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## ILLEGAL, LEGAL, IRREGULAR OR REGULAR – WHO IS THE INCOMING FOREIGNER?

**Abstract.** Irregular migration is a global topic which currently occupies a central position especially in Europe. Illegal migration as a concept covers a number of rather different issues. We can find different terms as clandestine migration, illegal entry, irregular migrant, undocumented migrant irregular migration etc., to name the phenomenon of illegal entry, illegal stay or overstaying a visa-free travel period. In the context of legal instruments and recommendations of the United Nations and European Union, this article tries to present the multitude of terms and definitions concerning the phenomenon of migration that is unusual to rules and regulations, and its authors who neither recognise nor follow legal migration procedure. The article also endeavours to present the terms which are mostly used in legal discourse and examples of particular acts and contexts in which they are used.

*Keywords:* migration, migrant, illegal, irregular

### 1. Introduction

Immigration, cross-border circulation and all kinds of nomadic behaviour have existed for millennia. In this modern era, every day millions of people cross borders all over the world. This behaviour is mostly legal but at the same time untold thousands are crossing those borders unlawfully.

Irregular migration is a global topic which currently occupies a central position on the agenda of the European Union. Illegal migration as a concept covers a number of rather different issues. Immediately apparent are those of: a foreigner arriving clandestinely on the territory of a state; a foreigner staying beyond his or her permitted period of entry and/or residence; a foreigner working when not permitted to do so or in a manner inconsistent with his or her immigration status (Guild, 2004).

This is a sociopolitical problem and one that brings with it a language and terminological issue. This article tries to answer the question of how we should label the phenomenon of migration that is unusual to

rules and regulations, and its authors who do not follow legal migration rules.

## 2. Multitude of naming unauthorised migration

There are eight principal ways in which non-nationals become unauthorised migrants:

- illegal entry (illegal border crossing),
- entry using false documents,
- entry using legal documents, but providing false information in those documents,
- overstaying a visa-free travel period or temporary residence permit,
- loss of status arising from non renewal of a permit, failure to meet residency requirements or breaching conditions of residency,
- being born into irregularity,
- absconding during the asylum procedure or failing to leave a host-state after a negative decision,
- failure of a state to enforce a return decision for legal or practical reasons (Morehouse and Blomfield, 2011).

In the scientific literature there is no consensus regarding the terms that must be used to describe the phenomenon of illegal border crossing and illegal stay and employment. In the opinion of defenders of human rights, no person whatsoever can be considered as illegal (Duszczuk, 2011). The terms that are used interchangeably are: migrants of undocumented status and migrants staying without permission (Balicki and Stalker, 2006). The division of migration status into legal and illegal is mostly down to the laws of individual countries; the status of illegal migrant can also be given to migrants who have violated procedures in force in the country they left (their country of origin or a transit country) (Kraszewski, 2003).

In various discussions, different terms are used: illegal immigrants, irregular immigrants, undocumented immigrants, persons without papers (French *sans papiers*), and clandestine immigrants (Spanish *clandestinos*). However, the term “illegal” is considered as problematic because the adjective has a negative connotation and suggests an involvement in crime. One must say, however, that the most proper adjective from the point of view of legal language with reference to the status of an immigrant is the word “illegal,” even if representatives of other scientific fields use this term reluctantly (Wróbel, 2008; Morehouse and Blomfield, 2011; Perkow-

ska, 2013). This paper analyses different approaches to the phenomenon and its definitions.

The European Commission decided to define the term *illegal migration* in 2006, in its special “Communication on policy priorities in the fight against illegal migration of third-country nationals”, COM (2006) 402, which focused on the prevention of illegal immigration. According to the Communication, illegal migrants are third-country nationals who illegally enter the territory of a member state (to include its air transit zones) by land, sea and air, which often takes place with the use of false or forged documents or through organized crime networks engaged in migrant-smuggling and people-trafficking. The document also discusses a situation where third-country nationals enter the territory of a state legally but illegally extend their stay (Duszczuk, 2011). The EU also uses the term “illegal immigration” in article 63a of the Lisbon Treaty (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 13.12.2007, OJC 306) where it refers to combating this phenomenon.

As Morehouse and Blomfield indicate, the United Nations, non-governmental organizations, and migrant groups in Europe often use the term *irregular* or *undocumented migration*. In the United States, *illegal immigration* is the most commonly used term (Morehouse and Blomfield, 2011).

