

Illegally Staying in the EU

An Analysis of Illegality in
EU Migration Law

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• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2018

Hart Publishing

An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

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First published 2018

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British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50991-287-2
ePDF: 978-1-50991-285-8
ePub: 978-1-50991-286-5

Library of Congress Cataloging-in-Publication Data

A catalogue record for this book is available from the Library of Congress

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

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author information, details of forthcoming events and the option to sign up for our newsletters.

Introduction

IRREGULAR MIGRATION IS an extremely relevant and controversial topic in contemporary European migration law. Not only has it been a high priority issue for the EU in the last decade, it has also been a crucial topic in every national and international political debate. In this area of law national sovereignty is strongly challenged by the implementation of EU legislation. However, this book illustrates that a wide margin of manoeuvre is left for Member States in implementing immigration-related legislation. The concrete focus of the book is the sensitive phenomenon of the illegality of a migrant's stay within the EU. The book engages in that task due to the fact that there is a lacuna in legal research on this particular topic.¹ It does so by attempting to answer the questions of what is covered by the overreaching EU law conceptualisation of 'illegality' in relation to a migrant's legal status, which statuses are left out of this conceptualisation and which are covered but not acknowledged, for instance.

There are a number of different ways to construct an individual's illegal stay or to look at illegality as a phenomenon including social, anthropological, cultural, political, legal or a combination of these means. These constructions have different premises and content depending on factors such as the geographical focus (for example, a focus on the EU or in the US), the category of migrant that the illegality is attached to (such as mobile EU citizens, third-country nationals, third-country nationals accompanying a spouse who is a citizen of the Union, for instance), or whether they are being examined through a national or a supranational lens. This book looks at the concept of illegality of an individual's stay from a legal perspective with a particular focus on EU law. The main goal is to analyse the ways in which the EU deals with different types of illegal stays and to provide a clear study of illegality within the EU.

Before examining how EU law affects the shape of illegality, there is a clear need for a justification of the perspective chosen. There are two primary reasons. First of all, EU law (like national law) is a source of illegality. Whether voluntarily or otherwise, EU law can be the origin of an illegal migration status. For instance, the violation of supranationally imposed requirements to enter, stay, move and work in the EU can result in an illegal status. This is so in relation to third-country nationals who, for instance, overstay their visa and consequently violate the Visa Code, for example.² Similarly, the same can be said in relation to mobile EU

¹ G Sciortino and M Bommes, *Foggy Social Structures: Irregular Migration, European Labour Markets and the Welfare State* (Amsterdam, Amsterdam University Press, 2012) 13.

² European Parliament and Council Regulation (EC) No 810/2009 of the of 13 July 2009 establishing a Community Code on Visas (Visa Code), [2009], OJ 2009, L 243/1 (hereafter Visa Code).

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citizens within the context of intra-EU migration who no longer fulfil the compulsory conditions imposed by Directive 2004/38/EC.³ Consequently, if the origin of illegality situations is multi-layered, its regulation, enforcement and remedies have the same nature. The underlying aim of this research is to understand the role that the supranational level of regulation plays and to examine what potential that may have with regard to illegality.

Clarity with regard to the perspective chosen to look at illegality is needed since, as mentioned above, there is a combination of different layers of jurisdiction dealing with the phenomenon. As such, there are three relevant jurisdictions which regulate different issues in the area of irregular migration and therefore touch upon the issue of illegality, namely international law, EU law and the national laws of the Member States. This is important since the different sources of law look at different dimensions of illegality. For example, international law (and in particular human rights law)⁴ generally takes a more rights-based approach.

There is no comprehensive international law framework that tackles the issue of what illegality means, and there is no ‘conceptual clarity’ with regard to a definition of irregular migration for that matter.⁵ A selection of international documents highlight the fact that the main shared purpose is that of providing general protection to irregular migrants, crucially through affording them rights (although unfortunately this has often been met with a lack of support from States.) For instance, beyond refugee protection, international law establishes general binding obligations on States party to such instruments in relation to the rights of migrants irrespective of their migration status (unless they are expressly excluded from its scope).⁶ For example, Articles 1 and 2 (1) of the Universal Declaration of Human Rights contains a notion of human dignity applicable to all regardless of whether they are in possession of a regular migration status or not.

