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**WHO COUNTS AS AN UNAUTHORIZED/
/IRREGULAR/ILLEGAL IMMIGRANT?
COMPARATIVE ANALYSIS
OF THE US AND EU PERSPECTIVES***

Summary: With 11 million illegal aliens living in the United States, according to the 2010 US Census Data, it seems justified that illegal immigration is considered one of the most important problems of US immigration policy reform debate. Similarly, irregular immigration should also be considered a key challenge in the immigration policy debate in the European Union in the midst of the migration and refugee crises. However, direct comparisons are rare and often misleading. In the present paper we are analysing legal approaches towards defining unauthorized/illegal/irregular immigration in both entities and seek for the consequences of using different definition for analysis, public understanding and policy debates, and designing and implementing government policies. Various research methods were used in the preparation of this interdisciplinary paper, including the analysis of statistical data and the content analysis of acts of law and documents published by governmental and international institutions and organizations as well as NGOs.

Keywords: unauthorized immigrant, irregular immigrant, illegal immigrant, unauthorized alien, EU, USA.

JEL Classification: F22, J15, K37.

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Introduction

In 2005 Migration Policy Institute (MPI) released a special issue of its on-line journal “Migration Information Source”, which was devoted entirely to the problem of unauthorized immigration. The decision of the journal’s board of editors to publish it was based on the assessment of the global situation and a resulting conclusion, that the question of unauthorized immigration is “a hot political issue in many countries” that “continues to frustrate governments and their people” [Migration Policy Institute, 2005]. It is not difficult to compose a list of problems related to unauthorized migration, which include threats to national security, economic and political stability, societal stability in general, labour market and labour rights, human rights and human trafficking.

Ten years later, when Europe and the Mediterranean region are in the midst of migration, refugee and humanitarian crises (see e.g. [Pachocka, 2015, 2017]) and while immigration reform in the United States, particularly tackling illegal immigration, is at the centre of 2016 presidential election campaign, the question of unauthorized migration is as valid as it was a decade ago. To a casual observer it may seem that the US and the EU are facing similar problems and thus similar measures may be used to solve them, but is it so? The need to compare the EU and the US with regard to immigration and immigration policy is strong [Misiuna and Pachocka, 2016]. In the present paper we are analysing legal approaches towards defining unauthorized/illegal/irregular immigration in both entities and seek for the consequences of using different definitions for analysis, public understanding and policy debates, and designing and implementing government policies [Anderson and Blinder, 2014; Pachocka and Misiuna, 2015]. Various research methods were used in the preparation of this interdisciplinary paper, including the analysis of statistical data and the content analysis of acts of law and documents published by governmental and international institutions and organizations as well as NGOs.

1. In the maze of definitions

The initial problem when comparing the United States’ and the European Union’s unauthorised immigration challenges lies with terminology: it is difficult to be methodically correct without being certain that the data provided by different entities is based on the same or at least similar understanding of the key concepts. It is often the case that even the authors and editors of respected publications or journals unanimously and silently agree, that the answer to the ques-

tion “who is an unauthorized migrant” is self-evident and does not merit a passing thought. A good example of that approach is provided by the already mentioned special issue of “Migration Information Source” [Migration Policy Institute, 2005], in which no article, ranging from a general introduction to the problem of unauthorized immigration to a detailed case study, even attempted to explain what is understood by a particular state or an organization as ‘unauthorized immigration’. Not only is it important how we define a given term, it also matters which term we use to describe that kind of migration and there are many to choose from.

So far we have used the expression ‘unauthorized migrant’, which is commonly used to describe a person residing in a state without a permit issued by the authorities. However, there is a great variety of terms that are in use in this context, such as: an illegal immigrant, an illegal alien, an irregular immigrant or an undocumented person, to name but a few. The choice of terminology is of key importance as “the power of words has meaning particularly when we talk about a divisive issue like immigration, which is controversial and is very contentious. For that reason (...) we need to try to ensure that we have calm, reason and rationality in the debate” [National Public Radio, 2010].

