregation in low-skill/low-pay jobs (Fellini 2018). The management of the 'migration crisis' has put additional pressure on already-strained public finances and overburdened public services. Recent research has started to document the difficulties in

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the frontline border areas where payments of salaries of refugee centre workers can be delayed (Casati 2018) and where police and border guard officers feel they do not have the means to adequately fulfil their tasks (Chouliaraki and Georgiou 2017; Rozakou 2017).

Recent research has investigated *the economies of migration control.* One line of research has looked specifically into the border control industry, Claire Rodier (2012) has highlighted the triple function of migration controls—economic, ideological, and geopolitical—arguing that border management serves other interests than those it claims to defend, notably it leads to the development of an economy of security services, provided by specialized multinational firms. Rodier argues that this security industry has paradoxically profited from the introduction of free circulation within the EU. Fotiadis (2015) also shows how multinational companies and EU policies have boosted security concerns thus creating a market for high-tech control equipment. Carrying the argument a step further, Gammeltoft-Hansen and Sorensen (2013) analysed the complex relations between civil society, government, and private actors in migration management. These relations impact on migratory flows as well as on policies and practices that try to regulate migration movement, from the flourishing of transportation and border-crossing smuggling services to deportation practices aimed at control and deterrence for future prospective migrants.

A second line of research has assessed the overall cost-effectiveness of migration control—a question that often escapes public attention. Lunaria (2013) has shown that Italy spent more than 1.67 billion euros on policies aimed at combatting irregular migration in the period 2005–2012, of which three-quarters came from national funds and the rest from EU funds. Most of this funds have been used to ensure control of sea and land borders through surveillance technology systems implemented at border areas, implementing returns, running the administrative detention centres for irregular migrants (CIE, *Centri di Identificazione ed Espulsione* or Centres for Identification and Expulsion[1]), and cooperating with third countries to prevent and combat irregular flows. The study (Lunaria 2013) claims that the adopted measures were largely ineffective in increasing forced repatriation of irregular migrants and in discouraging further irregular migration flows, while they often violated the fundamental rights of migrants. A similar study in Greece (Angeli et al. 2014) has investigated the actual monetary and human resource costs of migration control policies and their effectiveness in achieving their objectives. The indiscriminate enforcement of control policies—notably generalised and racialized random controls in public places, apprehensions at border of migrants including those willing to ask for protection, blanket detention of anyone apprehended as a means of deterrence, and the insufficient availability of alternative schemes for monitored stay and assisted voluntary returns—created unnecessary expenditures and hampered the policies' effectiveness. The study shows how a tailor-made approach

[1] These have now been transformed into CPR (*Centri di Permanenza per i Rimpatri*, or Centres for Repatriation) with the Legislative Decree N.13/2017, converted into law with Law N. 46 of 13 April 2017.

could have functioned better, significantly reducing both the human and financial costs of migration management in Greece.

Taking stock of the literature on the economies of migration control, this chapter focuses on a complementary and interlinked aspect that can be conceived as the economies of reception: notably, how national and local stakeholders manage the arrival of asylum seekers, refugees, and other migrants; how they distribute new arrivals in different territories; and how they build material and human resource infrastructures. In the last decade, the term 'reception' increasingly is used with reference to the arrival at EU land and maritime borders of migrants who in principle are not authorised to enter until they manifest the intention to ask for asylum. Reception refers to their initial first-assistance upon arrival, registration, legal and administrative processing, and often involves access to international protection procedures. Hence, national reception mechanisms become an administrative tool that distinguishes those who are considered irregular upon arrival and those who can access the asylum procedure and be entitled, at least temporarily, to stay. It may actually be argued that the way reception takes place may create (or not) regularity and irregularity. The reception systems at the borders of southern Europe actually has a mixed character as it differs from country to country, and it covers care and protection practices as well as repressive ones. The whole 'industry' around reception thus serves to restore the orderly management and control of arrivals through irregular migration channels.

Estimating the impact of the migrants' presence on tax and welfare systems and the net fiscal consequences of immigration for public administration and the economy as whole, while also considering trends in unemployment and wages, is not an easy task and needs to consider also emergency funds and special instruments developed in Europe since mid-2015. Indeed, it is one of the most debated branches of the economic literature on migration, with regard to both national (macro) and local (micro) economies (Dustmann and Frattini 2014; Ruhs and Vargas-Silva 2015; Peri 2017). While acknowledging concerns about inadequate funding and poor services (Amnesty International 2017; D'Angelo et al. 2017; Ministry of Interior of Italy 2015) as well as human rights violations, especially concerning the impact of the EU-Turkey statement (Tunaboylu and Alpes 2017), this chapter seeks to cast light on the economic aspects of reception.

Hence, the chapter delves deeper into the impact of significant funding in a relatively short period of time, in response to an emergency which has protracted for several years and looking specifically at the cases of Italy and Greece. It has an exploratory character: it seeks mainly to sketch the contours of an emerging reception economy and its possible effect on receiving countries and their local residents. The analysis we propose is not based on empirical material, and the few case studies presented in the text have an introductive character as they present what constitutes an interesting field for ongoing or further research. Our aim here is to explore the qualitative features of the reception economy: we investigate the emergence of significant reception infrastructures; the emergence of new professions; and the impact in terms of real and potential employment of reception beneficiaries in local labour

markets, particularly in relation to informal work in specific sectors (see the sectoral analysis proposed in Chap. 8).

The chapter proceeds with a brief overview of the national and EU funding given to local and regional authorities to face the 'migration crisis' in 2015-2016 and seeks to assess the management of these funds between different levels of governance. We then turn to consider how the development of camps to host refugees and asylum seekers in Greece and of multiple reception facilities in Italy has affected civil society sector employment. Last but not least, we briefly consider the participation of migrants and refugees in reception in local labour markets, often in the informal economy. The chapter concludes with some remarks on the character and features of local economies of reception as well as pointing to further avenues for research.

9.2 EU Emergency Funding and Multi-level Governance: Introductory Remarks

Scholars have suggested since the early 2000s the inherent contrast between the public announcement of strong control and security measures and the shadow politics in which migrants' rights are extended, between the need to offer a symbolic reassurance to the electorate and that of attending to the pragmatic needs of security and social wellbeing of a polity (Guiraudon 2000, Massey 2009). The "vertical" and "horizontal" relationships between the EU and national governments and between multiple tiers of national governments leaves room for multiple overlaps in both policy framing and policy implementation, with a specific role for non-governmental actors and private actors (Scholten and Penninx 2016; Hepburn and Zapata-Barrero 2014). The local governments' geographical proximity to their populations makes them immediately responsible, as well as the most visible and exposed level of migration governance. Local and regional governments' portfolios include the implementation of several social and economic policies closely related to reception such as education, health services, training, and integration measures for active labour market participation of those in reception towards autonomy, eventually. This fact—together with the overlapping roles of European, central and local governments for the provision of public services in the field of migration management (control, reception, integration)—has strong implications on the multi-level governance of migration-related issues (Spencer 2018). In this context, this section sketches the size of the funding mobilised to respond to the 2015–2016 'migration crisis' by the EU with a view to providing some insights as to the incidence of this funding at the local and regional level.

Two European funds are assigned to migration and security for the period 2014–2020, providing member states with a policy and budgetary framework for national and local implementation of programs and actions. At the same time, efforts

at the EU level to establish a more coherent and mandatory system for all member states are ongoing while approaches and implementation of the tools already available vary across countries.[2] The Asylum, Migration and Integration Fund (AMIF, EUR 3.1 billion, according to Regulation 516/2014) promotes actions towards a common approach to asylum and immigration with specific focus on strengthening the Common European Asylum System (CEAS); on legal migration and integration of third-country nationals; on returns as means to combat irregular migration; and on solidarity towards member states most affected by recent asylum flows. Of these initial funds, 88% was to be implemented through shared management with member states under the framework of their multiannual National Programmes, and the remaining 12% was to be managed by the European Commission focusing on Union Actions, Emergency Assistance, and the European Migration Network. This budget was nearly doubled in 2015 and 2016 compared to the initial allocation, through top-ups as a result of unforeseen needs and to foster some solidarity mechanisms and decrease the burden of the 'migration crisis' on the most affected member states. Thus, the total foreseen funding reached 6,894 million euros for the period 2014–2020[3] to support relocation and resettlement, Union Actions, and most notably the Emergency Assistance (EMAS) to the most affected member states like Greece and Italy.

The Internal Security Fund (ISF, EUR 3.8 billion) aims at improving border management, visa regimes, and travel within the EU and combatting cross-border crimes, terrorism, and other threats to internal security. Moreover, the European Emergency Trust Fund for Africa (1.8 billion euros) and the Refugee Facility for Turkey (3 billion euros) were set up. Moreover, in June 2016, the European Commission also proposed allocating, through the AMIF, 10,000 euros per person resettled (from a third-country of first asylum), 6,000 euros per person relocated from Italy and Greece (and 500 euros for the two relocating countries to cover travel expenses).

Looking more specifically at Greece and Italy, the European Commission's financial support has been allocated as follows. Approximately 189 million euros in emergency assistance has been given to the Italian authorities and to international organizations and NGOs active in the country on top of the 626.4 million euros allocated to Italy under the 2014–2020 national plans (61% from AMIF and 39% from ISF) (EC 2017). Approximately 393 million euros have been allocated to Greece as emergency assistance to support Greek authorities on top of the 561 million euros allocated through the 2014–2020 national programmes (57% from AMIF and 43% from ISF). These emergency instruments are deemed to provide a targeted

[2] At the time of closing this Chapter (March 2019), negotiations on the EU multi-annual financial framework for the period 2021–2017 are ongoing, while EU Parliament proposals for a revision of the Dublin Regulation are on hold before EU elections to be hold in May 2019 and there is no significative progress in EU cooperation for what concerns operations of search and rescue in the Mediterranean and agreed disembarkation mechanisms.

[3] Based on total AMIF funding reported in the Financial Programming dataset.

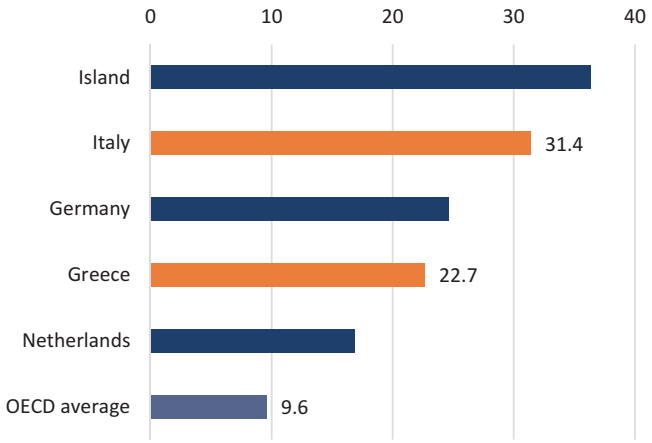

Fig. 9.1 Top 5 OECD countries by share of net ODA for refugees' expenditures (%), 2017. (Source: OECD 2018)

response to specific shocks while also channelling humanitarian funding to UN agencies and NGOs in close coordination with member states involved (EC 2018). Moreover, it is worth noting how expenditures related to refugee assistance are increasingly included in the official development assistance (ODA) of most European countries. According to the latest OECD data, Italy and Greece respectively devoted 31% and 23% of their official development funds to refugee-related expenditure in 2017, which means approximately 1.8 billion USD for Italy and 70.3 million USD for Greece (see Fig. 9.1).[4]

It is hence important to disentangle the inter-relationship between national and sub-national levels of government in the way all these funds, channelled to the two countries from the EU or budgeted at the country level, are utilised. While such distribution varies in relation to the overall level of state (de)centralization and to the country-specific structure of the reception system for asylum seekers, refugees, and other migrants, OECD estimates that the share of sub-national government spending in this field—after receiving fiscal transfers from the central states—is between 35% and 45% (OECD 2017). Usually, local and regional governments are asked to co-fund housing, language tuition and skills training, labour market and integration programmes as well as social benefit payments. In this respect, local entities frequently complain about late reimbursement of funds and additional fiscal costs generated from having a larger population on their territories to assist.

