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Towards a Human Right to Residence Security

A Comparative Case Study of Settled Irregular Migrants' Social and
Legal Situation in Italy and Germany

Author: Anja Riecken
Supervisor: Elina Pirjatanniemi

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Abstract

It seems a common view in European political discourse the state enjoys a broad sovereign right to exclude irregular immigrants, who reside on its territory without formal consent, from the enjoyment of any membership-specific rights. This thesis will question that view, arguing that over time immigrants become members of the social communities they settled in, even if they did so without official authorisation. Focusing on the social and legal situation of rejected asylum seekers in Italy and Germany, it will address the complex interplay between states' sovereign right to control immigration, and settled migrants' claims for social membership. First, patterns of exclusion, and the human rights concerns they entail, will be analysed. Following the assumption that status insecurity is the main factor, which fosters irregular migrants' marginalisation, two different pathways into regularity will then be compared: the Italian approach of implementing large scale one-off regularisation programmes for informally employed undocumented migrants, and the German system of granting a right to remain in individual hardship cases. The two systems will be critically assessed for their compatibility with existing human rights standards, their moral substance, and their socio-economic and political impacts.

I. Introduction

Since the summer of 2015 at the latest, the highly increased number of new-arriving asylum seekers has heavily occupied the media.¹ Little attention is however paid to those people, who came to Europe seeking protection years or even decades ago, and have never been granted asylum, nor any other permanent residence status.

To control the entry and stay of aliens on their territory, is traditionally an important prerogative of sovereign states. Their discretion in this matter is nevertheless not

¹ For a detailed analysis of the refugee and migrant crisis's press coverage in the EU see UNHCR, 2015

unlimited but put into boundaries by international human rights law. Conferring human rights on transnational migrants thus poses a direct challenge to the concept of state sovereignty. Sometimes states are obliged by international law to allow the residence of irregular migrants, most importantly in the case of refugees, who apply for international protection under the 1951 Geneva Convention. But even those irregular migrants, who do not fall under the narrow definition of a convention refugee, may have strong claims to remain on the territory of the country, which processed their asylum application.

Migrants who seek asylum in the European Union (EU) often have to wait for several years to receive the final decision on their legal status. Since currently migration authorities are largely overwhelmed by the high number of asylum claims, it is to be expected that asylum procedures will take even more time, creating a large group of long-term resident asylum seekers. Also after their claims have been rejected in the last instance, migrants may stay in the country for an extended period of time, if their immediate expulsion is not feasible. In this case they are forced to remain either entirely undocumented or in the legal limbo of ‘toleration’, which grants the temporary suspension of deportation but not a legal permit of residence.

Based on Joseph Carens’ moral theory of immigration, it will be argued that with the passage of time forced expulsion or the constant submission to the fear of deportation become disproportionately harmful to the individual migrant, and to his or her social environment.

Over time immigrants develop strong social ties to their country of residence, even if their residence is irregular². Many of them may find work, make friends, have families, and become active members of their social community. At the same time however, irregular migrants are constantly faced with the threat of imminent deportation, they are excluded

²Carens, 2010, p. 17

from most social benefits, and, since they can only work in the informal sector,³ they are barely protected from labour exploitation.

The deportation of long-term resident migrants seems especially unfair in the case of failed asylum seekers, since the duration of their stay in the host country is largely out of their own reach of influence. On the contrary, it often results from the slow processing of their asylum claims, or from the migration authorities' negligence to return them in a timely and humane manner.

This work will examine, how the moral claims of long-term resident migrants to social membership and residence security interact with national states' sovereign right to control the entrance and stay of aliens on their territory. The aim of the thesis will be to consolidate these two apparent poles. The empirical focus will lie on failed asylum seekers as particularly vulnerable groups of irregular migrants. Their social and cultural living environment as well as their treatment in political discourse and practice will be analysed, using the examples of Germany and Italy as two major immigration countries within the European Union.

The first chapter of the thesis will start with a description of the specific social and legal situation of rejected asylum seekers in Germany and Italy. It will analyse demographic, social and political trends and their interaction with migration movements. Furthermore, the main causes of irregular migrants' vulnerability as well as their most pressing human rights and human dignity concerns will be identified. Those issues will be further explored in the following three chapters.

Chapter two will be focused around the issue of irregular migrants' limited access to health care services. It will analyse provisions in international and European human rights law concerning the right to health, with special attention to their universal scope of application, and relate them to the social situation of rejected asylum seekers, using examples from Germany and Italy. Following Carens' proposal of a legal 'firewall'

³ Unlike fully undocumented migrants, tolerated persons in Germany are granted limited access to the labour market. See footnote No 126

between social institutions and migration authorities, this chapter will discuss possible policy approaches to ensure irregular migrants the effective enjoyment of basic health care, again drawing on past experience and current debates in Italy and Germany.

The third chapter will explore the reasons, why irregular migrants are particularly vulnerable to labour exploitation and examine existing human rights instrument to protect them from such abuse. The structural need for migrant workers and the respective role of refugees in this situation will be discussed from a socioeconomic perspective. After illustrating the paradoxes of European labour migration politics with examples from Germany and Italy, the chapter will end with an in-depth discussion of Italian mass regularisation programmes focused on irregularly employed migrants.

In the last chapter the application of the right to private and family life, enshrined in Article 8 of the European Convention of Human Rights (ECHR), in migration cases will be discussed. First an overview of the case law on Article 8 in relation to long term residence will be given. Subsequently the German practice of granting long-term resident tolerated people a humanitarian right to remain, which is based on the right to private and family life, will be critically assessed.

The thesis will end with an elaboration of the discussed migration policies' moral substance, in which the claims of individual migrants as well as the public interest in democratic societies will be considered.

II. Methodology

Migration constitutes a highly complex social phenomenon within modern societies, which raises questions about the boundaries of social membership, democratic legitimacy, economic implications, historical backgrounds, and many others. It therefore seems appropriate to address the topic from an interdisciplinary perspective.

This thesis will explore the special obligations of states towards resident migrants. Existing human rights provisions as well as moral considerations will constitute the

basis of the discussion. The focal point will be on moral constraints, which bind states to respect, protect and fulfill the human rights of all persons, who permanently reside on their territory, regardless of their legal status. This obligation will be derived from arguments stressing the social membership of settled migrants to the community, where they live. It therein differs from the obligation to grant protection to recognised refugees and other international protection beneficiaries, which is based on factors relating to their country of national origin.

The discussion of how individual migrants' claims to social membership limit states' discretion to regulate immigration, will mainly be based on legal analysis and moral philosophy. It will further include sociological, political, economic, and historical theory.

The sources used for the legal analysis will be relevant provisions in international and European human rights law, including explanatory documents, as well as Italian and German domestic law. Moreover, the case law of international human rights committees and European courts as well as constitutional and administrative domestic courts will be discussed.

In the case study of Germany, empirical data on migratory movements, which the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge, BAMF*) conducts and publishes in annual reports, will be used. The Office primarily bases its empirical findings on moving statistics of the communal registration offices, where all persons are required by law to register their domicile, and also its abandonment. In addition they use data collected by the Central Foreigners Register (*Ausländerzentralregister*).⁴

For its empirical analysis of irregular migration flows, the BAMF relies on the numbers of illegal entries and of smugglers registered at the German border by the Federal Police. The police also registers illegally resident persons in the country's interior. Furthermore, the Federal Office for Criminal Investigation (*Bundeskriminalamt*)

⁴ BAMF, 2014, pp. 10-11

provides statistics on the number of persons prosecuted for illegal entry and stay, and for the crime of smuggling.⁵

The case study of Italy will be based on empirical and qualitative data conducted by the Institute for Multi-ethnic Studies (*Istituto per lo Studio della Multiethnicità, ISMU*), an independent organisation providing studies and research on both documented and undocumented migration.

Especially in producing estimates on irregular migration, the ISMU Foundation is regarded as the most reliable and accurate source.⁶ Using the ‘Centre Sampling Technique’, which exploits the social interaction of the undocumented population, the Institute has produced a valuable, detailed and continuous monitoring of irregular migration flows in Italy.⁷

In the discussion of the background and impacts of migration and integration policies, relevant policy documents and position papers will be analysed. In addition, reports of NGOs and international bodies concerning the human rights situation of irregular migrants in Germany and Italy will be taken into consideration.

Finally, sociological, political, economic and historical research will be included in the thesis. Although some empirical studies will be considered, qualitative social-scientific findings will primarily be used.

II.1. Definition of key terms

The main empirical focus of this work will be on the human rights situation of rejected asylum seekers. In the EU context, an asylum seeker is understood as a person who has made an application for protection under the Geneva Convention, in respect of which a final decision has not yet been taken.⁸ As will be further explained in Chapter 1.2,

⁵ BAMF, 2014, pp. 176-177

⁶ See *inter alia* Fasani, 2010, p. 173

⁷ ISMU, 2015, p. 11

⁸ Art. 2(c), Council Directive 2003/9/EC

asylum procedures are often lengthy and tedious, so that applicants are left in legal uncertainty for a continuous period of time.

If they are found to meet the definition of a refugee set out in Art. 1A of the 1951 Geneva Convention, asylum seekers pass into the permanent status of a recognised refugee.⁹ They are subsequently entitled to the enjoyment of a variety of rights under that Convention. Alternatively the applicant may be considered to meet the requirements for subsidiary protection or other humanitarian statuses, which are normally temporary. The difference between refugee status and other forms of international protection will be discussed in Chapter 1.3.3.

However, a large share of asylum applications lodged in the EU are rejected.¹⁰ After all means for appeal have been exhausted, they are ordered to leave the country, where they applied for international protection. If they resist their expulsion order, their presence on the territory becomes illegal. Migration critics therefore often use the term ‘illegal migrant’ to describe rejected asylum seekers. Following the premise that no person can be ‘illegal’, the more positively connoted term ‘undocumented migrant’ or the rather neutral term ‘irregular migrant’ will instead be used throughout this thesis.¹¹ Within this group, special notice will be given to long-term resident irregular migrants.

In his book “Multicultural Odysseys: Navigating the New International Politics of Diversity”, Will Kymlicka defines long-term resident irregular migrants as persons, who are settled more or less permanently, albeit with a highly precarious legal status or completely hidden from the authorities.¹² They face the threat of forced expulsion if they are detected by the authorities, if their expulsion becomes feasible or if they commit a crime. “But they nonetheless form sizeable communities in certain countries, engage in some form of employment, legal or illegal, and marry and form families”¹³.

⁹ The term ‘convention refugee’ will be used synonymously with ‘recognised refugee’.

¹⁰ See p. 16, 20 of this thesis

¹¹ See Carens, 2013, pp. 129-130

¹² Drawing on Walzer’s theory of social justice, Kymlicka uses the Ancient Greek term ‘metics’ for ‘de facto’ residents who are nevertheless excluded from the polis. Walzer 1983, cited after Kymlicka, 2007, p. 75

¹³ Kymlicka, 2007, p. 75

The same understanding of long-settled migrants, which emphasizes their social membership, will be used throughout this work.

II.2. Theoretical Framework

The question, how liberal democracies should respond to the special vulnerability of rejected asylum seekers, will be the main focal point of this thesis. Following Carens' moral theory, it will be argued that states should "accept them as members of the community, at least after they have been present for an extended period, and grant them legal authorization (sic.) to stay"¹⁴

From a normative perspective, Carens accepts the premise that states have a general right to control the entrance and residence of non-nationals on their territory, as well as the conditions of membership to the community of citizens. He however problematises the moral limits of this sovereign right.¹⁵

Among social scientists and moral philosophers there are conflicting opinions about the limits of states' authority to control immigration. In her book "The citizen and the Alien: Dilemmas of Contemporary Citizenship", Linda Bosniak groups these different views in two fields, which she terms the 'convergence' and 'separation view'.¹⁶ According to the convergence view, states' right to exclude immigrants at the territorial border applies analogously in the territorial interior.¹⁷

By contrast, on the separation view, policies which affect settled migrants should be governed by principles separate from those, which apply at the territorial border. Instead, states' obligations towards both citizens and non-citizens residing on their territory should be based on the principle of equal social membership.¹⁸ The internal logic of this premise, which relativises the principle of state sovereignty, requires that states should treat all resident immigrants as equal members after a period of time.¹⁹

¹⁴ Carens, 2010, p. 5

¹⁵ Hovdal-Moan, 2012, p. 1225

¹⁶ Bosniak, 2006, p. 75

¹⁷ See Perry, 1979, cited after Hovdal-Moan, 2012, p. 1227

¹⁸ Bosniak, 2006, p. 75

¹⁹ Walzer 1983, cited after Hovdal-Moan, 2012, p. 1228

As an advocate of the separation view, Carens argues for a moral obligation to grant amnesties to irregular resident migrants, after they spent a continuous period of time in a country. Indeed, the equal treatment of undocumented migrants is only possible if they have the possibility to obtain a regular residence status. Otherwise they will always be characterised by “one dramatic difference- their vulnerability to deportation”.²⁰

The emphasis on the equal rights of persons inherent in this view also constitutes the basis of human rights obligations towards irregular migrants. This work will compare existing provisions in human rights law to the actual living situation of rejected asylum seekers in Germany and Italy. It will further discuss both moral obligations and socio-economic incentives to grant residence security to long-settled migrants.

To answer the question of how migrants’ claims to social membership limit states’ discretion to regulate the residence of aliens on their territory, will be the aim of this thesis.

II.3. Choice of Case Studies

At the basis of the argumentation will be a comparative case study, which will explore the human rights situation of rejected asylum seekers in Italy and Germany.

Germany and Italy are two major immigration countries in the European Union. However, despite the fact that they both have a strong demographic and economic need for immigration, they have been reluctant to acknowledge this fact in politics and public discourse.

Moreover, both countries receive a high number of asylum seekers, but only few of them are granted refugee status or another form of international protection. Both in Germany and Italy a large share of former asylum applicants are perceived to stay in the country after their claims have been rejected, either because they cannot be expelled for legal or factual reasons, or because they withdrew themselves from the grasp of state authorities.

²⁰ Carens, 2010, p. 5

These people remain in a highly precarious social and legal situation, often for many years or even decades. To abate their vulnerability, Italy and Germany have developed distinct policy tools: Italy has introduced periodic large-scale regularisation programmes focused on irregular migrants' labour market integration. Germany on the other hand, has recently adopted a framework for the regularisation of 'hardship cases' based on humanitarian considerations, as well as the possibility of a right to remain for rejected asylum seekers, who show outstanding levels of integration.

The aim of this work is to compare these two policies, to identify their weaknesses and strong points, and to recommend possible alternative approaches.

1. Migration and Asylum in Italy and Germany

1.1. Becoming a Country of Immigration

Germany and Italy are two major immigration countries within the European Union. They experienced distinct patterns of immigration which followed specific historical paths and are dependent on different economic, demographic, geographic and sociological factors. The following chapter will give an overview of the main developments leading to Germany's and Italy's emergence as countries of immigration.

1.1.1. Germany

Within Europe, Germany is the most important destination country for immigrants from both inside and outside of the EU. In the year of 2014 over 20 percent of people residing in Germany had a migration background.²¹ This number includes all migrants, who came to Germany after 1950, as well as their descendants. Their presence can be traced back to various immigration patterns in the last six decades, both to the Federal Republic of Germany and to the German Democratic Republic (GDR).

Since the beginning of the cold war a large number of people fled from Europe's Eastern Block, including the GDR, to Western Germany. Among this group of migrants were many German nationals and Eastern Europeans of German origin. The preferential treatment of 'ethnic Germans', many of which have lived outside of Germany for many generations, in the process of immigration shows that German migration politics have been descent-based from the very beginning. It goes in line with the country's *ius sanguinis* citizenship policy, on the basis of which German nationality is acquired at birth only through German parents. The place of birth or residence, on the other hand, does traditionally not play a role in the granting of German citizenship. The ethnic underpinning of migration politics, which contributed to the view of immigrants as

²¹ BAMF, 2014, p. 186

foreigners, who are not deemed to become Germans, remained in place for over a century until the very end of the 20th century.²²

This dogma also explains the misperception of early labour migrants as temporary ‘guests’. Immigration to the Federal Republic of Germany was spurred by the active recruitment of so called “guest workers” from the Mediterranean basin, based on bilateral agreements starting in 1955. Less than two decades later, in 1973, an official recruitment ban was issued. At this point around three million foreign workers were living in the Federal Republic of Germany and many of them decided to stay.²³ Instead of returning to their countries of origin, as they were initially expected to, a large share of “guest workers” founded families, or brought their family members from their home regions, and built permanent communities in their place of residence. Still today, Turks, who have been the main target of the early labour recruitment programmes, constitute the largest group of people with a migration background in Germany.

Meanwhile the GDR pursued a very different migration policy. It denied the freedom of movement to its citizens and to foreign workers, who were mostly recruited in Vietnam and other socialist “brother states”. The majority of these workers were returned after the state collapsed in 1989. Only some ten thousand contract workers remained, and subsequently became foreign residents in the unified Germany, albeit under a precarious legal status.²⁴ Today only five percent of the population with a migration background live in the former GDR, while the vast majority of them stay in the more prosperous West.²⁵

Soon after the German reunification in 1990 a new pattern of immigration emerged, which resulted from the outbreak of civil war in the Balkans. Germany, albeit reluctantly, hosted a number of asylum seekers and civil war refugees, mainly from former Yugoslavia, which contributed to a peak of immigration in 1992. Around 200,000 refugees from the region were accepted on a temporary basis. While the

²² Reichel, 2014, p. 3

²³ Cyrus & Kovacheva, 2010, p. 126

²⁴ Cyrus & Kovacheva, 2010, p. 126

²⁵ BAMF, 2014, pp. 23-24

overwhelming majority of them had to return after the violence had seized, only around 20 thousand victims, who were traumatized by war atrocities, were granted a permanent status of protection.²⁶ Germany's unwillingness to accept former Yugoslav refugees as permanent residents stands in sharp contrast to the experience of its neighbouring country Austria, where their integration was relatively successful, and where as a result around 85,000 Bosnians were naturalised in 1998.²⁷

Since the mid-2000s Germany experiences a continuous increase in immigration. In the year of 2014 the Federal Office for Migration and Refugees (*BAMF*) registered around 1,5 million immigrants, which signifies an increase of nearly 20 percent in comparison to the previous year and a record high since the last immigration peak in 1992.

Although the majority of migrants arriving in Germany are still European citizens – in 2014 63% of newly arriving immigrants came from the EU in addition to an important number of Turkish and Russian citizens²⁸-, the share of people seeking asylum among the migrant inflow has significantly increased in 2014 and has reached a historical peak in 2015. The special role of refugees and asylum seekers in German immigration politics will be discussed in detail in the second part of this chapter.

On the other hand, a considerable level of emigration from Germany takes place, which largely consists of rejected asylum seekers' 'voluntary' or enforced returns.²⁹ Germany is currently expanding its already established practice of signing bilateral agreements with countries of origin, in order to facilitate the returns of unwanted immigrants.

Furthermore, although Germany has partly accepted its dependency on a foreign work force as a result of low birth rates and an aging population, those workers are usually admitted on a temporary basis only.

²⁶ Cyrus & Kovacheva, 2010, p. 127

²⁷ Brick, 2011, p. 10

²⁸ BAMF, 2014, pp. 14-15

²⁹ Cyrus & Kovacheva, 2010, p. 127

In 2005 a new Immigration Act entered into force which constituted a comprehensive reform of Germany's existing migration policy.³⁰ The new law differentiates between a temporary permit of sojourn (*Aufenthaltserlaubnis*), for students, seasonal workers, asylum seekers and others, which can be revoked when the reason of sojourn expires, and a permanent residence permit (*Niederlassungserlaubnis*) for which it sets very strict requirements. Only highly qualified migrants such as researchers, engineers and IT specialists are excluded from these requirements. By granting easy access to a permit of residence and its accompanying benefits to highly skilled workers, Germany is finally reviving its foreign labour recruitment policy. The target group has however changed significantly since the 1960ies and 70ies.