2. Who is who in the US

The situation regarding terminology describing unauthorized aliens living in the United States is peculiar: there is no official glossary of migration-related terminology that would attempt to standardize the language used by the federal government and thus eliminate, among other problems, the unnecessary proliferation of terms. So far the US federal law and the regulations of different federal agencies have provided multiple definitions used only in certain, sometimes very narrow, contexts. For example, Title 8 of *Code of Federal Regulations* (Section 274a.1) stipulates that the term ‘unauthorized alien’ for – and only for – the purposes of control of employment of aliens means that at the time of control of employment “the alien is not at that time either: (1) lawfully admitted for permanent residence, or (2) authorized to be so employed by this Act or by the Attorney General” [www 5]. This definition, slightly altered, could be used for all purposes, but it is not. Other institutions use their own terms with their explanations, even if it means redefining the term for each document or institution. Indeed, in May 2004 the General Accounting Office (GAO), the predecessor of the Government Accountability Office, the top level audit institution of the US federal government, published a report on undocumented aliens and their impact

on hospitals' uncompensated care costs. In the report the auditors had to provide their own definition of the term 'undocumented alien' as there was no such definition in the federal law. The GAO assumed that it denoted "a person who enters the United States without legal permission or who fails to leave when his or her permission to remain in the United States expires" [US General Accounting Office, 2004, p. 1]. However, in the years following the publication of the GAO report, situation changed to some extent. While there is still no universal official definition of 'undocumented alien', another federal institution, the Internal Revenue Service (IRS), has provided its employees with its own understanding of the term (the exact moment of creation of this definition is unknown). For the IRS, the federal agency responsible for collecting taxes, the aforementioned term is used interchangeably with 'illegal alien', which in turn is defined as "an alien who has entered the United States illegally and is deportable if apprehended, or an alien who entered the United States legally but who has fallen 'out of status' and is deportable" [www 4]. The difference in those two definitions, apart from exact wording, is limited to the stress put by the IRS on the necessity of deportation if such a person is apprehended.

Although the IRS supplemented federal regulation with the definition of 'illegal alien', the term itself is not in the official use of the U.S. Citizenship and Immigration Service (CIS) and "has no legal definition". Still, it "is widely used to define undocumented individuals". Its roots can be traced to the term 'legal alien' that was coined in 1798 in the Alien and Sedition Act [www 1], which, however, did not include a definition of a legal alien.

None of the aforementioned terms is used by the Office of Immigration Statistics (OIS), which is a part of the Department of Homeland Security (DHS). To describe unauthorized migrants, the OIS prefers to employ the term 'unauthorized resident immigrant population' which is defined as "all foreign-born non-citizens who are not legal residents". Further information on the circumstances of their entry to the United States ("without inspection or were admitted temporarily and stayed past the date they were required to leave") makes the term very similar to the 'undocumented/illegal alien' as defined by the IRS [Baker and Rytina, 2013, p. 1].

3. Who is who in the EU

Among the European Commission's (EC) Directorates General (DG), DG for Migration and Home Affairs (DGMHA) is the one dealing with all aspects of migration and asylum in the EU in internal and external dimensions. Recently, in consequence of the migration and refugee crises of 2014+ in Europe and the

Mediterranean region, the importance of the issue of irregular/illegal migration has increased substantially. As of late 2016, the content analysis of the website of the DGMHA reveals that the adjective ‘irregular’ and the corresponding adverb ‘irregularly’ prevail. Additionally, such terms as ‘unauthorized entry/transit/stay (residence)’ in the EU are also in use [www 3]. As we learn from an updated on-line version of the European Migration Network’s (EMN) *Asylum and Migration Glossary* [European Migration Network, 2015], a variety of expressions referring to irregular/illegal (im)migration is used in the EU legislation and official documents. Table 1 presents an overview of selected key terms in the field, discussed both in the EU/Schengen and global contexts. The sources of definitions are provided, as well as synonyms of key terms together with broader, narrower and related concepts.

The *Treaty on the Functioning of the EU* (TFEU) mentions ‘illegal immigration’ and ‘unauthorised residence’ while stating that the EU “shall develop a common immigration policy” [European Union, 2012b, Art. 79 (1) and (2c)]. There is no reference to any irregularity in this context. In turn, in the *Treaty on the EU* (TEU) neither the term ‘illegal’ nor ‘irregular’ is used with reference to immigration or stay of migrants or third country nationals [European Union, 2012a].