In order to assess the size and dynamics of the regional reception economies emerging over the last decade in Italy and Greece we would need a breakdown of

[4] See the OECD's DAC Temporary Working Group on Refugees and Migration page for the methods adopted to report in-donor refugee costs within ODA: http://www.oecd.org/dac/refugees-migration-working-group.htm

national and EU funds per region (or province or municipality) and per sector (e.g. maritime border control, first reception housing or camps, catering and provision of basic services, security of camps or accommodation, asylum processing, and so on). Such information, however, is not publicly available—not least because in both Greece and Italy most reception centres' management and related services were given through direct assignment, under emergency procedures, from the local prefectures to associations or private entities in Italy, and from the Ministry of Migration Policy—founded in 2016—again to both private entities and non-governmental organisations in Greece. Thus, data are scattered and there is as yet no assessment of how these resources were spent. The recent ECRE (2018) report points to the lack of transparency in how some of the funds are allocated and both the EP Budgetary affairs department (2018: 23–24) and laments the lack of available data and the changing sectors of allocation between national and European funds responding to both structural and emergency needs (2018: 27–31). Therefore, the detailed allocation and use of the funds is neither complete nor clear so as to fully assess their implementation and—for the purposes of our study—their impact on local economies and local labour markets.

9.3 Local Frameworks of Reception: Infrastructures, Professions, Labour Markets

The sheltering of newly-arrived migrants while they are being registered and in relation to their application for asylum (where relevant), has had an impact on the creation of new jobs in the reception system writ-large. The large irregular migration flows via the central and the eastern Mediterranean routes have produced a domino effect for the creation of services that did not previously exist and the expansion of services in new areas and places to cope with the needs of migrants from their first humanitarian relief onwards. This reception economy has grown mostly in the countries of first-arrival—Italy and Greece above all—but also in all other European countries which receive not only migrants arriving by land but also those redistributed through relocation and resettlement programmes.

Looking at the wide range of services and activities enhanced or created from scratch to cope with recent arrivals by sea and by land in Europe allows to show the breadth of the areas of intervention for public and private actors, which changes depending on each specific local context but that invariably requires professional staffing and expertise. The next sections discuss the reception system structures in Greece and Italy, the emergence of new professions and related needs for training of social workers and other professionals, and the 'refugeeization" of local labour markets.

9.3.1 Reception Infrastructure in Greece and Italy

Upon arrival, procedures related to immediate first aid, first identification and registration, emergency shelter, and possibly referral to the national asylum procedure, typically pertain to central government actors, whose composition and competences varies by country but which generally involves maritime authorities, police forces, immigration forces, and, in some cases, defence forces. Moreover, European agencies (EASO and Frontex), UN agencies (UNHCR, IOM, UNICEF) and international and national NGOs do play a role in these phases, particularly after the implementation of the hotspot approach (D'Angelo 2018).

Depending on the level of state decentralization and how the national asylum system is designed, the central government and the sub-national authorities (regions, provinces, municipalities) are responsible for the management of first- and second-tier reception centres and the provision of a variable set of services. Literature has treated the proliferation of camps in different regions including Europe as a result of policies that address migration (Agier 2014). More recent literature investigates the transformation of European reception systems for asylum seekers, refugees, and irregular migrants since the beginning of the European migrant crisis. According to Kreichauf (2018), since 2015 a generalized tightening of national laws on asylum and local practices has been observed with regards to accommodation, duration of obligatory accommodation in first-reception camps, enlargement and increase in numbers of big centres either in remote areas or at the margins of big cities, changes in administrative detention practices, and the adoption of legal exceptions to normal standards of reception services provided.

In this sense, the term 'refugee camp' previously associated with situations in the global South is more and more common in Europe, and does not only refer to makeshift, irregular gatherings such as those in Idomeni (Greece) or Calais (France). These camp-like settings—or the "campization" (Kreichauf 2018) of the response in some EU member states—involve different living standards, management structures and responsibility chains, labelling spaces, and different guests and staff. Moreover, conditions that were initially meant to be exceptional and temporary become more and more permanent or frozen. Recent literature has shown how these changes have exacerbated the exclusion and marginalization of migrant subjects for whom a (re)integration into the society is more and more difficult as transiting periods last longer or indefinitely.

While 'campization' and confinement is used in some countries and under certain conditions (the Greek islands as well as Lampedusa island in Italy, but also in mainland regions of Greece and Italy), in other contexts (even in the same countries) there has been an explicit shift of paradigm—at least on paper—to more dispersed and urban reception solutions that have created multiple and smaller urban realities where migrants are physically closer to local communities. This has been adopted as global policy by (UNHCR 2014), and some measures have been implemented in Italy in this direction so as to provide better and faster inclusion of asylum seekers and refugees in local communities (SPRAR 2015) and formulas for the redistribution

of new arrivals across the country with consideration for the economic development and population density of each region (Ministry of Interior of Italy 2016).

The administrative management of camps and accommodation of migrants arriving by sea in Greece has changed over time since the beginning of the crisis and is quite complex. Since 2013, with the implementation of EU laws, more Ministries are involved in the management of housing. Sometimes, camps are directly managed by Ministry of Labour, or by the Army. In other cases, the management is given to NGOs funded through European funds, or to UN agencies (both IOM and UNHCR) in support of Greek authorities. Also, the situation of the islands is different from that on mainland, in Athens, Thessaloniki, or other areas. The permanent campization of the islands facing the Turkish coast has been the consequence of the implementation of the EU-Turkey statement and the requirement that migrants or asylum seekers arriving after 18 March 2016 stay there and are processed under a special asylum procedure (Triandafyllidou 2017).

On the Greek mainland a number of temporary—emergency—camps has proliferated since mid-2015. As the so-called Balkan Route was interrupted by the border closure of North Macedonia and other countries further north of Greece, temporary camps emerged in a short period of time to accommodate those 'trapped' in mainland Greece. These sites have included the Reception and Identification Centres (RICs), the open Temporary Reception Facilities for Asylum Seekers (*Δομές Προσωρινής Υποδοχής Αιτούντων Διεθνή Προστασία)*, as well as open Temporary Accommodation Facilities (*Δομές Προσωρινής Φιλοξενίας)* for persons subject to return procedures or whose return has been suspended (Greek Council of Refugees 2018). The overall capacity and occupancy by type of facilities has changed from mid-2015 onwards. UNHCR for example provides accommodation to refugees and asylum seekers in apartments, hotels, and other buildings all over Greece, in collaboration with municipalities as well as central governmental institutions (Leclerc 2017). Moreover, information on the location, maximum capacity, and actual occupancy of existing shelters is scattered among different sources and hardly consistent over time. Table 9.1 presents data from UNHCR and IOM on the number of hosted migrants and refugees in 2016, 2017, and 2018 in the mainland and on the islands. The type and distribution of shelters have changed since mid-2016, when UNHCR started running an accommodation scheme. In short, two types of accommodation

Table 9.1 Migrants hosted in reception facilities in Greece, by type and location, 2016–2018

	Mainland	Islands	UNHCR Accommodation Scheme in the mainland	Total number of accommodated migrants and refugees
April 2016[a]	45,890	7,969	NA	**53,859**
April 2017[a]	34,791	12,822	14,460	**62,073**
December 2018[b]	23,800	14,648	21,635	**60,083**

Sources: [a]Data from UNHCR (2016, 2017); [b]Data from IOM (2018, 18): mainland's figure includes Open Accommodation Facilities, EKKA shelters for adults, EKKA shelters for UASC, Reception and Identification Centres, Detention Centres

Table 9.2 Hotspots reception capacity in Italy and Greece as of May 2018

Italy[a]	**Lampedusa**	**Pozzallo**	**Trapani**	**Taranto**	**Messina**	**Total**
	500	300	400	400	250	1850
Greece	**Lesvos**	**Chios**	**Samos**	**Leros**	**Kos**	**Total**
	3000	1014	648	980	816	6458

Source: EPRS (2018)

[a]Lampedusa and Taranto were temporarily closed for renovation works, re-opening by mid-2018. The center in Trapani has been converted into a CPR (detention centre) in the summer of 2018

emerge: reception centres run by NGOs alongside state's facilities and centres run by UN agencies (UNHCR and IOM).

Moreover, in Italy as well as in Greece, the EU prompted the opening of hotspots: places of first reception and transit which are spatially-defined areas near harbours and which have been hosting large numbers of individuals (often beyond the official capacity, see EPRS, 2018) and where standards of reception fall below the average of ordinary reception centres. In Greece, the Reception and Identification Centres constitute these hotspots, where registration and identification take place and the screening "selects between those seeking asylum and those to be returned" (ECRE, CIR, and GCR 2016) (Table 9.2).

Besides hotspots and the so-called CPR (Detention Centres for Repatriation), Italy hosts different types of first- and second-tier reception systems for asylum seekers, refugees, and other vulnerable migrants (unaccompanied children, victims of trafficking and torture etc.), with different standards, numbers of hosted migrants, and responsibility chains. This makes the Italian landscape a mix of large hubs for hundreds of migrants in isolated areas or at the borders of big cities and of small and medium reception centres distributed throughout the country in line with a matching of offer and demand managed by the National Association of Italian Municipalities (ANCI), which has been lastly reformed with new legislative changes adopted at the end of 2018.[5] The 'ordinary' centres, formerly known as SPRAR and now SIPROIMI (*Sistema di protezione per titolari di protezione internazionale e per minori stranieri non accompagnati*), benefit from a comprehensive approach aimed at the socio-economic integration of migrants who have obtained a recognized protection status. They are normally small reception places (apartments or

[5]The Legislative Decree No. 113 (the so-called Immigration and Security Decree), converted into ordinary law by Law 132 of 1 December 2018, introduced several innovations concerning immigration and security issues in Italy, including the abrogation of the humanitarian protection permit and the creation of new "special cases" protection permits; the transformation of the ordinary reception system "for asylum seekers and refugees" (the so-called SPRAR) into the protection system "for international protection holders and unaccompanied migrant children" (the so-called SIPROIMI) with criteria to access it and other non-ordinary, first-aid reception centres; an extended duration up to 180 days of stay in centres for repatriation of irregular migrants; new administrative rules for the registration into the municipal registers of asylum seekers. Additional ministerial communications issued by the Italian Ministry of Interior between December 2018 and February 2019 also included more specific indications on changes in the approach and guidelines for local authorities with regards to public tenders and the management of reception centres of various type.

centres), involving the local authorities for integration (including language learning and training) and employment services.

The second sub-system, initiated to face the sharp increase of arrivals in 2014, includes CAS (*Centri di Accoglienza Straordinaria*, Centres for Extraordinary Reception), CPA (*Centri di Prima Accoglienza*, Centres for First Reception), and ex-CARA (*Centri di Accoglienza per Richiedenti Asilo*, Centres for Asylum Seekers). These centres are managed by the local prefectures through NGOs and private actors and can be large in terms of their capacity, hosting even several hundreds of migrants each. They are often in isolated areas of each municipality so as to be 'hidden' from local residents. These centres do not offer a full range of support and integration services like the SIPROIMI does.

Although the capacity of the ordinary reception centres has increased over the years, they are still insufficient to respond to all reception needs for all types of adult and child migrants in the process of asking asylum or who have been granted a protection status. Thus, the 'extra-ordinary' centres hosted approximately 78% of all hosted migrants in mid-2018. At the same time, the total number of beneficiaries in reception of all types started to decrease in parallel with the decrease in arrivals by sea in Italy, being about 160,500 in July 2018 compared to 205,000 in July 2017 (Italian Ministry of Interior 2018) (Table 9.3).

The extensive reception infrastructure presented above already hints to the importance of reception as an economic factor for local and regional economies. In Greece in particular, where there was no official geographical dispersion system the creation of camps and reception centres either on the islands or the mainland aside from border areas, this was a new phenomenon. In Italy, the increase in arrivals by sea since mid-2017 has led to a growing number of people hosted temporarily at reception centres across the country. In both countries, reception infrastructure in geographically peripheral areas near the borders is more visible and its impact on regional economies and labour markets likely more pronounced. The maps presented in Figs. 9.2 and 9.3 help understand how some specific regions—like Sicily, Lombardy, Campania and Latium in Italy and the Aegean islands and metropolitan Athens in Greece—host a significant number of reception centres and camps of different types. The whole list of services and professions that developed around these structures are the focus of the next section.