Furthermore, while the law is supposed to attract certain desired migrants, it largely restricts other channels of immigration, for example through family reunification, and it excludes the largest share of newly arriving migrants from the full range of benefits attached to the permit of residence.³¹ This development shows that half a century after the first wave of 'guest worker' recruitment, German politicians still prefer to view the majority of migrants as 'guests' rather than as full members of society.

1.1.2. Italy

Italy has only recently become a migrant-receiving country after almost a century of significant emigration. During the post-war economic boom Italy, unlike Germany and other Northern European countries, was not obliged to import foreign labour, because the demands for cheap workers in the more industrialised regions were satisfied by substantial inflows of internal migrants. Due to Italy's significant socioeconomic

³⁰ "Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)", entry into force 1 January 2005; See Reichel, 2014, p. 3

³¹ Paul, 2012, pp. 148-149

inequalities within the country, internal migration from its Southern regions played the historical role that immigration from the Mediterranean basin did in Germany.³²

Foreign migration flows first became perceptible in the mid 1970ies, which can be explained partly by the ban Germany and other Northern European countries cast on labour migration, and partly by the strong economic growth Italy experienced since the 1960ies. In addition, the country's geographical position played an important role when push-factors increased in Italy's neighbouring regions: Its proximity to less developed areas such as the Balkan region and the Maghreb, as well as the accessibility of its borders from the Mediterranean Sea made Italy a transit and destination country for migrants fleeing political and economic crisis.³³

The demographic decline and low fertility rate in Italy has additionally fuelled Italy's need for foreign workers to compensate for quantitative shortages in the labour market. Similarly to Germany, the demand also increases under the pressure of an aging population, as in both countries over 20 percent of the population are over 65 years old. Foreign nationals currently represent around 8% of the total resident population and 22% of all minors.³⁴

Although economic and demographic factors point to a structural dependency on foreign labour, immigration has never been propelled by an explicit demand coming from the industries, nor by an active recruitment policy on a national level, as has been the case in Germany. Still today migration to Italy, although useful for an economic system in need of a cheap and flexible work force, has received little official recognition of its positive functions.³⁵

Italian politicians have thus failed to reconcile the structural need for migrant workers with the increasing stock and flows of migrants. As a result the majority of migrants currently arrive through irregular channels. Moreover, the perceptiveness of the

³² Pastore, 2004, p. 36

³³ Fasani 2010, p. 167

³⁴ ISMU, 2015, pp. 45,49

³⁵ Pastore, 2004, p. 36

country's shadow economy remains the most important pull-factor for migration. The lack of a reasonable management of immigration flows, and the simultaneous restrictiveness in providing legal channels for labour migration, can be best described as a "policy of closing the front door of legal entry, while keeping the back door for illegal entry half open".³⁶

Although the number of immigrants in relation to the native population is lower in Italy than in Germany – currently the number of both regular and irregular migrants residing in the country is estimated at 5,8 million³⁷-, Italy has experienced a steep increase in immigration in the last two decades. Indicatively, the migrant population in 2007 has been more than five times higher than the level recorded in 1990.³⁸ After Germany and the United Kingdom Italy has thus become the country with the third highest net immigration balance within the EU.³⁹ Also in Italy, the most important group of immigrants are Eastern Europeans, mainly Romanians and Albanians, followed by North-Africans, Asians and Sub-Saharan Africans.

Similarly to Germany, the most significant change in Italian immigration patterns in the last two years has been the noticeably larger share of asylum seekers among the newly arriving immigrants. In Italy this development is dramatically accompanied by an increasing influx of people arriving on its Southern shores by boat. The Institute for Multi-ethnic Studies (*ISMU*) reported 170,000 arrivals in 2014, whereas in 2012 only 20,000 immigrants were registered on the shores.⁴⁰ As in other EU countries, the surge of asylum seekers arriving in Italy has led to a significant boost of asylum applications since 2014. The country however still mainly functions as a transit country, while the majority of immigrants try to seek protection in Northern Europe. Italy's nevertheless important role in hosting asylum seekers will be further discussed in the second part of this chapter.

³⁶ Zincone 1998, cited after Fasani, 2010, p. 169

³⁷ ISMU, 2015, p. 45

³⁸ Fasani, 2010, p. 169

³⁹ BAMF, 2014, p. 161

⁴⁰ ISMU, 2015, p. 46

1.1.3. Concluding Remarks

Italy and Germany have become two major immigration countries in the course of the last six decades. However, the importance of stocks and inflows of foreign nationals in both countries has for a long time been juxtaposed by an officially restrictive stance on migration and by a lasting reluctance to accept migrants as equal and permanent members of society.

The growing presence of people seeking protection from war and crisis in Italy and Germany will pose a challenge to their traditional utilitarian perception of migrants as temporary guests. Those immigrants, who fled from persecution and destitution in their countries of origin, did not travel to Europe as a place of temporary sojourn. They came in need of a new place to live and set roots in, knowing that they will not be able to return to their home countries in the near future.

1.2.Reception of Asylum Seekers

As other countries within and beyond Europe, Germany and Italy experienced a significant increase in asylum applications due to the political crisis in the Middle East and other conflict regions. Their political reaction to this boost of applications is based on distinct and to some extent contrary policy frameworks.

Not only in the light of the recent surge of refugees, but already since the refugee crisis of the 1990ies, are the countries regarded as two showpieces of different immigration regimes. Italy as the ‘inefficient South’ is often contrasted with an ‘effective North’ in terms of internal controls and humanitarian protection. While Italy is often considered to have a lax immigration system with weak controls and insufficient guarantees for refugees and asylum seekers, Germany, is perceived to dispose of a highly regulated

asylum framework and an efficient reception management.⁴¹ The following subchapter will present both countries' refugee reception regimes and show how the two seemingly contrasting systems are in fact largely interrelated.

1.2.1. Germany

The right to asylum for politically persecuted refugees is granted under Art 16a of the German Constitution (*Grundgesetz, GG*)⁴². The administrative body, which decides upon the granting of constitutional asylum, as well as refugee status under the 1951 Geneva Convention, or other forms of protection for humanitarian reasons is the Federal Office for Migration and Refugees (*BAMF*). Asylum seekers may appeal against a negative decision before a regular administrative court. Further appeals before a high court are however only possible under exceptional circumstances.

For the duration of their procedure, asylum seekers are issued a temporary permit of sojourn. After they are filed at the *BAMF*, they should be accommodated in initial reception centres for up to six months during the first stage of their asylum procedures. Subsequently, they are usually sent to local accommodation centres where they have to stay for the remaining time of their procedures. The obligation to stay in such decentralized accommodation centres, often located in rural and isolated areas, also applies to the whole length of possible appeal procedures, which can take up to several years. It should be noted however that since the reception of asylum seekers is carried out by the sub-regions (*Länder*), their accommodation is organized in different ways and in some municipalities they are also granted access to the regular housing market.⁴³

In a comparative study of the reception conditions throughout the *Länder*, the refugee advocacy NGO *Pro Asyl* asserted severe interregional differences in the standards and management of accommodation facilities. These differences can partly be explained by

⁴¹ Finotelli, 2009, p. 886

⁴² Article 16a, Basic Law for the Federal Republic of Germany, 23 May 1949

⁴³ ECRE, 2015, pp. 12-13; Pro Asyl, 2015, p.12; § 44 para. 1 AsylVfG; § 3 para. 2, sentence 1 AsylbLG

varying attitudes towards immigrants among the population. Some *Länder* such as Rhineland-Palatinate accommodate asylum seekers in ways that are supposed to avoid conflict and enable relatively normal living conditions in decentralized shelters and private flats. In Saxony and Bavaria on the other hand, where xenophobia is traditionally more widespread, they are obliged to stay in overcrowded mass accommodations, which points to an underlying objective of deterring future asylum seekers in those *Länder's* reception policies.⁴⁴

The study shows that, although the reception of asylum seekers is regulated by EU law, most importantly by the Reception Condition Directive⁴⁵, standards of living can vary significantly, even within one country.

The distribution of migrants seeking protection is regulated by an allocation formula in accordance with each *Land's* tax revenue and with the size of its population. Asylum seekers have no subjective right to codetermine the place they will be allocated to or to appeal against relocation,⁴⁶ which is symptomatic of their general heteronomy regarding important life choices.

Germany's aggregate protection rate has increased in the last two years with 31,5 % of all decisions resulting in some form of protection in 2014 and 42,2 % in the first ten months of 2015.⁴⁷ This mainly results from a policy of prioritizing a certain share of cases which can be dealt with in accelerated procedures. To Syrians as well as Christians, Mandeans and Yazidis from Iraq the *BAMF* currently grants refugee status on the basis of a questionnaire.⁴⁸

While the aforementioned groups largely benefit from the fast-track processing of their cases, which gives them almost immediate access to the full range of rights granted to convention refugees, accelerated procedures have the opposite effect on people fleeing

⁴⁴ Pro Asyl, 2014, pp. 6-9

⁴⁵ Council of the European Union, Directive 2013/33/EU

⁴⁶ The only criteria that must be respected in a relocation decision is according to §46, para. 3, sentence 2 AsylG the unity of the core family.

⁴⁷ BAMF 2014, p. 102; ECRE, 2015, p. 10

⁴⁸ ECRE, 2015, p. 10

proclaimed ‘safe countries of origin’. Asylum applications, filed by nationals of ‘safe countries’, which as of November 2014 include Albania, Bosnia and Herzegovina, Ghana, Kosovo, the Former Yugoslav Republic of Macedonia (FYROM), Montenegro, Senegal and Serbia,⁴⁹ are regularly rejected as manifestly unfounded.⁵⁰ Appeals against a negative decision then have to be filed within one week and do not suspend the execution of an expulsion order. Since in the case of an application's rejection as manifestly unfounded, migrants are obliged to return within seven (instead of the regular 30) days, the possibilities of effective remedy are extremely slim for asylum seekers from ‘safe countries of origin’.⁵¹ Symptomatically, between January and October 2015 the rejection rates for the applications of both Serbian nationals and citizens of FYROM were at over 99 %.⁵² This shows that Germany's aggregate protection rate does not contain significant meaning for individual asylum seekers, as their chances to be granted refugee status are highly dependent on their respective countries of origin.

Both the divergent reception conditions throughout the *Länder* and the dual use of accelerated procedures show that asylum seekers in Germany are subject to a significant amount of arbitrariness. Their lack of agency to influence the length and outcome of their asylum procedure and their living conditions along the way, coupled with the mental or physical distress, which the experience of irregular migration often causes, make them a particularly vulnerable group of migrants.

Finally, the average lengths of asylum procedures at the authorities' level between January and October 2015 show a high level of divergence between different countries of origin: While applications submitted by Serbian nationals are dealt with within three to four months, Afghans and Pakistanis have to wait for an average of twelve to fourteen months to receive their first instance decision.⁵³ In the case of a subsequent appeal procedure the processing of their cases can take several years. This thesis will

⁴⁹ Appendix II of §29a AsylG

⁵⁰ §29a, para.1 AsylG

⁵¹ §36, para. 1 AsylVfG; § 38, para.1 AsylVfG

⁵² ECRE, 2015, p.6; the rejection rate refers to first instance decisions.

⁵³ ECRE, 2015, p. 16

focus on those asylum seekers, whose claims are rejected at the last instance, after they have spent a significantly long period of time in the country where they applied for protection.

1.2.2. Italy

Refugees and asylum seekers have, until recently, played a relatively marginal role both in comparison to the total number of foreigners residing in Italy, and compared to other large European countries such as Germany. In 2006, Italy hosted around 26,800 refugees which corresponded to 0,4 refugees per 1000 population. This number seems modest considering that Germany recorded a stock of 7,3 refugees per 1000 population in the same year.⁵⁴ Although the discrepancy between the two countries' reception capacities has continuously decreased since then, in order to understand Italy's current asylum policy, it is important to note that the phenomenon is relatively new in the country.

Until 1990, only Europeans were given access to an asylum procedure in Italy. When the country then opened for receiving non-European asylum seekers, the system was disorganised and reception conditions were poor from the very beginning.⁵⁵ Still today, Italy remains the only EU country without an organic asylum law. Although Italy has ratified the 1951 Geneva Convention, and has enshrined the right to asylum of "foreigners who are denied the effective exercise of democratic freedoms guaranteed by the same Constitution in their country" in Article 10§3 of its Constitution, this relatively generous provision has never been implemented by the adoption of a comprehensive law regulating the right to asylum⁵⁶. Nowadays, some relevant provisions have been issued and included into the general law on migration, following the EU Directives on Reception Conditions (2003/9/EC), on Qualifications (2004/83/EC) and on Procedures (2005/85/EC).⁵⁷

⁵⁴ Fasani, 2010, p.174

⁵⁵ Baldwin-Edwards & Zamagni, 2014, p.8

⁵⁶ Di Pascale, 2014, p. 289; Fasani, 2010, p. 174

⁵⁷ Law No. 189/02, amending Law No. 40/98 "Testo unico delle disposizioni concernenti la disciplina dell' immigrazione e norme sulla condizione dello straniero"

Legal uncertainty coupled with the restrictive granting of refugee status and poor benefits for both asylum seekers and recognized refugees are factors, which discouraged potential asylum seekers from going through the strenuous process of an asylum procedure in the initial years. Recently, due to measures towards a common European asylum system, Italy was forced to bring its reception conditions into conformity with EU standards. During the last decade, the responsible authorities have therefore introduced initiatives and reforms to improve the asylum mechanism.

Nevertheless, the basic well-being of asylum seekers and refugees is still far from properly secured. The most striking issue remains their lack of support in terms of accommodation and integration. Despite the introduction of EU-wide minimum standards in the reception of asylum seekers, the Italian system leaves thousands of people – including many considered vulnerable – without proper means for taking care of themselves.⁵⁸

Especially since the beginning of the economic crisis in 2010, the state-run ‘Protection System for Asylum Seekers and Refugees’ (*Sistema di Protezione per Richiedenti Asilo e Rifugiati, SPRAR*) is suffering from a lack of funding. The system has not been able to provide adequate shelter for all, even before the recent increase in asylum applications throughout the EU. As a result, a significant number of persons applying for protection have no realistic prospect of being accommodated in the *SPRAR* programmes. Those people may be accommodated in other facilities with usually much lower standards. Others are forced to sleep in vacant buildings or train stations and rely on charity to provide for their most basic needs.⁵⁹ In *Tarakhel v. Switzerland* the European Court of Human Rights (ECtHR) found that the return of an Afghan family of asylum seekers to Italy amounted to inhuman and degrading treatment, given that “the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded”.⁶⁰ Such shortcomings

⁵⁸ Baldwin-Edwards & Zamanigni, 2014, p. 9

⁵⁹ Giudici, 2013, p. 67

⁶⁰ *Tarakhel v. Switzerland*, ECtHR, Judgement of 4 November 2014, Application no. 29217/12

explain, why still today the majority of irregular migrants in Italy opt for an undocumented presence, even though some among them may be eligible for asylum or another form of protection.⁶¹

Another option was, especially in the initial years of the Italian asylum system, to continue one's journey to Northern Europe, in order to apply for asylum under more favourable conditions. A turning point however came in 1997, when the Dublin Convention entered into force, making Italy responsible for a much greater share of asylum seekers entering the country. The core principle of this European Regulation is that asylum seekers are obliged to file their application in the first EU member state they entered. Upon arrival their fingerprints are taken and registered in the central European database (EURODAC). Subsequently they will not be able to apply for asylum in any other country, and will be sent back to the country of first entry, if they continue their journey to a more desired destination.

The system, formally created to equally share the 'asylum burden' among European countries, is based on the assumption of uniform reception conditions for asylum seekers across the EU. In reality however, the rights and benefits for people seeking protection, as well as the application of European asylum law, are highly variable in different member states.⁶² It should be noted however that migrants are largely aware of these regulations as well as different reception standards throughout the Union. They are therefore conscious not to be registered in a country, where they do not wish to apply for asylum.

The geo-political crisis in the Middle East, which has stipulated the current wave of people claiming protection in Europe, also impacts Italian immigration patterns. Significantly, as has been noted in the first part of this chapter, the number of migrants arriving by boat on the country's Southern shore has dramatically increased. The raised

⁶¹ Fasani, 2010, p. 169

⁶² Giudici, 2013, p. 76

inflow of newly arriving migrants has also led to a high number of asylum applications in 2015, precisely 61,545 between January and October.

When examining the composition of the applicants' countries of origin, it therefore seems astonishing, that citizens of countries directly involved in the current Middle Eastern crisis are largely underrepresented. On the contrary, the five main nationalities of asylum seekers in 2015 were Nigerians, Pakistanis, Gambians, Bangladeshi, and Senegalese⁶³. Given that Italy's protection rate of 60,7 % is above EU average,⁶⁴ the country appears to have developed as an important destination for those migrants, who would have little prospect of being granted asylum in Northern Europe. Unlike Syrians, Iraqis or Eritreans, whose claims for protection are more widely accepted throughout Europe, these people are forced to opt for an asylum procedure in Italy, despite the country's poor reception conditions, knowing that the Italian authorities are relatively unlikely to return them to their home countries. This particularly desperate situation makes asylum seekers in Italy an especially vulnerable group.

1.2.3. Concluding Remarks

Both Italy and Germany dispose of distinct pull-factors which led them to become important destinations for people seeking asylum in Europe. While the former attracts migrants with weak controls and an easily accessible geographic position, the latter has especially allured people fleeing the conflict in Syria and Iraq by temporarily granting them asylum almost unconditionally.

The two countries have however sought to counterbalance these pull-factors by creating powerful push-factors: Italy discourages migrants to apply for asylum by largely denying them any form of social assistance. Germany, on the other hand, has established a highly selective asylum policy, which poses almost unsurmountable barriers to the successful completion of a large share of procedures. As will be shown in the next section of this chapter, these two very different strategies have a similar side

⁶³ ISMU, 2015, p 48

⁶⁴ ISMU, 2015, p. 308

effect: They leave a significant amount of people without a permanent status of residence. Be it in the legal limbo of documented irregularity or completely unauthorised presence, thousands of people in Italy and Germany are permanently exposed to the threat of imminent deportation.

1.3. Dealing with Rejected Asylum Seekers

Even after their claims for international protection have been rejected in the last instance, migrants may stay in the country for an extended period of time, if they are not willing or able to return to their countries of national origin immediately. In this case they are largely subjected to criminalisation and social marginalisation. The specific legal and social situation of asylum seekers in Italy and Germany will be presented in the following subchapter.

1.3.1. Criminalisation of Irregular Migration

Following EU-wide efforts to combat irregular migration, both Germany and Italy have classified illegal entry and stay on their territory as a criminal offence, instead of relying on administrative sanctions.⁶⁵

In Italy allegations of escalated crime rates caused by episodes of ‘illegal’ migration were among the main topics discussed before the general elections held in 2008 and significantly contributed to the victory of the right wing coalition led by Silvio Berlusconi. Subsequently a ‘security package’ (*Pacchetto Sicurezza*) was passed in 2009, as a set of legal measures aimed at improving Italian citizens’ level of safety. A number of interventions, especially the classification of undocumented residence as a criminal offence punishable with a five to ten thousand euro fine, clearly targeted undocumented migrants. Additionally, the law shrinks the already limited rights of

⁶⁵ See for Germany: § 95 para., 1 No. 2 and No. 3 AufenthG; for Italy: Art 1(16)(a) of 3/36 Law 94/09

unauthorized migrants by extending the maximum length of detention for migrants with a foreseeable removal order, and by further excluding them from public services.⁶⁶

The new provisions criminalizing undocumented stay have been met with criticism for various reasons: Many Italian commentators considered the offence as a crime which is inherent in people, and therefore raises questions in view of the principle of non-discrimination. Further criticism focused on the proportionality of the measures and on the question, whether the criminal prosecution of unauthorized migrants is effective in discouraging and preventing irregular migration.⁶⁷

The application of criminal sanctions to foreign residents without a legal status also seems inadequate considering that breeches of immigration law are considered as ‘victimless crimes’. According to the High Commissioner for Human Rights of the Council of Europe “criminalization (of irregular entry and stay) is a disproportionate measure, which exceeds a state’s legitimate interest in controlling its borders.