In fact, at the EU level there are two main legal sources of definitions relating to the problem discussed, i.e. the *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* (Return Directive) [European Union: Council of the European Union, 2008] and the *Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders* (Schengen Borders Code) [European Union: Council of the European Union, 2006]. In the Return Directive the following terms are used: ‘illegal immigration’, ‘illegal stay’ and ‘illegal migrants’. The document also mentions third country nationals who have illegally entered the territory of a Member State or are staying illegally, thus emphasizing the (il)legal aspect. The only fully defined term in the Return Directive from 2008 is ‘illegal stay’ understood as “the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State” [European Union: Council of the European Union, 2008, Art. 3(2)]. The same document discusses external borders of Member States that can be irregularly crossed by third country nationals, as well as an authorisation or a right to stay in

a given Member State [European Union: Council of the European Union, 2008, Art. 2(2a)]. The term ‘irregular(ly)’ is never used again.

Noteworthy is the fact, that in the updated online version of the EMN *Asylum and Migration Glossary* [European Migration Network, 2015] the term ‘illegal migrant’ is not listed, while it was included in its electronic book version from October 2014 [European Migration Network, 2014]. It means that EMN has made an adjustment of some terms and their explanations.

While the terms ‘irregular’ and ‘undocumented’ migration/migrant are mostly applied by the United Nations [www 6], the term ‘illegal immigration’ was long in use by the EU institutions, including adopted legislation, reports or EC communications. It was even clearly reflected in the TFEU and the Return Directive. Nowadays, the EC favors the term ‘irregular stay/entry’ instead of ‘illegal’ [European Migration Network, 2015].

Another strongly Europe-rooted and oriented international organization – the Council of Europe – stated in the *Resolution 1509 (2006)* adopted by its Parliamentary Assembly that the term ‘irregular migrant’ was preferred to other terms such as ‘illegal migrant’ or ‘migrant without papers’ as it was “more neutral and did not carry, for example, the stigma of the term ‘illegal’”. It is also a term increasingly favoured by international organisations working on migration issues” [Council of Europe: Parliamentary Assembly, 2006, Art. 7]. Bearing this in mind, it is also a criminal connotation of the word ‘illegal(ly)’ that is often invoked in the context of the debate on defining irregular migration. Entering or staying in a given country without the required documents is usually not a criminal offence but an administrative infringement. That is why it is recommended to apply the term ‘irregular’ instead of ‘illegal’ with reference to migration and migrants. In addition, some experts stress that while an act can be considered as legal or illegal, these terms cannot be applied to a person [European Migration Network, 2015].

In conclusion, regardless of the official terms used even in the EU directives and the previous practice in this area, the EU institutions, and especially the EC, have started to avoid the term ‘illegal’ in use, turning to ‘irregular’ instead, as it has no criminal connotation and is more adequate in relation to persons.

Table 1. Overview of selected key terms referring to ‘irregular migration’ and related issues at the EU/ Schengen and global levels

Key term	Definition (Source)	Terms (S) Synonymous (B) Broader (N) Narrower (R) Related
irregular entry	<p>1. In the global context, crossing borders without complying with the necessary requirements for legal entry into the receiving State. (Derived by EMN from the definition for ‘illegal entry’ in Art. 3(b) in: [United Nations General Assembly, 2000]).</p> <p>2. In the Schengen context, the entry of a third-country national into a Schengen Member State who does not satisfy Art. 5 of the Schengen Borders Code. (Developed by EMN).</p>	(S): illegal entry (B): irregular migration (R): border control, legal entry
irregular migration	Movement of persons to a new place of residence or transit that takes place outside the regulatory norms of the sending, transit and receiving countries. (Derived by EMN from: [International Organization for Migration, 2011; www 2]).	(S): clandestine migration, illegal immigration, illegal migration, unauthorised migration, undocumented migration
irregular migrant	<p>1. In the global context, a person who, owing to irregular entry, breach of a condition of entry or the expiry of their legal basis for entering and residing, lacks legal status in a transit or host country. (Derived by EMN from: [International Organization for Migration, 2011]).</p> <p>2. In the EU context, a third-country national present on the territory of a Schengen State who does not fulfil, or no longer fulfils, the conditions of entry as set out in the Schengen Borders Code, or other conditions for entry, stay or residence in that Member State. (Derived by EMN from the definition of ‘illegal stay’ in Art. 3 of: [European Union: Council of the European Union, 2008]).</p>	(S) clandestine migrant, illegal migrant, insufficiently documented migrant, migrant in an irregular situation, migrant with irregular status, unauthorized migrant, undocumented migrant (N) third-country national found to be illegally present
irregular stay	The presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Art. 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State. (Art. 3 (2) of: [European Union: Council of the European Union, 2008]).	(S): illegal stay (B): irregular migration (R): irregular entry, overstayer, third-country national found to be illegally present

