

Annalisa Morticelli

Human Rights of Irregular Migrants in the European Union

Implementation of European Policy and Legislation
for the Effective Protection of these Rights



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Abstract

Human rights of irregular migrants in the European Union: implementation of European policy and legislation for the effective protection of these rights

In the current European legal framework there are many aspects that are very relevant subjects of investigation: the migration flows issue, the need of a common asylum system for all States, the protection of the human rights of vulnerable persons, the integration issue and so on¹.

Among these, one relevant theme in the current political and juridical European context and an area to which academic research can also make a contribution is the field of irregular migration: the movement of migrants who enter and/or stay in a Member States without legal status, namely against the national law of the Member State and European Union law².

These persons are particularly vulnerable to human rights abuses because of their position in the territory in contravention of the law of that State: they are in the middle of a strong tension between the security needs of the State that can be seen to be undermined by their illegal entry and/or residence, and the obligation of Member States to guarantee the protection of their human rights enshrined in several international and European Union conventions and laws.

Given the tensions at the European Union level, it is very important to achieve a balance and a coordinated system. In this context, the theme of protection of irregular migrants is considered a relevant topic in the legal framework of the European Union³.

1 S. CASTELS & M.J. MILLER, *The age of migration: international population movements in the modern world* (4th ed.) New York: Guilford Press, 2004.

2 A. BLOCH, *Irregular Migrants: Policy, Politics, Motives and Everyday Lives*, London, Routledge, 2012; A. TRIANDAFYLLIDOU, *Irregular Migration in Europe: Myths and Realities*, Farnham, Surrey, Ashgate, 2010.

3 A. TRIANDAFYLLIDOU, *Irregular Migration in Europe: Myths and Realities*, Farnham, Surrey, Ashgate, 2010; M. TODINO, *The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case*, in *Journal of International Maritime Law*, April 2012, Vol. 18, No. 1, pp. 59-74. at 62: "In the case of active resistance, the interception cannot fall within the SAR legal regime".

The main aim of this research is to try to outline the actual legal framework concerning the protection of human rights of irregular migrants at European level, to verify how the Member States implemented this law through a focus on two countries, Italy and Germany, to detect and analyze the critical points in the framework, and finally try to offer a contribution in terms of research to improve the critical aspects drawing on the comparison between the two Member States previously mentioned.

The analysis reported in the dissertation has been divided into three Chapters: the initial chapter deals with a classification of migration phenomena in general and the specific category of irregular migration in the European Union; the second has been dedicated to the analysis of the European legal tools for protecting the human rights of irregular migrants with a focus on first reception of this category of migrants in the European Union; finally, the third part of the thesis addresses a comparison between the two Member States, Italy and Germany, to understand how these Member States implemented European legislation on the protection of human rights of irregular migrants in the entry phase, analyzing the specific national law.

The methodology used for each Chapter consisted of collecting legal materials, laws and jurisprudence, and international literature on the topic, adding also material from international organization recognized as experts who conduct empirical work in this field, as for instance the Agencies of United Nations. The material has been organized to give a detailed overview of the subject of each chapter and to highlight what the main literature concludes in order to then be able to proceed to a critical analysis. The update of the thesis regarding the part of analysis on the Italian system excludes the last legislative changes starting from decree law of 4 October 2018, n. 113, coordinated with the conversion law of 1 December 2018, n. 132, containing "Urgent provisions on international protection and immigration, public safety, as well as measures for the functionality of the Ministry of the Interior and the organization and functioning of the National Agency for the administration and destination of seized and confiscated property to organized crime"⁴.

Returning to the contents of the individual Chapters, in the first one the broader category of migration is explored including irregular migration in the European Union context. The migration category has been analyzed with the goal to understand the phenomenon of migration in general from a sociological point of view: what are the reasons underpinning the move-

4 Italian Official Journal 3 December 2018, n. 281.

ment? The chapter analyses this phenomenon in several Member States that have known large flows of migration in their history, (such as Germany, France, United Kingdom, Italy and Spain). After this description, the focus is on the birth of the concept of irregular migration in the European Union analyzing this category specifically in some Member States where the irregular status of migrants has been a significant phenomenon.

After that the focus moves to explore exactly who irregular migrants are from a legal point of view in the European Union regulation. There is not an exact definition of irregular migrants or the status of irregularity at the European Union level. However, the legislation, such as the Schengen Code and Directive 2008/115/EC through the definition of “illegal stay”, identify the requirements necessary for legal entrance and residence in the European Union territory. Consequently in the absence of these requirements a foreigner is irregularly in the European Union territory⁵.

Finally, the last part of the first Chapter focusses on the terminology used to define this category: initially, the term used in the literature and by European Union institutions was “illegal”. This analysis highlights how that is not correct, starting from the assumption that a person, from a legal point of view, cannot be illegal. Indeed only their actions and behaviors can be defined as illegal. The correct terminology, currently recognized at academic level, is irregular because it is more neutral. Also used are undocumented, *sans papier* or clandestine⁶.

In the second Chapter the protection of human rights of irregular migrants is explored on two levels: international law and in the context of the European Union. Firstly, the focus is on the content of the International Conventions, such as the European Convention of Human Rights, and then in particular in the context of the European Union, the European Union Charter of Fundamental Rights. That allows and understanding of the tools which guarantee protection for irregular migrants.

Thereafter the illustration of the European Union framework for the protection of human rights of irregular migrants in relation to the entry phase into Member States will be analysed. In particular it will be explored

5 Schengen borders Code, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders OJ L 77, 23.3.2016, p. 1–52; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, p. 98–107.

6 A. TRIANDAFYLLIDOU, *Irregular Migration in Europe: Myths and Realities*, Farnham, Surrey, Ashgate, 2010.

in depth, what kind of guarantee of human rights is provided in the context of the high seas and hot spots and during detention and return procedures.