Further, even though the International Convention on the Elimination of All Forms of Racial Discrimination allows for a distinction to be drawn between citizens and non-citizens,⁷ it simultaneously guarantees protection against discrimination of citizens and non-citizens alike.⁸ A further example is the 2003

³ Arts 6, 7 and 8 of the European Parliament and the Council Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory, [2004] OJ L 158/77 (hereafter Citizens Directive 2004/38).

⁴ See for an example Arts 1 and 2 (1) of the UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (hereafter Universal Declaration of Human Rights).

⁵ J Handmaker and C Mora, “‘Experts’: The Mantra of Irregular Migration and the Reproduction of Hierarchies” in M Ambrus and others (eds), *The Role of ‘Experts’ in International and European Decision-Making Processes* (Cambridge, Cambridge University Press, 2014) 267.

⁶ For example, Arts 1 and 2 (1) of the Universal Declaration of Human Rights. See also for a more comprehensive analysis of the development ‘soft law’ on the field of vulnerable irregular migrants A Betts, ‘Towards a “Soft Law” Framework for the Protection of Vulnerable Irregular Migrants’ (2010) 22 *International Journal of Refugee Law* 236.

⁷ Art 1 (2) of the UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

⁸ Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against non-citizens, 64th session, 2004.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. This document represents an effort to establish a minimum standard of social rights available for all migrants irrespective the regularity of their status,⁹ which shows that even from a rights-based approach considerable efforts have been made to expand the bundle of rights that irregular migrants can enjoy (ultimately, however, without the support of EU Member States, none of whom opted to ratify the Convention). Additionally, Article 9 (1) of the International Labour Organization (ILO) Convention No 143 on migrant workers posits the right to equal treatment for migrants who enter a state irregularly and cannot be regularised. This article is related to the rights that arise from past employment with regards remuneration, social security and other benefits. However, although some EU Member States have ratified this Convention it was not subscribed to in a widespread manner.¹⁰ Consequently, we can see that there is no conceptual clarity in international law and that it establishes general binding obligations on States party to such instruments in relation to the rights of migrants irrespective of their migration status, unless they are expressly excluded from its scope.

Rather than focussing on such international instruments this book examines the existence of a concept of illegality in EU law. This is a conceptual question that attempts to challenge simplistic assumptions about such a complex phenomenon (that of illegality), rather than arguing for a (still very important) expansion of these rights. As such, the first reason why an EU law take on illegality was the most appropriate relates to the nature of the research question.

The second reason for the choice of EU law over other possible sources of law that deal with the issue of the illegality of a migrant's stay relates to the need to clarify and clearly distinguish different concepts and phenomena such as illegality and criminality which are commonly conflated in the EU migration discourse.¹¹ It is crucial to distinguish between the two in order to understand the scope of the former. Chapter four addresses the issue of the criminalisation of migrants and discusses whether the way EU immigration databases are designed contributes to the conflation of migrants and criminals. One particularly important finding is that border controls may have a significant impact on the way migrants are categorised. In Bigo's words:

The uncertainty about the borders of the EU plays a major role about feelings of fear among the population but it creates also the capacity for governments to manufacturing

⁹ This Convention focuses particularly on providing irregular migrants equal treatment with national workers in matters of: conditions of work, remuneration, terms of payment and the right to join and participate in trade unions (see Arts 25 and 26).

¹⁰ EU Member States that ratified the International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention, C143, 24 June 1975, C143: Cyprus, Italy, Portugal, Slovenia and Sweden.

¹¹ V Mitsilegas, 'The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law' in MJ Guia, M van der Woude and J van der Leun (eds), *Social Control and Justice—Crimmigration in the Age of Fear* (The Hague, Eleven International Publishing, 2013) 87.

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unease and to use it as a technology of domination where the control of some people is more important than the control of the territory at the borders.¹²

The book analyses how this control over mobile people within the EU, in particular illegally staying third-country nationals, affects not only their legal categorisation but also their marginalisation, for example through conflation of the concepts of illegality of stay and criminality (as we will see in chapter four).

