

Annalisa Morticelli

# Human Rights of Irregular Migrants in the European Union

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



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## Abstract

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

In the current European legal framework there are many aspects that are very relevant subjects of investigation: the migration flows issue, the need of a common asylum system for all States, the protection of the human rights of vulnerable persons, the integration issue and so on<sup>1</sup>.

Among these, one relevant theme in the current political and juridical European context and an area to which academic research can also make a contribution is the field of irregular migration: the movement of migrants who enter and/or stay in a Member States without legal status, namely against the national law of the Member State and European Union law<sup>2</sup>.

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

Given the tensions at the European Union level, it is very important to achieve a balance and a coordinated system. In this context, the theme of protection of irregular migrants is considered a relevant topic in the legal framework of the European Union<sup>3</sup>.

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- 1 S. CASTELS & M.J. MILLER, *The age of migration: international population movements in the modern world* (4th ed.) New York: Guilford Press, 2004.
  - 2 A. BLOCH, *Irregular Migrants: Policy, Politics, Motives and Everyday Lives*, London, Routledge, 2012; A. TRIANDAFYLLIDOU, *Irregular Migration in Europe: Myths and Realities*, Farnham, Surrey, Ashgate, 2010.
  - 3 A. TRIANDAFYLLIDOU, *Irregular Migration in Europe: Myths and Realities*, Farnham, Surrey, Ashgate, 2010; M. TODINO, *The Legality of Intercepting Boat People Under Search and Rescue and Border Control Operations with Reference to Recent Italian Interventions in the Mediterranean Sea and the ECtHR Decision in the Hirsi Case*, in *Journal of International Maritime Law*, April 2012, Vol. 18, No. 1, pp. 59-74. at 62: "In the case of active resistance, the interception cannot fall within the SAR legal regime".

*Abstract*

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

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

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

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

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



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

After that the focus moves to explore exactly who irregular migrants are from a legal point of view in the European Union regulation. There is not an exact definition of irregular migrants or the status of irregularity at the European Union level. However, the legislation, such as the Schengen Code and Directive 2008/115/EC through the definition of “illegal stay”, identify the requirements necessary for legal entrance and residence in the European Union territory. Consequently in the absence of these requirements a foreigner is irregularly in the European Union territory<sup>5</sup>.

Finally, the last part of the first Chapter focusses on the terminology used to define this category: initially, the term used in the literature and by European Union institutions was “illegal”. This analysis highlights how that is not correct, starting from the assumption that a person, from a legal point of view, cannot be illegal. Indeed only their actions and behaviors can be defined as illegal. The correct terminology, currently recognized at academic level, is irregular because it is more neutral. Also used are undocumented, *sans papier* or clandestine<sup>6</sup>.

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

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

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

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

*Abstract*

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

The migrants in an irregular situation are more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process. They often face prolonged detention or ill-treatment and, in some cases, enslavement, rape or murder. They are more likely to be targeted by xenophobes and racists, victimized by unscrupulous employers and sexual predators, and can easily fall prey to criminal traffickers and smugglers<sup>7</sup>. Rendered vulnerable by their irregular status, these men, women and children are often afraid or unable to seek protection and relief from the authorities in countries of origin, transit or destination. Clearly, the irregular situation in which international migrants may find themselves should not deprive them either of their humanity or of their human rights. International human rights law provides that everyone, without discrimination, must have access to the fundamental rights provided in the international bill of human rights.

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

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

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

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

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

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

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

Italy was transformed from an emigrant country to a country of destination as many studies underline<sup>8</sup>. In recent years, especially with the increase of the democratic instability of the Mediterranean region, as shown by the "Arab Spring"<sup>9</sup> and the tragic wars which are characterizing the Middle East<sup>10</sup>, the number of persons who flee from their countries to reach the European shores has been growing, Italy has developed an articulated legal, political and diplomatic instrument for controlling sea migration over the last few years, especially with a view to combating clandestine migration.

