Chapter 5

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

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5.1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

² Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (The Facilitation Directive); Framework Decision 2002/946/JHA; and Directive 2004/81/EC allowing for the issuance of residence permits to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, and cooperate with the competent authorities.

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

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

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

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

5.2.2 The Evolution of National Responses to Irregular Migrants

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

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

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

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

1. excluding irregular migrants from public services and requesting service providers to report individuals with irregular status to immigration authorities. Topical examples are given by the Dutch *Linking Act* in 1998,³ the German *Residence Act* in 2005,⁴ and the Italian 'Security Package' in 2009,⁵ which required service providers to check the immigration status of any individual requesting a service (or in the Italian case imposed on the latter the exhibition of a valid residence permit),⁶ deny access to irregular migrants, and denounce them.
2. using criminal law to punish irregular entry and/or stay (criminalisation) with fines and even imprisonment. The first instances of laws making irregular migration a criminal—rather than administrative—offence date back the 1970s, but it was in the 2000s that this policy expanded throughout Europe to the point that in 2014 only three countries in the EU did not use criminal sanctions (or administrative sanctions mimicking criminal punishments) against irregular entrants⁷ or stayers⁸ (FRA 2014). Criminalisation of irregular migration in this period was further accompanied by an expanded *use of criminal law to punish people engaging with irregular migrants* beyond smugglers and traffickers, including landlords renting properties to irregular migrants (FRA 2014). A case in point is that of Nicolas Sarkozy's France, which adopted a law⁹ in 2007 introducing a crime—later nicknamed 'crime of solidarity' (*délit de solidarité*)—penalising any person providing direct or indirect assistance to irregular immigrants with up to five years imprisonment, without restricting the criminalisation to those who profited from the irregular migration (Duarte de Carvalho 2016).

³ *Koppelingswet*, Law of 26 March 1998.

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

⁵ *Legge* 94/2009.

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

⁷ Malta, Portugal, and Spain.

⁸ France, Malta, and Portugal.

⁹ *Loi* 2007-1631.

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

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

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

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

5.3 Policies Enforcing Immigration Law: Increasing Restrictiveness and Decreasing Success

5.3.1 *EU Aquis on Removals*

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

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

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

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

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

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

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

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

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

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

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

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

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

5.4 The Criminalisation of Irregular Migration

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

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

territory of the state. Ten countries also punished irregular (over)stay with imprisonment; eight states sanctioned migrants for irregular entry with fines only, as did 15 countries for irregular stay. In 2014, only three countries in the EU did not penalise irregular entry or irregular stay¹⁰ (FRA 2014).

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

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

¹¹ *Loi* n° 2012–1560, Article 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

2013, the Netherlands allowed students with irregular status to take up apprenticeships. In 2009 and 2011, amendments to the German Residence Act excluded medical¹⁴ and educational institutions¹⁵ from the obligation to report patients and students with irregular status to immigration authorities (Spencer and Hughes 2015). Often, these measures were adopted through policies and decisions overtly targeting irregular migrants (and not through an implicit inclusion in a universal entitlement), indicating a clear intention to include these migrants.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸ Articles 8 and 9.

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

5.7 Conclusions

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

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

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

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

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

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

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

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

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

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