I. EU LAW'S IMPACT ON THE DEFINITION OF ILLEGALITY

EU law sources that touch upon the regulation of illegality are 'scattered', similar to the rest of EU migration law.¹³ At the level of primary sources, the Union recently saw its competence increased in the area of immigration.¹⁴ That having been said, EU law's regulation of irregular migration is constrained to the development of a common immigration policy that takes 'enhanced measures to combat, illegal immigration and trafficking in human beings'.¹⁵ The book identifies three main trends that are illustrative of the impact that EU legislation has in the creation of a concept of illegality at a supranational level. First, EU legislation has contributed to the erosion of the traditional distinction between legal and illegal migrants and has failed to solve the situation of those whose status is somewhere between these two categories. Second, EU law only partially regulates the regime of illegality. For example the definition of 'illegal stay' is revealed to be broad enough to allow Member States to create their own categorisation of the same phenomenon, as will be shown below. Third, there has been a shift in what it means to 'have papers' or to be registered in the host Member State since EU law has been implemented in this area. Each of these three impacts deserves to be examined in greater detail.

To elaborate, the first impact is the way in which the EU contributes to a blurring of the distinction between legal and illegal migration. An example of this lack of clarity is the fact that the migration status of certain categories of individuals not clearly covered by illegality under EU law is left to the discretion of Member States (such as the categorisation of non-removable migrants, or migrants who are illegally staying but cannot be removed from the host Member State).¹⁶ These migrants may be kept in limbo for a certain amount of time and, although some safeguards are provided by EU law, there is not (yet) a straightforward answer to this issue that, in practice, 'disturbs the coherence of the legal-illegal dichotomy'.¹⁷

¹² D Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion' in B Bogus and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden, Martinus Nijhoff Publishers 2004) 72.

¹³ P Boeles and others, *European Migration Law* 2nd edn (Cambridge, Intersentia, 2014) 37.

¹⁴ Art 79 TFEU and *ibid.*, 37.

¹⁵ Art 79 TFEU.

¹⁶ The status of non-removable migrants is the object of chapter three of the present book.

¹⁷ Handmaker and Mora (n 5) 28.

The existence of non-removability situations, created or at least tolerated by EU law, shows that although illegality is meant to be a temporary phenomenon by definition, the lack of effective supranational regulation prevents this from being the case.¹⁸ Even if it is agreed that this group of migrants are illegally staying within the territory of the host Member State (if they are not granted authorisation to stay), this is an atypical situation.¹⁹ The presence of such individuals is acknowledged but there is no duty imposed by EU law to recognise them at the national level, apart from a written confirmation that 'shall' be issued stating that the return decision 'will temporarily not be enforced'.²⁰ This is not the place to analyse in detail the case of non-removable migrants in the EU, as that is the focus of chapter three, but it is important to show that EU law partially regulates this phenomenon which may have a negative impact on both the scope of the safeguards granted to migrants in this situation and the lack of clarity as to what it means to be illegally staying in Europe.

Second, the complex regulation of illegality from a supranational view is not only scattered and partially developed, it provides half-baked definitions of components of the phenomenon of illegality and allows Member States at the national level to complete them. The examples of these incomplete definitions vary. For instance most national immigration laws do not provide a satisfactory definition of who is an illegal migrant.²¹ Furthermore, the definition of 'illegal stay' is a striking example of the incoherence (between domestic and supranational legislation) that may be generated at the domestic level. It must be stressed that the creation of these scenarios does not contravene EU law as the Court of Justice of the European Union (CJEU) clarified in the *Achughbabian* case, stating that the Return Directive, which provides a definition of 'illegal stay', is not 'designed to harmonise in their entirety the national rules on the stay of foreign nationals'.²²

For instance, the Belgian Immigration Act does not include a definition of illegally staying migrants.²³ This national legislation distinguishes between third-country nationals who have fulfilled the formal requirements imposed by law (being registered by the commune or more generally by the competent national authorities) and those who have not.²⁴ However, Belgian law adds a further

¹⁸ Especially visible in the non-mandatory character of the regularising power of Art 6 (4) of the Return Directive.

¹⁹ The reasons as to why this is so will be explored in much greater detail in chapter three.

²⁰ Art 14 (2) of the European Parliament and of the Council Directive 2008/115/EC on common standards and procedures Member States for returning illegally staying third-country nationals, [2008] OJ L 348 (hereafter Return Directive).