Immigration offences should therefore remain *administrative* in nature”.⁶⁸ Arguing from a moral perspective, Carens comes to a similar assessment: “Of course, the state does have the power (...) to make violations of immigration law a criminal offence. But if we weigh the harm criminalization (sic.) aims to prevent against the social costs it incurs, we see that it makes no sense.”⁶⁹

Nevertheless, when the Italian Constitutional Court was called upon to assess the constitutionality of the 2009 security package, it came to a different conclusion. In its judgement it considered that the crime of illegal immigration did not penalise a “way of being” of persons but rather a specific behaviour manifest in the lack of compliance with immigration law. It held that the application of criminal sanctions in this matter could not be considered arbitrary, as the illegal entry and stay of foreigners infringed the interest of the state to control migratory flows in accordance with a regulatory framework. To support this view, the Court referred to comparable laws, which are in

⁶⁶ Fasani, 2010, pp. 179-180; Baldwin-Edwards & Zampagni, 2014, p.7

⁶⁷ Di Pascale, 2014, p. 291

⁶⁸ Council of Europe Commissioner for Human Rights, cited after Di Pascale, 2014, p. 287

⁶⁹ Carens, 2010, p. 46

place in other European countries such as Germany, and which foresee similar or even significantly more severe penalties for breaches of immigration law.⁷⁰ Indicatively, the German residence law stipulates detention up to one year for unauthorized entry or stay.⁷¹

1.3.2. Non-Penalisation of Asylum Seekers

Due to the extremely limited channels for legal entry to the European Union, the majority of people in need of protection currently enter illegally into the country, where they apply for asylum. As has been discussed above, states usually enjoy a wide discretion in regulating migration to their territory. They are however prohibited by international law to sanction immigrants for illegal entry or presence, while they exercise their individual human right to seek asylum, which is enshrined in Art 14 of the Universal Declaration of Human Rights (UDHR). To this effect, Article 31§1 of the 1951 Geneva Refugee Convention (GRC) provides as follows:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

An asylum application thus suspends the irregularity of migrants’ residence in one country, even if they entered it without official authorisation. Accordingly, migration authorities are obliged to issue a temporary permit of sojourn, which is valid throughout the duration of the asylum procedure. If they are recognised as refugees, it will subsequently be transformed into a permanent residence permit.

Although national legislators throughout Europe are currently trying hard to limit the GRC’s scope of application as far as possible, states’ sovereignty in determining, who may or may not stay on their territory is clearly restrained by international human rights

⁷⁰ Italian Constitutional Court, Judgement of 15 July, 2010, Application No. 250/10, para. 6.3, 6.5

⁷¹ § 95 para., 1 No. 2 and No. 3 AufenthaltG

law. In the following chapters the argument will be developed that human rights and human dignity must also be considered when dealing with irregular immigrants, who do not meet the formal definition of a refugee.

1.3.3. Permanent and Temporary Protection

The criteria to determine, which asylum seekers qualify for refugee status within the meaning of the GRC or other forms of protection, are specified in the ‘Qualification Directive’ (2004/83/EC). It was passed in an attempt to harmonize the different asylum standards in the EU, by setting out who can benefit from protection, who will be excluded from it, when it will be withdrawn, and what rights are to be attached to it.⁷²

As has been emphasized above, practices of granting asylum or other forms of protection still vary greatly within the EU. Advances towards a common European asylum system are hampered by differing national interests, especially in the current context of a perceived ‘refugee crisis’. The implementation of the Qualification Directive, however, makes it easier to compare the varying interpretations of asylum in different member states. An important difference with severe implications for the immigrants’ future is some countries’ preference to grant temporary protection, while others are more likely to grant a permanent legal status.

Refugee status is generally granted on a permanent basis and does not need to be renewed. As has been explained above, Germany presently grants this form of protection on a large scale to Syrians, Iraqis and (to a slightly lesser extent) Eritreans.⁷³

In Italy on the other hand, the granting of subsidiary protection and residence permits based on humanitarian reasons is much more widespread, while only 5,6 percent of asylum applicants have been recognised as refugees between January and October 2015.⁷⁴ In the majority of cases the authorities decide that asylum seekers do not

⁷²Dauvergne, 2008, p. 149

⁷³ It should be noted here that Germany’s high “refugee rate” (over half of first instance decisions between January and October 2015 resulted in refugee status) is related to the current prioritization of certain caseloads by the responsible authorities and does not represent a long-time trend. See ECRE, 2015, pp.6,10

⁷⁴ ECRE, 2015(1), p. 6

qualify as refugees within the meaning of the Convention, because they do not fall under its limited definition, but also that they cannot be returned to their country of origin where they would face serious threats to their life, liberty or health. These kinds of residence permits based on the principle of *non-refoulement* are much more temporary and precarious, as they have to be renewed on a regular basis and can be revoked if the reason for protection no longer applies.⁷⁵ According to Giudici, “multiple shifts between different legal and illegal statuses are therefore extremely common”.⁷⁶

From a normative perspective, a positive function of subsidiary protection and humanitarian visas is to compensate for the limitations resulting from the restrictive formal definition of who is a refugee under the Convention.⁷⁷ On the long run however, the precariousness of a temporary status hampers social integration and the constant fear of losing their residence permit puts a serious burden on migrants.

Considering that the moral grounds to enter and stay in the country which granted them protection were just as valid as those of persons, who have formally been recognised as refugees, this burden seems excessive. If the reasons for which they are unable to return to their country of origin are ongoing, it therefore becomes crucial to enable immigrants the passage into a secure status, instead of expecting them to live in limbo indefinitely.⁷⁸

1.3.4. Possibilities after a Negative Decision

After an asylum application has been rejected in the last instance, the migrant loses the temporary permit of sojourn, which was granted to him or her for the duration of the asylum procedure. They are obliged to leave the country, in which they are now present ‘illegally’ within a given time frame. If the exit does not occur voluntarily, former asylum seekers may be forcefully deported or put into detention.

⁷⁵ The *non-refoulement* principle prevents states from returning a person to a country where his or her life or freedom would be threatened. See UNHCR, 1997

⁷⁶ Giudici, 2012, p. 62

⁷⁷ Carens, 2013, p.204

⁷⁸ Carens, 2013, pp. 204-205

Not every rejected asylum seeker however leaves the country after a final negative decision. This may be because they go into hiding and thus withdraw themselves from the grasp of state authorities, or because the responsible authorities ‘look away’ and never actively undertake their deportation. Especially persons whose asylum application took a long time often rely on support from their social community to continue their stay, even without official authorization.

In Italy the relevance of unauthorized residents among the migrant population is a well-established fact. Entire economic sectors became niches for the informal employment of irregular immigrants, making it possible to survive in the country even without any state support.⁷⁹ Although data on the effective removals of rejected asylum seekers is not available, it is to be expected that a considerable fraction of persons, who have not been successful in obtaining refugee status or another form of protection opted for unauthorized residence.⁸⁰

Rather than relying on the very limited social benefits awarded to both asylum seekers and recognised refugees, many immigrants awaiting an asylum decision already resort to work in the Italian shadow economy. The different categories of regular and irregular migrants are therefore fluent and often overlapping as “asylum seekers and even ‘international protection beneficiaries’ tend often to share, in their everyday life experience, the same spaces of marginality and exclusion as those of ‘irregular migrants’”.⁸¹

Another reason why rejected asylum seekers stay in the host state, which regularly applies in Germany, can be that their deportation is not feasible for legal or factual reasons. In this case they are issued a ‘toleration’ (*Duldung*), which temporarily suspends their deportation but does not represent a legal residence permit. Tolerated status is granted for no more than three months at a time and expires when the reasons for postponing deportation cease.⁸² Unlike other ‘deportable’ populations such as

⁷⁹ Baldwin-Edwards & Zampagni, 2014, p. 10

⁸⁰ Fasani, 2010, p. 175

⁸¹ Giudici, 2013, p. 62

⁸² §60a AufenthG

irregular labour migrants, tolerated persons are registered with the government authorities, leaving them in the legal limbo of documented but not fully authorised presence.⁸³

By the end of 2014 around 113,000 people were tolerated in Germany. Over 30,000 of them had lived in the country for more than six years due to so-called ‘chain tolerations’, in which cases the status is renewed repeatedly for several years or even decades.⁸⁴ The highly precarious situation of chain toleration was the experience of many Roma who fled conflict in the Balkan region in the 1990ies, and who since then never managed to obtain a permanent legal status in Germany. After a repatriation agreement was signed with Kosovo in 2010, it became feasible to return many of them. As a result some 4,000 Roma have been repatriated in the following years, often through violent, forced deportations. Many of them were children born and raised in Germany but with no chance of returning, due to visa restrictions imposed on Kosovar nationals.⁸⁵

The example shows that the real threat of deportation never ceases to impact the lives of rejected asylum seekers, even after they have lived in a country for many years.

1.3.5. Concluding Remarks

International and European refugee law limits sovereign states’ prerogative to determine the admission and stay of aliens on their territory. They are however still largely unrestricted in their treatment of irregular migrants, who have not been formally recognised as refugees or beneficiaries of other forms of humanitarian protection.

Asylum seekers, whose claims have been rejected, and migrants, whose temporary protection status was not renewed, therefore constitute a particularly vulnerable group. In the following chapters the argument will be developed that states have a moral obligation to grant human rights and a secure status to long-term resident rejected

⁸³ Castañeda, 2014, p. 94

⁸⁴ BAMF, 2014, p. 204

⁸⁵ Castañeda, 2014, p. 94

asylum seekers. This obligation is not based on threats emanating from their country of origin but on their social membership to the country, which over time became their home.

2.The Right to Health

2.1.Rejected Asylum Seekers' Access to Health Care

Generous social benefits as a characteristic of European welfare systems are often mentioned as a pull-factor in the public discourse on immigration. Although little evidence is available to support this concern,⁸⁶ state legislators are reluctant to grant those benefits to aliens, who settled on their territory without official permission. Especially in the case of rejected asylum seekers, who consciously withdrew themselves from the grasp of the authorities, there seems to be little political willingness to provide any social services to them.

States are however bound by human rights law to grant certain social rights to everyone within their jurisdiction, regardless of their residence status.⁸⁷ Just as they are obliged to protect all persons present on their territory from violence and theft, states need to ensure that everyone is able to enjoy some basic social rights such as the right to health, education and housing. This chapter will explore irregular migrants' limited access to health care as an example of their social marginalisation and discuss states' obligations under human rights law to tackle this issue.

2.1.1.International and European Human Rights Law Framework

The right to health is considered a fundamental right, indispensable for living a life in dignity.⁸⁸ It is recognised in a number of international and regional human rights documents, beginning with the Universal Declaration of Human Rights. In its Article 25§1 it affirms that “everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”. As all other rights set forth in the Declaration, the right

⁸⁶ In fact a number of studies conducted throughout the EU have confirmed that immigrants contribute more to the economy than they receive in transfer benefits. Sciortino, 2004, p. 112

⁸⁷ Carens, 2010, p. 32

⁸⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, (hereafter General Comment No 14, 2000), para, 1

to health applies to everyone without any distinction based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*”.⁸⁹

States party to the Convention on the Rights of the Child (CRC) commit to the special protection of children and pregnant women’s highest attainable standard of health.⁹⁰ The right to health is further acknowledged in the International Convention on the Elimination of All Forms of Racial Discrimination⁹¹ and under the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICESCR, which has binding force in both Germany and Italy, contains the most authoritative provision of the right to health at the international level. In its Article 12§1 state parties “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. States are obliged to respect, protect and fulfil this right without discrimination. In a non-binding but authoritative General Comment, published in 2000, the UN Committee on Economic, Social and Cultural Rights (CESCR) explicitly includes unauthorised migrants into the scope of Article 12:

“States are under the obligation to respect the right to health by inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers *and illegal immigrants*, to preventive, curative and palliative health services”⁹²

The General Comment further affirms that the right to health not only extends to access to medical services but also to the underlying determinants of health, such as access to clean drinking water and adequate sanitation, safe conditions of work, a clean

⁸⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (hereafter UDHR), Article 2, emphasis added

⁹⁰ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 (hereafter CRC), Article 24

⁹¹ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195 (hereafter ICERD), Article 5

⁹² General Comment No 14, 2000, para. 34, emphasis added

environment, and access to health-related education and information.⁹³

The interpretation of the right to health, as set out in the General Comment, is remarkably far-reaching in its scope.⁹⁴ It is however doubtful that states fully adhere to the obligations emanating from it.

At the regional level, the European Social Charter (ESC) mentions extensive health rights under Articles 11 and 13. Their applicability to undocumented migrants is however contested. The appendix of the 1961 Charter originally limits the personal scope to only include legal residents.⁹⁵ Yet in *International Federation of Human Rights League (FIDH) v. France* the European Committee of Social Rights held that any “legislation or practice, which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter”.⁹⁶ No violation of Article 13 was found in this case, since France did allow irregular migrants to receive some medical assistance, albeit in a limited way. Restricting irregular migrant children’s access to health care however breached the more extensive Article 17, which provides for the right of children and young persons to social, legal and economic protection.

A similarly dynamic interpretation of the Charter was applied in *Defence for Children International (DCI) v. the Netherlands*, where The Committee found that by effectively denying children unlawfully present on their territory access to adequate shelter, the Netherlands acted in violation of Article 31§2 ESC. In its judgement it reiterated the need to respect every person’s human dignity and urged states to take account of the particularly vulnerable situation of children.⁹⁷

The emphasis on the fundamental principle of human dignity in both judgements affirms the position that basic social rights must be granted to everyone on the basis of a

⁹³ General Comment No 14, 2000, para. 36

⁹⁴ Flegar, Dalli& Toebe, 2016, p. 6

⁹⁵ Flegar, Dalli& Toebe, 2016, p. 4

⁹⁶ *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003

⁹⁷ *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, para. 47,48

shared humanity. However, while Italy has ratified the 1995 Additional Protocol to the ESC, which allows for collective complaints before the committee, this supervisory mechanism has hitherto not been accepted by Germany.⁹⁸

Although the European Convention of Human Rights does not contain a specific provision guaranteeing the right to health, the prohibition of torture, inhuman and degrading treatment enshrined in its Article 3 has been applied in relation to medical assistance. For instance in *Pretty v. UK* the Court held that “the suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment (...) for which the authorities can be held responsible”.⁹⁹ In *Wasilewski v. Poland* the Court however asserts that “the Convention does not guarantee the right to any particular standard of medical services or the right to access to medical treatment in any particular country”.¹⁰⁰

Finally Article 35 of the Charter of Fundamental Rights of the European Union, which binds EU institutions as well as member states implementing Union law, stipulates that,

“Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.”

The use of the term ‘everyone’ implies the applicability of the provision to third country nationals independent of their migration status. By granting member states the possibility to establish conditions in accordance with ‘national laws and practices’, the provision however allows for a wide margin of appreciation.

To conclude, although the right to health has been recognised as a fundamental right of

⁹⁸ Flegar, Dalli& Toebe, 2016, p. 4

⁹⁹ *Pretty v. UK*, Judgement of 29 April 2002, Application No. 2346/02, para. 52

¹⁰⁰ *Wasilewski v. Poland*, Judgement of 6 December 2005, Application No. 3274/96, para. 2

every human being in a number of treaties, the question, to which extend states are obliged to grant this right to aliens unlawfully residing on their territory, has not been sufficiently determined on an international or European level. As a result, the right of undocumented migrants to the highest attainable standard of health is unevenly protected throughout the European Union, as will be illustrated using the examples of Italy and Germany.

2.1.2. Rejected Asylum Seekers' Access to Health Care in Italy

In Italy medical care is in principle guaranteed to all migrants independent of their administrative residence status.¹⁰¹ All citizens and regular immigrants, including asylum seekers, can register in the tax-funded health system and are entitled to primary, inpatient, and emergency care that is free at the point of service. Although co-payment is foreseen for most other services, asylum seekers are exempted from charges if they do not dispose of an income. They are thus treated under the same rules as unemployed Italian nationals.¹⁰²

Rejected asylum seekers are no longer able to register in the mainstream health system. They can however apply anonymously for a six-month health card, which entitles them to urgent care as well as continuous treatment of severe diseases. They also receive preventive care, including maternity care, as well as diagnosis and treatment of infectious illnesses.¹⁰³

Importantly all doctors and other health professionals are prohibited from reporting irregular migrants seeking treatment. They thus constitute a significant exemption from the statutory duty, which requires all public officers (including teachers, civil servants and local authority employees) to denounce persons illegally residing in Italy to the police or judicial authorities.¹⁰⁴

¹⁰¹ Art. 35 Legge 286/1998

¹⁰² ECRE, 2015(1), p. 83; Gray & van Ginneken, 2012, p. 7

¹⁰³ Gray & van Ginneken, 2012, p. 7

¹⁰⁴ Amnesty International, 2014, p. 13

Italy generally has one of the most favourable legal systems of the EU with regards to health care provisions for undocumented migrants. There are however local differences in the interpretation and implementation of these provisions. As a result, great interregional varieties exist in irregular migrants' effective access to medical care. Besides different legislations, these varieties are also due to the uneven availability of economic resources as well as different levels of information concerning the legality of treatment both for migrants and physicians. Other factors barring undocumented migrants' effective access to care may be related to language, culture, as well as a general fear of contact with public authorities.¹⁰⁵

2.1.3. Rejected Asylum Seekers' Access to Health Care in Germany

The German welfare system, based on a Bismarckian tradition, is characterised by a high relevance of status maintenance coupled with low levels of universalism. The inclusion of foreign nationals into this framework thus highly depends on their formal labour market participation.¹⁰⁶

Accordingly, health care benefits for asylum seekers are restricted to cases of acute diseases or pain, in which 'necessary' medical treatment has to be provided.¹⁰⁷ Only 15 months after their registration are asylum seekers entitled to standard social benefits under the same conditions as German citizens.

The complicated framework regulating asylum seekers' and other third country nationals' access to health care has led to a great deal of uncertainty among physicians and administrators. For instance the term 'necessary treatment', to which asylum claimants and tolerated persons are entitled under the Asylum Seekers' Benefits Act (*Asylwerberleistungsgesetz*), has not been conclusively defined. Although some local courts have upheld the view that treatment for chronic diseases also needs to be provided, the opinion prevails that the provision only includes absolutely unavoidable

¹⁰⁵ PICUM, 2013, p. 12; Gray & van Ginneken, 2012, p. 7

¹⁰⁶ Paul, 2012, p. 145

¹⁰⁷ Pregnant women and women in need of post-natal care, as well as torture victims and traumatised asylum seekers are entitled to more extensive medical and psychiatric support; ECRE, 2015, pp. 63-64

medical care.¹⁰⁸

Migrants without any regular status are unable to register in the public insurance system. It is also highly unlikely that they could apply for private insurance, which is only accessible for high-income employees, civil servants and self-employed persons, and to which membership can be denied on individual grounds.¹⁰⁹

Nevertheless hospitals are obliged to provide emergency treatment to every person in need. If the patient is not insured they can receive financial reimbursements from the tax-funded social welfare offices. Although public officials are generally obliged to report the unauthorised presence of migrants to the authorities, the doctor's professional confidentiality in this case extends to the office.¹¹⁰

In theory, undocumented migrants are not only entitled to emergency care but also to the same 'necessary treatment' which is provided to asylum seekers and tolerated persons. In all cases of planned care, hospitals and general practices will however only treat patients who are in possession of a medical card, for which foreigners must personally apply at the welfare office.¹¹¹

The office is then obliged under §87 of the Residence Act (*Aufenthaltsgesetz*) to denounce the alien's unlawful presence to the migration authorities. The duty to report undocumented migrants, which binds all public officials (except for the employees of schools and other educational institutions), thus effectively prevents them from seeking any kind of planned medical care.