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

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

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

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

## Abstract

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

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

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

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

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

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

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## Introduction

The migration phenomenon is currently a very relevant topic in the European Union and within each of its Member States. Indeed, the migration issue affects the political, sociological and economical debate in all Member States and at the European level<sup>11</sup>.

The constant high flows of migrants who arrive in Europe in particular from the African continent and Middle East, does not seem likely to stop or decrease given the difficult conditions in which, very often, the countries of origin or transit are in: wars, lack of democracy, low or absent protection of human rights, lack of work, etc<sup>12</sup>.

The European Union institutions as well as the majority of Member States continue to face criticism in management of the flows and in creating an efficient common system of regulation in relation with the migration phenomenon in general, as for instance in the asylum field. The will of the States to reach common legislation is still far from being achieved<sup>13</sup>.

In the current European legal framework there are many aspects that are very relevant subjects of investigation: the migration flows issue, the need of a common asylum system for all States, the protection of the human rights of vulnerable persons, the integration issue and so on<sup>14</sup>.

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

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- 11 L. MASERA, G. SAVIO, *La "prima" accoglienza*, in M., Savino, *La crisi migratoria tra Italia e Unione Europea: diagnosi e prospettive*, Editoriale Scientifica, Napoli, 2017.
  - 12 M. BORRACCETTI, *La prima assistenza ai migranti in arrivo tra diritti fondamentali e zone franche*, in *Dir. Imm. Citt.*, 2014, No 2, 13; G. CAMPESI, *L'Italia e il controllo delle frontiere marittime*, in M. SAVINO, *La crisi migratoria tra Italia e Unione Europea: diagnosi e prospettive*, Editoriale Scientifica, Napoli, 2017.
  - 13 G. VERMEULEN, E. DESMET, *Essential text on European and International Asylum and Migration Law and Policy*, Maklu, Antwerpen-Apeldoorn-Portland, 2017.
  - 14 S. CASTELS & M.J. MILLER, *The age of migration: international population movements in the modern world* (4th ed.) New York: Guilford Press, 2004.

## Introduction

who enter and/or stay in a Member States without any legal status, namely against the national law of the Member State and European Union law<sup>15</sup>.

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

Given the tensions at the European Union level, it is very important to achieve a balance and coordinated system. Otherwise, the integration project will be at risk. For the reasons illustrated above the theme of protection of irregular migrants is considered a relevant topic in the legal framework of the European Union<sup>16</sup>.

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

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

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

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

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

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

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

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

A distinction within the category of irregular migrants is outlined referring to the classification proposed by Professor Frank Düvell: quasi-legal illegal and total illegal migrants. This distinction has consequences in terms of protection of fundamental rights of the migrants<sup>17</sup>. Further, the Chapter is dedicated to understanding the relationship between the irregular and regular status and how the immigration categories of documented and undocumented immigrants are not static.

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

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

## Introduction

view in the European Union regulation. As it has been explained, there is not an exact definition of irregular migrants or the status of irregularity at the European Union level. However, the legislation, such as the Schengen Code and Directive 2008/115/EC through the definition of “illegal stay”, identify the requirements necessary for legal entrance and residence in the European Union territory. Consequently in absence of these requirements a foreigner is irregular in the European Union territory<sup>18</sup>.

Finally, after outlining the normative framework of who can be defined as an irregular migrant, the last part of the first Chapter focusses on the terminology used to define this category: initially, the term used in the literature and by European Union institutions was “illegal”. This analysis highlights how that is not correct starting from the assumption that a person, from a legal point of view, cannot be illegal. Indeed only their actions and behaviors can be defined as illegal. The correct terminology, currently recognized at academic level, is irregular because it is more neutral. Also used are undocumented, *sans papier* or clandestine<sup>19</sup>.

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

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

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

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

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

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

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

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

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

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territory of the European Union or of violations during the identification procedures in the hotspot<sup>21</sup>.

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

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

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

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

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

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



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

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