The migrants in an irregular situation are more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process. They often face prolonged detention or ill-treatment and, in some cases, enslavement, rape or murder. They are more likely to be targeted by xenophobes and racists, victimized by unscrupulous employers and sexual predators, and can easily fall prey to criminal traffickers and smugglers⁷. Rendered vulnerable by their irregular status, these men, women and children are often afraid or unable to seek protection and relief from the authorities in countries of origin, transit or destination. Clearly, the irregular situation in which international migrants may find themselves should not deprive them either of their humanity or of their human rights. International human rights law provides that everyone, without discrimination, must have access to the fundamental rights provided in the international bill of human rights.

Moreover, the whole first reception phase is particularly interesting for the aim this research project because it is a delicate phase in which the protection of the human rights of irregular migrants risks being subject to violations because of the lack of balance between the need for security of the State and the protection of the fundamental rights of these migrants. Member States are obligated to guarantee.

The third Chapter of this thesis is dedicated to analysing how the European law described is implemented in the Member States: the aim of the Chapter is to try to understand the major criticisms in the implementation of the European regulation and international and European conventions by the Member States in the first reception phase. The chapter also considers the national law, and, through the comparison between two legal frameworks on the topic, explores what can be improved in the legislation at European Union level. The countries chosen are Italy and Germany: these are different States but, as the research makes clear, it is useful to understand how the European Union legislation can be implemented in both

7 V. T. REITANO, L. ADAL, M. SHAW, *Smuggled Futures: The Dangerous Path of the Migrant from Africa to Europe*, *The Global Initiative against Transnational Organized Crime*, Geneva, 2014, available online; D. WEISSBRODT, *The Protection of Non-Citizens in International Human Rights Law*, in R. CHOLEWINSKY, R. PERRUCHOUD and E. MACDONALD (eds.), *International Migration Law: Developing Paradigms and Key Challenges*, T.C.M. Asser Press., The Hague 2007, pp. 228-232.

situations. It is interesting to see how these two countries have implemented the same European Union legislation in different ways and to explore what each system can learn from the other. This then leads to inspiration for more efficient legal framework at European Union level.

It is possible to anticipate that in both States the violations of human rights of irregular migrants arise from the already mentioned tension between the need of the country to guarantee the security of its borders and the obligation to protect human rights.

Both countries, as will be illustrated, adopted restrictive law towards irregular foreigners, for instance they both provide the crime of clandestinity and limit the application of migrants' rights. In Germany in the specific case of *duldung*, which relates to foreigners who have to be returned and do not have any legal status, but, for various reasons, such as administrative ones, are subject to a formal suspension of enforcement action, migrants see the right to health and to education for example limited.

Although the phenomenon of irregular migration presents different characteristics in the two States, both countries are restrictive in the respect of the human rights of irregular foreigners committing many violations in particular concerning the phase of deportation and return.

Italy was transformed from an emigrant country to a country of destination as many studies underline⁸. In recent years, especially with the increase of the democratic instability of the Mediterranean region, as shown by the "Arab Spring"⁹ and the tragic wars which are characterizing the Middle East¹⁰, the number of persons who flee from their countries to reach the European shores has been growing. Italy has developed an articulated legal, political and diplomatic instrument for controlling sea migration over the last few years, especially with a view to combating clandestine migration.

In Germany the phenomenon of irregular migration has a smaller dimension than in Italy. With respect to the subject of this analysis, namely

8 For a detailed reconstruction under an historical point of view of the Italian immigration policy, see L. EINAUDI, *"Le Politiche dell' Immigrazione in Italia dall' Unità' ad oggi"*, Laterza, 2007.

9 Wave of pro-democracy protests and uprisings that took place in the Middle East and North Africa beginning in 2010 and 2011, challenging some of the region's entrenched authoritarian regimes (Jasmine Revolution in Tunisia 2010, Egypt Uprising of 2011, Yemen Uprising of 2011–12, Libya Revolt of 2011, and Syria Uprising of 2011–12.)

10 For instance: Egyptian Revolution 2011; Libyan war 2011; Syrian Civil war 2011-2018; Turk-Syrian Kurd Conflict 2018.

the protection of fundamental rights of this category of migrants, most of the violations are related to the procedure of return.

The violations of human rights seem to be the result of a lack of good management and organisation in the German territory and related more to the structure than a policy aimed to restrict the fundamental rights of this category of migrants. This is a difference with the Italian policy that tries to restrict the human rights of these migrants using more severe legislation. Although, in the German scenario a similar normative framework is in force in relation to *duldung*, mentioned above.

In general terms, the comparison showed that the recognition of important human rights, such as the right to work, right to health or the right to education is limited for irregular migrants during the time they have to stay in the European territory before being returned.

In conclusion the main themes emerging from this research project are: there is poor protection of the rights of irregular migrants when they remain in the territory, albeit irregularly, and the issue of repatriations is in addition problematic.

As it falls within the competence of the Member States, the matter of immigration, is managed with too much diversity between the them and the European legislation which regulates some aspect of the matter, allows too much discretion in its application by them. This is so for several reasons analysed in the research, like the lack of clarity and ambiguity of some directives. There is also a lack of specific legislation at European level, there are mainly references to international legislation, which in turn guarantee protection without providing strictly specific rules on this category of migrants. As long as the issue of immigration is not within the competence of the European Union, there will not be more precise and effective legislation or a common regulatory framework in all member states.

The repatriation issue represents one of the most critical moments in relation to violations of human rights, and must be addressed by the European Union in all its aspects, including the stipulation of agreements with third countries with the EU and the identification of the precise procedure that limits the most common violations of human rights. Within this framework the system of voluntary repatriation should be further developed. It should be managed according to precise and binding procedures. Member States should be called to adequately promote this instrument. The European Union should have more initiative in signing agreements with the countries of origin in order to facilitate voluntary repatriations.