Although all immigrants are in principle granted access to medical treatment of acute pain, postnatal care and preventive care of infectious and sexually transmitted diseases, the possibility of deportation deters irregulars from seeking any contact with public officials. Unless medical professionals are willing to forego their reimbursement and

¹⁰⁸ Gray& van Ginneken, 2012, p.8; ECRE, 2015, p. 63

¹⁰⁹ Flegar, Dalli& Toebe, 2016, p. 6

¹¹⁰ Gray& van Ginneken, 2012, p.8

¹¹¹ Ibid.

treat them without a health card, those in need of medical assistance therefore mostly rely on the aid of charitable or religious organisations.¹¹²

2.1.4. Concluding Remarks

Rejected asylum seekers, who withdrew themselves from the authorities in order to remain in the country, where they had applied for protection, are primarily subject to policies related to immigration control and enforcement. By excluding them from most social benefits, state legislators seek to combat irregular flows and the practice of bypassing immigration rules.

On the other hand, international and European human rights law stresses the fundamental character of certain social rights, which have to be granted to everyone without discrimination. In order to ensure that their national laws and policies comply with such provisions, states are therefore obliged to grant some form of social security to every person present within their jurisdiction, including rejected asylum seekers.

The conflicting objectives of enforcing immigration rules on the one hand and the adherence to human rights obligation on the other have not been sufficiently reconciled at an EU level. As a result, the social rights of rejected asylum seekers and other undocumented migrants are unevenly protected in different member states.

One of the most important factors determining the effectiveness of irregular migrants' access to social services appears to be the question, whether or not they run the risk of revealing their presence to the migration authorities, if they seek assistance. The next chapter will explore this issue from a socio-political and philosophical perspective.

2.2. The Firewall Argument

¹¹² Flegar, Dalli & Toebe, 2016, pp. 8-9; Gray & van Ginneken, 2012, p.8

An important political objection to granting undocumented migrants access to social welfare is that doing so will attract more migrants. This argument is however largely inconsistent with the social reality of irregular migrants. People, who settle in Europe without a valid residence title, rarely come for the purpose of medical treatment. They are in fact primarily young and healthy human beings, whose physical and mental conditions quickly diminish, due to the precarious living circumstances they are exposed to upon arrival.¹¹³ Policies that criminalise irregular stay, and exclude undocumented migrants from social security create legal and social structures that constrain their rights and capabilities on a continuous, everyday basis.”¹¹⁴

2.2.1. Disparities between Legal Access and Factual Exclusion from Social Care

The majority of undocumented migrants in Europe are informally employed, for instance as domestic workers, in the construction business, or as agricultural workers. Especially in the latter two sectors, migrants frequently face unhealthy and unsafe working conditions.¹¹⁵ Their often precarious housing situations further contribute to the risk of becoming ill.

A survey monitoring the living conditions of a sample of 150 African agricultural workers in the Rosarno area of Southern Italy found that a considerable number of interviewees suffered from illnesses connected to their precarious accommodation. They were found to sleep on mattresses on the ground in overcrowded rooms, with no adequate toilets nor clean drinking water and merely an open fireplace for cooking. As a result, the workers, mostly strong and healthy young men, soon developed infections of the respiratory system, aggravated by the cold and the smoke inside their rooms, as well as gastrointestinal diseases, caused by malnutrition and unclean drinking water. In

¹¹³ Médecins du Monde, 2009, p. 136; Dossier Radici/Rosarno, 2012, p. 114

¹¹⁴ Hovdal-Moan, 2012, p. 1234

¹¹⁵ Amnesty International, 2012, 27

addition, many suffered from ostealgia, pain in the back and dermatitis resulting from the harsh and unhealthy conditions of work.¹¹⁶

69 % of the interviewed workers were rejected asylum seekers and another 9 % were asylum seekers and recognised refugees.¹¹⁷ In Italy refugees, asylum seekers, and even rejected asylum seekers are formally entitled to medical care. However, due to the conditions of marginality and social exclusion in which they live, irregular migrants do not always succeed in gaining access to health services, even if they are guaranteed by law.

A report on the access to medical care for persons without a valid residence permit, conducted by Médecins du Monde in eleven European countries, revealed that even the children of undocumented migrants often do not receive sufficient medical treatment. Moreover 48 % of the (formerly) pregnant women interviewed during the course of the study had refrained from seeking care during or after their pregnancy and many of them reported devastating experiences related to childbirth.¹¹⁸ These results are particularly grave, considering that the rights of both children and pregnant women to health care are explicitly protected under Article 24 of the CRC. In all of the eleven countries included in the study undocumented migrants were legally entitled to some form of paediatric services and maternity care.

Their reluctance to claim the medical services they are formally granted often stems from a lack of information thereof. From the point of view of irregular migrants, the complexity of the health system, administrative barriers, language difficulties and experienced racism are some of the main factors barring their effective access to health care.¹¹⁹ Most importantly however, they will not seek assistance, if doing so will reveal their presence to the migration authorities and consequently lead to their detention or deportation. As Bosniak puts it, “(i)f we know anything about the lives of irregular

¹¹⁶ Dossier Radici/Rosarno, 2012, p. 114

¹¹⁷ Dossier Radici/Rosarno, 2012, p. 51

¹¹⁸ Médecins du Monde, 2009, p. 137

¹¹⁹ Médecins du Monde, 2009, p. 103

migrants, we know that their vulnerability to deportation functions to undercut those basic rights that are formally available to them”.¹²⁰

2.2.2. The Need for an Information ‘Firewall’

In order to ensure that irregular migrants can effectively access basic social services, Carens proposes a firewall between the protection of migrants’ rights on the one hand, and immigration enforcement on the other. Morally, it makes no sense to grant immigrants purely formal social rights under conditions, which make it impossible to effectively enjoy them. Hence, those persons who are providing migrants access to the enjoyment of basic rights, such as the right to education and the right to health must not share any information with migration authorities.¹²¹

This information firewall needs to be established as a firm legal principle in order to ensure a sufficient level of certainty for migrants as well as teachers, health professionals and administrators. In Italy for instance, physicians and office staff are explicitly banned from reporting undocumented migrants.¹²² However a new legislation, which would require medical professionals to denounce their patients to the police or judicial authorities, was debated in Senate in 2009. As a result, doctors reported a noticeable decrease in patients without documents, although the new legislation, as finally adopted, did not modify the reporting ban.¹²³ The example illustrates the direct connection between undocumented migrants’ vulnerability to deportation and the effectiveness of their access to social care.

It also shows the fragility of provisions, protecting the human rights of foreigners in a political climate of preponderant xenophobic resentment. Under such conditions, as were in place during Berlusconi’s right-wing government, “(b)orders often end up

¹²⁰ Bosniak, 2010, p. 86

¹²¹ Carens, 2013, 133

¹²² Art. 35.5 Decreto Legislativo 286/1998

¹²³ Gray& van Ginneken, 2012, p. 7; Amnesty International, 2012, p. 47

trumping core liberal commitments- not just at the state's frontiers but also in the interior itself"¹²⁴.

While immigration control may be perceived by some as a generally legitimate aim, the attempts to eliminate the protective firewall between medical personnel and migration authorities have met strong resistance at the individual level. Thus the failure of the proposed legislative amendment, partly resulted from a campaign launched by health professional unions, which argued that eliminating the reporting ban would effectively violate irregular migrants' right to health.¹²⁵

Clearly most professionals, who are responsible for the protection of migrants' basic human rights, have little desire to participate in the enforcement of immigration laws.¹²⁶ According to Médecins du Monde, the obstacles undocumented migrants are faced with when seeking access to medical assistance are not only contrary to human rights but also to their professional ethics.¹²⁷ They therefore demand,

“(t)hat in every European country all medical treatment, as well as preventive care, shall be equally accessible to persons without a residence title and to all other social groups, without discrimination related to their status or financial capacities. To this goal, (Médecins du Monde) demand that European governments should stop subordinating health policies under the realm of immigration policies”.¹²⁸

The two conflicting objectives of enforcing immigration rules on the one hand, and protecting the rights of undocumented migrants on the other are of course difficult to reconcile in Realpolitik. As Carens notes, “there are always tensions between enforcing rules and protecting the rights of people suspected of violating those rules”.¹²⁹ However,

¹²⁴ Bosniak, 2010, p. 91

¹²⁵ Amnesty International, 2012, p. 47

¹²⁶ Carens, 2013, p. 134

¹²⁷ Médecins du Monde, 2009, p.137

¹²⁸ Ibid., author's translation

¹²⁹ Carens, 2013, p. 134

when the rights at stake are of fundamental value, border control concerns must not be placed over their effective protection

2.2.3. The Limits of the 'Firewall' Guarantee

A firewall between immigration enforcement and the protection of migrants' human rights is an important step towards making this protection effective rather than purely formal.¹³⁰ The reporting ban, prohibiting health personnel to denounce their irregular migrant patients to the authorities in Italy, is a positive example of this approach.

In the long run however, such measures cannot sufficiently solve the ongoing, multi-faceted human rights concerns of undocumented migrants, which stem from their structural marginalisation. The continuous vulnerability to forced expulsion affects their enjoyment of basic social rights in various ways, whereas an information firewall could only tackle some selective points.

As has been shown, the precarious conditions, in which immigrants without a residence title regularly live, negatively impact their health. Their lack of sufficient food and clothing, inadequate accommodations and unhealthy working conditions are only some of the many concerns, which are either directly or indirectly related to migrants' irregular status.

Furthermore, because of their need to stay 'invisible', undocumented migrants are highly limited in their mobility. Médecins du Monde reports that more than half of the immigrants they interviewed restricted their own movement or activities out of fear of being arrested.¹³¹

An employee of a free clinic in Munich that provides health care services to persons without papers describes how this self-restriction affects a patient's access to their services.

¹³⁰ Carens, 2010, p. 34

¹³¹ Médecins du Monde, 2009, p. 113

“She waits, hidden in the shade of a street corner, and we have to convince her that she is not in danger, so that she will find the courage to enter our establishment. She has cystitis, needs spectacles, suffers from (...) high blood pressure and needs a gynecological examination. When we ask her, how she has been handling her health concerns in the past, she answers ‘I helped myself’. She lives in hiding, constantly changing her place of residence. She does not dare to go to the city center out of fear of the police.”¹³²

The person described in this report is a 44 year old Peruvian woman, who had been living in Germany for thirteen years at the time of the interview.

Because of the structural nature of irregular migrants’ human rights concerns, a firewall approach can only work as a temporary solution to gross shortcomings in their effective protection. To safeguard their human dignity on the long run, residence security becomes a more important matter. Only the regularisation of their status can put an end to the subordinating effect of undocumented migrants’ deportability.¹³³

From a normative perspective, it is difficult to argue for a universal right to residence security. Carens therefore contends that, after having lived in one country for an extended period of time, irregular migrants should be granted a regular legal status. Their moral claim to amnesty, unlike basic human rights, does not simply derive from their status as a human being but on their social membership, which developed over time.¹³⁴

Germany and Italy have both implemented regularisation programmes in recent years, albeit in very different ways. Chapters three and four will explore the two political approaches in detail and discuss their adequacy to tackle the vulnerability concerns of long-term resident migrants with an insecure legal status.

¹³² Ibid., author’s translation

¹³³ Bosniak, 2010, p. 86

¹³⁴ Carens, 2010, pp. 32-33

3.Labour Rights

3.1.Asylum Seekers' Access to the Formal Labour Market

Asylum seekers seeking employment in Germany or Italy are faced with a number of legal, social and bureaucratic obstacles. Despite some efforts to facilitate their integration into the labour market, they are still widely excluded from working in the formal sector.

3.1.1.Germany

Following the obligations set out in the 'Recast Reception Condition Directive' several EU countries reduced the waiting period, during which asylum seekers are not permitted to work. According to Article 15 of said Directive,

“Member States shall ensure that applicants have access to the labour market no later than 9 months from the date when the application for international protection was lodged if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.”¹³⁵

Both Italy and Germany have transposed the provision more favorably than the minimum standards required by the Directive. Within two years after its entry into force in 2013 Germany reduced the waiting time for asylum applicants to seek employment from one year to three months.¹³⁶ The gradual opening of the German labour market to asylum seekers and tolerated persons seems to reflect a shift in the public attitude towards immigration. While former migration patterns triggered a diffuse fear of immigrants 'stealing our jobs', xenophobic notions are today largely inspired by a myth of 'lazy' asylum seekers looking to exploit the generous German welfare system. In addition, “surging labour shortages in the widely accepted demographic decline scenario (...)

¹³⁵ Art 15(1) Directive 2013/33/EU

¹³⁶ ECRE, 2015, p. 61

shape alleviations for an otherwise highly excluded group of migrant residents in Germany”.¹³⁷

Nevertheless, a law was adopted in October 2015, which contains new restrictions to accessing the labour market. Asylum seekers are now forbidden to work as long as they are accommodated in an initial reception centre. This regulation involves a high level of arbitrariness, since the individual asylum seeker is hardly able to influence the length of his or her stay in those centres. Some of them are allowed to leave after a short period of time for legal or practical reasons (e.g. because of overcrowding), whereas others may remain in the initial reception centres for a maximum of 6 months, during which they are not permitted to formally apply for work.¹³⁸

Furthermore, even after the passage of the waiting period, asylum applicants are not granted unlimited access to the labour market and face a number of bureaucratic obstacles. First they are required to apply for an employment permit. To this end, they need to hand in an employer’s confirmation of a concrete job offer as well as a detailed job description to the Foreigners’ Registration Office (*Ausländermeldeamt*). Since it is not possible to register for self-employment until the asylum procedure is completed, applicants’ personal agency in determining their participation in the labour market is limited.¹³⁹

In addition, during the asylum seeker’s first year of possible access to employment, the job centre has to carry out a ‘priority review’, in which it assesses whether a German or EU citizen, or a third-country national holding a secure residence permit is available to fill the offered position. The review shall then be communicated to the Foreigners’ Registration Office, which has the final authority to grant the requested employment permit. The Office is however not bound to any time limit in the issuing of the document.

¹³⁷ Paul, 2012, p. 156

¹³⁸ Pro Asyl, 2015, p.7; ECRE, 2015, p. 61

¹³⁹ ECRE, 2015, p. 62

Consequently, asylum seekers often miss out on job opportunities because they are pulled back by this time-consuming bureaucratic process.¹⁴⁰

There is a general willingness in Germany to deal with the shortage of skilled workers, by utilising the potential contributions of refugees to the labour market. The legal and bureaucratic hurdles imposed on the successful economic integration of asylum seekers show however that the concern of economic migrants misusing the asylum system as an easy entry channel, continues to influence legislative decisions. As German officials stated in 2014,

“Waiting periods for access to the labour market seek balance between the desire for integration and the desire to reduce social welfare expenses on the one hand, and the problem of creating unwanted incentives for persons that apply for asylum in Germany merely out of non-asylum-related but purely economic reasons on the other hand. It is assumed that the shorter the waiting period is, the stronger the potential ‘pull-effect’ may be”.¹⁴¹

This assumption goes in line with Germany’s overall immigration policy of using social exclusion and limited rights as a push factor towards unwanted irregular migrants, while at the same time creating incentives for the integration of those foreign national, who satisfy a specific economic demand.

3.1.2. Italy

In Italy the legal framework regulating asylum seekers’ access to employment appears much more liberal than in Germany. According to a legislative decree passed in August 2015 (LD 142/2015) applicants may start working within 60 days from the moment they lodged an asylum application. They are then entitled to enlist at the Provincial Offices for Labour (*Uffici Provinciale del Lavoro*) and are granted access to employment without any formal limitations. Moreover, asylum seekers or beneficiaries of international

¹⁴⁰ Pro Asyl, 2015, pp. 7-8

¹⁴¹ EMN, 2014, p. 4

protection accommodated in the *SPRAR* system receive individualised support in their integration process, by means of vocational training and internships.¹⁴²

These generous provisions reflect a traditionally more wide-spread acceptance of foreigners' participation in the labour market. According to Fasani, although Italians worry about increasing inflows of irregular migrants, "the real core of the concern regards the 'irregular migrants who are unemployed and who commit crime' and not those 'who work and behave well'".¹⁴³ In addition, due to Italy's limited public funds to provide for the basic needs of refugees and asylum seekers, it is in the legislators' economic interest to encourage them to work and care for themselves.

Notwithstanding the formally liberal access to employment for asylum seekers in Italy, a number of practical obstacles hamper its effective enjoyment.

One serious problem relates to common delays in the registration of asylum applications and the subsequent issuing of a residence permit, which can take up to several months. Without the residence permit, applicants are not able to register at the Offices for Labour and are therefore effectively excluded from working legally.¹⁴⁴

The current financial crisis is an additional factor, hampering asylum seekers possibilities to find work in Italy. While unemployment is an issue, which affects immigrants as well as Italian nationals, the aforementioned *SPRAR* training programmes suffer from a serious lack of funding. As a result, the majority of asylum seekers currently receive little or no assistance in the difficult task of finding employment.¹⁴⁵

3.1.3. Overcoming the Obstacles to Employment

Although asylum seekers are in principle granted access to the labour market in Germany and Italy, they face serious hurdles in effectively entering it. These can be practical difficulties such as language barriers, the remote location of accommodation centres, and

¹⁴² ECRE, 2015(1), p. 81

¹⁴³ Fasani, 2010, p. 178

¹⁴⁴ Giudici, 2013, p. 67; ECRE, 2015(1), p. 81

¹⁴⁵ Giudici, 2013, p. 67; ECRE, 2015(1), pp. 81-82

the mental stress caused by the often traumatising experience of flight and subsequent legal uncertainty. In addition, they are burdened with a number of legal and bureaucratic obstacles, which further aggravate their exclusion.

Nevertheless, a number of applicants still manage to find formal employment in Germany and Italy, especially if their procedure takes a long time. Cases of asylum seekers, who reached extraordinary levels of integration against all odds, have repeatedly entered the media and public debate in Germany. They have been instrumental to NGOs and civil society movements, supporting their claims for a right to remain (*Bleiberecht*) based on good integration, which will be further discussed in chapter four.

Of course employment is only one facet of social inclusion but it is one that facilitates many others. Deporting a former asylum seeker, who has been a valuable member of a team of employees, thus not only disrupts his life, but also that of his employer, coworkers, friends and neighbours.¹⁴⁶ Furthermore, while the humanitarian aspect of the right to remain is more likely to ensure the support of civil society, policy-makers seem to be especially receptive to the economic benefits of it. As one official at the Labour Ministry puts it,

“(I)f they stay, it makes sense in terms of humanitarian and labour market policy concerns to say: if they are willing to integrate in the labour market, they should have an option to do so, and who succeeds to maintain their own living should have a residence rights perspective. Especially as we will need more workers.”¹⁴⁷

The labour market integration of immigrants without a secure residence status may thus become an important argument against their expulsion.

3.2. Legal Protection of Informally Employed Migrants

¹⁴⁶ See Carens, 2010, p. 17

¹⁴⁷ Senior official at Labour Ministry (*Bundesministerium für Arbeit und Soziales*), cited after Paul, 2012, p. 156

Some asylum seekers manage to overcome the legal, bureaucratic, and practical hurdles, which hinder them in their pursuit of legal employment, and find adequate work. Yet many others resort to working in the informal sector, often under exploitative conditions.