If we look at the International Organisation for Migration (IOM) Glossary on migration we will find the following terms *clandestine migration*, *illegal entry*, *irregular migrant*, *undocumented migrant* *irregular migration*.

According to IOM, an *irregular migrant* is a “person who, owing to unauthorized entry, breach of a condition of entry, or expiry of his or her visa, lacks legal status in a transit or host country. The definition covers *inter alia* those persons who have entered a transit or host country lawfully but have stayed for a longer period than authorized or subsequently taken up unauthorized employment (also called clandestine/undocumented migrant or migrant in an irregular situation). The term “irregular” is preferable to “illegal” because the latter carries a criminal connotation and is seen as denying migrants’ “humanity”.

In the main this concept originates from the United Nations General Assembly Resolution 3449 on Measures to ensure the human rights and dignity of all migrant workers (9 December 1975). The General Assembly “requests the United Nations organs and specialized agencies concerned to utilize in all official documents the term “non documented or irregular migrant workers” to define those workers that illegally and/or surreptitiously enter another country to obtain work”.

This kind of discourse has been introduced not only on the universal level but also at regional level. The European Union Parliamentary Assembly issued Resolution 1509 (2006) Human rights of irregular migrants (27 June 2006). It states in article 7 that “Assembly prefers to use the term “irregular migrant” to other terms such as “illegal migrant” or “migrant without papers”. This term is more neutral and does not carry, for example, the stigmatisation of the term “illegal”. It is also the term increasingly favoured by international organisations working on migration issues.”

It is possible to indicate one more example of a regional document calling for use of the terms irregular or undocumented migrants. It is the European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004–2008 (2007/2145(INI)) that “Calls on the EU institutions and Member states to stop using the term ‘illegal immigrants’, which has very negative connotations, and instead to refer to ‘irregular/undocumented workers/migrants’”.

Also, according to Crépeau – UN Special Rapporteur on the human rights of migrants, “migrants may be irregular or in an irregular situation, but they are not “illegal”. Incorrect terminology contributes to negative discourses on migration, reinforces negative stereotypes against migrants, and legitimates a discourse of the criminalisation of migration which in turn contributes to further alienation, marginalisation, discrimination and violence against migrants” (Crépeau, 2013). However, as De Genowa indicates “illegality” (much like citizenship) is a juridical status that entails a social relation to the state; as such, migrant “illegality” is a preeminently political identity (De Genowa, 2002).

He goes further by stating that irregular entry or stay should never be considered criminal offences: they are not *per se* crimes against persons, property or national security. As the United Nations Working Group on Arbitrary Detention has stated, “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention” (A/HRC/7/4, para. 53, Crépeau, 2013).

Moreover, Crépeau indicates the importance of de-linking migration and smuggling or trafficking, in order not to give the false impression that irregular migration is a criminal offence in line with smuggling or trafficking. While the smuggling of migrants is a criminal offence, migrants who are, or have been, smuggled into a state should not be criminalized. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, re-

quires states to establish as a criminal offence the smuggling of migrants. However, the criminalization requirement does not apply to the migrants themselves. The Protocol states that migrants are not subject to criminal prosecution under the Protocol for the fact of having been the object of smuggling (Crépeau, 2013).

It is worth to mention that migrants can never be illegal themselves, only their activities can be regarded as such. Due to the association of illegality with crime, it is suggested replacing the term *illegal* with *undocumented*, *unauthorised*, or *irregular* (Schrover et al., 2008).

If we follow those recommendations it is necessary to present the term of *undocumented migrant*. According to IOM, it is “a non-national who enters or stays in a country without the appropriate documentation. This includes, among others: a person (a) who has no legal documentation to enter a country but manages to enter clandestinely, (b) who enters or stays using fraudulent documentation, (c) who, after entering using legal documentation, has stayed beyond the time authorized or otherwise violated the terms of entry and remained without authorization” (Perruchoud and Redpath-Cross, 2011).

Also, according to the Platform for International Cooperation on Undocumented Migrants (PICUM), the words “undocumented” and “irregular” are synonymous. PICUM explains that undocumented migrants are those without a residence permit authorising their regular stay in the country of destination. They may have been unsuccessful in the asylum procedure, have overstayed their visa or have entered irregularly. More specifically, undocumented or irregular migrants are individuals who enter a country without a visa or authorization by the authorities of the destination country and/or live in a country without a valid residency permit.