Table 9.3 Migrants hosted in reception facilities in Italy by type, 2016–2018

	Ordinary system (former SPRAR, SIPROIMI)		Other types of facilities[a]		
	Presence	% of Total	Presence	% of Total	Total
July 2016	20,347	*15.0*	115,438	*85.0*	**135,785**
July 2017	31,313	*15.3*	173,690	*84.7*	**205,003**
July 2018	35,881	*22.4*	124,577	*77.6*	**160,458**

Source: Italian Ministry of Interior,http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/statistica/cruscotto-statistico-giornaliero

[a]It includes hotspots, CAS, ex-CARA, CPA. It does not include detention centres

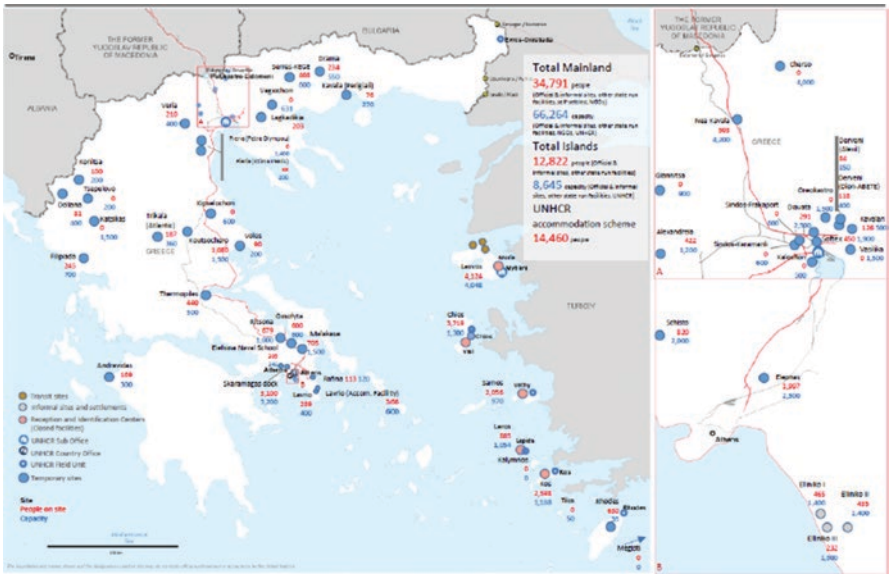

Fig. 9.2 Capacity and occupancy of reception centres in Greece, as of April 2017. (Source: UNHCR 2017)

9.3.2 Reception Services and Migration-Related Professions

Upon newcomers' arrival and accommodation, whether in camps or dispersed accommodation schemes and centres, the relevant reception localities and towns were confronted with the need to provide them with services. These include basic accommodation, food and healthcare, and language training, legal and administrative support for those in the asylum process (legal counselling and assistance to help with completing forms and administrative work, for example, to access the national healthcare system). Additional services concerned access to primary and secondary education for children, mentoring services in tertiary education, social welfare support for finding independent housing (and moving out of the centres or camps), and assistance to seek and find employment. These services have been supported by the national and European funds presented earlier in this chapter, and involved a wide variety of stakeholders, from local cooperatives and third-sector organizations to national and international NGOs as well as international and UN organizations and European agencies.

The new local demand has fostered fresh training courses and education paths that provide regional or national certificates aimed at qualifying and possibly "reordering" migration-related professions such as university courses on cultural mediation and interpreters; Masters and lifelong training courses and diplomas for social workers or immigration lawyers were the most visible among all new professional and training paths available. These new "locally-produced" professions competed

Fig. 9.3 Share of migrants hosted in reception facilities in Italy by region (%), July 2018. (Source: IOM 2018)

with the expansion at the international level of prestigious universities offering intensive migration courses and curricula that produce a pool of international experts hired by UN and European agencies. These external experts are in some cases perceived as intruding the local equilibrium, trying to replace, coordinate or support local municipalities and actors. According to Howden and Fotiadis (2017), "international UNHCR staff earn three times more than their local counterparts". The two authors quote a Greek UN employee who describes how "local staff were side-lined and 'treated like secretaries' by the newly arrived international staff".

Tensions between different actors in the same areas—especially in emergency settings and in the first reception of new arrivals—might frequently arise because of differences in the organizational culture, the knowledge of the local context, the spoken language (local versus English), and salaries and benefits (ranging from the EU agencies' officers to the short-term contracts of local staff of municipalities and NGOs). Whether directly funded by public resources (European, national, or local) or through private fundraising, the presence of these actors too has an impact on the "normal" local economy in terms of providing market services (food, housing, clothing) and activating or increasing available local services. Coordination issues also arise from different agendas and priorities.

In addition, there were cases of corruption when public procurement contracts were issued through non-transparent procedures bypassing open calls and evaluation mechanisms (Howden and Fotiadis 2017; ECRE 2018: 9). Such instances of corruption impacted negatively on the cost-efficiency and effectiveness of implemented programmes for baseline service provision (see for example Pianezzi and Grossi 2018 on a recent corruption case in the management of Mineo's ex-CARA in Sicily, which hosted some 3000 migrants at that time) and the overall public credibility of the reception system.

On the other hand, in some cases policymakers have tried to steer these new funds and investments to stimulate economic activity in previously depressed and depopulated areas. In Italy in particular, there are examples of municipalities in peripheral areas that have explicitly tried to combat geographical isolation and population ageing through the reception and integration of new, young generations of citizens (see for example the cases of Riace in Calabria[6] and Belluno in Veneto). At the same time, larger municipalities have joined EU-wide networks of cities for the exchange of good practices and expertise on a wide range of aspects (see for example EUROCITIES[7] or some networks of inclusive universities[8]).

In Greece the proliferation of the different camp-like settings also constitutes an opportunity for the creation of small contract jobs which contributed to curb—even if temporarily—unemployment. The Hellenic Manpower Employment Organization

[6] See Marrazzo (2018).

[7] See 'Integrating cities, common solutions for shared challenges' project, available from: http://www.integratingcities.eu/

[8] See 'In here, higher education supporting refugees in Europe' project, available at: https://www.inhereproject.eu/homepage or 'Tandem partnership project on migrant and refugee integration on Southern Europe', available at: https://iomintandem.com/

(OAED) offers small-scale contract employment programs for staff working inside the various reception and accommodation facilities in order to meet the different needs of these facilities. According to representatives of the First Reception Service, since OAED runs this program through different municipalities, most of the personnel employed are locals.

The different commitments of the Greek Administration in the recession era—where successive bailout agreements have proscribed new permanent hiring in the public sector—has led to the proliferation of such solutions for labour force absorption to counter unemployment, especially among younger generations. At the same time, such solution met the needs of the administration, in terms of new tasks emerged with the management of different reception facilities. Similar to the above is the absorption of a significant number of staff employed by the municipal police that lost its mandate during 2013.[9] According to First Reception representatives, many of the personnel hired in this service—in the headquarters, as well as in the different RICs—has been re-assigned from municipal police staff.

The different funds available represented an opportunity for already-established organizations and NGOs to grow in number and expand their work in more migration- and protection-related areas. This is the case of Generation 2—a well-established national NGO in Greece with an important role mainly in the integration of second-generation migrants. From 2016 onwards, the organization showed considerable growth in order to address the needs of newly-arrived migrants and asylum seekers. As recent arrivals in Greece became more and more permanent stayers in Greece, rather than transiting towards northern Europe, NGOs such as Generation 2, specialized in long-term integration intervention, come to meet the needs of larger shares of the migrant population.

Migration and refugee UN agencies also have increased their presence in Italy and Greece over the past years. IOM and UNHCR offices have expanded their operations with multiple projects to support national authorities in the management of new arrivals, such as assistance and protection activities for the most vulnerable, cultural mediation services, health and movement assistance (for example with regards to the EU-funded Relocation Scheme), on-site assistance in camps, and distribution of Non-Food Items (NFI), depending on the context. At the same time, the EU agencies Frontex and EASO also expanded their operations and presence in these countries. In particular, as stated by EASO's operational plans for Greece and Italy in 2018, the staff deployed to support national authorities with regards to the asylum procedures (registration and assessment) and capacity-building reached more than 200 individuals in Italy and more than 300 individuals in Greece at the end of the year (EASO 2017a, b).

Finally, the recent legislative changes to the overall reception system in Italy which aimed, among other things, at reducing public expenditures for integration services, started to produce effects at the beginning of 2019 locally also in economic

[9] The municipal police constitutes a branch of the Greek administration separated from police forces. In 2013, as a result of the economic crisis, the tasks of this department had been abolished. The municipal police was re-established in 2015.

terms, with closures of facilities and loss of jobs.[10] All these experiences show the economic relevance of the described local reception systems. Even in a political and public debate which is hostile to more migration, the role of local entities and cities as policymakers, service providers, employers, and buyers of goods and services in all cross-cutting activities pertaining to migrant integration are increasingly recognized.

9.3.3 The 'Refugeeization' of Some Local Labour Market Sectors

The arrival of large numbers of asylum seekers and other migrants and their territorial distribution in centres and camps has had a tangible impact on local labour markets, particularly as first reception and asylum processing were prolonged and those in reception started seeking employment—even if in the informal economy—with a view to making some money and covering their needs or to plan secondary movements within Europe. The latter, for example, is the case of many beneficiaries of open reception centres in the Attiki region, such as Schisto. According to representatives of the reception and identification service interviewed in spring 2018, many asylum seekers residing there are employed in seasonal agricultural occupations (often informally) in nearby districts or more distant ones.[11] The employment of asylum seekers within the reception system in itself is also quite widespread: this is the case of many translators and cultural mediators employed under short-term contracts in different reception facilities. There is no detailed data on the number of asylum seekers absorbed in this sector, and this could be an interesting field for further investigation.

As Chap. 8 in this book has shown, irregular migrants are typically concentrated in sectors and occupations such as agriculture, tourism, construction or care services that are not intrinsically outsourceable to other low-wage countries. Among all possible combinations of stay and work statuses, the one of asylum seekers in the process and of protection holders seem to be particularly conducive to specific types of irregular employment as migrants in reception can be ready to accept to work for lower wages than both natives and regular migrants as they receive, temporarily, accommodation and food at least. Even when they are not or no more entitled to reception, migrants with pending applications or granted protection status are non-deportable although might lack proper housing and, hence, official residence. Hence, various degrees of regularity of residence status are paired with employment

[10] As reported by main trade unions, see for example: https://www.rassegna.it/articoli/cgil-cisl-uil-licenziamento-per-351-addetti-servizi-immigrazione

[11] Interviews with representatives of the Reception and Identification Service conducted at the headquarters on 04/05/2018 and at the Schisto camp on 18/05/2018. This is only a pilot phase for a larger study under development in both Greece and Italy seeking to collect both qualitative and quantitative information on the local/regional reception economies in Greece and Italy.

in irregular forms and even under exploitative conditions, especially in agriculture but also in construction, where substitution is observed in some specific market niches and locations (Ottaviano and Peri 2012; Peri 2017). This is the case of the agricultural sector (see also Triandafyllidou and Bartolini, Chap. 8) of southern European countries—and Italy and Greece in particular—where newly-arrived African and Asian migrants are extensively employed alongside eastern European ones in conditions where the stratification of different legal statuses of residence and work produces various forms of informal settlements (camps established close to official reception centres) and of labour exploitation (Perrotta and Sacchetto 2014; Palumbo and Sciurba 2018; Papadopoulos et al. 2018; Corrado 2018). This allows producers to squeeze labour market costs and try to be competitive in an overall framework of low prices for agri-food products. Some scholars have called this phenomenon a "refugeeization" of a specific segment of the migrant workforce (Dines and Rigo 2015). Given the humanitarian approach of most European countries over the past years, migrants might prefer to keep their protection status or might be unable to convert their documents into work permits, which usually have stricter requirements of residence and work. Keeping migrants in a non-regular position in employment seems to add particular, though unfair, economic advantages to their presence (Düvell 2006). If this is the case, the overall humanitarian structure in which newly-arrived migrants are inserted—while, in parallel, legal channels for labour migrations are precluded to most—works in a way that privileges informal and usually exploitative insertion in local labour markets at the expense of both migrant and native workers (D'Angelo 2018).