²¹ E Guild, 'Who is an Irregular Migrant' in C Cholewinski B Bogusz, A Szyszczak (ed), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives, Immigration and Asylum and Policy in Europe* (Leiden, Martinus Nijhoff Publishers, 2004) 15–16.

²² Case C-329/11, *Achughbabian*, [2011], EU:C:2011:807, para 28.

²³ Art (1) of the Loi 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.

²⁴ Guild (n 21) 21: 'This case is covered by article 79: "Est possible d'une peine d'amende l'étranger qui contrevient aux articles 5, 12, 17 ou 41bis ou qui circule sur la voie publique sans être porteur d'un des documents prévus à ces articles ou à l'article 2"'

distinction (that of irregular stay and illegal stay) that is not made by (but crucially is also not prohibited by) EU law. Falling into an illegal stay in EU law depends on not fulfilling the ‘conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence’²⁵ in the host Member State. As such, there are no obstacles to national immigration legislation that creates another regime for a type of stay (irregular) that simply does not accomplish the formalities (such as registering in the commune) and for that reason is sanctioned differently from an illegal stay.²⁶ The Belgian legislation is cited as an example in order to demonstrate that the role played by EU law in defining certain parts of the phenomenon of illegality leaves gaps in this definition which can be filled, often in a problematic manner, at the national level by Member States.

II. THE LANGUAGE OF ILLEGALITY: TERMINOLOGICAL CHOICES

Despite the fact numerous studies have been published concerning the terminological choices inherent in addressing not only the phenomenon of illegality but also the immigration status of the migrants living within it,²⁷ it is nonetheless necessary to briefly address the reasons behind the terminological choices made in this book. Illegality and irregularity are used interchangeably when referring to an immigration condition that structurally is a product of policy choices, subsequently translated into immigration legislation.²⁸

Second, (with regard to the personal element of illegality) the terminology used for the individual who is not granted a legal immigration status by the host country’s immigration authorities is illegally or irregularly staying migrant, or simply an irregular migrant. The expression ‘illegal migrant’ is not used throughout this book due to the fact that it is not considered to be legally precise and at the same time harmful to the conception of illegality by conflating it with criminality. Scholars, NGOs and most actors working in this area do not encourage the use of the term ‘illegal migrant’²⁹ due to the fact that illegality arises as a result of the migrant’s act of breaching immigration law rather than from the individual

²⁵ Art 3 (2) of the Return Directive.

²⁶ In the Belgian example irregular stay is sanctioned with a fine and not imprisonment as an illegal stay may be, see Guild (n 21) 21.

²⁷ K Groenendijk, ‘Introduction: Migration and Law in Europe’ in E Guild and P Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Leiden, Martinus Nijhoff Publishers, 2012) 5; M Jandl, D Vogel and K Iglicka, ‘Report on methodological issues’ Research Paper, Clandestino, Undocumented Migration: Counting the Uncountable, 2008; A Triandafyllidou, *Irregular Migration in Europe: Myths and Realities* (Farnham, Ashgate Publishing Company, 2010) 2.

²⁸ See chapter one of this book for a comprehensive version of the concept of illegality.

²⁹ For an example, the Platform for International Cooperation on Undocumented—PICUM—an NGO actively campaigning for a change in terminology (see: <http://picum.org/en/news/picum-news/45168/>, or <http://picum.org/en/news/picum-news/42546/>), or RI Cholewinski, *Study on obstacles to effective access of irregular migrants to minimum social rights* (Council of Europe, 2005) 8.

themselves.³⁰ Some believe that categorising people as illegal clashes with the recognition of their humanity³¹ and as such there is a clear preference for referring to these migrants as irregular migrants, rather than illegal, in order to avoid the pejorative connotations that associate migrants who are illegally staying in a country with ‘criminals’ and criminality.³²