The notion of labour exploitation is here understood as “work situations that deviate significantly from standard working conditions as defined by legislation or other binding legal regulations, concerning in particular remuneration, working hours, leave entitlements, health and safety standards and decent treatment”.¹⁴⁸

While undeclared employment may seem like an easier option before an asylum application is decided, it becomes the only possibility to provide for one's needs once a final negative decision has been issued. Rejected asylum seekers, who chose to remain in the country for various reasons are subsequently classified as unauthorized aliens and thus entirely denied access to the formal labour market.¹⁴⁹

From a normative perspective, it is difficult to argue that states are obliged to allow migrants unlawfully residing on their territory to legally seek employment, as this right is inherently membership-specific. This assertion, however, does not imply that irregular migrants, including former asylum seekers, working in the informal sector should not be granted other work-related rights.¹⁵⁰

3.2.1. International and European Human Rights Provisions Relevant to Irregularly Employed Migrants

As has been emphasised in the previous chapter, undocumented migrants enjoy protection under international human rights law, despite their irregular status. Just as the right to health, which applies to every human being, a number of work-related

¹⁴⁸European Union's Agency for Fundamental Rights, 2015, p.10

¹⁴⁹An exception are tolerated persons in Germany. Although they do not dispose of a legal residence permit, they are granted access to the labour market under the same conditions as asylum seekers. According to §33(1) para.2 BeschV, they are however not to be granted an employment permit, if they deliberately sabotaged their deportation.

¹⁵⁰Carens, 2013, pp.139-140

provisions in relevant UN documents shall also be granted universally. Most importantly, the prohibition of forced and compulsory labour,¹⁵¹ the right to work, the enjoyment of just and favourable conditions of work,¹⁵² and the right to form and join trade unions¹⁵³ explicitly apply to ‘everyone’ independent of their legal status or the legality of their employment.

A crucial instrument providing specific guidance in the treatment of irregular migrant workers is the 1975 ILO Migrant Workers Convention¹⁵⁴. Its aim is to tackle the issue of labour exploitation by setting minimum standards of protection applicable to migrants with an irregular status, or who were employed illegally. According to its Article 1, states signatory to the Convention are obliged to “respect the basic human rights of all migrant workers,” irrespective of their migratory status or legal situation.¹⁵⁵

A further corner stone strengthening the international protection of regular and irregular migrant workers is the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (UN ICRMW), which ensures migrant workers access to a broad range of human rights. No major immigration country however ratified this Convention, which strongly diminishes its impact in the international scene.¹⁵⁶

Accordingly, no EU member state has committed to the ICRMW, which reflects a general reluctance throughout Europe to include informally employed migrants into the scope of labour rights.

Nevertheless, some positive developments can be noted in the European protection of irregular migrant workers. Importantly, the Charter of Fundamental Rights of the

¹⁵¹Art 8 ICCPR; Art 35 CRC; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13 (hereafter CEDAW), Art 6

¹⁵² UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 (hereafter ICESCR), Art 6, 7

¹⁵³Art 8(1) ICESCR

¹⁵⁴ International Labour Organization (ILO), *Migrant Workers (Supplementary Provisions) Convention, C143*, 24 June 1975

¹⁵⁵ Italy ratified ILO C-143 in June 1981 whereas Germany never ratified it.

¹⁵⁶Guchteneire and Pecoud, 2009, pp. 8,13

European Union proclaims the right to fair working conditions for “every worker” in its Article 31, without consideration for his or her legal status.

Finally, human rights bodies insist that, although States are entitled to deny undocumented migrants access to the labour market, those migrants shall still enjoy labour rights once they are working. Specifically, the Council of Europe identified the rights to “fair wages, reasonable working conditions, compensation for accidents, access to a court to defend their rights, and also freedom to form and join a trade union.”¹⁵⁷ which have to be granted independent of a worker's legal status. This view was asserted in the ECJ judgement of *Courage v. Crehan* in 2002. Herein the Court held that a law, which prevented migrant workers with illegally formed contracts from asserting their work rights in domestic courts, violated the UK's duty to protect individuals' contract rights.¹⁵⁸

3.2.2. The Human Rights Situation of Irregular Migrant Workers in the Italian Context

A report on the human rights practices in Italy in the year of 2015 critically states that “(e)mmployers and organized criminals (...) continued to take advantage of the lack of legal protection for noncitizens against exploitation to subject them to abusive working conditions”.¹⁵⁹

Italian law deals with labour exploitation by imposing criminal sanctions and providing monitoring in the form of labour inspections. The enforcement of these measures however suffers from a number of shortcomings.

The organised recruitment of workers to be employed in situations “characterised by exploitation, violence, threats, or intimidation, taking advantage of the worker's state of need or want” is listed as a criminal offence under the Italian Penal Code.¹⁶⁰

The provision aims at penalising unlawful gang-mastering in the field of irregular

¹⁵⁷Council of Europe, 2006

¹⁵⁸ECJ, QB 507/2002, cited after Hovdal-Moan, 2012, p. 1226

¹⁵⁹USDOS, 2015

¹⁶⁰Article 603-bis Codice Penale, author's translation

labour. While it contributes to the fight against the exploitation of undocumented migrants, the effectiveness of this legislation is questionable, since it only sanctions intermediaries and not those employers that recruit workers by themselves.¹⁶¹

Severe sanctions for employers have however been introduced by the Legislative Decree 109/2012, the so-called *Rosarno Law*, which was adopted to implement the EU Employers Sanctions Directive (2009/52/EC). The Directive's goal, as stated in its preamble, is to tackle irregular immigration to Europe by eliminating one of its major pull factors- the possibility of informal employment.¹⁶² Yet, to formulate an adequate response to the issue of undocumented migrants' vulnerability to exploitation, was not a primary concern.

The *Rosarno Law* criminalises the employment of irregular migrants, especially when exploitative practices are involved, and gives labour inspectors the power to detect such crimes.¹⁶³ Labour inspections have however proven to be highly ineffective for the protection of undocumented migrants. Indicatively, Amnesty International found that both regular and 'extraordinary' inspections are usually announced beforehand, leaving the employers with the possibility to send undocumented migrants away from the working place at the time of inspection.¹⁶⁴

Furthermore, due to the criminal character of undocumented stay, which has been discussed in Chapter 1.3, any public official confronted with an irregular migrant is required to disclose his or her presence to the police or judicial authorities. Undocumented migrants facing labour exploitation are therefore not inclined to report their situation out of fear of being detained or expelled. This has implications both for the implementation of the provisions of the criminal code, the *Rosarno Law*, and the monitoring by labour inspectors. Since the latter are public officials, they are under an obligation to denounce irregular migrants. This has created a situation where inspectors are more concerned with detecting undocumented migrants than with the examination

¹⁶¹Amnesty International, 2012, p.35

¹⁶²Directive 2009/52/EC para. (2), (3)

¹⁶³DL 109/2012 Art 1(a), 2, 4

¹⁶⁴Amnesty International, 2012, p. 32

of labour conditions.¹⁶⁵

This situation contributes to the deterrence of undocumented migrants to report on labour exploitation, undermining their right to an effective remedy. In addition, mechanisms at the disposal of migrants to file complaints and to get reimbursements for unpaid wages are lacking. No decree has been published to that goal.¹⁶⁶

The firewall argument, which was introduced in the previous chapter, also applies in this context. In order to ensure the effective protection of migrants working in the informal sector, a rule must be established that information gathered by labour inspectors cannot be used for any other governmental purposes. Without this safeguard, immigrants enjoy the human right to work under just and favourable conditions in name only.¹⁶⁷

In addition to the insufficient legal protection of migrants in irregular employment situations, various social factors further contribute to their vulnerability on the labour market. As noted in a report developed by the Platform on Forced Labour and Asylum, scenarios of “poverty and destitution, social isolation, reliance on limited social networks or contacts, and lack of knowledge about rights and alternative opportunities” constitute a fertile ground for exploitation.¹⁶⁸ Of course these factors vary according to the migrant's specificities. For instance, skilled migrants are clearly less vulnerable than their unskilled counterparts, and persons belonging to a large and well-organised minority are usually better supported than isolated migrants. Likewise, xenophobic prejudice, racism and discrimination are often targeted against specific groups of immigrants.¹⁶⁹

Yet generally speaking, migrant workers constitute an easy scapegoat for problems which often have little to do with immigration, such as *inter alia* unemployment,

¹⁶⁵Ibid.

¹⁶⁶PICUM, 2015, p. 8

¹⁶⁷Carens, 2013, p. 134

¹⁶⁸Lewis, Waite and Hodkinson, 2014, p. 8.

¹⁶⁹De Guchteneire and Pécoud, 2009, p.3

decreasing resources for social welfare, and terrorism. “(Their) poor living and working conditions rarely inspire solidarity from nationals, who rather express scepticism towards their presence, (...) disregarding their economic, social and cultural contributions.”¹⁷⁰

Finally the crucial contradiction between Italy's formally strict migration policy and an enduring practice of tolerating illegal practices in the work market, have contributed to the relevance of the country's informal labour market.¹⁷¹ As has been explained in Chapter 1.2 the demographic and economic need for migrant workers has not been met with satisfactory labour recruitment policies. The result of this negligence is the repeated use of large scale ex-post regularisations, which will be discussed in the following chapter.

3.3.The Use of Regularisation Programmes

The high number of undocumented migrants living in Italy, be they rejected asylum seekers, beneficiaries of temporary protection whose status was no longer renewed, or immigrants who settled without authorisation for economic or family reunification reasons, is a well-established fact. According to ISMU estimates, 404,000 non-nationals were living in Italy without a valid residence permit in the beginning of 2015.¹⁷² Most of these people are employed in the country's vast informal sector, often under exploitative conditions.

To address this issue Italy has repeatedly undertaken large scale amnesty programmes, through which far over a million undocumented migrants were granted a regular, albeit temporary status. .¹⁷³ Similar large scale programmes have never been implemented in

¹⁷⁰ Ibid.

¹⁷¹ Fasani, 2010, p. 178

¹⁷² ISMU, 2015, p.47

¹⁷³ Bricks, 2011, pp. 1,4,13

Germany. The country does however provide limited channels for regularisation to well integrated immigrants, which will be discussed in detail in the following chapter.

In Italy and other Southern European countries regularisations have become popular as a tool to address a number of issues related to irregular migration and irregular labour. As it has been stated in a Council of Europe draft resolution with regard to a large scale amnesty programme carried out in Spain in 2006,

“the success of this programme can be put down to its response to a number of pressing needs. Employers and trade unions had a need to hire persons legally and escape the risk of criminal prosecutions, irregular migrants had a need to find security and a better level of protection of their human rights, and the Government had a need to tackle the shadow economy, increase social security and tax contributions and promote the rule of law.”¹⁷⁴

Despite these apparent benefits, amnesties are a highly contested policy tool and do not enjoy widespread acceptance throughout the European Union. Especially Northern European countries have vocally opposed large-scale one-off regularisations. On an EU-level there have been repeated efforts to limit member states discretion in implementing these programmes, as they are believed to have unforeseen effects on their neighbouring states.¹⁷⁵ The main concern is that regularised migrants, who, once they became free to move about within the European Union, will leave Southern Europe to move to a country with better social welfare benefits. Moreover, critics claim that amnesties reward lawbreakers and create a pull effect for irregular migration. Arguing from the migrants’ perspective on the other hand, concerns have been raised that many regularised persons may lapse back into irregularity.¹⁷⁶

This subchapter will address these points of critique, as well as the benefits assigned to regularisation programmes. Drawing on the example of irregular migrants employed as

¹⁷⁴ Council of Europe, 2007, p. 2

¹⁷⁵ Bricks, 2011, pp. 6, 8-9

¹⁷⁶ Council of Europe, 2007, p. 2

domestic workers or caretakers in Italy, the impacts of regularisations for the individual migrant, as well as society as a whole will be critically assessed.

3.3.1. The Role of Immigrants in the Italian Welfare System

According to Esping-Andersen's typology of welfare regimes, Italy and Germany are two classic examples of conservative-corporatist welfare states, characterised by the key role mandated to families for most welfare matters.¹⁷⁷ Since few social services are available on a generalised basis, households largely have to choose between either assigning family members to provide these services, or the reliance on paid help.¹⁷⁸

The increasing participation of women in the labour market coupled with the growing number of elderly in need of care constitutes a derivation of the classic conservative one-breadwinner model, in which the non-working partner provides for domestic services. As a result, there is in Italy, as in the other Mediterranean countries, a high demand for domestic personnel and caretakers, which is largely satisfied by undocumented migrant women. Immigration thus functions as an alternative to the direct provision of social services by the state, or by family members.¹⁷⁹

Immigrants, who are unable to enter the formal labour market, be it because of legal restrictions, language barriers or other social factors, have a strong incentive to become domestic workers. Households often provide accommodation, and they are unlikely to be raided by labour inspectors.¹⁸⁰ In a field study of the domestic service sector in Lombardy and Liguria, Ambrosini also found that solidarity networks and mutual aid within immigrant communities play an important role in the recruiting of domestic personnel.¹⁸¹ It is therefore not unlikely that migrant women, even if they did not initially come to Italy for economic purposes, will eventually opt for work in this sector, after they experienced enduring situations of status insecurity, inadequate accommodation, and a general lack of assistance regarding their social integration. Due

¹⁷⁷ Esping-Andersen, 1990

¹⁷⁸ Sciortino, 2004, p. 115

¹⁷⁹ Ambrosini, 2012, p. 361; Sciortino, 2004, pp. 116-117, 122

¹⁸⁰ Sciortino, 2004, p. 123

¹⁸¹ Ambrosini, 2012, p. 363

to the absence of a coherent labour migration policy, the recruitment of immigrants already residing in Italy, albeit with an irregular or insecure status, is in fact much more feasible than their legal immigration for the declared purpose of seeking or carrying out a job. Thus “(a)s often happens in Italy, economy and society react to inadequate institutions and legislation by devising shortcuts, which better fit their needs.”¹⁸²

The ‘invisibility’ and limited regulation of the personal service sector make it easily accessible to immigrants in an insecure legal position. On the other hand, its absence of clearly defined boundaries can lead to serious forms of abuse and exploitation.

Although domestic work and especially care-taking are perceived to be socially useful, these tasks are not believed to require special skills and qualifications. On the contrary, it is presumed that they consist of mere housekeeping and care activities, traditionally performed by women.¹⁸³ The non-recognition of work culturally assigned to women as real jobs, together with the widespread practice of underpaying irregular migrant workers, thus contributes to a double marginality imposed on undeclared domestic and personal care workers.¹⁸⁴

3.3.2. The Impact of Amnesties

The need for foreign domestic workers in the maintenance of the Italian welfare regime is duly acknowledged in Italian political debate.¹⁸⁵ Nevertheless, no adequate recruitment strategy has been adopted to satisfy this demand. This negligence has led to the growth of an informal welfare system, in which waged immigrant women, most of whom are not employed with a formal contract, carry out essential social services. The widespread practice not to declare these women’s employment implies a significant tax deficit for the state. On the other hand, as in other economic sectors, it excludes the informally employed migrants from any social security benefits and makes them

¹⁸² Fasani, 2010, p. 176

¹⁸³ Ambrosini, 2012, p. 365

¹⁸⁴ The declared salaries of immigrant housekeepers are little more than half of the average income of irregular immigrants working in agriculture and manufacturing, Sciortino, 2004, p. 120

¹⁸⁵ See Sciortino, 2004, 120; Ambrosini, 2012, p. 361, 368

vulnerable to exploitation. Italy has repeatedly attended to both of these issues by regularising large numbers of irregular migrant workers through amnesty programmes.

During the last three decades Italy has implemented one-off regularisation programmes on an average of every four to five years. Of the total number of approximately five million people, who have been regularised in the EU since 1996, around one third of cases occurred in Italy.

While in the 1980ies and 90ies amnesties have been granted to irregular migrant workers on a rather general basis with few requirements, their scope of application subsequently became more and more focused on domestic personnel and care-takers.¹⁸⁶ In the following the regularisation programme of 2009 targeted exclusively at migrants working in the personal and homecare service sector, and the most recent programme announced in 2012 will be discussed in more detail.

In the 2009 amnesty permanent legal residents with a minimum annual gross income of 25,000 Euros could request the regularisation of up to three irregular migrant employees, who were working in Italy as domestic workers or care-takers since at least five months. No minimum income was required for employers seeking to regularise migrant care-takers of elderly or disabled people, which reflects a strong demand of work force in this particular sector. Of the 294,744 applications around 40% were filed for care-givers while the remaining share was submitted in account of housekeepers.¹⁸⁷

Approved days before the entry into force of the ‘security package’, which introduced the ‘crime of irregular immigration’ the 2009 regularisation was largely intended as an amnesty to the employers of irregular migrants, who otherwise would have had to face serious sanctions. They were given the possibility to avoid criminal prosecution, by declaring the irregular work contract, and by paying a lump sum of 500 Euros as a compensation for forgone social security contributions.¹⁸⁸

¹⁸⁶ Baldwin-Edwards& Zampagni, 2014, p.14; Bricks, 2011, p. 13

¹⁸⁷ Baldwin-Edwards& Zampagni, 2014

¹⁸⁸ Amnesty International, 2012, pp. 18-19; Baldwin-Edwards& Zampagni, 2014

The procedure was thus focused entirely on the employer, with no agency given to migrant workers, who were entirely restricted from actively participating in the proceedings. In particular, they were not entitled to submit the application for regularisation, or to receive documents and communications directly from the authorities. Moreover, migrant workers were not allowed to finalise the procedure without the cooperation of the employer, even when the employment relationship had been terminated in the meantime. This restriction effectively prevented them from leaving their employment for the duration of the regularisation procedure, which in some cases took over two years.¹⁸⁹

A new regularisation was announced in 2012, following the adoption of the *Rosarno Law*. Although the programme was not explicitly targeted at domestic workers, they made up 86% of the total 134,576 applications filed. This rather low number of applicants presumably resulted from more restrictive eligibility criteria. The minimum annual income of the employer was raised to 30,000 Euros, the migrant employee had to be resident in Italy for at least 9 months, and the lump sum to be paid for social contribution was doubled, now amounting to 1,000 Euros.¹⁹⁰ The significant shortcomings of the 2009 regularisation, regarding migrants' possibilities to participate in the proceedings were perpetuated in the 2012 programme.¹⁹¹

In both programmes discussed, migrants were granted a two-year residence permit, with the possibility of subsequent renewal. The possibility of renewing the permits is however contingent on the continuity of legal employment. The dependence of legal status on the possession of a stable employment position has been criticised by a number of scholars and civil society organisations.¹⁹² Especially in the light of the current economic crisis, which has produced mass unemployment among nationals and non-nationals alike, this requirement seems untenable. Rather than providing *de facto*

¹⁸⁹ Amnesty International, 2012, p.19

¹⁹⁰ Baldwin-Edwards& Zampagni, 2014, p. 16

¹⁹¹ Amnesty International, 2014, p. 20

¹⁹² See inter alia Fasani, 2010, p. 177; Casareo cited after Baldwin-Edwards& Zampagni, 2014, p. 21

residence security, temporary working permits perpetuate the workers' precarious status as well as their dependency towards their employers.

In a study of the long-term impact of regularisations, as experienced by formerly irregular migrants, Baldwin-Edwards and Zampagni nevertheless found the effects to be generally positive. Out of ten people interviewed, two reported a doubling of their pay rates and another six stressed the advantages of access to health care and a secure legal status.¹⁹³ Another study conducted by Carfagna *et. al.* subsequent to a previous amnesty programme also found other effects, such as regularised migrants' highly increased mobility within Italy and beyond, the possibility of changing careers, or their ability to legally marry, to be of importance.¹⁹⁴ Moreover several studies have pointed at a small risk of relapsing into irregularity despite the temporary nature of the residence permits.¹⁹⁵ More sources and data are however needed to assess regularised migrants' capability to maintain their status on the long run.

Bearing these findings in mind, the concern of migrants leaving the country where they have been regularised, to seek better living conditions in Northern Europe, seems highly implausible. While asylum seekers are often unable to choose the country where they will file their application, the majority of irregular migrants settle in one country for specific reasons such as family ties, linguistic preferences or employment prospects.¹⁹⁶ These reasons do not cease to apply after they become regularised. On the contrary, their incentives to remain in the country, where they are- now legally- employed, enjoy social benefits and labour rights, developed social networks, and acquired specific knowledge are then much stronger than they were before.