9.4 Concluding Remarks

The local/regional dimension in migration studies has so far focused mostly on legal migrants and their integration, pointing to divergence between city-level and national policies (Caponio and Borkert 2010; Ambrosini 2013; Scholten and Penninx 2016; Bellabas and Gerrits 2017). These studies have often focused on large cities rather than smaller municipalities to explain different patterns in terms of ethnic mobilization, relative political openness or closure in a specific territory, and broader pragmatism to solve locally perceived hot issues of inclusion and coexistence (see Spencer 2018 for a broad review). Recent research however has focused on rural areas that constitute 'New Immigration Destinations' (NID), and the important transformations that smaller localities are going through in – and out – migration (McAreavey 2018). This branch of research has mainly focus on the mobility of migrant workers, their different processes of incorporation in NID, the transformations they induce in the rural landscape and the emerging inter-group relationships. More specifically on southern Europe, research on rural migration has focused on the harsh conditions and exploitation of labour migrants in the strawberry fields of Manolada in Greece (Papadopoulos et al. 2018) and of crop-pickers in Italy's southern regions of Sicily, Calabria and Apulia (Corrado 2018). While presenting

the precarious and harshliving working conditions of migrants involved, these studies also point to how these conditions are contested through migrant agency and mobilisations.

Migrant inflows from the central and eastern Mediterranean routes in the last few years have increased the visibility of small and marginal locations and municipalities in many countries and their grappling with massive irregular arrivals of mixed migration inflows. The Greek islands, the areas surrounding the green borders across all western Balkan countries, coastal areas of southern Italy as well as green borders within the EU and the Schengen space are the most visibly and routinely affected by the arrival and transit of migrants from the Middle East and North Africa. The role of small and large municipalities as first arrival points, transit hubs, and final destinations is only gradually being acknowledged in academic research (Manara and Piazza 2018) and policy debates. Rozakou (2017) in a recent paper presents the way different procedures that take place in the Greek islands create a kind of irregular bureaucracy. Casati's (2018) analysis of the everyday and non-institutional contexts that the different encounters of migrants in irregular situation with locals take place in Italy sheds light on the role that the local communities play on the reshaping of the deservingness of asylum seekers. The debate on their role in providing services and coordinating policy, coherence, and proper funding from higher government levels has often pitted security and control against solidarity at the local and national levels, disregarding the emerging economy of reception in local and regional contexts.

This chapter is a first effort to fill this gap by focusing on the emerging local/regional economies of reception, underlining that while putting pressure on scarce regional resources, the reception of newly-arrived migrants through irregular means in Italy and Greece comes together with the development of a whole reception infrastructure (centres and camps of different types) and a whole set of occupations and professions (such as certified social worker in the field of migration) that increase or transform the economic activity and particularly employment for both locals and settled migrants. While a full analysis of the issue and of the economic impact of the reception infrastructure on a given region or city goes beyond the scope of this chapter, here we have identified the main components of reception economies. These include a reception infrastructure, notably the emergence of centres and camps for reception and first accommodation of the new arrivals in local societies; and a socio-professional infrastructure, notably the emergence of new professions, new economic activities and even new education and training modules for the reception workers. We have documented the emergence of a range of new services and professions that respond to the funding and cater for the needs of the newcomers, thus creating a whole local ecosystem. Furthermore, the economy of reception includes the insertion of beneficiaries into local labour markets, sometimes at the expense of low-skilled local inhabitants and for the benefit of local employers, particularly in agriculture.

While this chapter does not offer a quantitative assessment of the impact of these reception economies on the economic situation of specific provinces or regions, it points to important developments and avenues for further research with a view to

providing a comprehensive and critical understanding of the systems that developed in response to the recent and protracted irregular arrivals of refugees and other migrants in southern Europe.

It would not be an exaggeration to argue that the 'migration crisis' of the last few years has led to the emergence of a whole *reception industry*. It is our contention that this emerging economy of reception is turning into a strategy for survival and development in certain peripheric areas of Europe, and of Italy and Greece in particular.

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Chapter 10
Cities Breaking the Mould? Municipal Inclusion of Irregular Migrants in Europe

Sarah Spencer

10.1 Introduction

Throughout this book we are exploring the conceptual challenges posed by the presence of irregular migrants in Europe and evolving policy responses from the international to the local level. This chapter focuses on municipal responses to irregular migrants and in particular the significance of inclusive responses to restrictive national welfare provisions. The chapter questions whether inclusive responses run counter to national immigration control objectives or whether they may, counter-intuitively, contribute to them. It further considers the implications of local responses for national social and economic policy goals.

Management of irregular migration regularly includes legal restrictions on access to welfare services as a means to deter irregular arrival and stay. While there is a variable geography of permitted access and restrictions, the norm is one of exclusion. Thus irregular migrants are regularly denied access by law from services such as shelter, primary and secondary health care, pre- and post-school education and welfare support (FRA 2011; Spencer and Hughes 2015b; Delvino 2017).

At the local level, while some cities and smaller municipalities are notably resistant to any further inclusion of these residents within welfare provision (Ambrosini 2018), others have responded with provision of a wider range of services than national policy requires or in some cases allows. As sub-state tiers of government have pushed the boundaries and insisted on the right to provide the services they consider necessary, there have been tensions with national governments—a collision course that has led to litigation in a number of countries and the near fall of the Dutch coalition government in 2015 (Spencer 2018; Oomen and Baumgärtel 2018).

Some of Europe's larger cities are now seeking recognition for the front-line role they play in managing the presence of irregular migrants and a voice at the policy-

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making table, using their umbrella bodies to voice that demand. That call has been heard and has secured some international recognition. That support may however not be welcome to those national governments in dispute with sub-state tiers on the extent to which they are inclusive of irregular migrants; migrants who are the potential subjects of enforcement action and removal. Yet there is some evidence that suggests that, far from running counter to national immigration control objectives, local provision to irregular migrants can contribute to them. This chapter explores that apparent contradiction. It asks whether we are indeed witnessing fragmented policy outcomes in the divergence between national and local approaches on welfare provision to this section of the migrant population (Burchianti 2016) or whether these apparently divergent approaches are in fact more coherent than the tensions between them suggest.

10.2 Context for Municipal Service Provision to Irregular Migrants

While the most recent, officially accepted, estimate of the number of migrants with irregular status may be considered low, up to just 0.8% of the population of the then-EU27 (Clandestino 2009; European Commission 2010) migrants are concentrated in urban areas and those with irregular status are no exception (Gebhardt 2010; GLA Economics 2009), not least because it is easier to avoid detection and to earn a living in large cities with significant informal economies (Genç 2018: 2). The Clandestino estimate is from a decade ago and precedes recent arrivals from the 'refugee crisis.' With more than one million people expected to be told to leave once their asylum claim has been processed, but an overall return rate in the EU of less than 50%, many who are refused permission to stay will nevertheless remain (European Commission 2017; EMN 2016). The impact on and policy response from the cities and smaller municipalities in which they live, and the significance of those responses for migration control objectives, are thus important research and policy questions.

National governments have primary responsibility for immigration control, determining policy and taking the lead on implementation while delegating certain tasks to regional and local authorities. National governments also lead on economic and social policies, setting objectives and legal frameworks for access to services, but here regional and local authorities have greater delegated powers and direct responsibility for service delivery. There is thus an overlapping responsibility for policy fields ranging from economic development and public health to social cohesion, education, policing, shelter and social care that impact upon, and are impacted by, the migrant population. Thus, while national governments have lead responsibility for policies on irregular *migration*, there is a shared responsibility with sub-state tiers for policies on irregular *migrants*, albeit one in which there is a clear hierarchy in the governance structure.

Municipalities across Europe have differing mandates, ranging from cities that are also federal states, such as Berlin and Vienna, to small authorities with a more limited remit (CEMR 2011). Cities also enjoy differing levels of autonomy from national governments (European Commission 2015a) so that their scope for policy responses that differ from national approaches vary. Cities in north-west Europe have been found to be subject to firmer policy compliance on migration matters than those in southern Europe where cities have greater scope for policy divergence (Penninx et al. 2014).

10.3 Municipal Provision

A shift in the balance of responsibility on migration-related issues in recent years to sub-state tiers, and of the economic and social policies impacted by migration, has widened the scope for policy divergence at the local level. Neoliberalism has decentred the state. The resulting scope for action at sub-state level has led in some areas to nativist responses that reinforce or can exceed the level of exclusion intended by national policymakers (Guiraudon and Lahav 2000; Varsanyi 2011; Ambrosini 2018). In relation to irregular migrants in particular, municipalities may adopt a 'security frame' in which their priority is restrictive measures and reassuring their public that these are in place (Caponio 2014: 5). Inclusion may nevertheless be fostered by intermediaries including civil society organisations, co-ethnics, and municipal street bureaucrats, but here the latter are exercising their discretion in ways that run counter to the official policy of the local authority for which they work (Van der Leun 2006.; Ambrosini 2018).

Scholars have also documented the ways in which a level of municipal autonomy has facilitated an inclusive 'local turn' in policies towards migrants (Caponio and Borkert 2010), municipalities taking advantage of the devolution of responsibilities to overcome some of the constraints in national policy measures. They have become increasingly entrepreneurial in developing their own distinct approaches, moving away from historically-rooted national integration models. As a consequence, local policies can diverge not only from national policy but from that of other municipalities within the same country (Scholten and Penninx 2016; De Graauw and Vermeulen 2016).

In relation to irregular migrants, municipalities are confronted daily with the consequences of irregular status when individuals cannot access the ordinary services of everyday life. They face the challenge of managing the individual, social and economic impacts of migrants' exclusion from work and welfare provisions—exclusion affecting not only the individuals concerned but the wellbeing of other local residents (Wilmes 2011; Spencer and Delvino 2019). As a result, there are municipalities that adopt an inclusive approach towards irregular migrants or do so in relation to one or more services.

Inclusive provision can still be overtly in line with national policy, for instance where education law requires schooling to be inclusive of all children of school age,

or the law permits the issuing of birth certificates regardless of status. However, municipalities also provide services or civic documentation that go beyond what national policy requires, stretching the limits of local authorities' competences (Genç 2018: 10; Spencer 2018). Services variously provided to irregular migrants include accommodation, food banks, healthcare, legal advice and representation, preschool and school education, apprenticeships, language tuition and skills training, outreach services to street prostitutes, safe reporting of crime for victims and witnesses, subsistence support, and assistance in return to the migrant's country of origin. Services are provided by the authority itself or through collaboration with other public and non-profit organisations that become partners in policy making and implementation in this field (Burchianti 2016; Delvino 2017).

10.3.1 Tensions in Multi-level Governance

Inclusive local responses, driven by local factors to address municipal policy objectives (Scholten 2013) in the case of irregular migrants have largely been considered by scholars to run counter to national immigration and welfare policies. Their inclusive intent contrasts with the restrictive and exclusive policies favoured at the national level and "constitute a serious challenge to the established centralist approach to irregular migration management" (Genç 2018: 10).

That interpretation is supported by the tensions that have arisen in the multi-level governance of this issue. As municipal policy responses towards irregular migrants have diverged from national legal and policy frameworks, national governments have (as in relation to municipal integration policies for legal migrants, Scholten 2013: 234), attempted to limit local policy choices but faced claims from local tiers for autonomy to address the issue in the way they deem necessary (Spencer 2018). The resulting tensions have led to political disputes, to instances of non-compliance by the lower tier, and at times to litigation in the courts. Dutch cities, for instance, successfully challenged the exclusion of young people from apprenticeships in 2012 (winning the argument that apprenticeships are 'education' not 'work') and in the courts resisted the government's opposition to their 'Bed, Bath and Bread' provision—a litigious dispute that has only recently been resolved (Spencer 2018; Rosenberger and Koppes 2018). Similar conflicts have been seen at the regional level. Some German Länder refused to provide the Federal immigration authorities with data on pupils with irregular status, contributing to the pressure for that requirement to be withdrawn (Laubenthal 2011). When Italian regions used their legislative powers to extend irregular migrants' entitlements to healthcare, they were challenged by the national government but their right to do so was supported by the Constitutional Court (Delvino and Spencer 2014).