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Introduction

The migration phenomenon is currently a very relevant topic in the European Union and within each of its Member States. Indeed, the migration issue affects the political, sociological and economical debate in all Member States and at the European level¹¹.

The constant high flows of migrants who arrive in Europe in particular from the African continent and Middle East, does not seem likely to stop or decrease given the difficult conditions in which, very often, the countries of origin or transit are in: wars, lack of democracy, low or absent protection of human rights, lack of work, etc¹².

The European Union institutions as well as the majority of Member States continue to face criticism in management of the flows and in creating an efficient common system of regulation in relation with the migration phenomenon in general, as for instance in the asylum field. The will of the States to reach common legislation is still far from being achieved¹³.

In the current European legal framework there are many aspects that are very relevant subjects of investigation: the migration flows issue, the need of a common asylum system for all States, the protection of the human rights of vulnerable persons, the integration issue and so on¹⁴.

Among these, one relevant theme in the current political and juridical European context and an area to which academic research can also make a contribution is the field of irregular migration: the movement of migrants

11 L. MASERA, G. SAVIO, *La "prima" accoglienza*, in M., Savino, *La crisi migratoria tra Italia e Unione Europea: diagnosi e prospettive*, Editoriale Scientifica, Napoli, 2017.

12 M. BORRACCETTI, *La prima assistenza ai migranti in arrivo tra diritti fondamentali e zone franche*, in *Dir. Imm. Citt.*, 2014, No 2, 13; G. CAMPESI, *L'Italia e il controllo delle frontiere marittime*, in M. SAVINO, *La crisi migratoria tra Italia e Unione Europea: diagnosi e prospettive*, Editoriale Scientifica, Napoli, 2017.

13 G. VERMEULEN, E. DESMET, *Essential text on European and International Asylum and Migration Law and Policy*, Maklu, Antwerpen-Apeldoorn-Portland, 2017.

14 S. CASTELS & M.J. MILLER, *The age of migration: international population movements in the modern world* (4th ed.) New York: Guilford Press, 2004.

who enter and/or stay in a Member States without any legal status, namely against the national law of the Member State and European Union law¹⁵.

This subject is particularly delicate in relation to the protection of human rights. Indeed, there are many decisions by the European Union Courts which condemned Member States for human rights violations of irregular migrants. These persons are particularly vulnerable to human rights abuses because of their position in the territory in contravention of the law of that State: they are in the middle of a strong tension between the security needs of the territory of the State that can be undermined from their illegal entry and/or residence, and the obligation of Member States to guarantee the protection of their human rights enshrined in several international and European Union conventions and laws.

Given the tensions at the European Union level, it is very important to achieve a balance and coordinated system. Otherwise, the integration project will be at risk. For the reasons illustrated above the theme of protection of irregular migrants is considered a relevant topic in the legal framework of the European Union¹⁶.

The main aim of this research is to try to rebuild the actual legal framework concerning the protection of human rights of irregular migrants at European level, to verify how the Member States implemented this law through a focus on two countries, Italy and Germany, to detect and analyze the critical points in the framework, the reasons why, and finally try to offer a contribution in terms of research to improve the critical aspects also by the comparison between the two Member States previously mentioned.

The analysis reported in the dissertation has been divided in three Chapters: the initial chapter deals with a classification of migration phenomena in general and the specific category of irregular migration in the European Union; the second one has been dedicated to the analysis of the European legal tools for protecting the human rights of irregular migrants with a fo-

15 A. BLOCH, *Irregular Migrants: Policy, Politics, Motives and Everyday Lives*, London, Routledge, 2012; A. TRIANDAFYLLIDOU, *Irregular Migration in Europe: Myths and Realities*, Farnham, Surrey, Ashgate, 2010.

16 A. TRIANDAFYLLIDOU, *Irregular Migration in Europe: Myths and Realities*, Farnham, Surrey, Ashgate, 2010; M. TODINO, *The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case*, in *Journal of International Maritime Law*, April 2012, Vol. 18, No. 1, pp. 59-74. at 62: "In the case of active resistance, the interception cannot fall within the SAR legal regime".

cus on first reception of this category of migrants in the European Union; finally, the third part of the thesis addresses a comparison between two Member States (the reasons why the two countries have been selected will be explained later), Italy and Germany, to understand how these Member States implemented the European legislation on the protection of human rights of irregular migrants in the phase of entrance, analyzing also the specific national law.

The methodology used for each Chapter consisted of collecting legal materials, laws and jurisprudence, and international literature on the topic, adding also material from international organization recognized as experts who conduct empirical work in this field, as for instance the Agencies of United Nations. The material has been organized to give a detailed overview of the subject of each chapter and to highlight what the main literature concludes in order to then be able to proceed to a critical analysis.

Returning to the contents of the individual Chapters, in the first one the broader category of migration is explored including irregular migration in the European Union context. The migration category has been analyzed with the goal to understand the phenomenon of migration in general from a sociological point of view: what are the reasons underpinning the movement? The chapter analyzes this phenomenon in several Member States that have known a huge flow of migration in their history, such as Germany, France, United Kingdom, Italy and Spain.

After this description, the focus will be on the birth of the concept of irregular migration in the European Union analyzing this category specifically in some Member States where the irregular status of migrants has been a significant phenomenon: Austria, Czech Republic, Greece, France, Germany, Italy, Netherlands, Poland, Spain, United Kingdom.

A distinction within the category of irregular migrants is outlined referring to the classification proposed by Professor Frank Düvell: quasi-legal illegal and total illegal migrants. This distinction has consequences in terms of protection of fundamental rights of the migrants¹⁷. Further, the Chapter is dedicated to understanding the relationship between the irregular and regular status and how the immigration categories of documented and undocumented immigrants are not static.