However, the word “undocumented” is ambiguous, since sometimes it is used to denote migrants who have not been documented and sometimes to describe migrants without documents. Neither situation applies to all illegal migrants. Furthermore, undocumented migrants who apply for asylum are not illegal (Schrover et al. 2008; Koser, 2005). PICUM is also against calling migrants who have irregularly entered or are irregularly residing in a country “illegal” because:

- it creates stereotypes, fear, and resentment;
- it suggests criminality, but most irregular migrants are not breaking the law; being in a country without the required papers is most times (depending on the country) the result of an administrative error, not a criminal offence.

- it denies their humanity; defining an individual or group as “illegal” risks violating their human right to recognition as a person before the law.
- it is simplistic; people can find themselves in an undocumented or irregular status for all sorts of reasons, and many migrants arbitrarily fall from “regular” to “irregular” due to issues over which they have little or no control. For example, over-bureaucratic and deterring residence and work permit applications, as well as inefficient renewal procedures, are frequently reported;
- it exacerbates the vulnerability of migrants, who often find themselves in very vulnerable positions and are often excluded from all forms of social and legal protection;
- it can jeopardise the asylum claims of people fleeing repressive states where their rights are denied; asylum seekers are often wrongly perceived as irregular migrants, but it is not illegal nor irregular to enter a country and claim asylum, because applicants for asylum receive a temporary residence permit; calling any migrant who finds themselves in an irregular situation “illegal” encourages intolerance towards asylum seekers too.
- no international legal text or treaty, from the Universal Declaration of Human Rights to the Geneva Convention refers to ‘illegal’ migrants; they do, on the other hand, say that our governments have a duty to treat all migrants with dignity and humanity.

According to rules of international law, those who cross the borders without necessary documents but claim for asylum or refugee status do not commit any crime. Therefore, it is incorrect to use the term of *illegal* referring to a person. Preferable in this situation the term *undocumented migrant* or *migrant with undocumented or unregulated status* would be the most appropriate. Deliberating which term *undocumented* or *irregular* should be used to the migrant, we need to highlight that from legal perspective the *irregular migrant* is a person that has no document confirming his/her rights to stay in a country thus it is possible to use those terms interchangeably.

After having analysed the problem of *irregular migrant* it is necessary to focus on the term *irregular migration* that according to IOM is a movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the

sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country. There is, however, a tendency to restrict use of the term “illegal migration” to cases of migrant-smuggling and human-trafficking (Perruchoud and Redpath-Cross, 2011).

Use of the words *illegal* and *irregular* as synonyms in relation to migration, is in accordance with the general meaning of the word *irregular* that is “(behaviour or actions) not according to usual rules or what is expected”. *Irregular migration* is a set a behaviour that is complex and can have different forms. Notwithstanding, in every form it consists of breaching the rules.

It is, however, worth to mention that the term *irregular migration* leads to confusion, because it is also used to describe migration that takes place at irregular time intervals, as opposed to regular (seasonal) migration. The term can also be understood to mean disorderly, which again has a criminal association. Replacing the term ‘illegal’ because of its negative connotation does not help, since any new term will acquire a similar connotation in the light of how the topic is generally discussed (Schrover et al., 2008).

Another term used in relation to migration is *clandestine migration*, that according to IOM is “... secret or concealed migration in breach of immigration requirements. It can occur when a non-national breaches the entry regulations of a country; or having entered a country legally overstays in breach of immigration regulations. The generic term “irregular migration” should preferably be used.” (Perruchoud and Redpath-Cross, 2011). Such definition is also used by Frontex in its reports (Annual, 2014). While not stating the definition directly, Frontex provides examples of clandestine migration in terms of “hiding in means of transport” or “Clandestine entry requires migrants to stay in confinement for long periods of time, and is known to put migrants’ lives at risk of suffocation and dehydration”. It clearly shows that it refers to secret and concealed methods of crossing state borders. According to IOM, *clandestine migration* is a synonym of *irregular migration*. However for Frontex, it refers only to the forms of illegal border crossing where people are hidden in different means of transport. The term *clandestine migration* is nowadays rather used to describe clandestine (secret, not visible) means of border crossing. People are usually concealed in cars, trucks, less often in boats or planes, in areas that do not normally serve for transport – the trunk of a car, the cargo compartment of a truck or trailer; even (as recently occurred) in the undercarriage wells of a commercial passenger jet.