This conflict, where one part of the state is in open dispute with another, is an instance of 'de-coupling' in multi-level governance in the migration field. De-coupling occurs where there is a level of shared responsibility for an issue but a lack of shared framing of the problem (Schön and Rein 1994) and hence of proposed

solutions if there are no effective means through which differences can be resolved (Scholten 2013). Such tensions come at a cost to municipalities and there is evidence that some seek to avoid conflict by choosing a means of low-visibility provision; whether by funding NGOs to provide a service at arm's length, avoiding asking service users for evidence of immigration status, bending rules that require them to report service users to the immigration authorities, or having no paper trail relating to the beneficiaries of the service (Wilmes 2011: 128; Spencer 2018).

Those tensions, and the steps some authorities take to avoid them, suggest that the local authorities and governments concerned do themselves consider that the inclusion of irregular migrants in these services at the local level runs counter to national policy objectives. Yet there is reason to think that may not, or not always, be the case. In the next section I draw on relevant areas of the migration literature to consider whether, despite policy divergence, municipal responses may nevertheless contribute at least in part to national policy goals.

10.4 Limits of Enforcement

It is first of all helpful to recognise that irregular migration and the local presence of migrants with irregular status is a structural phenomenon not a temporary problem that can be addressed through enforcement alone. Rather, it is temporarily "'repaired' by state organisations oscillating between means of repression, silent toleration and resigned acceptance" (Bommes and Sciortino 2011: 17). Demographic pressures, global economic disparities, segmented and informal labour markets, sectoral demand for cheap labour and geo-political conflicts are among the causes of irregular migration and of legal migrants choosing to remain without authorisation (Koser 2010). Scholars have exposed the contradictions in enforcement policies that criminalise irregular migrants while tolerating exploitative labour market policies (as in London); and suggested that this need for workers is effectively acknowledged in the tolerance by national governments of their presence (Chauvin and Garcés-Mascareñas 2014; Ambrosini 2018: 19).

Thus, while enforcement is regularly considered a priority at the national level and identified in comparative research as an area of national policy convergence, it is not notably effective, leading to pressure for ever more restrictive policies (Koser 2010; Hollifield et al. 2014: 4). Many factors are cited as contributing to the widening gap between enforcement goals and outcomes in industrialised receiving states including employer demand for workers regardless of legal status; the huge costs of implementing more effective policies; a lack of cooperation by sending and transit countries, and liberal domestic human rights norms that constrain the extent to which punitive measures can be used (Guiraudon and Lahav 2000; Hollifield et al. 2014: 4; EMN 2016; Andersson 2016; Ambrosini 2018: 35). Enforcement measures can also prove counterproductive, leading irregular migrants to shift from formal to informal work, from legitimate to criminal behaviour, and from being identifiable to unidentifiable (Engberson and Broeders 2011). The consequence is the continuing

presence of irregular migrants in Europe and their residence within local communities. As Genç argues, "The persistence of irregular migration shows that despite all the efforts at national, international and regional levels, this type of human mobility cannot be managed as previously conceived by national governments. It demands efforts that transcend mere 'control' and 'prevention'" (2018: 1).

10.5 Competing Policy Imperatives

Governments have responded to the enforcement gap by using restrictions on welfare provision to enhance immigration control, aiming to remove any incentive to migrate without authorisation or to remain once a temporary right to stay has expired (Bommes and Geddes 2000). Welfare restrictions, however, have negative consequences that impact on other government commitments such as international human rights standards, and on social and economic policy objectives such as public health and meeting the sectoral need for migrant labour. It is an instance of the competing policy imperatives and contradictory pressures well recognised in the migration literature where pursuit of one policy objective is constrained by the need simultaneously to pursue other goals (Guiraudon 2006; Ruhs 2013: 33).

Negative impacts have to be mitigated by inclusive measures, as in a level of access to essential services provided by national law, so that, as Chauvin and Garcés-Mascareñas write in this volume (Chap. 3), formal exclusion is paradoxically coupled with formal inclusion beyond any informal inclusion by street bureaucrats (see also Chauvin and Garcés-Mascareñas 2012). The resulting, varying geography of national entitlements to healthcare and school education has been mapped across the EU28 (Spencer and Hughes 2015a) and in relation to a wider range of services in earlier work by the EU Fundamental Rights Agency (FRA 2011). Children have been the greatest beneficiary, their perceived lack of responsibility for their immigration status and their level of need ensuring that in many states they are granted more liberal access to essential services while still facing significant levels of exclusion (Spencer 2016a).

Notwithstanding that governments are themselves implementing these mitigating welfare measures, an analysis that they are the outcome of competing policy imperatives suggests that liberalisation of access to welfare services is in tension with, rather than contributing to, immigration control objectives. That tension is indeed evident in debates leading to national policy reforms, as between the UK Home Office and Department of Health in relation to access to HIV treatment, on which the rules were changed on public health grounds to allow access in 2012; and in the debates which led to law reform in Sweden to allow greater access to health care on the grounds, inter alia, that the voluntary clinics that had emerged to treat irregular migrants could not match Swedish standards of healthcare and administration (Social Affairs Department 2011; Spencer 2018).

10.6 Interpreting Inclusion at the Local Level

Scholars have recently interpreted diverging local policies on irregular migrants as similarly reflecting competing policy objectives. Here the tension is played out between the national and sub-state tiers where there are shared policy competencies but the economic, political or cultural interests of the authorities diverge (Hepburn and Zapata-Barrero 2014; Spencer 2016b). Chauvin and Garcés-Mascareñas note in Chap. 3 that tension between national and local levels is particularly evident in relation to healthcare, with local authorities showing greater concern for public health than their national counterparts. In relation to provision of shelter by Dutch municipalities, Oomen & Baumgärtel likewise pose local authorities as in conflict with national policy. Highlighting the municipalities' reliance on judgements of the European Committee of Social Rights as justification for provision of services, the authors frame municipal measures as the realisation of human rights for irregular migrants where those rights have been negated at the national level. A consequence of municipal actors' willingness to take on the role of duty bearer, they write, is that "local authorities invoke responsibilities derived from international human rights law to 'decouple' their policies from those adopted nationally" (2018: 614). Carrera and Parkin similarly see municipalities as active players in delivering human rights for irregular migrants in face of the exclusionary consequences of security-oriented national policies (2011: 17).

10.6.1 The Local State

It would be a mistake, however, to see local authorities as anything other than a part of the state, notwithstanding the semi-autonomous way in which they may appear to act. As a matter of international law, the state is a single entity regardless of its internal governance divisions, bound, for instance, by the state's international human rights obligations regardless of the degree of autonomy they may have (UNHRC 2015: 17).

Whereas the state is often perceived as responding to a pluralist collection of competing external and internal interests, in which the policies that emerge reflect the most powerful among them, Lahav argued in the context of immigration control that we should rather understand the state as 'neo-corporatist', managing different actors instrumentally, reconciling competing interests to achieve its own optimal outcomes (1998). She saw European states addressing the challenge of managing migration by devolving responsibility to a proliferation of new public and private actors (such as airline carriers and NGOs) in order to open up new opportunities for regulation, reinventing forms of state control.

Among those engaged to monitor and implement migration control functions is the local state. Far from representing a loss of control by the national state, incorporating local actors into the management of migration opens up new opportunities for

control, enhancing its capacity and flexibility to manage migration while diminishing the political fallout at the national level for potentially unpopular measures (1998: 689). That trend, she argues, has led to some conflict between tiers and led to more diverse local outcomes that can give the semblance of policy incoherence. As Lahav later wrote with Guiraudon, reporting on a study of developments in Germany, France, and the Netherlands, national governments shift decision-making up to intergovernmental fora, down to local authorities, and out to non-state actors that, having different capacities and subject to fewer constraints, are more likely to achieve its policy goals:

> This multifaceted devolution of migration policy has not resulted in states losing control over migration. Rather, it shows the adaptiveness of agencies within the central state apparatus in charge of migration control and their political allies. By sharing competence, states may have ceded exclusive autonomy yet they have done so to meet national policy goals, regaining sovereignty in another sense: capabilities to rule (Guiraudon and Lahav 2000:164).

Guiraudon and Lahav nevertheless found variation in local responses, from municipalities that followed the spirit of national policies to those resistant to it. A recent study of access to welfare support conditional on cooperation in the return procedure found that delegation of responsibility for implementation across tiers of government had weakened the impact of the policy tool. Moreover, shared responsibility across policy fields with differing views and interpretations of what is required—welfare agencies in particular perceiving their primary role as inclusion—was a further limiting factor (Rosenberger and Koppes 2018: 11).

We thus need not assume that the national state is always successful in controlling the role played by its sub-state tiers. Rather, we saw that there are varying degrees of autonomy accorded to them in states across Europe, and that there is strong evidence of de-coupling where there are open disagreements on the steps that sub-state tiers have taken. Lahav and Guiraudon's analysis does, however, raise the question whether some of the measures that local tiers are taking, while appearing to conflict with national immigration control objectives, are in fact contributing to their regulatory effect. Moreover, going beyond a focus on migration control, it raises the prospect that local actions, if not contributing to the regulation of migration, may nevertheless contribute to national social and economic policy objectives that are being pursued by other parts of the national state.

10.6.2 Contributing to or Undermining National Policy Objectives?

It is also helpful to recall that national policy measures that selectively grant access to services have been shown to serve the dual purpose of helping to manage the presence of migrants and increase rates of return. Morris highlights the way in which the stratification of labour and social rights attached to the ever-expanding range of immigration statuses has brought with it an element of control. The process

of granting and delivery of rights provides a means of monitoring migrants' behaviour in order to assess eligibility, in turn requiring the sharing of information on them between public agencies, most notably by those involved in providing welfare support (2001: 388). Access to housing and social allowances for rejected asylum seekers are in some states made conditional on cooperation in the return procedure so that "Migration control is carried out with the help of conditional access to basic social rights. The tool combines a duty with a right, if a person cooperates with return processes, then he/she may be granted stay and welfare support" (Rosenberger and Koppes 2018: 2). Access to a temporary toleration status, such as Duldung in Germany, can bring with it a requirement to remain within a defined territorial area. In these cases, we can say that providing a level of access to welfare support is not in tension with immigration control objectives but is contributing to them.

In relation to shelter and support for irregular migrants in the Netherlands, Leerkes finds parallels with the historical social control function of poor relief. Just as poor relief served to mitigate the external effects of poverty such as threats to public health and public safety arising from the proximity of the poor to other residents, so the semi-inclusion of irregular migrants mitigates the effects of their exclusion and facilitates removal. In the Dutch case, poor relief for irregular migrants was initiated by civil society and municipalities and only later conjoined, under pressure, by the national government. While the latter nevertheless fears that inclusion may reduce migrants' incentive to cooperate with immigration control, Leerkes argues that this poor relief is nevertheless an element of it, facilitating locating potential deportees and thus their removal while also functioning to keep those who are not deportable off the streets and out of sight (2016: 148).

Provision of basic accommodation and subsistence operates alongside detention of those considered to pose an actual risk of anti-social behaviour. "Apparently", Leerkes argues, "providing accommodation and elementary allowances without full incapacitation is only considered a sufficient solution to control the perceived negative external effects of poverty among the 'docile' poor, that is, when there are only potential public health issues and minor types of nuisance". Allocation to accommodation or detention also depends on the extent to which individuals create a credible impression that they are prepared to 'work on return'. Those who do not are likely to find themselves excluded from the more inclusionary arrangements (Leerkes 2016: 147).