Following the analysis on the phenomenon of migration in general and then irregular migration from a mainly sociological perspective, the focus moves to explore exactly who are irregular migrants from a legal point of

17 F. DÜVELL, *Illegal immigration in Europe beyond control?*, Palgrave Macmillan, 2006.

view in the European Union regulation. As it has been explained, there is not an exact definition of irregular migrants or the status of irregularity at the European Union level. However, the legislation, such as the Schengen Code and Directive 2008/115/EC through the definition of “illegal stay”, identify the requirements necessary for legal entrance and residence in the European Union territory. Consequently in absence of these requirements a foreigner is irregular in the European Union territory¹⁸.

Finally, after outlining the normative framework of who can be defined as an irregular migrant, the last part of the first Chapter focusses on the terminology used to define this category: initially, the term used in the literature and by European Union institutions was “illegal”. This analysis highlights how that is not correct starting from the assumption that a person, from a legal point of view, cannot be illegal. Indeed only their actions and behaviors can be defined as illegal. The correct terminology, currently recognized at academic level, is irregular because it is more neutral. Also used are undocumented, *sans papier* or clandestine¹⁹.

After having delineated in general the migration phenomenon in European Union and defined who are irregular migrants according to the European Union law, in the second Chapter the focus is on the protection of human rights of irregular migrants. *In primis* an analysis of the international and EU legal tools that are implemented by the European Union and consequently by the Member States, with the aim to protect the human rights of irregular migrants has been conducted. As it will be shown, there are several important conventions that provide protection of the fundamental rights of everyone without any distinction based on the status of the person. Therefore, the irregular migrants are also covered by these conventions: as the European Convention of Human Rights in which is enshrined the protection to all persons regardless their status according to Art. 1 thus including irregular immigrants; or the Universal Declaration of Human Rights that protects *without distinction of any kind, such as race,*

18 Schengen borders Code, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders OJ L 77, 23.3.2016, p. 1–52; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, p. 98–107.

19 A. TRIANDAFYLLIDOU, *Irregular Migration in Europe: Myths and Realities*, Farnham, Surrey, Ashgate, 2010.

*colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status*²⁰.

The analysis continues with a focus on the protection of human rights of irregular migrants in the specific phase of first reception of these migrants, namely the phase of entrance. This phase includes different subphases: high sea; hotspots and the phase of procedure of detention and return to the country of origin or transit. The whole first reception phase is particularly interesting for the aim this research project because it is a delicate phase in which the protection of the human rights of irregular migrants risks being subject to violations because of the balance the Member States have to guarantee.

Indeed, for the European Union and for the Member States, to find a balance between the protection of human rights of irregular migrants and to guarantee the security of the European Union borders from irregular entrance, represents a challenge in which most of the violations of the fundamental rights of the category of migrants under analysis occur.

The three aforementioned subphases are those in which the irregular foreigners are more exposed to not seeing the correct application of their rights. In particular, the high sea is a critical phase due the complex juridical framework of international legislation on sea law, refugee law, European Union law and the Convention on Human Rights which are crucial for the control activity and that must be applied simultaneously. The issue is very complicated considering the complex framework and the large number of actors who are involved in the control of maritime borders. Most of the violations are to the right to life, collective expulsion and violation of the principle of *non-refoulement*.

Another critical phase for the protection of human rights of irregular migrants related to the hotspot: as will be explained, the hotspot is a section of external borders characterized by the arrival of huge migration flows. In these areas a proper team composed by European Union Agencies (FRONTEX, EASO, Eurojust and Europol that will be analyzed subsequently) and personnel from Member States that collaborate in order to accomplish the first reception. These hotspots arose in particular in Greece and Italy where the pressure of irregular migration flows is more relevant. Very often violations of fundamental rights occurred as for instance to the right of information concerning the rights the migrants have once on the

20 Art. 2(1) of the Universal Declaration of Human Rights, UN General Assembly Resolution A/RES/217 (III) of 10 December 1948.

territory of the European Union or of violations during the identification procedures in the hotspot²¹.

Finally, when the irregular migrant does not have, or does not have anymore, any legal status to stay in the territory of the Member States, he or she has to be returned to the country of origin or transit, and during these procedures violations of personal freedom frequently occur in several Member States, especially due the prolonged detention over the terms provided by the European legislation.

Having concluded a terminological analysis on irregular migration, a general overview on irregular migration in the European Union, after the exact detecting of whom can be defined irregular in the European territory, and subsequently to the deepening of the protection of human rights of this category of migrants specifically in the most critical phase, first reception one, the third Chapter of this thesis is dedicated to analyzing how the European law described is implemented in the Member States. The aim of the Chapter is to try to understand the major criticisms in the implementation of the European regulation and international and European conventions by the Member States in the first reception phase. The chapter considers also the national law, and, through the comparison between two legal frameworks on the topic, Italian and German, explores what can be improved in the legislation at European Union level.

The countries chosen are Italy and Germany: these are different States but, as will be better explained in this part of the research, it is useful to understand how the European Union legislation can be implemented in both situations. It could be interesting to see how these two countries have implemented the same European Union legislation noting the differences and to see if there are legal elements presented in one legislation that can be integrated by the other one in order to improve the own system. That could be also an inspiration for more efficient legislation at European Union level.

It possible to anticipate that in both States the violations of the human rights of the irregular migrants arise from the already mentioned tension between the need of the country to guarantee the security of its borders and the obligation of the protection of human rights.

Both countries, as it will be illustrated, adopted restrictive law towards irregular foreigners, for instance they both provide the crime of clandestine

21 F. CASOLARI, *The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?*, in *The Italian Yearbook of International Law*, 2015, Vol. 25.

ity and limit the application of migrants rights,. In Germany in the specific case of *duldung*, which relates to foreigners who have to be returned, do not have any legal status, but, for different reasons, such as administrative ones results in a formal suspension of enforcement action. The figure of *duldung* sees for instance the right to health and to education limited.