The argument that amnesty programmes create pull-factors for irregular immigration seems to have more substance. The prospect of regularising their status can be an incentive for irregular immigrants to settle in Italy. They however tend to use other legal

¹⁹³ Baldwin-Edwards& Zampagni, 2014, p. 27

¹⁹⁴ Carfagna *et. al.* cited after Baldwin-Edwards& Zampagni, 2014, p. 22

¹⁹⁵ Carfagna, Sciortino cited after Fasani, 2010, p. 177

¹⁹⁶ According to Baldwin-Edwards' and Zampagni's research irregular migrants' reasons for choosing Italy as their country of residence were predominantly friends or relatives living there: Baldwin-Edwards& Zampagni, 2014, p. 27 .

entry channels in a similar ex-post fashion, despite the legislators' intention. Since the introduction of a quota system in 1998, third country nationals have the theoretical possibility to apply for work in Italy from their countries of origin. Based on the number of employment contracts formed with foreigners residing outside of Italy, the government then establishes a quota- the so called *flow decree*- for legal entries. In reality however, few employers are willing to hire a person without any previous meeting. A widespread practice has therefore emerged where labour migrants enter Italy through irregular channels. They then undergo a 'probation period' in the shadow economy and, once they have found an employer willing to regularise their status, they go back to their home country and apply for the *flow decree*, pretending never to have been to Italy before. According to Fasani, "(t)herefore the difference between an amnesty and the 'Flow decree' tends to be more nominal than substantial".¹⁹⁷

The example shows that the most significant pull-factor for irregular migration to Italy is the disparity between the high demands for foreign labour on the one hand, and very limited possibilities of legal entry for economic purposes on the other. Amnesty programmes are used as a tool to correct this disparity, but cannot be regarded as its root cause. Rather than leaving migrant workers in the precarious situation of undocumented status forever, Italy should create legal entry routes for job seekers to adequately address the issue of irregular labour immigration.

Perhaps the most powerful argument against regularisations is that they reward law-breaking. Critics claim that granting immigrants, who have violated immigration and employment laws, a regular residence permit, is unfair to others who 'waited in line' and applied for legal entry through the flow decree. Amnesty programmes thus undermine the legitimacy of immigration rules and the state's authority to enforce them.

The first part of the argument can easily be dismissed, considering the aforementioned malfunctioning of the quota system. While third country nationals may be able to obtain a working contract from abroad through referrals by foreign-born workers already

¹⁹⁷ Fasani, 2010, p. 176

employed in Italy, or through co-national migrant entrepreneurs, the possibility is widely illusive for the majority of non-European job seekers.¹⁹⁸ In other words, “(m)ost of those who settle as irregular migrants would have had no possibility of getting in through any authorized (sic.) channel. To say that they should stand in a line which does not exist and does not move is disingenuous.”¹⁹⁹

The adverse effect of regularisations on the integrity of the border control regime has to be weighed against the concurrent benefits such programmes entail. As has been shown, the work of immigrants, including irregular ones, in Italian households fulfils important social functions and is widely considered to be necessary.²⁰⁰ Their violations of immigration and employment laws, in comparison, seem relatively minor. The criminalisation of undocumented migrant workers therefore constitutes a disproportionate measure, which exceeds the state’s legitimate aim to preserve the integrity of its immigration regime. Regularising their stay on the other hand recognises their important social contributions and brings significant benefits both to the affected migrants and to society as a whole.²⁰¹

3.3.3. Concluding Remarks

Failed asylum seekers, as other irregular migrants, are formally excluded from the labour market, but they still constitute a significant workforce in the shadow economy. They fulfil important economic and social functions and thus become members of the societies they live in. Due to the invisibility and irregularity of their employment, they are however vulnerable to serious forms of exploitation and abuse. Regularisation programmes can constitute a solution to this issue, albeit not an entirely satisfactory one. In Italy they were mostly implemented as amnesties for employers, and not as protection measures for informally employed migrants, and thus hardly contributed to the emancipation of exploited workers. In fact, since migrants were restricted from

¹⁹⁸ Fasani, 2010, p. 176

¹⁹⁹ Carens, 2013, p. 154

²⁰⁰ Ambrosini, 2012, p. 361

²⁰¹ See Carens, 2013, p. 156; Council of Europe Commissioner for Human Rights, cited after Di Pascale, 2014, p. 287

participating in the regularization process, the programmes rather contributed to their disempowerment and reliance on their employer.

The dependence of regular status on the continuous possession of a stable employment position further perpetuates regularised migrants' precarious residence status, and exposes them to an ongoing risk of lapsing back into irregularity.

Finally, ex-post regularisation programmes are made necessary by the serious incoherence of the Italian immigration system and do not constitute a consistent policy framework. In the long run they therefore need to be replaced by the creation of adequate legal entry channels for a much needed foreign work force, and by the effective integration of asylum seekers and international protection beneficiaries into the formal labour market.

4.The Right to Private and Family Life

4.1.Respect for Private and Family Life under Article 8 ECHR in Immigration Cases

The application of regularisation programmes discussed in the previous Chapter, while clearly benefiting the affected migrants as well, largely reflects the Italian state's interest to tackle the widespread problem of undeclared labour. Despite overall EU efforts to limit the use of this policy tool, Italy, along with other Southern European states, continues to act in its own best interest, relying on its sovereign right to regulate the status of aliens on its territory.²⁰²

On the other hand, binding human rights law may oblige states to regularise the status of resident immigrants, even when such measures go against their respective national interest. Especially with regard to rejected asylum seekers, such provisions may constitute a severe interference with states' autonomy to determine, who qualifies for refugee protection and the accompanying right to remain on their territory.²⁰³

Meanwhile, from the migrants' perspective, the conferral of human rights to irregular residents may decrease their vulnerability to state arbitrariness and give recognition to their moral claims to stay in the country, where they developed strong social ties. This sub-chapter will discuss the potential of Article 8 ECHR as a human right to residence security.

4.1.1.The Application of Article 8 ECHR in Deportation Cases

The rights of migrants are not explicitly mentioned in the European Convention of Human Rights and in the first four decades of its existence, the Court largely remained silent on matters concerning the contracting states' migration policies. Since the 1990ies, the ECtHR has however taken a lead role in protecting the human rights of

²⁰² Brick, 2011, p. 9

²⁰³ See Thym, 2015, p.143

foreigners indirectly, by obliging the contracting states to confer the provisions set out in the Convention not only to its citizens but also to resident aliens.²⁰⁴

Along with the application of Article 3 ECHR in cases concerning the deportation of foreign nationals to countries, where they risk being subjected to torture, inhuman or degrading treatment,²⁰⁵ the right to respect for private and family life, as protected under Article 8§1 ECHR, constitutes an important example of the Convention's indirect applicability to migration issues.²⁰⁶ The provision sets out that “everyone has the right to respect for his private and family life, his home and his correspondence.”

In *Moustaquim v. Belgium* the Court first qualified the deportation of a foreigner as a violation of his right to family life. The case concerned a Moroccan national who had been living in Belgium since the age of one, and was deported after a series of criminal offences. In its judgement the Court considered the particularly strong social rootedness of the applicant:

”all (his) close relatives- his parents and his brothers and sisters- had been living in Liège for a long while; one of the older children had acquired Belgian nationality and the three youngest had been born in Belgium. Mr Moustaquim himself was less than two years old when he arrived in Belgium. From that time on he had lived there for about twenty years with his family or not far away from them. He had returned to Morocco only twice, for holidays. He had received all his schooling in French. *His family life was thus seriously disrupted by the measure taken against him.*”²⁰⁷

The expatriation of Mr Moustaquim to Morocco clearly disrupted the family life he had been maintaining with his relatives in Belgium. The Court however also stressed that states party to the Convention enjoy the right “as a matter of well-established

²⁰⁴ Thym, 2008, p. 103

²⁰⁵ Art 3 ECHR was first applied to the extradition of a migrant to his country of origin in *D. v UK*, Judgement of 2 May 1997, Application no. 146/1996/767

²⁰⁶ Thym, 2008, p. 103

²⁰⁷ *Moustaquim v. Belgium*, Judgement of 18 February 1991, Application No. 12313/86, para. 45, my emphasis

international law and subject to their treaty obligations to control the entry, residence and expulsion of aliens”.²⁰⁸ This right is implicit in Article 8§2:

“2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Hence, states are generally allowed to expel foreigners who have been convicted under criminal law, if their expulsion follows the purpose of maintaining public order.²⁰⁹ In its jurisprudence, the Court allows states a wide margin of appreciation in the control of the entry and stay of foreigners on their territory. States are nevertheless required to bring expulsion measures in conformity with the obligations set out under Article 8 ECHR.²¹⁰

Accordingly, the deportation of foreign nationals is only justified if it is executed in accordance with the law, if it pursues one of the legitimate aims listed under Article 8§2, such as the state's economic well-being and the maintenance of public order and security, and if it is proportional to the aim pursued. According to the Strasbourg judges, the legitimate aim of maintaining public order also includes the execution of immigration control and the pursuit of a specific migration policy.²¹¹ The proportionality assessment of an expulsion measure thus primarily consists of the balancing of interests between the pursuit of states to control immigration on the one hand, and the moral claims of individual migrants to remain in their country of residence on the other.

²⁰⁸ Ibid., para. 43

²⁰⁹ *Boultif v. Switzerland*, Judgement of 2 August 2001, Application No. 54273/00, para. 39

²¹⁰ Farahat, 2014, p. 198

²¹¹ Thym, 2015, p. 122; Farahat, 2014, pp. 198-199

4.1.2. The Protection of Private Life as an Independent Value under Article 8 ECHR

What seems striking in the aforementioned case of *Moustaquim v. Belgium* is that, although the applicant is bound to Belgium by no core family ties,²¹² the judges focus almost exclusively on the interference with his right to family life, meanwhile neglecting the accompanying disruption of his private life. The Court first recognised the respect for private life as an independent value in *Slivenko et al v Latvia*, which concerned the expulsion of a former Soviet soldier together with his family. In its judgement the Court holds that the family's removal "from the country where they had developed, uninterruptedly since birth, *the network of personal, social and economic relations that make up the private life of every human being* (...) constituted an interference with their 'private life' and their 'home' within the meaning of Article 8§1 of the Convention".²¹³ The focus on the legitimacy of wider social relations has important implications for long-term resident migrants. By extending the provision's scope of application to the "totality of social ties between settled migrants and the community in which they are living (...), regardless of the existence or otherwise of a 'family life'"²¹⁴, the Court moved towards the protection of long-term residence status *ipso jure*.²¹⁵

In some particular cases the Court even admitted complaints relating to the positive obligation of states to issue a regular residence permit. For instance, *Aristimuño Mendizabal v. France* concerned the failure of the French authorities to grant the applicant, a Spanish national of Basque origin, a permanent residence permit, which she was entitled to under EU law. The Court here emphasised the "important material and psychological consequences" of her precarious residence status, which included

²¹² The core family is commonly understood as the relation between spouses and between minor children and their parents.

²¹³ Ibid., para.96

²¹⁴ *Üner v. the Netherlands*, Judgement of 18 October 2006, Application No. 46410/99

²¹⁵ Thym, 2015, p. 130

“precarious and unqualified employment, social and financial difficulties and the impossibility to rent an apartment and to work in her trained profession”.²¹⁶

The Grand Chamber reconfirmed that Article 8 ECHR extends to situations of residence insecurity in its judgement of *Sisojeva et al. v. Latvia*.²¹⁷ The case resembled the aforementioned *Slivenko* case with the important difference that the Latvian state tolerated the applicants’ stay and did not proceed with their deportation.

Notwithstanding the different socio-political context in Post-Cold War Latvia, the applicants’ legal status resembled that of tolerated persons in Germany. Indeed, German administrative Courts repeatedly relied upon *Sisojeva* and similar judgements in cases concerning the regularisation of long-term tolerated migrants.²¹⁸ The potential right to regularise tolerated stay will be explained in detail in Chapter 4.2.

The dynamic interpretation of the Convention, to include long-term resident migrants into the scope of Article 8, was further influenced by a number of cases concerning the expulsion of second generation 'guest workers'. In *Benhebba v. France*, the Court admits: “They received their education, established most of their social contacts and hence developed their personal identity there (...). Some of these immigrants have conserved with the country of origin nothing else than the sole link of nationality.”²¹⁹

The judges thus recognise that despite their difference in legal status, second-generation immigrants live in comparable situations as national citizens. The Court's focus on real social ties developed through long-term residence, instead of formal status or even state authorisation has important implications for rejected asylum seekers and other migrants in a precarious legal situation.²²⁰

²¹⁶ *Aristimuño Mendizabal v. France*, Judgement of 17 January 2006, Application No. 51431, para. 71, my translation

²¹⁷ *Sisojeva et al. v. Latvia*, Judgement of 15 January 2015, Application No. 60654/00

²¹⁸ Thym, 2008, pp. 98-99, 105

²¹⁹ *Benhebba v. France*, Judgement of 10 July 2003, Application No. 53441/99, para. 33, author’s translation

²²⁰ Thym, 2015, p. 133

4.1.3. The Applicability of Article 8 to Irregular Migrants

Human rights, which by definition belong to every person, serve as the basis for the protective scope of Article 8. Therefore even unauthorised migrants obtain a potential right to regularise their stay, which the Court famously recognised in *Rodrigues da Silva & Hoogkamer v. the Netherlands*. The case concerned a Brazilian immigrant who had entered the Netherlands with a tourist visa, which she overstayed. During her stay she entered into a relationship with a Dutch national, with whom she had a daughter. After the relationship broke up, although child custody was formally granted to the father, Ms Rodrigues da Silva continued to care for her daughter and was attested a positive influence on her by the father's family. The applicant had never been granted a residence permit in the Netherlands and did not formally hold custody of her child. The Court however focused on the protection of private and family life in real terms, thus confirming Carens' normative argument that social ties do not depend on official permission.²²¹

Notwithstanding the limited consideration of the applicant's irregular status in the proportionality assessment, the Court did stress that when family life was created

”at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (...) it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.”²²²

The emphatic exceptionality of *Rodrigues da Silva and Hoogkamer*, has been responded to with a restrictive granting of Article 8 protection in immigration cases, especially when they concerned rejected asylum seekers. For instance, in *Omorie et al. v. Norway* the applicant, a Nigerian asylum seeker whose claims for protection had been rejected in the last instance, was married to a Norwegian woman with whom he had a

²²¹ Thym, 2008, pp. 100-101; Carens, 2010, p. 18

²²² *Rodrigues da Silva and Hoogkamer v. the Netherlands*, Judgement of 31 January 2006, Application No. 50435/99, para. 39

child. Although the applicant's expulsion would clearly disrupt the family life he built with his wife and daughter, the Court stressed that, when this family life was created the persons involved already knew of Mr Omoregie's unstable immigration status.

Therefore, it did not find that the interference could be considered disproportionate to the “public interest in ensuring an effective implementation of immigration control”.²²³

Important dissenting opinions in this and similar cases however point to an emerging willingness to expand the protective scope of Article 8 to refused asylum seekers, especially when the integrity of the core family is at stake. In the *Omoregie* case dissenting judges emphasised that

”contrary to most expulsion cases (...) the first applicant had not committed any criminal offence. The only accusation against him was 'that he had seriously violated the Immigration Act or had defied implementation of the decision that he should leave the country’”.

They further considered that

”the first applicant’s Norwegian wife could hardly have been required to follow him to Nigeria so that they could pursue their family life there. It was likewise highly unrealistic to envisage that the first applicant would travel alone to his home country and return occasionally to visit his wife and son in Norway. Their family life would have been seriously impaired”.

Resorting to the more realistic perception of family life, which the Court had adopted in *Rodrigues da Silva & Hoogkamer*, the dissenting judges do not find that a proper balance has been struck between the disruption of the applicants' family life and the legitimate aim of controlling immigration.²²⁴

²²³ *Omoregie et al. v. Norway*, Judgement of 31 July 2008, Application No. 265/07, paras. 61-65, 68

²²⁴ *Omoregie et al. v. Norway*, Dissenting Opinion of Judge Malinverni joined by judge Kovler, paras. 11-13

4.1.4. Concluding Remarks

Due to the wide margin of appreciation, which the Court allows for in cases concerning immigration, Article 8 ECHR does not constitute a reliable protection against the expulsion of settled migrants. There have however been important developments since the 1990ies, such as the recognition of private life as ‘the network of personal, social and economic relations that make up the private life of every human being’, the potential expansion of the scope of application to irregular migrants, and the recognition of a positive obligation to grant residence security to long-term resident migrants, albeit only in particular cases.

These developments point to an emerging consensus throughout Europe that irregular migrants’ human right to private and family life may on the long run imply a right to regularise their stay. The following subchapter will analyse the transposition of the relevant Strasbourg case law into German immigration law.

4.2. The Implications of Article 8 ECHR for Rejected Asylum Seekers in Germany

The right to protection of one’s family life is enshrined in Article 6 of the German Constitution (*Grundgesetz, GG*), which reads as follows:

- “1. Marriage and the family shall enjoy the special protection of the state.
2. The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.

3. Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect. (...)”²²⁵²²⁶

Furthermore, Germany has transposed the provisions set out in the ECHR into its national legal order and is obliged under Article 46§1 ECHR to “undertake to abide by the final judgment of the Court in any case to which they are parties”. Article 8 ECHR and Article 6 GG generally apply in two fields related to the regulation of migration: the expulsion of migrants to their countries of origin and the refusal to grant a permanent residence permit.

While Italy is under the same obligation to respect, protect and fulfil the provisions set out in the ECHR, the country’s efforts to tackle the issues of irregular stay and illegal employment are based on an economic rationale, rather than on the right of undocumented migrants to respect for private and family life. The following subchapter will therefore focus on the article’s transposition into German migration law.

4.2.1. The Right to Private and Family Life as an Obstacle to Deportation

As has been explained in Chapter 1.3, the presence of migrants, who do not qualify for a regular residence permit, may in certain cases be tolerated if their deportation is not feasible for legal or factual reasons.²²⁷ One common reason to grant toleration status is the protection of private and family life stipulated in Art 8 ECHR and Art 6 GG. Such permits do not represent *de jure* regularisations because they do not alter the obligation of foreigners to leave Germany. They can however enable later entries into a legal status, which will be explained in the following subchapter.

Toleration can be based on the integrity of the family, especially when an expulsion measure would disrupt the bond between parents and minor children or that between

²²⁵ Basic Law for the Federal Republic of Germany, 1949, Art. 6

²²⁶ The Italian Constitution sets out the right to protection of family life in Articles 29-31. Constitution of Italy, 22 December 1947

²²⁷ § 60a AufenthG

spouses.²²⁸ Moreover, pregnant women shall not be deported if the father is a German national and the child is expected to hold German citizenship.²²⁹ The father of an unborn child shall be granted toleration in the case of a high risk pregnancy, or if he has already submitted a declaration of paternity and of the intent to share custody.²³⁰

The protection of private life is relevant for long-term resident migrants facing deportation, for instance after an excessively long asylum procedure, which finally resulted in a negative decision. On the basis of the relevant Strasbourg case law, private life, within the scope of Article 8 ECHR is understood as "the sum of personal, social and economic ties that constitute the private life of every human being, and which, due of their significance for personal development, gain importance with duration of this person's stay"²³¹

The applicability of Article 8 protection depends on the 'rootedness' of the applicant in the host society. The term is understood as the integration into the local way of life, which depends on the entirety of ties developed in the country of residence.²³² An applicant's integration is assessed using a dynamic set of criteria which closely follow the Strasbourg case law. These include the duration of stay in Germany, school and academic performance, the residence status of family members, knowledge of the German language, personal contacts, economic ties, etc.²³³

Toleration based on the protection of private life is most commonly granted to families with minor children. In such cases the courts primarily assess the rootedness of the children but also the integration of the family as a whole. Importantly, judicial authorities may use the fact that the living conditions of the entire family reflect the way of life in the family's country of origin as an argument against their rootedness in

²²⁸ Marx, 2015, p. 396

²²⁹ Section 60a 2.1.1.2 VwV-AufenthG

²³⁰ Marx, 2015, p. 397

²³¹ See VGH Baden-Württemberg, Judgement of 13 December 2010, Application No. 11 S 2359/10, author's translation

²³² Marx, 2015, pp. 398-99

²³³ OVG Rheinland-Pfalz, Judgement of 05. April 2007, Application No. 7 A 10108/07

Germany.²³⁴ This assimilationist understanding of social integration will be further discussed in the following subchapter.