If nationally approved welfare measures are contributing to immigration control, we might equally expect to find that relationship where inclusive local measures are implementing national laws. In the UK, local authorities that have a statutory duty to support destitute migrant families excluded from mainstream welfare benefits are indeed required by law to pass on the details of the families to the national immigration service, thus facilitating resolution of their immigration status and, if no right to remain, their removal (Price and Spencer 2015: 23).

The question then is whether inclusive measures that municipalities adopt on their *own* initiative may also contribute to immigration control. The evidence suggests that this can be the case. Legal advice, for instance, attached to provision of shelter or independently, is regularly offered by municipalities in order to help

irregular migrants resolve their immigration status, either by facilitating regularisation or voluntary return. The City of Utrecht claims a success rate of over 90% (some 900 people over ten years) for its 'problem-solving' approach to resolving immigration status; provision of shelter offering a means of access to the migrants and a sufficient basis for trust to provide advice and representation with the national authorities and, if status is not resolved, to facilitate voluntary return.

The City of Munich extends small grants to facilitate voluntary return, while Ghent provides advice on regularisation and return alongside information on other services, ensuring confidentiality so that individuals can seek advice without automatic referral to the immigration authorities. Shelter is provided in a reception centre to those who agree to cooperate in their return. Barcelona funds 55 non-profit 'social entities' to provide free legal support on how to obtain a regular status or renewal of expiring residence permits and to make representations on the migrants' behalf. The whole thrust of Barcelona's published strategy on irregular migrants is to promote regularisation and prevent lapsing into irregularity (Adjuntament de Barcelona 2017; CMISE 2019).

Municipalities do not *frame* their reasoning here as contributing to immigration control. Rather, it is to reduce the size of the irregular migrant population in the city and the challenge their exclusion presents. However, reducing irregularity through regularisation or voluntary return clearly contributes to control; as does the requirement adopted by some municipalities that provision of shelter is conditional on compliance with return procedures. The European Commission advocates increasing voluntary return as its first priority to improve the effectiveness of the EU return system.[1] It is more cost-effective than supervised departures and the share of voluntary returns in the EU has increased from just 14% of the total returns in 2009 to around 40% in 2013 (European Commission 2015b).

10.7 Social and Economic Objectives

Beyond measures related to resolving immigration status, municipalities cite economic and social policy reasons for inclusive service provision, ranging from crime prevention and public health to maintaining accurate population statistics, child protection, tackling homelessness, and maintaining the image of the city for tourism (Spencer and Delvino 2019). None of those objectives would conflict with national social policy objectives—only the target group to whom they are directed. Even in relation to irregular migrants many governments have not only permitted a level of access to education and health services, as we saw, but contribute directly to service provision: the Austrian government, for instance, co-funds with the City of Vienna

[1] European Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States – Annex Return Handbook, C(2015)6250. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf

the AmberMed clinic for irregular migrants in the city, while the Irish government funds Dublin's Women's Health Project, providing sexual healthcare services to migrants regardless of immigration status. The Italian government requires municipalities to provide outpatient care for irregular migrants; and Italian cities have been challenged by their government for failing to provide a service, as when Milan (in 2007) and later Bologna (in 2010) denied access to pre-school for children whose parents had no residence permit (Delvino and Spencer 2014: 19-21).

Beyond healthcare and education, the Spanish and French governments have made provision for victims of domestic violence to be able to seek help from the police without fear of deportation, and the Dutch government has extended this to victims of all crimes ('Free in, free out')—a decision taken after that approach was piloted in Amsterdam, an instance of a city initiative leading to national policy change. EU law (the Victims Directive of 2012) now explicitly requires that victims should receive confidential support regardless of residence status. Thus any municipalities that make provision for safe reporting are at least acting in line with the EU's legal requirements of its Member States.

The dependence of sectors of national labour markets on irregular migrants is well-documented in the literature, leading to some toleration of their status by national governments and the regular use of employment as a criteria for 'earned' regularisation. Different forms of employment, such as care work, are recognised in regularisation schemes according to their perceived value in the labour market (Chauvin et al. 2013). Hence municipalities such as those in industrial and agricultural regions of Italy that provide shelter and other amenities for irregular migrant labour and have assisted them with applications for regularisation during past amnesties (Delvino 2017: 7) are doing no more than is already evident from time to time in national practices. Ambrosini attributes the informal acceptance between local authorities, employers, and NGOs of the need to provide shelter and services to irregular seasonal workers as not only serving the needs of employers but also the avoidance of social conflict (2018: 19), a further objective shared by policymakers at the national and local levels.

10.8 Explaining National Resistance

The evidence thus suggests that municipal measures conflict less with national immigration, economic and social policy goals than might appear. If the challenge facing immigration control is to find the right balance between effective law enforcement and practical toleration policies that can deal with the ambiguities of modern society (as Engberson and Broeders argue, 2011: 185), we are perhaps seeing that balance emerging in the complementary strategies of the national and local state. Why then do national governments challenge inclusive local policies and deter other municipalities which have the potential to contribute but, as Genç argues, need the green light from their national governments to do so (2018: 11)? Four potential reasons emerge. Each requires further investigation.

First, notwithstanding that the semi-inclusion of irregular migrants is to an extent authorised by national governments and that some municipal measures contribute towards national immigration and social policy objectives, there is a fear that these measures may act as an incentive to migrants to come or remain with irregular status. That concern has not been shown to be well-founded in the instances where it has been examined: in the enquiry that led to law reform in Sweden, for instance, where it was a prerequisite of the government that greater inclusivity should not result in an increase in irregularity (Social Affairs Department 2011). It was similarly refuted in relation to the extension of access to HIV treatment in the UK, where there was concern that it might incentivise 'health tourism' (NAT 2008). Nevertheless, the impact of inclusive measures on the behaviour of migrants with irregular status is a concern on which further empirical evidence is required.

Second, the fact that municipalities are challenged by national governments may reflect the primacy of immigration control objectives over social and employment policies, and of Interior Ministries over less powerful employment and social policy departments. The latter are able on occasion to trump the primacy of immigration control to secure inclusion of irregular migrants within welfare provision, not least into health care, but more often do not attempt to do so or succeed.

Third, the primacy which is here given to governmentality by municipalities—the need to regulate the local population in its entirety through inclusion (an argument well developed by Chauvin and Garcés-Mascareñas in Chap. 3)—may nevertheless for national governments be a lower priority than that of immigration control because of the high political salience of that issue at the national level. A significant irregular foreign population can be seen by policymakers and the public alike as not only an operational failure but a "challenge to state sovereignty, a proof of inadequate governance and an indicator of institutional crisis' that cannot be ignored" (Bommes and Sciortino 2011: 12).

Finally, there is a further possibility that government challenge to municipalities is more symbolic than substantive; that, despite a lack of actual challenge by municipalities to the achievement of immigration control objectives, governments want to signal that they are taking action to thwart their inclusive intent. Slaven and Boswell (2018) identify three theoretical accounts in the literature of symbolic policymaking: *manipulation*, to mobilise public support through compelling narratives; *compensation,* to divert attention from the gap between public preferences for restriction and more liberal policies, in contrast to manipulation which draws attention to it; and *adaptation*, addressing the discrepancy between what is operationally feasible and political narratives. Their analysis of UK policymaking on irregular entry leads them to conclude that adaptation may be a more important driver of symbolic policymaking than past scholarship has recognised. Further evidence is needed on the rationale for challenging municipal practices in order to establish which of these drivers of symbolic policymaking may apply in this case.

10.9 Cities Seeking Recognition

An analysis that inclusion at the local level can contribute to national policy objectives may not be unhelpful to cities in their claim for recognition of their frontline role. National governments continue to be the principal actors in relation to the management of migration. Local authorities are increasingly involved as they respond to the presence of migrants in their territory but have thus far been left out of the framing and negotiation of policy development. That exclusion has, the International Organisation on Migration argues, contributed to local policy divergence on irregular migrants, with 'sanctuary' cities in the US going as far as to refuse to cooperate with some federal requirements in law enforcement (IOM 2018: 230).

Those European municipalities willing to challenge national governments have not been shy in making clear their assessment that provision of a service is necessary. In that visibility, Barcelona has perhaps been most bold, publishing its 33-page budgeted action plan (Adjuntament de Barcelona 2017). A polarity has thus emerged between the minority of cities that feel able to discuss publicly the provision they are making and those that only feel able to make provision in a less visible way. There are signs, nevertheless, that cities are gaining confidence in seeking recognition at an international level of the challenges they face. The Mayoral Forum on Mobility, Migration and Development, for instance, declaring that opening municipal services to irregular migrants is a humanitarian priority and fundamental for social cohesion, has called on international organisations and national governments to give them greater support and for legislation to be "more realistic" in minimizing the generation of exclusion.[2] Such calls have been heard, and the need for local authorities to foster a level of inclusion is now acknowledged at the international level. The UN Secretary General has argued that both national and sub-national authorities need to consider pragmatic and rights-based options for managing irregular migrants including facilitating access to health, education, housing and other services—an approach, he insists, that is grounded in sound public policy and fosters social inclusion and the rule of law.[3] The subsequent UN Global Compact on Migration (2017) secured agreement that there should be access to basic services regardless of immigration status and that service providers' cooperation with immigration authorities should not exacerbate the vulnerabilities of irregular migrants by compromising their safe access to them.[4]

The role of municipalities in relation to the inclusion of irregular migrants is thus now firmly on the agenda at the international level. At the national level, recognition

[2] See: https://www.uclg.org/en/media/news/barcelona-declaration-highlights-important-role-local-governments-international-migration

[3] UN Secretary General 'Making Migration Work for All'. 12 December 2017. Paras 39–41. http://refugeesmigrants.un.org/sites/default/files/sg_report_en.pdf

[4] Global Compact for Safe, Orderly and Regular Migration. Final draft 11 July 2018. Para 31. https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf

that municipal measures can contribute to national immigration control and to national economic and social policy objectives could provide a more conducive context for pursuit of those discussions than assumptions that inclusive municipal policies are necessarily undermining what national governments are trying to achieve.

10.10 Conclusion

In this chapter I have considered the implications of municipal responses to irregular migrants living in their area. I questioned whether, as the tensions in multi-level governance on this issue suggest, inclusive responses undermine national immigration control objectives or whether they may at least in part contribute to them and to wider national policy goals.

While municipalities across Europe have differing mandates and levels of autonomy, their fulfilment of their responsibilities can be affected by the exclusion that irregular migrants experience from lawful access to the labour market, welfare support and services. Some respond with provision of access to advice, services, and documentation, diverging from the spirit and in some cases the letter of national law. That in turn can lead to tensions between national and local tiers, a de-coupling in multi-level governance that has contributed to analyses that diverging local responses conflict with the intentions of national governments to deter and exclude irregular migrants through welfare restrictions.

National and municipal responses can only be understood within a broader understanding of the nature of irregular migration as a structural phenomenon in advanced industrial societies, limiting the efficacy of enforcement measures that are designed to deter, detect and remove. The consequence is the continuing presence of irregular migrant residents with which municipalities, and less directly national governments, have to contend. Each find it necessary to address the negative consequences of welfare restrictions, through modest exceptions to national restrictions and through municipal service provision: competing policy imperatives ensuring that formal exclusion is simultaneously accompanied by a level of formal inclusion, particularly at the local level. In relation to municipalities the tensions that have arisen between national and local tiers have tended to suggest that inclusive measures run counter, rather than contribute, to immigration control. Yet Guiraudon and Lahav's analysis of the state's evolving capacity to use non-state and local state actors to manage migration, shifting the institutional locations of policymaking to achieve its own outcomes, raises the question whether this is in fact what we are witnessing in municipal activism on irregular migrants: not a loss of national control to the local state but a reinvention of it at the local level.

National welfare measures have already been shown by scholars to contribute in some respects to migration control, helping to monitor the location of irregular migrants and to regulate their behaviour in relation to compliance with return procedures. The question was then whether inclusive municipal measures that are taken

outwith and in apparent contradiction of national policy may also make that contribution. The evidence cited shows that they may indeed do so, facilitating the regularisation of immigration status, voluntary return and compliance with national return procedures. Beyond immigration control objectives we saw that municipal policymakers cite a range of economic and social policy objectives as justification for the services they provide, none of which would conflict with national policy goals, only the target group to whom they are directed.