Although the phenomenon of irregular migration presents different characteristics in the two States, both countries are restrictive in the respect of the human rights of the irregular foreigners committing many violations in particular both concerning the phase of deportation and return.

CHAPTER I: The phenomenon of irregular migration in the European Union: historical developments and preliminary questions of terminology

1. Theories of migration: an overview

Ernest Georg Ravenstein, a German-born geographer who worked for the Royal Geographical Society in London, gave the first major contribution to a theory of migration at the end of nineteenth century²². William Farr²³, a contemporary scholar who stated that the phenomenon of migration occurred basically at random, prompted him to theorize about the structured features of migratory movement.

Ravenstein tried to articulate a series of laws that could be used to both explain and predict migratory movements, relevant to migrations within and outside of national borders. It is possible to summarize the main “laws” (understood as guidelines) as follows²⁴:

- *migration and distance*: most migrants travel short distances, while those who do travel long distances prefer major commercial and industrial centers;
- *migration by stages*: a current of migration occurs when commercial and industrial centers absorb large numbers of migrants; the closest rural dwellers move to cities, thereby leaving gaps that are filled by the rural population from more remote areas; and the process of dispersion is the reverse of that of absorption;
- *stream and counter stream*: mainstreams of migration produce a counter stream;
- *urban/rural differences in propensity to migrate*: rural dwellers are more likely to migrate than the natives of cities;

22 T. FAIST, P. KIVISTO, *Beyond a Border: The Causes and Consequences of Contemporary Immigration*, Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

23 T. FAIST, P. KIVISTO, *Beyond a Border: The Causes and Consequences of Contemporary Immigration*, Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

24 Using Everett Lee's grouping of Ravenstein's conclusion. E. LEE, *A Theory of migration, Demography*, 1966, 3(1), 47-57.

- *predominance of females among short distance movers*: more women make short-distance migrations, particularly within national borders, than males;
- *technology and migration*: improvements in transportation networks and the expansion of industrialization lead to increased levels of migration;
- *centrality of economic factors*: while levels of migration can be influenced by state actions (e.g. laws, tax policies), climate and geographic factors, they not only are not nearly as consequential as economic considerations, but are often actually intervening obstacles that can sometimes be eliminated and permitting economic forces to operate in an essentially unimpeded way²⁵.

The most fundamental accusations leveled against Ravenstein's work was that he had failed to articulate what would generally be construed as theory. Instead, some authors like Petersen²⁶ consider that it does not add up to a theory or, in his terminology, to "laws". Nevertheless, Ravenstein's work influenced two subsequent currents of migration theorizing, which will be detailed below: the push-pull model and an economic model based on neoclassical economic presuppositions.

The push-pull model is attributed to Everett Lee, although he did not use the term in describing his "theory of migration"²⁷. Lee distilled a model that is based on the assumption that the volume, that he called the "stream", and the selection of those who fall within the stream, are structured by four factors. He identifies these factors as: point of origin, those with the destination, intervening obstacles and the personal characteristics of potential migrants. There are three types of factors which are operative at both the origin and destination, those that promote migration, those that deter or prevent it, and those that have no bearing on it²⁸.

25 T. FAIST, P. KIVISTO, *Beyond a Border: The Causes and Consequences of Contemporary Immigration*, Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

26 W. PETERSEN, *A General Typology of migration*, in *American Sociological Review*, 1958, 23(3), 256-266.

27 H. DE HASS, *Engaging diasporas: How governments and development agencies can support diaspora involvement in the development of origin countries*, A study for Oxfam Novib, Oxford: International Migration Institute, James Martin 21st Century School. New York: University of Oxford, 2006, p. 9.

28 T. FAIST, P. KIVISTO, *Beyond a Border: The Causes and Consequences of Contemporary Immigration*, Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

This model offers a remarkably intuitive and parsimonious account of the process, indeed a major part of the task at hand in accounting for migrations is to provide a cost-benefit calculus²⁹.

The assumption is that migrations occur as a consequence of two complementary processes:

1) they commence when the weight of the factors pushing people out of one place are more powerful than those keeping them there. Among the most important push factors are rapid population growth, poverty and a lack of economic opportunity, and political repression. In various combination, these and other factors contribute to the migratory push³⁰;

2) it occurs when the weight of factors pulling people into another area are powerful than those deterring entry. Among the key factors that pull people to a society are job opportunities, more wages than in the homeland, the possibility of acquiring land, and political and cultural freedom. The respective intensity of these forces contributes to the volume and defines the particular nature of the stream, moving from A to B rather than to C.

Moreover, Lee considers that two other factors need to be factored into the equation: “natural inertia” that refers to the fact people are by nature stayers rather than movers. Therefore, migrations are not persistent features of the modern world, being triggered only in extraordinary times. Other factors shaping migrations are the “intervening obstacles” like distance. They are linked to the state of existing transportation systems. Physical barriers, such as the fence that has been built along section of the U.S.-Mexican border, represent another obstacle, as do legal barriers.

Lee is clear that some people are more likely to migrate than others. Migrations are selective, thus young people are more likely to migrate than older ones because they are more adequate candidates for the receiving society's labor market. However, those with certain types of human capital (such as educational credentials, employment skills) are far more likely to migrate than those with human capital deficits³¹.

29 E. LEE, *A Theory of migration*. *Demography*, 1966, 3(1), 47-57; H. DE HASS, (2006). *Engaging diasporas: How governments and development agencies can support diaspora involvement in the development of origin countries*, A study for Oxfam Novib, Oxford: International Migration Institute, James Martin 21st Century School. New York, University of Oxford, 2006.

30 Among the most important push factors are rapid population growth, poverty and a lack of economic opportunity, and political repression.