Much ink has been spilled in an attempt to find the perfect terminology with which to categorise migrants who have an irregular immigration status. The terms which are typically used include: ‘illegal’, ‘clandestine’, ‘unauthorised’, ‘unlawful’, ‘non-compliant’, ‘sans papiers’, ‘irregular’, ‘aliens without residence status’, ‘undocumented’ and ‘precarious’.³³ These are only a few of the examples of the creative semantic exercises that dominate the debate in this area.³⁴ A definition must in its essence look at the phenomenon as it is and avoid becoming a normative argument in relation to what the author believes the phenomenon may be. One such example is Bauder’s ‘illegalized refugee and immigrant’ proposal.³⁵ This author argues for the adoption of a term that focuses on the ‘systematic process that renders people “illegal”’, instead of making these migrants responsible for the situation where they find themselves.³⁶ On the face of it, Bauder’s idea that illegality is a product of the governments and institutions in charge of enforcing migration and refugee laws seems correct. However, it also seems biased for not taking into account the agency of migrants who do not possess a residence permit, or have not renewed their visa, or even refused to leave after being issued an expulsion order. As such, Bauder’s definition does not recognise the possibility that migrants can themselves be responsible for their irregular immigration status.

The challenge of finding the essence of what the concept of illegality means in EU law starts by understanding and demystifying the wording used at this level of governance. To avoid adding fuel to the fire of the debate about the terminological options in the area of irregular migration, and at the risk of not doing justice to the already extensive sociological literature on the topic, the term ‘illegally staying

³⁰ R Andersson, ‘Illegal, Clandestine, Irregular: On Ways of Labelling People,’ *Border Criminologies* (<http://bordercriminologies.lawox.ac.uk/illegal-clandestine-irregular/>), 2014, and H Bauder, ‘Why We Should Use the Term ‘Illegalized’ Refugee or Immigrant: A Commentary’ (2014) 26 *International Journal of Refugee Law* 2.

³¹ P Nyers, ‘No one is Illegal between City and Nation’ (2010) 4 *Studies in Social Justice* 127.

³² The relationship between illegality and criminality is analysed in further detail in chapter four.

³³ See, for example: Andersson (n 30) and B Vollmer, *Policy Discourses on Irregular Migration in Germany and the United Kingdom* (Basingstoke, Palgrave Macmillan, 2014) 9.

³⁴ For examples of scholars using the different terms see: J McDonald, ‘Migrant Illegality, Nation Building, and the Politics of Regularization in Canada’ (2009) 26 *Refuge: Canada’s Journal on Refugees*; M C LeMay, *Illegal Immigration: A Reference Handbook* (Santa Barbara, ABC-CLIO, 2007); Bauder (n 30); M Jandl, ‘The Estimation of Illegal Migration in Europe’ (2004) *Studi Emigrazione* 141, L Chavez, *Shadowed Lives: Undocumented Immigrants in American Society* (Andover, Cengage Learning, 2012); A Błuś, ‘Beyond the Walls of Paper. Undocumented Migrants, the Border and Human Rights’ (2013) 15 *European Journal of Migration and Law*; and A McNevin, ‘Political Belonging in a Neoliberal Era: The Struggle of the Sans-Papiers’ 10 *Citizenship Studies* 135.

³⁵ Bauder (n 30) 1.

³⁶ *ibid.*, 5.

third-country national' and 'unlawfully staying EU citizen' is preferred as this is the terminology used by the source of law that is at the heart of the present study: EU law.³⁷

Third, leaving aside the terminological choices that focus on the role of the migrant, or those that focus on the role of the host countries and institutions, this book opts to look at illegality from the perspective of what it is legally linked to: the right to stay or to reside. Thus, the terms adopted in the present study when referring to the individuals that are part of illegality is illegally staying third-country national or irregular migrant. This choice is also motivated by the fact that this is the terminology used in official EU documents and CJEU jurisprudence dealing with illegality and irregular migration in EU law. Hence, in order to avoid unnecessary misconceptions with regard to, first, the perspective taken in the book (EU law) and second, the phenomenon under analysis (illegality in relation to migration statuses), the decision was taken to opt for a more legal and perhaps literal approach to the terminology.

It is important to clarify that the position taken does not simply dismiss the importance of the problem discussed by the various scholars referred to previously. It is rather a conscious choice that considers this book not the best and most useful forum for a detailed discussion of this issue once more. Rather, the book attempts to challenge the 'unspoken assumption'³⁸ that the definition of who falls into illegality and what illegality is exactly is unproblematic.³⁹ This is the issue that lies at the heart of the book, an issue of substance, and which will be explored in the following chapters.