When the social integration of children is contrasted by their parents' lack thereof, they can only confer their protected status to their parents in exceptional cases.²³⁵ According to the case law of the ECtHR, granting a toleration status to irregular immigrants who do not show any indication of integration would touch upon significant political interests related to the regulation of migration. States are therefore not restricted from deporting these migrants, even when their children show high levels of social rootedness.²³⁶ This lack of commitment to the best interest of the child illustrates the potential for state arbitrariness, which is inherent in the provision's wide margin of appreciation.

In cases, where all applicants have already reached maturity, their private life will only fall within the protective scope of Article 8§1 under exceptional circumstances. In order for the provision to apply, the applicants' integration into German society and the accompanying alienation of their country of origin must be so far advanced that they can be considered "factual natives".²³⁷

According to the German High Administrative Court (*Bundesverwaltungsgericht*), a fair balance between the competing interests of the state and the affected migrant has not been struck in cases concerning the deportation of "foreigners, who became factual natives, after having spent a significant period of their personal development in Germany, and who, due to the specificities of their case, cannot be expected to live in their country of national origin, to which they have no connection".²³⁸

The recognition of strong social ties as a potential obstacle to deportation reflects, on the one hand, important progress in the protection of long-term resident migrants. On

²³⁴ Ibid.

²³⁵ VG Stuttgart, Judgement of 26 October 2006, Application No. 1753/06

²³⁶ Marx, 2015, pp. 398-399

²³⁷ BVerwG, Judgement of 29 September 1998, Application No. C 8/96

²³⁸ Ibid., author's translation

the other hand, the granting of toleration represents the state's effort to recover control over rejected asylum seekers who cannot be removed from German territory. Such an instrument can therefore be understood as "the efforts of the state to struggle against the failure of its control policy while overcoming at the same time the temptation to carry out an 'Italian style' regularisation".²³⁹

Unlike other factual or legal reasons, for which the expulsion of rejected asylum seekers may not be feasible, the protection of their private and family life normally constitutes a permanent condition, which justifies their continuous stay in Germany.²⁴⁰ However, due to the unclear and subjective criteria which both the ECtHR and German judicial authorities apply in the assessment of their rootedness, resident foreigners remain vulnerable to administrative arbitrariness.²⁴¹

4.2.2. The Right to Remain based on Sustained Integration

In the year of 2006 over 100,000 people, primarily rejected asylum seekers, were living in Germany with a tolerated status.²⁴² Around 21,000 of them had stayed in this precarious status for over six years. In addition, around 1,800 people were registered as asylum applicants for at least six years but had not yet received a final decision.²⁴³

These people were factual members of society. However, legally they were largely excluded from social, economic and political participation. To address this discrepancy, the Council of Interior Ministers (*Landesinnenministerrat*) decided upon a new law in 2006, which finally allowed long-term resident tolerated persons to regularise their stay. Unlike Italian regularisation programmes, which aim to legalise the stay of fully undocumented migrants, the German law specifically addresses persons living in the

²³⁹ Finotelli, 2009, 898

²⁴⁰ Under § 25, para. 5 *AufenthG* it is possible to shift from tolerated to regular status after 18 months if the reason for which a deportation is not feasible is permanent. This regulation is however applied in a restrictive manner and therefore does not constitute an effective instrument to regularise tolerated stay. Farahat, 2015, p. 381

²⁴¹ See Farahat, 2015, p. 199

²⁴² *Pro Asyl*, 2011, p. 7

²⁴³ BAMF, 2008, p. 187

legal limbo of documented irregularity. Despite their different scope, both frameworks however have important implications for the living situation of rejected asylum seekers.

In order to apply for a right to remain within the scope of the 2006/7 measures, tolerated persons needed to meet certain criteria: They had to have lived in Germany for at least six (for families) or eight (single applicants) years at a fixed date of reference, show proof of advanced social integration and of a clear criminal record, and prove that they were able to economically sustain themselves.²⁴⁴ Especially the last criteria, economic self-sufficiency, constituted a high barrier, because of which the right to remain was beyond reach for a large share of tolerated persons. They were indeed for a long time excluded from the formal labour market, and are still today submitted to the practice of ‘priority review’ and other restrictive measures.²⁴⁵

Migrants, who were not fully able to sustain themselves, but showed good prospects for future employment were granted a ‘right to remain on probation’. It gave them the chance to reapply after four years if they could then economically provide for themselves and their family without any social assistance. The aim of this regulation was to encourage tolerated persons to proceed their economic integration. It did not however put an end to the precariousness of their status.²⁴⁶

As a result of the restrictive eligibility criteria applied in the regularisation programme of 2006/7, only 18.752 tolerated persons were able to regularise their stay.²⁴⁷ More than 80 percent of them were only granted a ‘right to remain on probation’ because they were depending on some form of state sponsored social assistance.²⁴⁸ The regulation, which was proclaimed as a humanitarian right to remain, in fact disadvantaged adults,

²⁴⁴ Pro Asyl, 2011, p. 7

²⁴⁵ See Chapter 3.1.1

²⁴⁶ Pro Asyl, 2011, pp.7- 8

²⁴⁷ In comparison, around 350,000 irregular migrants benefited from the regularisation programme Italy implemented in the same year. Bricks, 2011, p. 13

²⁴⁸ BAMF, 2008, p. 187

who were not able to work or required social aid because they were caring for elder family members or for their children.²⁴⁹

Within the general category of rejected asylum seekers, children constitute a group with particularly strong claims for continuous protection. This is partly because they are an especially vulnerable subcategory of human beings. Their need for special protection is reflected, for instance, in the existence of the CRC, which Germany signed and ratified. In addition, children are not responsible for their irregular presence within the state, since it is their parents, who decided to settle in another country. According to Carens, this means that “the state is even more morally constrained in dealing with irregular migrants who are children than it is in dealing with irregular migrants who are adults”.²⁵⁰

Moreover, arguing from a socio-economic perspective, the abilities and resources of young migrants are clearly an enrichment for society and the labour market. Especially in the light of the aforementioned demographic decline Germany is currently experiencing, immigrant children constitute an important factor.²⁵¹

These arguments have continuously been brought forward by migrant advocacy groups, NGOs and clerical organisations, who criticised the 2006/7 regularisation programme as too restrictive. In 2011 Germany finally reacted to enduring public pressure with the introduction of a regularisation framework directed specifically at tolerated minors and young adults. The regulation’s aim is to give young and well-integrated tolerated migrants a perspective for residence security. With this new provision Germany has for the first time created a dynamic and future-oriented right to remain, which is independent of a fixed date of reference.²⁵²

²⁴⁹ Pro Asyl, 2011, p. 13

²⁵⁰ Carens, 2013, p. 135

²⁵¹ Pro Asyl, 2011, pp. 26-27

²⁵² Marx, 2015, p. 429

The right to remain for young tolerated persons also has its basis in Article 8 ECHR and Article 6 GG. According to the new provision set out in the Residence Act (*Aufenthaltsgesetz*),

“A minor or young adult holding a toleration status shall be granted a permit of residence if

1. He has uninterruptedly resided on the Federal territory under tolerated status for at least four years,
2. He has successfully attended school or has graduated from a recognised school or vocational training college,
3. He applied for a residence permit before the age of 22,
4. It is ensured, with regard to his education and way of life, that he will be able to integrate into the way of life in the Federal Republic of Germany, and
5. No concrete evidence points to the fact that he does not avow himself to the liberal democratic basic order of the Federal Republic of Germany.”²⁵³

An especially complex criteria is the prediction of future integration inherent in No. 4 of §25a, which requires that the applicant disposes of “the mental, intellectual and personal characteristics to integrate in the future”.²⁵⁴ The authorities here consider *inter alia* the applicant’s duration of stay in Germany, his or her school performance, the social environment, relations with friends and acquaintances disposing of a regular permit of residence as well as vocational and professional trainings.²⁵⁵

In addition to the right to remain for well integrated tolerated minors and young adults Germany has introduced the perspective of residence security for adults showing ‘sustained integration’.

According to the new law of 2015,

²⁵³ § 25a, para. 1, AufenthG, author’s translation

²⁵⁴ Marx, 2015, p. 432

²⁵⁵ Marx, 2015, p. 433

“A tolerated alien shall (...) be granted a permit of residence if he is sustainably integrated in the way of life of the Federal Republic of Germany. This regularly requires that the alien,

1. Has resided uninterruptedly on the Federal territory under a tolerated status (...) for at least eight years or six years if he lives in a domestic community with a minor, unmarried child,
2. Avows himself to the liberal democratic basic order of the Federal Republic of Germany and has general knowledge of the legal and social order and the way of life in the Federal territory,
3. Primarily provides for himself through gainful employment, or if it is to be expected, considering his school and vocational performance, income and family situation, that he will be able to provide for himself in the future (..)
4. Disposes of sufficient knowledge of the German language (...)
5. In the case of children, provides prove of their school attendance.”²⁵⁶

The provision sets similar eligibility criteria as the regularisation programme of 2006/7 with the important difference that it applies independent of a fixed date of reference for the duration of stay in Germany. A further deviation is that migrants are only required to earn their livelihood ‘primarily’ through gainful employment. Old or sick people and disabled persons, as well as apprentices and single parents of small children are excluded from this requirement.²⁵⁷ By loosening the restrictive eligibility requirements of the right to remain, German legislators succumbed to the continuous claims of civil society organisations to adapt the criteria for status regularisations to the socioeconomic reality of tolerated migrants.²⁵⁸

This important progress was however accompanied by an expansion of the applicability of entry and residence bans, primarily for applicants from ‘safe countries of origin’.

²⁵⁶ § 25b, para. 1 AufenthG, author’s translation

²⁵⁷ § 25b, para. 1.2 AufenthG

²⁵⁸ This claim has primarily been voiced by ‘Pro Asyl’, ‘Caritas’ and ‘Diakonie’, Pro Asyl, 2011, p. 3

These new restrictive laws are expected to further reduce the scope of the new regularisation framework.²⁵⁹

The following subchapter will discuss the implications of the new right to remain from a socio-political and philosophical perspective, focusing on the requirements of social integration.

4.3.The Integration of Immigrants with an Insecure Residence Status in the German Context

In sharp contrast to the Italian approach towards irregular migration, Germany was for a long time termed an “ideological opponent of regularisation”.²⁶⁰ Indeed, the treatment of rejected asylum seekers in Germany can largely be described as a “policy of the hope of voluntary return”.²⁶¹ Accordingly, ‘non-deportable’ migrants are mostly subjected to the same provisional arrangements and social exclusion as asylum applicants who are still awaiting their final decision. For instance, they are only granted access to certain jobs if no other person with a more secure status (including German citizens, EU citizens, as well as third country nationals with unlimited access to the labour market) is available to fill the position.²⁶²

Similarly to the initial reception of ‘guest workers’ from the Mediterranean basin, German residence law perpetuates the social exclusion of those immigrants, who are not deemed to become regular residents, ignoring the factual improbability of their voluntary repatriation. According to Kymlicka, “(t)he likely result of such a policy is to create a disenfranchised, alienated, and racially and ethnically defined underclass”²⁶³. As a matter of fact, the failure to integrate Turkish labour migrants into German society

²⁵⁹ Marx, 2015, p. 429

²⁶⁰ Reichel, 2014, p. 7

²⁶¹ Kymlicka, 2007, p. 76

²⁶² Reichel, 2014, p. 4

²⁶³ Kymlicka, 2007, p. 76

during the initial period of their stay led to continuously low levels of education and high rates of unemployment, drug abuse, and crime even among the third generation of immigrants of Turkish origin.²⁶⁴

Germany reacted to the surge of Balkan war refugees during the 1990ies in an equally neglectful fashion. When they arrived, these people were not conceived as future citizens or even as long-term residents. Therefore, instead of encouraging the newcomers' social integration from the beginning, legislators primarily focused on their repatriation. But, whatever the initial expectations and official rules, many of them have settled permanently in Germany. Over time their social membership grows in moral importance, and the fact that they were not officially invited to enter and settle becomes correspondingly less relevant.²⁶⁵

4.3.1. The Right to Remain as a Dogmatic Shift in Immigration Politics

Long-term residence in continuous legal limbo is finally starting to be recognised as an untenable burden in German public discourse and politics, which is most apparent in the implementation of the new right to remain discussed in the previous subchapter. The regulation can partly be understood as a reaction to humanitarian concerns related to the return of long-settled migrants, which were raised by civil society organisations. As Castañeda points out, “(t)he issue of repatriation has provoked protest throughout Germany, especially when children are involved”.²⁶⁶

On the other hand, politicians have largely understood that a regular legal status plays an important role for one's labour market outcome.²⁶⁷ Besides humanitarian aspirations, the German regularisation framework thus follows the same economic purpose as the Italian one. Reichel terms the German mechanism as “two-step regularisations”, since unauthorized migrants can only obtain a residence permit after a ‘probation period’

²⁶⁴ Toktaş, 2012, p. 8

²⁶⁵ Carens, 2013, p. 150

²⁶⁶ Castañeda, 2014, p. 95

²⁶⁷ Reichel, 2014, p. 17

under tolerated status.²⁶⁸ During this period they are expected to “integrate into the way of life in the Federal Republic of Germany “. ²⁶⁹

4.3.2. Integration as Assimilation

By giving special weight to qualitative criteria of integration such as language skills, social contacts, school performance, and employment, Germany follows the recent case law of the ECtHR concerning residence security.²⁷⁰ There are however some moral concerns related to this approach, which will be discussed in this chapter.

Individuals become members of a social community and build attachments to it at different rates. Accordingly, the harm of deporting them after an extended period of stay will vary as well.²⁷¹ It therefore seems appropriate to consider the level of integration in decisions relating to an individual’s right to remain, and to subsequently become an official member of that community. According to Carens, it is nevertheless a mistake to put too much weight on qualitative criteria of social integration and “an especially big mistake to grant more discretion to officials in judging whether individual migrants have passed the threshold of belonging that should entitle them to stay.”²⁷² The categorisation of some migrants’ behaviour as not good enough to fall under the scope of the right to remain, while the individual living situation of others commands respect, raises questions of fairness and goes against the idea of universal human rights.

Germany’s general integration policy can be characterised as highly assimilationist. By expecting new-arriving immigrants to adopt ‘the German way of life’, legislators have largely resisted the multiculturalist trend, which led other immigration countries to reconsider their political approach to the integration of ethno-cultural minorities.²⁷³ The current treatment of newly arriving asylum seekers does not constitute an exception to this general framework. The assimilationist understanding of social integration is

²⁶⁸ Reichel, 2014 p. 7

²⁶⁹ § 25a, para.1, No.4 AufenthG

²⁷⁰ Thym, 2015, p. 140

²⁷¹ Carens, 2013, p. 152

²⁷² Ibid.

²⁷³ Kymlicka, 2007, p. 74

especially apparent in current parliamentary debates about the implementation of an ‘Integration Act’ which would oblige refugees and asylum seekers to attend mandatory integration courses. If they fail to complete the integration modules, they may lose the social benefits they are entitled to under the Asylum Seeker Benefits Act.²⁷⁴

As Kymlicka rightly points out, “the idea of adopting a multicultural concept of citizenship presupposes that the newcomers are in fact ‘citizens’ rather than simply ‘guests’, ‘visitors’ or ‘foreigners’”.²⁷⁵ As has been explained in Chapter 1.1.1, immigrants in Germany are traditionally regarded as temporary guests and not as full members of society. The adoption of the new right to remain points to a dogmatic shift in German immigration politics in this regard. Long-settled rejected asylum seekers gradually enjoy equal treatment as immigrants, who had initially arrived as legal migrants. Unfortunately this shift has not been accompanied by a corresponding reconsideration of the country’s integration politics. As a result the integration requirements linked to the right to remain- although less restrictive than in the initial provision- are still highly illusive for many tolerated people.

By differentiating between individual levels of integration in the granting of the right to remain, German administrative courts further ignore that social integration does not solely depend upon the efforts of the individual migrant but can often be adversely affected by discriminatory attitudes in German society. Especially people of Roma origin are routinely degraded as ‘poverty migrants’ seeking to live off the social welfare system, and are not deemed to incorporate properly into German society.²⁷⁶ In a study of the social situation of Roma in Neuköln, a lower-income district of Berlin, Castañeda finds that “as social service and healthcare providers must regularly make judgments about who is legitimately in need of assistance, Roma are frequently conceptualised as culturally different and less deserving”.²⁷⁷

²⁷⁴ Koalitionsausschuss, 2016

²⁷⁵ Kymlicka, 2007, p. 75

²⁷⁶ Castañeda, 2014, 95

²⁷⁷ Castañeda, 2014, 96

As has been mentioned in Chapter 1.3.4, many Balkan Roma who have lived under tolerated status in Germany for many years are currently deported to their countries of national origin. Their claims for respect of their human right to private and family life are regularly rejected due to their poor integration. Because of the wide margin of appreciation, which the authorities enjoy in assessing the aptitude of an applicant “to integrate into the way of life in the Federal Republic of Germany”,²⁷⁸ migrants run the risk of being subjected to a political agenda, rather than human rights considerations. As Castañeda concludes, “(a)ll of these framings, and the inconsistencies they inherently entail, underscore how migrants may be defined, categorized, and managed by states seeking to curtail population movements deemed problematic”.²⁷⁹

4.3.3. Concluding Remarks

The current peak of asylum applications is bound to generate a large population of long-term asylum seekers and non-returnable rejected asylum seekers. Germany’s treatment of those immigrants, who do not manage to immediately pass into the status of convention refugees, follows a logic of ‘the hope of voluntary return’. This approach has already been applied during earlier patterns of immigration and has produced immigrant populations, which have to a large part remained in the margins of society, showing poor levels of social, linguistic and economic integration.

The implementation of the new right to remain based on good integration represents a reaction to the humanitarian and economic concerns linked to situations of ongoing legal limbo. It thus constitutes an important shift in German migration politics.

However, In order for this provision to be effective, social integration must be made possible from the start. This implies that even persons with an insecure residence title, such as asylum seekers, beneficiaries of temporary protection and tolerated persons, are treated as members of society and not as mere guests. It further entails that their unique culture-specific contributions are valued as benefitting the whole of society.

Accordingly, Germany needs to rethink its assimilationist approach to integration,

²⁷⁸ § 25a, para. 1, No.4 AufenthG, author’s translation

²⁷⁹ Castañeda, 2014, 96

which perpetuates the social exclusion of those immigrants who, because of discriminatory attitudes in the general society, are not deemed able to fully integrate.

It is not wrong to apply certain criteria of integration to regularisation mechanisms since “(i)t is not the passage of time per se that matters (for the attachment to one’s place of residence) but what that normally signifies about the development of a human life”.²⁸⁰ These criteria must however be transparent, objective and realistic.

²⁸⁰ Carens, 2013, p. 152

III. Conclusion

Although Italy and Germany have emerged as two major countries of immigration within Europe, with high levels of socio-economic dependency on immigration, the two countries' migration regimes are characterised by a lasting reluctance to accept non-nationals as equal and permanent members of society. This reluctance is particularly strong with regard to asylum applicants, who are not perceived to meet the criteria for refugee status or another form of international protection. As a result, rejected asylum seekers, who are not willing or able to return to their countries of national origin, are largely marginalised in both countries.