31 T. FAIST, P. KIVISTO, *Beyond a Border: The Causes and Consequences of Contemporary Immigration*, Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

With regards to the neoclassical economics model³² of migration this theory, with a more recent approach, is preferred to the push-pull model³³. In part, this is because one variant of the push-pull model is frequently taken to be representative of the model as a whole, an economic theory known as the neoclassical equilibrium perspective³⁴. It portrays migration as a consequence of the interplay between the size of the labor supply and wages are consequently reduced in one place, a segment of the surplus population is attracted to a destination characterized by labor shortages and, due to the demand for labor, higher wages.

The earliest articulations of this model were intended for internal migrations within developing nations, specifically the mass movements of workers from rural to urban settings³⁵, but it has also been used to explain international migration³⁶.

For both kinds of migration, the internal and the international, this model assumes that the volume of migration is determined by the relative differences in the supply of and demand for labor in different geographical locations. When the differences are significant, the volume will be high; viceversa when the differences are low, the volume will be low. It must be emphasized that the migrants need to factor into the equation the cost of migration and potential problems they might encounter before gaining entrance into the destination countries with a higher wage labor market.

In the case of undocumented migrants, on whom this research is focused, the potential costs associated with arrest and deportation must also

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- 32 T. FAIST, P. KIVISTO, *Beyond a Border: The Causes and Consequences of Contemporary Immigration*, Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.
 - 33 This theory has been developed in particular from Douglas Massey and colleagues (D. MASSEY, S. ARANGO, J. HUGO, G. KOUAOUICI, A. PELLEGRINO & T.J. EDWARD, *An evaluation of international migration theory: The North American case*, in *Population and Development Review*, 1994, 20(4), 699-751; D. MASSEY, & J.E. TAYLOR, (Eds), *International migration: prospects and policies in a global market*. New York: Oxford University Press, 2004.
 - 34 T. FAIST, P. KIVISTO, *Beyond a Border: The Causes and Consequences of Contemporary Immigration*, Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.
 - 35 J.R. HARRIS & M.P. TODARO, *Migration, unemployment, and development: A two-sector analysis*, in *American Economic Review*, 1970, 60(2), 126-142; M.P. TODARO, A model of labor migration and urban unemployment in low-developed countries, in *American Economic Review*, 1969, 59(1), 138-148; M.P. TODARO, *Internal Migration in developing countries*, Geneva: International Labor Office, 1976.
 - 36 G. BORJAS, Economic theory and international migration, in *International Migration Review*, 1989, 23(3), 457-485; G. BORJAS, *Friends or strangers: the impact of immigrants on the U.S. economy*. New York: Basic Books, 1990.

be factored in³⁷. Massey and colleagues, summarize the essence of neoclassical economics in the following way: “*The difference between incomes expected at origin and destination, when summed and discounted over some time horizon and added to the negative costs of movement, yields the expected net gain from movement, which if positive promotes migration*”³⁸.

The reason that migrations are not considered to be perpetual or a constant state is that as more migrants enter a high-demand, higher-wage area, over time their presence reduces demand and wages. However, from the point of view of the place of origin, migrants can be seen as surplus labor. Their departure signals a decline in the surplus, which over time will increase the demand for labor, which in turn leads to increases in prevailing wages. In this way, a new equilibrium is achieved and the migratory wave comes to end as the incentives to migrate evaporate.

Massey and colleagues conclude that “*the accumulated evidence generally supports neoclassical theory's fundamental proposition that immigration is tied to international differences in wage rates*”³⁹. Although it has had a decided impact on both the ways the public thinks about the cause of immigration and has played a role in shaping immigration policy, there are limitations to its utility. The critique is that due to its singular focus on the individual, neoclassical equilibrium theory is not in itself sufficient to provide a compelling explanation of immigration. One might also note that the theory is only applicable to voluntary migratory flows with high degrees of freedom.

A theory which complemented the model mentioned above, is the “new economics of migration”, which is associated with economist Oded Stark⁴⁰. His approach did not seek to reject completely the neoclassical theory, but to amend it chiefly by complementing its insights with a more empirically grounded theoretical framework. The new economics approach calls into question the assumption that migration is a phenomenon pursued by individuals. Ignored by the neoclassical perspective is the fact

37 M.P. TODARO, & L. MARUSZKU, Illegal immigration and U.S. immigration reform: a conceptual framework, in *Population and Development Review*, 1987, 13(1), 104-114.

38 D. MASSEY, S. ARANGO, J. HUGO, G. KOUAOUCCI, A. PELLEGRINO & T.J. EDWARD, An evaluation of international migration theory: the North American case, in *Population and Development Review*, 1994, 20(4), 699-751.

39 In the review of the literature that has attempted to test the neoclassical equilibrium model in accounting for post 1945 immigration to the United States from elsewhere in the Western Hemisphere, 1994, p. 710.

40 O. STARK, *The Migration of Labour*, Oxford, Blackwell, 1991.

immigrants are embedded in what Simmel⁴¹ called “webs of group affiliations”.

Stark's position concentrated on the role of families. Building on this insight, Massey melded the new economics of migration to sociology by introducing network theory. Simmel's loosely conceived idea of webs takes on analytical rigor a “networks”, which he and his associates (Massey et al. 1994, p. 728)⁴² define in the following way: “*Migrant networks are sets of interpersonal ties that connect migrants, former migrants, and non migrants in origin and destination areas through ties of kinship, friendship, and shared community origin. The existence of these ties is hypothesized to increase the likelihood of emigration by lowering the costs, raising the benefits, and mitigating the risks of international movements. Network connections constitute a valuable form of social capital that people draw upon to gain access to foreign employment and high wages*”.

Historians of immigration have long been aware of what was once called the “friends and relatives effect” or “chain migration” in creating and sustaining immigration streams⁴³.