I concluded by asking why, in that case, national governments regularly challenge inclusive local policies and suggested four possible reasons: that there is a fear that, notwithstanding their contribution to national policy aims, municipal measures may encourage irregular migrants to come or to remain; the primacy of immigration control objectives over labour market and social policies, and of Interior Ministries over less powerful employment and social policy departments; that the primacy given to governmentality by municipalities—the need to monitor and regulate the local population in its entirety—is for national governments a lower priority than immigration control because of the political salience of that issue for the electorate; and finally that government challenge to municipalities is more symbolic than substantive—national governments want to be *seen* to be giving primacy to immigration control while less publicly acknowledging the need for a level of inclusion.

This analysis as ever raises more questions to be answered. Is there any justification for the fear that migrants with irregular status are attracted by the minimal level of welfare provision available to them in those localities where municipalities are inclusive, or that they are more likely to resist return? To what extent does provision of legal advice and representation, and assistance in voluntary return, contribute to migration management and control objectives? Are the instances where national governments challenge municipal policies merely symbolic or substantive attempts to change their approach?

A more fundamental question will then remain to be answered. If national and local tiers were to agree on the need to deliver a level of services to people whose immigration status is irregular, the question arises how far they should go. If these individuals are not to enjoy the same level of access to welfare services as other migrants or indeed citizens, what level of inclusion is appropriate, and on what grounds should that decision be made? As the legal scholar Linda Bosniak asked in her seminal text, *The Citizen and the Alien* (2006): when is it legitimate to restrict the rights of individuals as part of immigration control and when should the equality principle prevail (Pobjoy and Spencer 2012)?

In the answer to that question the proportionality principle will be key: a need to take account not only of the rights of irregular migrants (itself a grey area, as O'Cinneide argues in Chap. 4) but also of the impact of inclusive measures on a legitimate policy aim, migration control.[5] Thus, understanding the impact of

[5] The Global Compact on Migration (Para 31) indeed makes this point, signatories committed to ensuring in relation to service provision: "that any differential treatment must be based on law, proportionate, pursue a legitimate aim, in accordance with international human rights law." https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf

municipal measures on national policy objectives will be fundamental to resolving what the extent of irregular migrants' access to services should be.

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Chapter 11
Evolving Conceptual and Policy Challenges

Sarah Spencer and Anna Triandafyllidou

In this book we set out to explore the conceptual challenges posed by the presence of migrants with irregular immigration status in Europe and the evolving policy responses. In contrast to many earlier texts, our focus has been on irregular migrants living in Europe, not crossing its borders; and viewed not as a temporary crisis but as a continuing, structural feature of European societies. The drivers, forms, and consequences of irregular migration are nevertheless in transition and a key theme throughout has been that of change. Conceptual tools are needed to explain the complex social realities of this section of the migrant population; coupled with a need to unravel the legal and policy responses at the European, national and municipal levels: their drivers, multiple actors and potential future course.

Such a task required a multi-disciplinary approach to enable us to range across economic, legal, political, sociological, philosophical and ethical questions. Our authors, some of whom participated in the Oxford symposium from which the idea for this book was born,[1] have brought together evidence from different parts of Europe and sectors of its economies and communities to highlight recent trends. From their analyses, key themes emerge.

[1] 'Strategic Approaches to Migrants with Irregular Status in Europe', Autumn Academy 2017 held at St. Hugh's College Oxford from 18–22 September 2017. https://www.compas.ox.ac.uk/event/autumn-academy-2017-strategic-approaches-on-irregular-migrants-in-europe/

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11.1 A Structural Phenomenon – In Flux

First, while it is clear that irregular migration is a structural feature of contemporary Western societies, we see that the drivers and characteristics of that phenomenon are in flux. The structural determinants in sending and receiving states remain broadly those of economic and demographic pressures—the demand for low-wage workers and the willingness of migrants with irregular status, through lack of alternatives, to provide it. Together, conditions in receiving and source states create a powerful pull/push mechanism that defies border and internal controls. We see, in the contributions from Triandafyllidou and Bartolini (Chap. 2), that the forms of irregularity that emerge are nevertheless shaped by current economic conditions and contemporary labour market reforms. The fragile economic recovery in many European countries in the wake of the economic crisis of a decade ago, coupled with labour market reforms designed to reduce costs and increase flexibility, have created spaces which attract and retain those whose irregular status makes them willing to tolerate precarious conditions. Restrictive policies that limit legal channels for labour migration and family reunion and prioritise temporary migration exacerbate that dynamic. Hence labour market reforms and enforcement of employment legislation will be more effective in addressing irregular migrant employment than migration controls.

Taking their analysis forward through a deep dive into the intersection between irregular employment and irregular migration in domestic and care work, agriculture and construction, Triandafyllidou and Bartolini (Chap. 8) expose the close, interactive relationship between demand for labour in those sectors, restrictive labour migration policies, and irregular work. The differing labour market dynamics in each country, modes of regulation and of funding in public sector jobs, coupled with degrees of social acceptance of economic informality, shape the patterns of irregular work across sectors and the gender balance of that workforce. There is a continuum of irregular work that, while undeclared and insecure, is widely accepted by the public. The overall impact of irregular migrant employment remains unclear as regards competition with natives and driving down wages, but what is clear is that there is no single national interest in this area: rather, a pattern of beneficiaries (including employers, but sometimes also fellow native workers who may see their jobs re-classified, leaving those with lower pay and worse conditions to the irregular migrants) and those who lose out.

Alongside structural labour market conditions, conflicts and crises in the Middle East and North Africa have also been drivers of recent arrivals and, where asylum is not sought or is refused, a source of irregular stay. The top nationalities of migrants detected as ‘illegally’ present and of those who lodged an asylum application in the EU are almost the same, so that policy shifts on handling claims, rejection rates, and enforcement are also part of the changing dynamic that as migration scholars we need to understand. There is a clear risk today of an increasing population in limbo, whose status is in process but whose rights, particularly regarding employment, are unclear. Thus delays or reluctance to accept claims for international protection or

both may inadvertently provide exploitable and vulnerable migrant labour to unscrupulous employers.

Just as labour market conditions help to shape the irregular migrant population, we see how that population can in turn shape local labour markets. The scale of arrivals from across the Mediterranean has led to the emergence of a new economy of migrant and asylum seeker reception in the post-2015 period in peripheral border areas of Italy and Greece. That development is so significant, Bartolini, Mantanika and Triandafyllidou (Chap. 9) argue, that it provides an opportunity and even a strategy for survival in some border regions. In a southern European context of relatively high unemployment and economic austerity, the management of the 'migration crisis' had put additional strain on stretched public finances. EU funding for reception has then been a key factor in the arrivals being a catalyst for the creation of a new set of economic activities: of occupations, services, specialist training and migration-related branches of professions. We have, in effect, seen the emergence of a new *reception industry* which, with increased spending by those providing services, has enhanced the employment of both locals and settled migrants. Funds have in some cases been steered by policymakers towards depressed and depopulated areas. Municipal staff laid off in the economic downturn have found reemployment while IGOs and NGOs have expanded their remit and activities. Refugees have themselves changed the character of the local labour market, a 'refugeeization' of the migrant workforce, finding work within and outside of the reception system to the potential disadvantage of low-skilled local residents.

11.2 Irregularity – Fluid in Forms and Implications

While a structural feature, irregularity is thus fluid in its forms and implications. Irregularity itself has long been recognised by scholars as a multi-faceted status: not a false binary of legal-illegal, regular-irregular, but shades of grey: degrees and types of irregularity and semi- regularity, including 'befallen' regularity, where the rules are, for the migrants, impossible to fulfil or create conditions in which periods of regularity lapse intermittently into irregularity (Triandafyllidou 2010, 2013). Irregularity is thus not only multi-faceted but, for each individual, fluid; a status that can evolve between differing forms and between periods of regularity and irregularity. The paths to, and patterns of, irregularity have moreover increasingly diversified over time; as have the barriers to return and its sustainability. Thus, there are multiple possible intersections of work status, citizenship, and residence status. The evolving diversity of the population with irregular status compounds the difficulty of appropriate terminology (hence our choice simply of 'irregular'), and of collecting meaningful data—challenges which migration scholars face in particular in this field.

Governments may see irregular migrants as targets of enforcement action, but they are also people and like others are active to varying degrees in society: as parents, workers, patients, students, and contributors to community life. Some, as

Chimienti and Solomos (Chap. 6) discuss, are political actors. Irregular migrants thus develop reciprocal relationships and identities unrelated to their immigration status which bind them to their locality and others to them. Here enforcement comes up against social reality. Irregular migrants cannot be the subject of enforcement action alone; rather, they pose multiple moral and practical challenges to which a range of political and policy responses are required. Migration policies fail not only because they do not address the root causes of migration, the structural conditions in which it persists, but also because of the complex social reality of migrants' lives and relationships after they have arrived (Castles 2004). Policy responses—whether at EU, national or sub-state levels—can only be understood within an understanding or irregular migration, pre- and post-arrival, as a structural phenomenon, limiting the efficacy of enforcement measures designed to deter, detect, and remove.

11.3 New Forms of Multi-polar, Multi-level Governance

As a result, we have seen the emergence of new forms of governance engaging not only multiple state and non-state actors but new forms of multi-level governance as the remits of EU, national, and local authorities overlap in key policy areas. Neoliberalism has de-centred the state, devolving greater responsibility for economic and social policy agendas to private actors and sub-state tiers. While national governments have led responsibility for policies on *irregular migration*, there is a level of shared responsibility with sub-state tiers for policies impacted on and by *irregular migrants*, albeit one in which there is a clear hierarchy in the governance structure. Policy actors with apparently diverging agendas, within and between tiers of governance, compete for authority and legitimacy to secure policy reforms that reflect their enforcement or inclusion goals.

Tensions between competing policy imperatives have been well-explored in the literature in relation to national policy agendas on regular migrants but, as Chauvin and Garcés-Mascareñas (Chap. 3) argue, those tensions are less well understood in relation to irregular migration; and, in that context, between the national and local state. Yet, as Spencer (Chap. 10) writes, it is increasingly important to understand why municipal agendas on irregular migrants often diverge from those of national governments and, on occasion, drive national agendas from below.

Across Europe, municipalities enjoy differing levels of autonomy from national governments and have differing scope for policy responses that diverge. While some are no more inclusive than their national counterparts, others, facing the consequences of irregular migrants' exclusion from authorised work and welfare support, adopt a more inclusive approach that stretches the boundaries of their legal competence. Recent analyses of the political and legal conflicts that have emerged see the local state pitched against the national state, their actions deemed to run counter to national immigration and welfare policies (Genç 2018; Spencer 2018). The political tensions and litigation that have resulted, coupled with non-compliance and low-

visibility measures by municipalities—a 'de-coupling' in multi-level governance on this issue—supports that interpretation.

Yet, it would be simplistic—as Chauvin and Garcés-Mascareñas argue—to suggest that national policies exclude, while local policies include. Just as national policy frameworks on irregular migrants can contain inclusive measures (Spencer and Hughes 2015; Schweitzer 2018), Spencer shows that local state agendas may be less divergent from the dominant, national, exclusion agendas than the tensions between them might imply. Rather, some municipal measures contribute to immigration enforcement, facilitating voluntary return and compliance with national return procedures, while others are in line with shared economic and social policy goals. If, she argues, we recognise municipalities as part of the state and, following Lahav (1998), understand the state as devolving responsibility to public and private actors to *enhance* its capacity for migration control not to relinquish it, we may come closer to understanding the role that municipalities play. What we are witnessing in municipal activism on irregular migrants may not be a loss of national control to the local state but a reinvention of it at the local level.