III. OVERVIEW OF THE BOOK

The book is divided into two blocks of analysis. The first includes the first three chapters and has the main objective of addressing a holistic conceptualisation of illegality in the EU. As such, chapter one starts with a conceptual analytical part which deals with the legal sources of illegality and EU institutional framework that regulates this phenomenon. It then moves on to demonstrate why the traditional binaries of legal and illegal or alien and citizen are inadequate in terms of migrant statuses of the regulation of illegality within the EU in chapters two and three. The cases of unlawfully staying EU citizens and non-removable third-country nationals serve to illustrate the premise that the concept of illegality as it stands at present

³⁷ Used interchangeably with irregular migrant throughout the book. For example see: Art 2 (b) of the European Parliament and the Council Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. [2009] OJ L 168, (hereafter Employers Sanctions Directive).

³⁸ On 'unspoken assumptions': R Andersson, *Illegality, Inc: Clandestine Migration and the Business of Bordering Europe*, vol 28 (Oakland, University of California Press, 2014) 8.

³⁹ Guild (n 21) 3.

falls short of adequacy in relation to the group of migrants it affects. Simultaneously, these cases highlight the legal gaps left by EU law in the regulation of illegality and that Member States are forced to step in to fill in what is left unregulated. Illegality then becomes a phenomenon within a fragmented, multi-level regime which produces multiple migrant statuses with a heterogeneous interpretation at the domestic level. An example of this heterogeneous interpretation and application of the law is the scope of protection of non-removable migrants, or even the enforceability of the expulsion of an EU citizen from the host Member State.

The second stage addresses the side effects and problematic implications of the EU's approach to the illegality of a migrant's stay at national and supranational levels, as presented in earlier stages of the book. Chapters four and five look at ways in which the regime of illegality may produce perverse consequences (criminalisation at the level of border control (EU level) and the instrumentalisation of the access to legality (national level)). In relation to the issues covered by chapter four, it is shown that the EU databases, biometrics and information exchange used as tools to track illegality have somewhat deviated from their initial purpose, while the generalised surveillance of movement erodes the distinction between alien and citizen as well as criminal and illegally staying third-country nationals. It is shown that the combination of these two factors allied to greater access by national police authorities to the personal data stored in those systems risks violating the principles of proportionality, necessity and discrimination. In particular, chapter four considers the interconnection between the repositories of information as the Schengen Information System, the Visa Information System, the EURODAC, the EUROSUR, the Entry Exit System proposed by the Commission. It is shown that the unclear boundaries of irregularity and criminality have striking consequences not only for the individual *per se* but also for Member States' sovereignty and Europe as a whole. EU databases are a clear example of the potential conflation of illegality and criminality; access to their wide range of information along with the growing interoperability of agencies and bodies consequently associates millions of mobile third-country nationals with criminality in the EU.

Finally, the book has the broader goal of offering a comprehensive view of how the two levels of governance—EU and national—overlap in the implementation of illegal stay rules in relation to the access to legality as a way to bring to a close the cycle of illegality. Chapter five focuses on the idea of accessing legality and first looks into how Member States may instrumentalise the rules that grant a legal migration status to third-country nationals. The analysis moves on to a more normative take on this mechanism and suggests that by using it in a corrective way, from a supranational level, potential remedies to the consequences derived from the regime of illegality previously addressed could be extrapolated.

All things considered, the corrective rationale for the access to legality has a broader purpose of limiting the domestic instrumentalisation of who the EU citizenry should be, as well as implicitly delimitating the group of people for whom leaving illegality is revealed to be a harder task. Instead of suggesting a new categorisation of people, given that by the 'way we label, define, and categorize people

who move, we obscure and make invisible their actual lived experience',⁴⁰ the book takes a closer look within the competences as objectives of EU law and draws its normative claim from the need for a 'reset' in the context of regulation of illegality at the EU level. This is an important task to complete, as strides have been made in recent years in the area of migration, but there remains something to be said in a systematic matter about illegality in the EU and how the rules that regulate an exclusionary phenomenon such as this, impact more broadly on the definition of the people of Europe.

⁴⁰ A Crosby, 'The Boundaries of Belonging: Reflections on Migration Policies in the Twenty-First Century' in S Pratim Basu (ed), *The Fleeting People of South Asia: Selections from Refugee Watch* (London, Anthem Press, 2009) 52.