Another geographer, Robert C. Ostergren⁴⁴, in 1998, with regards to the last great migratory wave in the United States, described the process as one in which “*the first emigrants from Europe community commonly went to some place about which they possessed information. They in turn sent additional information home once they had reached their destination. As new emigrants followed in their footsteps, certain “axes of information” developed between places on either side of the Atlantic. Once the migrant stream began moving along these axes, it became self-reinforcing, ultimately taking on all the attributes of a chain migration*”.

The social ties served to link individual immigrants both to those who remained in the homeland and those who were fellow immigrants. The

41 G. SIMME, *Exkurs über den Fremde*, in G. SIMMEL, *Soziologie: Untersuchungen über die Formen der Vergesellschaftung*, 1908/1992, vol. 11, Frankfurt, Suhrkamp.

42 D. MASSEY, S. ARANGO, J. HUGO, G.KOUAUOCI, A. PELLEGRINO & T.J. EDWARD, *An evaluation of international migration theory: the North American case*, in *Population and Development Review*, 1994, 20(4).

43 D.E. BAINES, *Emigration from Europe, 1815-1930*. Cambridge, UK: Cambridge University, 1995, pp. 33-38; T.J. HATTON & J.G. WILLIAMSON, *The age of mass migration: causes and economic impact*. New York: Oxford University Press, 1998, p. 14; J. G. WILLIAMSON, *Migration to the new world: long term influences and impact. Explorations in Economic History*, 1974, II, 357-390.

44 R. C. OSTERGREN, *A community transplanted: The trans-Atlantic experience of a Swedish immigrant settlement in the Upper Middle West, 1835-1915*, Madison: University of Wisconsin Press, 1988.

journey was the result of the economic calculations of a family or other intimates and not made simply by an isolated individual. The significance of prepaid tickets purchased for potential migrants by friends or family is an indication of the collective nature of the migration decision-making process⁴⁵. The ongoing sharing of information between origin and destination about such matters as whether or not economic and other conditions were conducive to additional immigration was also part of the equation. At the same time, the creation of ethnic enclaves in both urban and rural setting indicates the significance immigrants attached to the maintenance of ethnic connections in the new world⁴⁶.

The model in question, contrary to the neoclassical equilibrium theory, treats migration as a phenomenon that involves both economic and non-economic factors. In a significant departure from neoclassical economics, the new economics model does not assume that migrations inevitably occur in a wave that ends with the return to wage equilibrium. The advocates of the new economics model contend that whatever sets in motion the initial impetus to migrate, the establishment of migratory networks serves to perpetuate migration because “*they lower the costs and risks of movement and increase the expected net returns to migration*”⁴⁷.

Charles Tilly⁴⁸ contends that “networks migrate”, by which he means that the network rather than the individual is the proper unit of analysis. In conclusion, the network can suggest that migration should either be declining or cease altogether.

Massey and associates⁴⁹ reinforce the idea that once underway, contemporary migrations tend to become self-perpetuating. Among the explicit economic factors that contribute to cumulative causation are changes in

45 T. FAIST, P. KIVISTO, *Beyond a border: the causes and consequences of contemporary immigration*. Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

46 T. FAIST, P. KIVISTO, *Beyond a border: the causes and consequences of contemporary immigration*. Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

47 D. MASSEY, S. ARANGO, J. HUGO, G. KOUAOUCCI, A. PELLEGRINO & T. J. EDWARD, *Theories of international migration: a review and appraisal*, in *Population and Development Review*, 1993, 19(3), 431-466, p. 448.

48 C. TILLY, *Transplanted networks*, in V. YANS-MCLAUGHLIN (Ed.), *Immigration reconsidered: history, sociology and politics*, 1990, New York: Oxford University Press, p. 84.

49 D. Massey, S. ARANGO, J. HUGO, G. KOUAOUCCI, A. PELLEGRINO & T.J. EDWARD, *Theories of International migration: a review and appraisal*, in *Population and Development Review*, 1993 19(3), 431-466, pp.451-454; D. MASSEY, S. ARANGO, J. HUGO, G. KOUAOUCCI, A., PELLEGRINO & T.J. EDWARD, *An evaluation of international*

income distribution, changes in land distribution, and changes in the organization of agricultural production. Fundamental element to changes in income distribution patterns at the point of origin is the role played by remittances sent to relatives from migrants. When household incomes rise as a result, those households not receiving remittances suffer from growing deprivation, thereby increasing the motive to migrate.

Migrants often purchase land back home, which impacts land distribution because it is thought they are less inclined to put such land into agricultural production, instead maintaining it as a place for retirement.

When they do work the land productively, they tend to do so in a more capital-intensive way than local owners, thus reducing the number of available agricultural jobs; in either event, the result is added incentive to migrate⁵⁰.

There are three other factors that contribute to cumulative causation: a culture of migration, the regional distribution of human capital, and social labeling⁵¹. The first of these factors refers to the fact that as migration changes the point of origin, those embedded in the migratory network come to see migration as one of a number of viable options. In some places, over time an expectation arises that young men will migrate, if only for a time and if only to test the waters. Due to the selective character of migration, those with human capital deemed valuable at the receiving location will come first, thereby increasing the level of human capital there while reducing it at the point of origin. Over time, this contributes to economic decline in the sending community, thereby ratcheting up the inducement to migrate⁵².

Finally, social labeling refers to the stereotypical matching of immigrants to certain job categories. This is certainly the case with those jobs described as dirty, dangerous, and difficult but it also applies to those “brain drain” immigrants who are perceived to possess educational credentials in short supply⁵³.

al migration theory: the North American case, in *Population and Development Review*, 1994, 20(4). pp. 733-738.

50 T. FAIST, P. KIVISTO, *Beyond a border: the causes and consequences of contemporary immigration*. Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

51 T. FAIST, P. KIVISTO, *Beyond a border: the causes and consequences of contemporary immigration*, Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

52 T. FAIST, P. KIVISTO, *Beyond a border: the causes and consequences of contemporary immigration*. Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

53 Indian case in Silicon Valley are a case in point.

Although there are parallels to be drawn, each nation has its own immigration dynamic: a brief overview within the context of the European Union is useful at this point before the field of irregular migration in the EU is explored.