Irregular migrants themselves, despite their vulnerability and limited resources, are also actors in this field, engaging in activism to secure greater inclusion. Chimienti and Solomos highlight their transnational mobilization to gain access to rights and protection: transnational because of limited opportunities for influence at the local and national levels and because of the transnational character of irregularity and the exclusion they seek to overcome. Mobilisation—local, national and transnational—is a response when their semi-inclusion is challenged and repressed. Here we can see another dimension of the multi-faceted state of irregularity: a continuum of 'weak agency' for survival, in local and national mobilisations, that is existential in seeking self-preservation and solidarity and not system change, through to transnational mobilisations that do seek broader transformative demands, exploiting modern technologies of communication and a new repertoire of actions. The outcomes can be symbolic, providing hope, and concrete in galvanising local movements and securing limited policy outcomes. Perhaps most significantly, transnational mobilisation highlights the need for a global approach to migration that engages sending and destination countries and migrants themselves.

11.4 Symbolic Responses

Spencer asks why, if inclusive local measures do at least in part contribute to national agendas, national governments are forceful in repudiating them; and municipalities, through low visibility provision of services, show their concern to avoid that response. Among the potential explanations she posits is that negative national responses may in some cases be more symbolic than substantive—intended to persuade the public that action is being taken to thwart inclusive local measures rather than having the actual intension of so doing.

Ataç and Schütze (Chap. 7), drawing on Slaven and Boswell (2018), explore the use and significance of symbolic policy-making in Austrian national policy responses towards non-removed rejected asylum seekers following the 2015 'emergency' when a short-term welcoming approach was replaced by tough enforcement and return measures. While some measures were intended to have substantive effect in addressing the deportation gap, the government faced constraints in the steps it could take including cost-efficiency, legal norms, and opposition from sub-state tiers. Consequently, the authors show the extent to which a series of symbolic policies also emerged, aiming simply to signal to the electorate the government's exclusionary intent. The signal such measures also send is that this section of the population poses a threat. Thus, as the authors remind us, signals also steer, just as steering sends signals. In their analysis they demonstrate the importance in any migration policy analysis of considering the interplay of the symbolic and substantive dimensions of policies and the ways in which they are used strategically to achieve different aims.

11.5 Evolving Balance of Exclusion and Inclusion in Policy Interventions

Notwithstanding measures with only symbolic intent, substantive exclusion measures are the norm. Irregular migrants are regularly excluded from the right to work and to access welfare support, measures intended to deter irregular arrival and stay. Delvino (Chap. 5) recalls the legal, treaty basis of the EU's focus on 'measures to combat illegal immigration' and the marked trend at the national level since the late 1990s to complement border controls with measures to exclude irregular migrants from public services, require service providers to report on their presence, and use criminal law to punish irregular entry and/or stay.

Yet we know that despite this substantive and rhetorical emphasis on enforcement, European governments have also—as a matter of law and policy—been responsible for a process of semi-inclusion of irregular migrants. Delvino sets that countertrend in the context of enforcement failing to eradicate irregularity. The scale of irregular arrivals from the Mediterranean region, and limited effectiveness of return procedures, alone demonstrate that no fortress is impregnable, requiring adaptation to accommodate a resident irregular population. At EU level we see the trend in the welfare safeguards, albeit modest, guaranteed in the Returns Directive (2008); and more recently, safeguards for victims regardless of status in the Victims Directive (2012). The reiteration in the European Pillar of Social Rights (2017), however, that the application of its rights and principles is explicitly restricted to those who are legally resident in the EU is a reminder of the limits to which acceptance of the need for inclusion has reached. The fortress, as Delvino concludes, is not breaking down, merely crumbling at the edges. That is no less true at national level, yet we see a variable geography across the EU of modest entitlements to

healthcare, education and other services, with notable recent instances of extensions of rights, not least for children and other vulnerable groups. There is a clear if modest countertrend towards a more pragmatic recognition of irregular migrants' residence in European societies. The instances of inclusion are not temporary measures but an integral part of the legal and policy frameworks of the EU and its member states.

We can thus say that while policies on *irregular migration* at the EU and national levels are still control-oriented, i.e., seeking to reduce its scale, policies on *irregular migrants* have both exclusive and inclusive dimensions. The law excludes and includes at the same time. Internal controls foster a hostile environment while simultaneously accommodating the reality of a resident population with irregular status. Cases of decriminalisation of irregular stay, 'earned' regularisations, extension of access to services and safe reporting of crime, while limited relative to the thrust of exclusionary measures, buck the trend and require explanation.

11.6 Moral Economy of Irregularity

Understanding this process is one of the most significant conceptual developments in the field, to which Chauvin and Garcés-Mascareñas have made a substantial contribution. The state, they argue, faces contradictory imperatives that require it to choose whether to exclude irregular migrants or to embrace the population in its entirety. They review the analyses of this tension found in the literature and find wanting the familiar argument that the primary driver of inclusion is the benefits of foreign labour to capitalist economies, asking why states then often choose to restrict labour mobility. While it is true that criminalisation of labour enhances scope for exploitation, why then have periodical regularisation programmes? Likewise, they acknowledge the role of human rights norms in restraining government actions, but find the argument weakened by the persistent illiberalness of democracies in other respects, and contradictory to their core claim: that inclusiveness is part of the state's *raison d'être,* not imposed against its will. Capacity and cost limitations can thwart that will but cannot explain resort to inclusive measures.

Chauvin and Garcés-Mascareñas thus look for an alternative explanation for inclusion and, following Foucault, find it in governmentality—in the state's need to ensure the predictability of collective conduct. Ability to govern the population becomes more important than deportation; regulating the population more important than drawing lines between those who belong and those who do not. A moderate loss of sovereign control, they argue, may be a necessary price to pay. Governmentality may, Spencer suggests, be an even greater driver of inclusive measures at the local level where the consequences of exclusion are most keenly felt, whereas national governments also have to contend with the high political salience of immigration control.

Formal inclusion, as a matter of law not an outcome of street bureaucrats' informal discretion or migrants' agency, changes the boundaries of citizenship from

which irregular migrants are no longer entirely excluded. Rather, "illegality" does not function as an absolute marker of illegitimacy, but rather as a handicap within a continuum of probationary citizenship (Chauvin and Garcés-Mascareñas 2012). This analysis forces us to reject binary conceptions of citizens versus non-citizens, legitimate versus illegitimate, deserving versus non-deserving members of society; even national versus local, as inclusion is seen to be an imperative not just for local administrations but for the national state itself. Ironically, the only place where nation-state sovereignty does exhibit as a clear citizenship binary may be in the distinction between citizens and non-citizens abroad; that is, located outside of the nation-state itself.

11.7 Tension Between Universality of Human Rights and the Hierarchy in National Laws

The uncertain boundaries in this moral economy of irregularity, in which we see irregular migrants constructed as more or less illegal, more or less deserving of inclusion, are reflected in the contradiction between the universality of international human rights standards and their limited realisation in practice for those with irregular migration status. While it is the universality of human rights that is the source of their normative power, affirmed in every major international and regional human rights instrument, it is not reflected in the hierarchical approach of national laws where non-citizens are regularly afforded fewer rights than citizens. That hierarchical approach, privileging members of the civic community over outsiders, is generally accepted as a desirable, fixed, and necessary element of a state-centred system of global governance. Thus, O'Cinneide (Chap. 4) shows that the presumed need to preserve national immigration controls trumps the logic of universal rights. Irregular migrants then experience a double layer of exclusion, denied the entitlements enjoyed by citizens but also the lesser privileges accorded to migrants with regular status. They experience a 'bare life' without the shelter of a civic identity, with significant exclusion from essential services, and the constant threat of removal.

For irregular migrants, the comprehensive protection ostensibly provided by universal human rights standards can be limited in their application by governments because the terms of the standards are diluted or insufficiently well developed in relation to this group of residents (as particularly in the case of welfare rights), resulting in the acute vulnerability that human rights law is intended to prevent. Few rights are absolute, and less favourable treatment of irregular migrants by states is not deemed to constitute a breach of their legal obligations if their treatment is objectively justifiable in achieving a legitimate aim (such as immigration control) *and* proportional. Applying that test, the courts have regularly given European governments' considerable leeway in restricting the rights of irregular migrants for whom it is sometimes held they have limited responsibility. Limited rights of access

to the courts translates into limited opportunities by migrants themselves to challenge the proportionality of their exclusion.

Yet O'Cinneide is confident that space remains for the incremental development of human rights standards as they apply to irregular migrants. For governments, success in arguing that restrictive measures are proportional is not guaranteed. Pressure to show that justification can deter their introduction; and recent legal challenges by non-governmental organisations and the inclusive practices of municipalities have begun to open such measures up to legal and political contestation. The invoking of international standards in discourse on national law and policy by state and non-state actors is serving to add social pressure to adhere to standards beyond any compliance achieved through formal mechanisms. As Oomen and Baumgärtel argue (2018) citing international human rights standards and norms in justification, municipal 'legislation from below' has introduced a new frontier in the development of a multi-layered system of rights protection.

11.8 An Evolving Research and Policy Agenda

When Bommes and Sciortino wrote the conclusion to their seminal text on irregular migrants in Europe, *Foggy Structures*, in 2011, they emphasised some of the themes highlighted in this book. It is instructive to see what has also changed in the intervening years. They drew out the significance of irregular migration as a structural, endemic feature of contemporary societies; the nature of irregularity as a multi-layered status that does not define individuals but their relationship with the state; and the social conditions and informal relationships that enable irregular migrants to survive. Prior research, they argued, had more often focused on illegal border crossing than on the social structures in the receiving country that enable the irregular migrants to maintain a camouflaged existence and sustain the continuity of new arrivals: 'foggy' social structures which form the connection between irregular migrants and the broader processes of informality that exist within any social fabric. Their book, they argued, had shed light on the processes that nurture places and sequences of social interaction in which irregular migrants may participate as an alternative to and protected from the system of institutional identities (2011: 225).

That emphasis in *Foggy Structures* on informality, on inclusion as a process that takes place despite not because of the state, highlights how recently we have come to see the juxtaposition of formal exclusion and *formal* inclusion, complementing the *informal* inclusion processes which that book explained so well. It is more apparent now that inclusive measures are not only the outcome of informal deviation from the rules but can intentionally be allowed *by* the rules, a process in which municipal activism has in recent years become more visible but to which national governments also contribute. In the years since 2011 we have also learnt more about the ways in which the structural conditions that foster irregularity are shaped by changing economic conditions and labour market reforms; seen incipient mobilisations of irregular migrants challenging their exclusion; the birth of a reception

industry in southern Europe; de-coupling in multi-level governance on this issue; and the incremental development of human rights standards for this vulnerable section of Europe's population.

There is much that remains to be understood. Many of the chapters in the book identify questions for a future research agenda, from the need for more empirical evidence on the relationship between irregular migration and irregular working in sectors of Europe's labour markets (and the relevance within that of factors such as gender, nationality and family status) to our need to position municipal activism within a clearer concept of the State. Do welfare restrictions and detention in fact serve to deter arrival and encourage return, and what is the actual impact of inclusive measures on social policy aims and on individual behaviour? Comparative studies, as Ataç and Schütze suggest, would help identify the role of national contexts, institutions, and political orientations on the effects of differing approaches. A stronger evidence base, as the Oxford symposium that led to this book concluded, would also help to counter the dominant narrative on 'illegal immigration' which is counterproductive for a constructive policy dialogue.[2]

A fundamental question, Spencer argues, would also then remain to be addressed: if a level of inclusion of irregular migrants is to be reflected in policy responses, what level of inclusion (not least through access to services) is appropriate? If irregular migrants are not to enjoy the same rights as citizens or other migrants, where should the line be drawn, and on what grounds (Bosniak 2006)? Should immigration status indeed be the determinant of entitlements to services, or alternative grounds such as level of need? Here the proportionality test emphasised by O'Cinneide is key: if restrictive measures are deemed necessary for a legitimate policy aim, immigration control, are they also a proportional response? Answering that question requires a richer body of evidence on the impact of exclusion on economic and social policy goals and on individuals themselves than migration scholars have yet produced; but the study of irregular migration is now an expanding and dynamic field of enquiry in Migration Studies. It is our hope that this book has both contributed to our collective understanding of this topic and will inspire others to prioritise irregular migration in their own research.

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