Source: European Migration Network [2015].

Conclusions

Our brief comparative content analysis reveals that the US law and official documents do not contain a definition of an ‘illegal/irregular migrant’. The most common term in usage is ‘unauthorized/undocumented alien’, also in working documents by some US federal agencies. Although the IRS supplemented federal regulation with the definition of ‘illegal alien’, the term itself is not used in the official use of the U.S. Citizenship and Immigration Service and neither does it have a legal definition.

In the case of the EU, there is a greater variety of terms in use. The adjective ‘illegal’ and the corresponding adverb ‘illegally’ were long in use with reference to migrations and migrants. It is reflected in the EU adopted legislation and in other official documents. For instance, the (il)legal aspect was emphasized in the Return Directive of 2008 through the use of the words such as ‘illegal migration’, ‘illegal migrant(s)’ and ‘illegal stay’, but the only fully defined term was ‘illegal stay’. Obviously, there are also other adjectives in use, including unauthorized, undocumented or clandestine, but they are rarely used. What is important, however, is the fact that recently the EU institutions, particularly the EC, have started to avoid using the term ‘illegal’, turning to the word ‘irregular’, as it has no criminal connotation and is more adequate in relation to persons. This is in line with the approach of the Council of Europe.

The main difference in approaches towards defining unauthorized/irregular/illegal immigration observed during content analysis of the US and the EU legal acts and official documents is the fact that the EU seeks to develop a standardized terminology. It means that the EU has a legal and analytical framework necessary for preparation, execution and verification of public policies addressing the problem. At the same time the US federal law does not contain a single definition of ‘unauthorized migrant’, that could be used as a basis for public policies or specific regulations by different federal government agencies. The principal consequence of that deficit is a big number of definitions that are similar in sense, yet not identical. Concluding, it is necessary to stress that international comparisons are possible, but with certain prudence.

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NIELEGALNI/NIEREGULARNI IMIGRANCY? ANALIZA PORÓWNAWCZA PODEJŚĆ USA I UE

Streszczenie: Według spisu powszechnego z 2010 r. w Stanach Zjednoczonych przebywało 11 milionów imigrantów o nieuregulowanym statusie prawnym. Nie zaskakuje w związku z tym fakt, że nielegalna imigracja jest jednym z podstawowych zagadnień poruszanych w debacie o reformie amerykańskiego systemu imigracyjnego. Analogicznie, nieregulowana imigracja jest jednym z kluczowych wyzwań przywoływanych w debacie nad polityką imigracyjną w Unii Europejskiej doświadczającej od kilku lat kryzysów migracyjnego i uchodźczego. Mimo zbieżności problemów analizy porównawcze USA i UE przeprowadzane są rzadko, a jeżeli już są wykonywane, to ich wyniki często wprowadzają w błąd. W artykule dokonujemy analizy definicji nielegalnej/nieregularnej imigracji stosowanych w aktach prawnych i dokumentach oficjalnych w USA i UE, mając na uwadze możliwe konsekwencje dla opracowywanych analiz w tym zakresie i prowadzonych debat publicznych, a także dla projektowania i wdrażania sektorowych polityk publicznych.

Słowa kluczowe: nieregularni imigranci, nielegalni imigranci, UE, USA.