2. The phenomenon of migration in the Member States

What follows is an analysis of what are the specific immigration flow characteristic of the five countries in the European Union with the largest numbers of immigrants and the main reasons for these flows.

Germany

From the division of the nation by the Cold War powers until reunification in 1990, the situation differed in the capitalist Federal Republic of Germany (West Germany) and the Soviet-bloc German Democratic Republic (East Germany). While the former experienced a post-war economic boom that made it the “economic miracle” of Western Europe and necessitated the import of foreign labor in order to make development possible, its communist counterpart lagged behind economically and created a fortress like border system that made immigration difficult and unattractive for western Europeans. That being said, during the 1980s there were several hundred thousand contract workers in the German Democratic Republic, mainly from Cuba, Mozambique, Angola and Vietnam. Thus, for most of the second half of the 20th century, immigration to Germany meant immigration to the Federal Republic.

During the early years of the Cold War, many individuals from the Soviet Union and elsewhere in the Warsaw Pact nations moved to Germany: the largest contingent came from Poland, followed by Romania and the Soviet Union. However, communist governments soon restricted this movement. So, the vast majority of immigrants during this period did not come from eastern Europe, but from southern and southeastern Europe, and did not have German ancestry, and therefore were officially categorized as *Gastarbeiter*⁵⁴ or guest workers.

54 It refers to foreign or migrant workers, particularly those who had moved to West Germany mainly in the 1950s, 60s and early 70s, seeking work as part of a formal guest worker program (*Gastarbeiterprogramm*).

Immigration during the second half of the 20th century occurred in two waves: the first began in the late 1950s and ended in 1975, shortly after the impact of the oil crisis began to be felt and economic restructuring from an industrial to a postindustrial system began to change the dynamics of labor demand. During this quarter of a century, more than 12 million left again, leaving a total stock that remained at 3.6 million. The German Federal Labor Office played an activist role in recruitment efforts, negotiating guest worker agreements with a number of countries, beginning in 1955 with neighboring Italy⁵⁵.

Over time, the numbers immigrating to Germany from European countries decreased while the numbers from Turkey increased. The expectation that workers would return home and the government's general opposition to family reunification decreased over time, with the result being that the temporary workers began to look like permanent residents. Indeed, the rotation principle, repatriation built into the guest workers system, was abolished very early. As early as the 1960s, the government ceased to enforce it at the request of employers who wanted to keep their migrant workers. In the wake of OPEC⁵⁶ crisis, with a decline in the demand for labor, public opinion made clear that Germans were opposed to the future settlement of additional workers from Yugoslavia and Turkey⁵⁷.

At the same time, the government hesitated to repatriate guest workers already in the country, seeking instead to find ways to improve their social rights. There was an effort on the part of the workers to return to their nations of origin, however the plan failed.

In the decade that followed, immigration levels dropped considerably, and in fact during the first half of the 1980s, Germany was actually a nation of emigration rather than immigration. The second wave began in 1985, between then and the end of the century, 5.5 million immigrants settled in Germany, this include immigrants from Eastern block nations who began to arrive when travel restrictions were relaxed prior to the end of communism and continued to arrive after the fall of the Iron Curtain⁵⁸. It also included asylum seekers and refugees, the latter including refugees

55 P. KIVISTO & T. FAIST, *Citizenship: Discourses, theory, and transnational prospects*, Malden, MA: Blackwell, 2007.

56 Organization of the Petroleum Exporting Countries.

57 P. ODMALM, *Migration policies and political participation*, Basingstoke, UK: Palgrave Macmillan, 2005, p. 29.

58 Iron Curtain is a term used in the West to indicate the boundary line that divided Europe into two separate zones of political influence, from the end of the Second World War to the end of the Cold War. During this period, Eastern Europe was

from Bosnia-Herzegovina who were forced into exile as a result of the ethnic conflict that arose in the aftermath of the collapse of a unified Yugoslavia⁵⁹.

The number peaked by the mid-1990s, after which the rate of immigration reduced. In part, this decline was due to the passage of a more restrictive asylum law, one that reflected the institutionalization of a fortress Europe approach to reducing the number of foreigners from outside the European Union. At the same time, the European Union's labor policies called for the free movement of workers from among the Member States. This meant, for example, that not only could workers from the less developed nations of the European Union freely enter Germany to seek employment, but so could workers from the more developed ones. Thus, when a decline in the construction industry in Britain led to increased levels of unemployment in that sector of the economy, many British workers took their construction skills to Germany, plying their trade there while awaiting a turnaround in the situation back home⁶⁰.

France

France has long been viewed as *le creuset française*, the French melting pot, a nation open to all newcomers prepared to embrace the ideals of the republic and in the process to forsake any allegiance to their pasts⁶¹.

France has, in contrast to Germany, long been a nation of immigration. The French state, due to demographic factors, had, since the 18th century, a longstanding policy of encouraging immigration. During the 19th century it was the most significant immigrant-receiving nation in Europe. The immigrants during this era were overwhelmingly from European points of origin, with Italy providing the greatest numbers, followed by Spain, Portugal, and Poland. Although since the French Revolution the nation has tended to view itself as being particularly open to those seeking political

under the political control and / or influence of the Soviet Union, while Western Europe fell under the influence of the United States.

59 Yugoslavia was one state existed between 1929 and 2003, passing through different institutional arrangements, which administered the territory of the Western Balkan Peninsula during the twentieth century.

60 T. FAIST, P. KIVISTO, *Beyond a border: the causes and consequences of contemporary immigration*. Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.

61 T. FAIST, P. KIVISTO, *Beyond a border: the causes and consequences of contemporary immigration*. Thousand Oaks, CA: SAGE/Pine Forge Press, 2010.