Howsoever, in Euro-Mediterranean speak the term *clandestine migration* presents an excessively secure approach to the phenomenon (Lannon, 2007).

As far as *illegal entry* (unauthorized/unlawful entry/admission) is concerned, IOM uses the definition from article 3 of the United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime act of "... crossing borders without complying with the necessary requirements for legal entry into the receiving State" (Perruchoud and Redpath-Cross, 2011). Frontex uses the term illegal border-crossing in the sense that it is simply a form of illegal entry. Illegal border-crossing is a necessary element of illegal entry, so those terms may be used as synonyms as it is impossible to enter illegally without crossing the border.

We believe that to name the phenomenon of migration that takes place in violation of legal rules it is more convenient to use the term of *illegal migration* or *undocumented migration* due to the fact that the term *irregular migration* is often used to describe the *circular migration* or *temporary migration* that often takes places in border regions of two countries. Therefore, it may lead to confusion whether we are speaking about the migration that is usual to rules and regulations or not. The term of *undocumented migration* is also more convenient because the migrant does not dispose any legal document confirming his/her stay in the hosting country.

In addressing considerations on *irregular* or *undocumented migration* one cannot skip the new term of *crimmigration*. This term was proposed by Stumpf in the field of problems concerning the aim of criminalisation of illegal behaviours related to migration. As immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct, merging of the two areas in both substance and procedure has created parallel systems in which immigration law and the criminal justice system are merely nominally separate (Stumpf, 2006). On a parallel trajectory, criminal law continued its march toward greater severity, imposing more punitive consequences and trending toward more intensive policing of minor acts: "disorder, incivilities, and misdemeanors." In combination, these changes in criminal and immigration law swept larger numbers into the pool of noncitizens subject to criminal prosecution, detention and deportation. Legislators and others justified this progressively harsher evolution of crimmigration law as necessary to deter violations of immigration and criminal law (Stumpf, 2013). Criminal law and immigration law play different roles: the former regulating conduct within a community, the latter governing the entry and expulsion of individuals



across borders. What criminal law and immigration law have in common is that they serve as systems both for excluding individuals from the community and for determining when individuals may join (or rejoin) society (Stumpf 2011).

### 3. Conclusion

Despite several attempts to unify the terminology concerning foreigners who cross borders illegally or stay in a country without legal basis, there is no one term that can be commonly used. There are the universal and regional recommendations of the United Nations and European Union to use the term *irregular* rather than *illegal* but not all countries respect those recommendations. As an example we can cite Polish law. The Polish Act on Foreigners (Journal of Laws of 2013, item 1650) uses the term of *illegal migration* (Polish *nielegalna migracja*). Especially the Act on Border Guard (Journal of Laws of 2011, No 287, item 1687) which uses the term *illegal migration* in art. 1 stating the competences of the Border Guard. One of its main duties is to prevent *illegal migration*.

Nowadays hundreds of thousands of migrants are heading for the borders of the European Union, with the intent of crossing them in search of asylum or economic prosperity. Europe as a whole but EU countries in particular, are facing the biggest migration crisis since the end of the Second World War. No matter if we call them illegal or irregular most deserve help and shelter. They should be treated with due respect to their rights and their dignity regardless of whether their arrival is deemed legal or illegal.

Lack of one definition of illegal/irregular migration on the European level, especially in the sphere of the European Union, results in different rules of administrative and criminal liability for illegal border crossing and illegal stay which again leads to irregular migrants circulating from one EU country to another escaping from responsibility.

Adoption and implementation of one definition would lead to unification of rules of liability for the phenomenon. This is extremely important in current situation in Europe facing huge wave of immigration. It is clear that adopting one definition will not eliminate the problem but it will be extremely useful in its prevention. It is central in the EU and especially the Schengen zone, in the area without border controls on internal borders. Therefore, there is an increasing need for uniform rules of administrative and criminal responsibility for behaviour like illegal migration is expressed hence a uniform definition would be a good start.

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