Persons seeking international protection in the European Union are already subjected to social exclusion during their asylum procedure, which may take up to several years. After their claims are rejected, asylum seekers lose their permit of sojourn and are ordered to leave the country, where they filed their application. Especially those rejected applicants, who are employed in the informal sector, established a family life or otherwise developed strong social ties, are however unlikely to return to their countries of origin, unless they are forcefully expelled.

Their social and legal marginalisation produces severe deficits in the effective protection of irregular migrants' human rights. Especially their access to basic social rights, such as the right to health, their protection from labour exploitation, as well as their enjoyment of the right to private and family life are seriously impaired.

But social exclusion not only negatively impacts the living situation of individual migrants. It also implies losses in human resources for the general society; it produces disenfranchised 'parallel communities' prone to engage in informal work or criminal behaviour; and it raises questions of double standards in liberal democracies, who pledged to respect, protect and fulfil universal human rights. States thus have a strong incentive to enable settled irregular migrants the regularisation of their stay.

Long-term resident migrants' claims to social membership limits states' discretion to regulate the residence of aliens on their territory, especially when these aliens' basic human rights are affected. In many cases however, it is also in the state's interest to allow rejected asylum seekers to remain in the country. In the cases discussed, demographic decline, a strong demand for foreign labour, the creation of incentives for good integration, and public protest in reaction to 'hardship cases' are some of the main reasons, why states opt for the regularisation of irregular migrants.

In Italy, large scale one-off regularisation programmes constitute a solution to issues related to the wide-spread employment of irregular migrants, many of whom are rejected asylum seekers, in the country's shadow economy. Notwithstanding the incisive benefits such programmes provide for a large number of irregularly employed migrants, a number of deficits have been identified:

First, migrants are restricted from personally participating in the regularisation process, which contributes to their disempowerment and dependency *vis à vis* their employer. Moreover, the requirement of a stable employment position for the extension of their regular status exposes them to an ongoing risk of lapsing back into irregularity. Finally, ex-post regularisation programmes do not constitute a coherent policy framework but are rather made necessary by the general incoherence of the Italian immigration regime.

In Germany the new right to remain based on exceptionally good integration provides a solution to humanitarian and economic concerns related to the situation of ongoing legal limbo, in which tolerated migrants often remain for many years. Unlike the Italian regularisation programmes, which are applied at irregular intervals, it constitutes a dynamic and foreseeable mechanism for obtaining a legal status. Nevertheless, due to restrictive criteria of integration, only a small number of people benefitted from the provision since its implementation in 2007.

Neither the German regularisation mechanisms based on good integration, nor the Italian programmes through economic channels, constitute a satisfactory solution to the human rights concerns of rejected asylum seekers. Both systems demand a specific

behaviour, while at the same time putting obstacles to it: Italy requires undocumented migrants, seeking to regularise their stay, to be employed in the informal labour market, although undeclared employment is illegal and largely exempted from the protective scope of labour rights. Germany on the other hand, demands outstanding levels of integration from tolerated persons, notwithstanding their serious social marginalisation.

III.I. Concluding Recommendations

In order to establish an integration system, which benefits both individual migrants and society as a whole, a number of factors should be improved:

First, social integration must be encouraged from the start. Considering the excessive number of pending asylum applications in Italy and Germany, it is to be expected that the processing of cases will often take a long time. It is neither in the interest of individual asylum seekers, nor in that of the state to exclude applicants awaiting their decision from social participation. Instead their potential to actively contribute to the host society, should be used from the very beginning. This implies, *inter alia*, the provision of language courses, a better incorporation of refugee centres into the local communities, and the encouragement and assistance of asylum seekers to integrate into the labour market.

Especially in Italy, asylum seekers and even international protection beneficiaries are forced to seek employment in the shadow economy, in order to care for their basic needs and for their families. In order to tackle this issue, it is important to both provide sufficient social assistance to migrants in need, and to encourage the legal employment of refugees and asylum seekers. Moreover, a realistic framework for labour immigration must be established in order to meet the demands for a foreign work-force. Legal entry channels for economic migrants could close the gaps in the labour market, which at the moment are largely filled with rejected asylum seekers and other irregular migrants.

Both countries need to go further in publicly acknowledging the contributions of immigration to society as a whole. Politicians as well as civil society should work actively in dismantling xenophobic prejudices and misconceptions concerning the root

causes and impacts of flight and migration. In order to promote better mutual understanding, representatives of politics, civil society and academia should engage in an open discourse about the role of migrants in society. Furthermore, social interactions between asylum seekers, refugees and the mainstream society should be enabled and encouraged.

Both for Italy and Germany the narrative of ethno-national homogeneity played an important role in the process of nation-building.²⁸¹ This discourse should however be rethought with regard to the current social reality of ethno-cultural diversity. Accordingly, the two countries' integration policies, which largely require newly-arriving immigrants to assimilate into the national mainstream, need to be reconsidered. Instead of enforcing cultural assimilation, they should move towards a policy, which embraces the value of cultural diversity, and which acknowledges newcomers as equal and permanent members of society. Only by accepting the pluralism of modern immigration societies, can liberal democracies preserve such fundamental principles as the equal moral worth of individuals, anti-discrimination, equal opportunities, the rule of law, and personal liberty.²⁸²

Human beings, who have formed important personal and social attachment to a democratic society, become members of that society.²⁸³ The response to their claims for social membership should be the establishment of a transparent, foreseeable and non-discriminatory regularisation framework, which gives settled migrants a realistic prospect of residence security.

²⁸¹ Kymlicka, 2007, p. 65

²⁸² See Carens, 2013, p.2

²⁸³ Carens, 2010, pp. 10-11

IV. Bibliography

AMBROSINI, Maurizio: Surviving Underground: Irregular Migrants, Italian Families, Invisible Welfare. In: International Journal of Social Welfare; Vol. 21; pp. 361–371, 2011

Amnesty International: Exploited Labour: Migrant Workers in Italy's Agricultural Sector. London: Amnesty International Ltd., 2012

Amnesty International: Exploited Labour Two Years on: The 'Rosarno Law' Fails to Protect Migrants Exploited in the Agricultural Sector in Italy. London: Amnesty International Ltd., 2014

BALDWIN-EDWARDS, Martin; ZAMPANIGNI, Francesca: Regularisations and Employment in Italy: REGANE Assessment Report. Vienna: International Centre for Migration Policy Development, 2014

BOSNIAK, Linda: Immigrants and the Right to Stay: Forum. In: Carens, Joseph (ed.): Immigrants and the Right to Stay. Cambridge, MA: The MIT Press, 2010

BRICK, Kate: Regularizations in the European Union: The Contentious Policy Tool. Migration Policy Institute, 2011

Bundesamtes für Migration und Flüchtlinge (BAMF): Migrationsbericht 2008. Available at <https://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Migrationsberichte/migrationsbericht-2008>. (Accessed 13 June 2016)

Bundesamtes für Migration und Flüchtlinge (BAMF): Migrationsbericht 2014. Available at: <https://www.bamf.de/SharedDocs/Anlagen/DE/Publikationen/Migrationsberichte/migrationsbericht-2014>. (Accessed 13 June 2016)

CARENS, Joseph: *Immigrants and the Right to Stay*. Cambridge, MA: The MIT Press, 2010

CARENS, Joseph: *The Ethics of Immigration*. Oxford: Oxford Political Theory, 2013

CASTANEDA, Heide: *European Mobilities or Poverty Migration? Discourses on Roma in Germany*. In: *International Migration*; Vol. 53 (3); pp. 87-99, 2015

Council of Europe: Document 10924: *Human Rights of Irregular Migrants*. Parliamentary Assembly, 4 May 2006

Council of Europe: Document 11350: *Regularisation Programmes for Irregular Migrants*. Parliamentary Assembly, 6 July 2007

CYRUS, Norbert; KOVACHEVA, Vesela: *Undocumented Migration in Germany: Many Figures, Little Comprehension*. In: Triandafyllidou, A. (ed.): *Irregular Migration in Europe. Myths and Realities*. Burlington, VT: Ashgate Publishing Company, 2010

DAUVERGNE, Catherine: *Making People Illegal: What Globalization Means for Migration and Law*. Cambridge: Cambridge University Press, 2008

ESPING-ANDERSEN, Gøsta: *Three Worlds of Welfare Capitalism*. Princeton, NJ: Princeton University Press, 1990

European Council on Refugees and Exiles (ECRE): *Country Report: Germany*. 2015. Available at: <http://www.asylumineurope.org/reports/country/germany> (Accessed 13 June 2016)

European Council on Refugees and Exiles (ECRE): *Country Report: Italy*. 2015 (1). Available at: <http://www.asylumineurope.org/reports/country/italy> (Accessed 13 June 2016)

European Migration Network (EMN): *EMN Ad-Hoc Query: Asylum Seekers Access to Labour Market*, 2014, Available at: <http://ec.europa.eu/dgs/home-affairs/what-we->

[do/networks/european_migration_network/reports/docs/ad-hoc-queries/integration/2015.645_emn_ahq_on_asylum_seekers_integration_labour_market_wider_diss_updated.pdf](https://do.networks/european_migration_network/reports/docs/ad-hoc-queries/integration/2015.645_emn_ahq_on_asylum_seekers_integration_labour_market_wider_diss_updated.pdf) (Accessed 13 June 2016)

European Union Agency for Fundamental Rights: Handbook on European Law Relating to Asylum, Borders and Immigration. Luxembourg: Publications Office of the European Union, 2014

European Union's Agency for Fundamental Rights: Severe Labour Exploitation: Workers Moving Within or Into the European Union: States' Obligations and Victims' Rights. Luxembourg: Publications Office of the European Union, 2015

FARAHAT, Anuscheh: Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht. Berlin, Heidelberg: Springer-Verlag, 2014

FASANI, Francesca: The Quest for La Dolce Vita? Undocumented Migration in Italy. In: Triandafyllidou, A. (edt.): Irregular Migration in Europe. Myths and Realities. Burlington, VT: Ashgate Publishing Company, 2010

FINOTELLI, Claudia: The North–South Myth Revised: A Comparison of the Italian and German Migration Regimes. In: West European Politics; Vol. 32(5); pp. 886-903, 2009

FLEGAR, Veronika; DALLI, María, TOEBES, Brigit: Access to Preventive Health Care for Undocumented Migrants: A Comparative Study of Germany, the Netherlands and Spain from a Human Rights Perspective. In: Laws; Vol. 5(9), pp. 1-22, 2016

GIUDICI, Daniela: From Irregular Migrants to Refugees and Back: Asylum Seekers' Struggle for Recognition in Contemporary Italy. In: Journal of Mediterranean Studies, Vol. 22(1); pp. 61-86, 2013

GRAY, Bradford H.; VAN GINNEKEN, Ewout: Health Care for Undocumented Migrants: European Approaches. Commonwealth Fund Publication No. 1650, Vol. 33

DE GUCHTENEIRE, Paul; PÉCOUD, Antoine: Introduction: The UN Convention on Migrant Workers' Rights. In: De Guchteneire, Pau; Pécoud, Antoine; Cholewinski, Ryszard (eds): Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights. Cambridge: Cambridge University Press, 2009

HOVDAL-MOAN, Marit. Borders as a Space of Interaction: An Account of Special State Obligations to Irregular Immigrants. In: American Behavioural Scientist; Vol. 56(9); pp. 1223-1240, 2012

Fondazione ISMU (Iniziative e Studi sulla Multietnicità): Ventunesimo Rapporto Sulle Migrazioni 2015. Milano: Fondazione ISMU

KYMLICKA, Will: Multicultural Odysseys: Navigating the New International Politics of Diversity. Oxford: Oxford University Press, 2007

LEWIS, Hannah; WAITE, Louise; HODKINSON, Stuart: Tackling Forced Labour among Refugees and Asylum Seekers: A Guide. Leeds: University of Leeds, May 2014

MARX, Reinhard: Aufenthalts-, Asyl- und Flüchtlingsrecht: Handbuch. Baden- Baden: Nomos Verlagsgesellschaft, 2015

Médecins du Monde: Der Zugang zu Medizinischer Versorgung von Menschen ohne Aufenthaltstitel in 11 Europäischen Ländern, 2009. Available at: <http://www.aerztewelt.org/fileadmin/pdf/Publikationen/European%20Observatory%20DE.pdf> (Accessed 13 June 2016)

PAUL, Regine: Managing diverse policy contexts: The Welfare State as Repertoire of Policy Logics in German and French Labour Migration Governance. In: Jønsson, H., V.; Onasch, E.; Pellander, S.; Wickström, N. (edt.): Migrations and Welfare States. Policies, Discourses and Institutions. Jyväskylä: Bookwell Oy, 2012

DI PASCALE, Alessia: Italy and Unauthorized Migration: Between State Sovereignty and Human Rights Obligations. In: Rubio-Marín, R. (edt.): Human Rights and Immigration. Oxford: Oxford University Press, 2014

PASTORE, Ferrucci: A Community out of Balance: Nationality Law and Migration Politics in the History of Post-Unification Italy. In: *Journal of Modern Italian Studies*, Vol 9(1); pp. 27-48, 2004

Platform for International Cooperation on Undocumented Migrants (PICUM):
Guaranteeing Access to Health Care for Undocumented Migrants in Europe: What Role Can Local and Regional Authorities Play? Brussels: PICUM, 2013

Platform for International Cooperation on Undocumented Migrants (PICUM):
Employers' Sanctions: Impacts on Undocumented Migrant Workers' Rights in Four EU countries. Brussels: PICUM, 2015

Pro Asyl: Für eine neue Bleiberechtsregelung. Frankfurt a.M.: Pro Asyl, 2011

Pro Asyl: Refugees Welcome - Aufnahme und Integration von Flüchtlingen in Deutschland: Forderungen an Bund und Länder. Frankfurt a.M.: Pro Asyl, 2015

REICHEL, David: 'We do not legalise! Do we?' Regularisations and Employment in Germany. REGANE Assessment Report. Vienna: International Centre for Migration Policy Development, 2014

ReteRadici: Dossier Radici/Rosarno: Monitoraggio Autunno-Inverno 2010/11, April 2011 Available at: <http://www.integrazionemigranti.gov.it/Documenti-e-ricerche/CampaniaDossier%20Radici%20Rosarno%202012%20FondazioneIntegrazione.pdf> (Accessed 13 June 2016)

SCIORTINO, Giuseppe: Immigration in a Mediterranean Welfare State: The Italian Experience in Comparative Perspective. In: *Journal of Comparative Policy Analysis*; Vol. 6(2); pp. 111-129, 2004

THYM, Daniel: Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay? In: *International and Comparative Law Quarterly*; Vol. 57(01); pp 87 – 112, 2008

THYM, Daniel: Residence as De Facto Citizenship? Protection of Long-Term Residence Under Article 8 ECHR. In: Rubio-Marín, R. (edt.): Human Rights and Immigration. Oxford: Oxford University Press, 2014

TOKTAŞ, Şule: Introduction: 50 Years of Emigration from Turkey to Germany - A Success Story? In: Perceptions; Vol. 17(2); pp. 5-9, 2012

United Nations High Commission for Refugees (UNHCR): Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries. December 2015. Available at:

<http://www.unhcr.org/protection/operations/56bb369c9/press-coverage-refugee-migrant-crisis-eu-content-analysis-five-european.html> (Accessed 13 July 2016)

US Department of State (USDOS): Country Report on Human Rights Practices 2015-Italy. 13 April 2016

Available at: http://www.ecoi.net/local_link/322538/448313_en.html (Accessed 17 April 2016)

WENDEL, Kay: Unterbringung von Flüchtlingen in Deutschland: Regelungen und Praxis der Bundesländer im Vergleich. Frankfurt a.M.: Pro Asyl, 2014

Legal Sources:

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5

European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC

European Union, *Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, 18 June 2009, 2009/52/EC

European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU

International Labour Organization (ILO), *Migrant Workers (Supplementary Provisions) Convention, C143*, 24 June 1975, C143

UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4

UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination*

Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

UN High Commissioner for Refugees (UNHCR), *UNHCR Note on the Principle of Non-Refoulement*, November 1997

German Legislative Acts:

Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory, Residence Act (*Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet, AufenthG*), Federal Law Gazette I, p. 3556, 2008, last amended 11 March 2016

Asylum Act (*Asylgesetz, AsylG*), Federal Law Gazette I, p. 1798, 2008, last amended 11 March 2016

Asylum Procedure Act (*Asylverfahrensgesetz, AsylVfG*), Federal Law Gazette I, p. 2439, 2008, last amended 11 March 2016

Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz, AsylbLG*), Federal Law Gazette I, p. 2022, 1997, last amended 11 March 2016

Decree Concerning the Economic Activity of Foreigners (*Verordnung über die Beschäftigung von Ausländerinnen und Ausländern, BeschV*), Federal Law Gazette I, p. 1789, 2013, last amended 24 October 2015

Italian Legislative Acts:

Italian Criminal Code (*Codice Penale Italiano*), 1930, last amended 15 January 2016

Legislative Decree N° 109/2012 Concerning Employment without a Residence Permit (*Decreto legislativo su lavoratori senza permesso di soggiorno*), 16 July 2012

Single Text on Immigration (*Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*), Legislative Decree N° 286, 1998, last amended 18 February 2015

International Case Law:

Aristimuño Mendizabal v. France, Council of Europe: European Court of Human Rights, Judgement of 17 January 2006, Application No. 51431, para. 71

Benhebba v. France, Council of Europe: European Court of Human Rights, Judgement of 10 July 2003, Application No. 53441/99

Boultif v. Switzerland, Council of Europe: European Court of Human Rights, Judgement of 2 August 2001, Application No. 54273/00, para. 39

D. v UK, Council of Europe: European Court of Human Rights, Judgement of 2 May 1997, Application no. 146/1996/767

Defence for Children International (DCI) v. the Netherlands, Complaint No. 47/2008, Council of Europe: European Committee of Social Rights, 20 October 2009

International Federation of Human Rights Leagues (FIDH) v. France (decision on the merits), Complaint No. 14/2003, Council of Europe: European Committee of Social Rights, 8 September 2004

Moustaquim v. Belgium, Council of Europe: European Court of Human Rights, Judgement of 18 February 1991, Application No. 12313/86

Omoregie et al. v. Norway, Council of Europe: European Court of Human Rights, Judgement of 31 July 2008, Application No. 265/07

Pretty v. UK, Council of Europe: European Court of Human Rights, Judgement of 29 April 2002, Application No. 2346/02

Rodrigues da Silva and Hoogkamer v. the Netherlands, Council of Europe: European Court of Human Rights, Judgement of 31 January 2006, Application No. 50435/99

Sisojeva et al. v. Latvia, Council of Europe: European Court of Human Rights, Judgement of 15 January 2015, Application No. 60654/00

Tarakhel v. Switzerland, Council of Europe: European Court of Human Rights, Judgement of 4 November 2014, Application No. 29217/12

Üner v. the Netherlands, Council of Europe: European Court of Human Rights, Judgement of 18 October 2006, Application No. 46410/99

Wasilewski v. Poland, Council of Europe: European Court of Human Rights: Judgement of 6 December 2005, Application No. 3274/96

Domestic Case Law:

Administrative Court of Baden-Württemberg (*VGH Baden-Württemberg*), Judgement of 13 December 2010, Application No. 11 S 2359/10

Administrative Court Stuttgart (VG Stuttgart), Judgement of 26 October 2006, Application No. 1753/06

German Constitutional Court, Judgement of 29 September 1998, Application No. C 8/96

High Administrative Court of Rhineland-Palantine (*OVG Rheinland-Pfalz*), Judgement of 05. April 2007, Application No. 7 A 10108/07

Italian Constitutional Court, Judgement of 15 July, 2010, Application No. 250/10